The Construct of Indigenous Australian 'Traditional Laws and Customs' in Contemporary Australian Law: A Conceptual Analysis

Diana Margaret Anderssen

July 2021

A thesis submitted for the degree of Doctor of Philosophy of
The Australian National University

© Copyright by Diana Anderssen 2021

All Rights Reserved

Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university. To the best of the author's knowledge, it contains no material previously published or written by another person, except where due reference is made in the text.

Diana Margaret Anderssen

4 July 2021

Acknowledgement of Country

The research and writing of this thesis has been conducted primarily on the ancestral lands of the Ngunnawal, Ngunawal, Ngambri and Ngarigu peoples. Throughout much of my research journey, I have been living and working on the magnificent campus of the Australian National University, and countless precious and difficult learning moments have occurred here at the foot of Black Mountain and by the banks of the creek that flows through the campus into Lake Burley-Griffin (formerly the Molonglo River). Many deep reflections have occurred during my long walks along the creek and beside the lake, and many meaningful conversations have occurred in the shadow of the mountain, under the auspices of the National Centre for Indigenous Studies. I am profoundly conscious of the privilege of living and learning in a place that has been a seat of learning for tens of thousands of years. I acknowledge the custodianship of the traditional owners and I pay my respects to their elders, past, present and emerging.

A special acknowledgment is due to the Yorta Yorta peoples whose long struggle for native title gave rise to the legal interpretation of 'traditional laws and customs' that forms the subject matter of this thesis. I pay my respects to their elders, past, present and emerging. I also acknowledge the traditional owners of other places I have lived, worked and stayed while working on this thesis — the Woiworung and Boonwurrung peoples of the Kulin nation (Victoria), the Yuggera, Jagera, Giabal and Gubbi Gubbi peoples (Southeast Queensland), and the Bindal and Wulgurukaba peoples (North Queensland) — and pay my respects to their elders. Finally, I acknowledge all those peoples whose ancestors were misrepresented, as objects of colonial research, in many of the theoretical works covered in this thesis, and the traditional owners of those lands where events recounted in this thesis took place.

I acknowledge the privilege of having been supervised and mentored by one of Australia's eminent Indigenous Australian leaders, former Social Justice Commissioner and Australian of the Year, Professor Mick Dodson. I sincerely thank Professor Dodson for his leadership and guidance, and for his support of my research. I am also incredibly grateful for the unwavering support and guidance of advisor, member and chair of my supervisory panel, Indigenous legal scholar, Professor Asmi Wood. I acknowledge the support of the community of Indigenous colleagues and friends who have shared in this research journey, especially my dear friend, Dave Johnston. Finally, I acknowledge the incredible ongoing support provided by my cousin, Indigenous scholar and researcher, Associate Professor Maree Toombs.

Acknowledgements

There are so very many people I would like to acknowledge, and I fear that my words will be insufficient.

First and foremost, my sincere and heartfelt thanks to Professor Mick Dodson for giving me the opportunity to pursue this research at the National Centre for Indigenous Studies (NCIS) at the ANU. I am incredibly grateful for Professor Dodson's guidance and support as my primary supervisor throughout the formative years of this research project. I also thank the other members of my supervisory panel from the outset of the project to its culmination in this thesis, Professor Asmi Wood and Professor Lisa Strelein, for their guidance and support and for the inspiration of their example.

I owe the greatest debt of gratitude to supervisor extraordinaire, Dr Diane Smith, whose association with this project began as HDR (Higher Degree by Research) convenor at NCIS, and who took over primary supervision during the course of my candidature. Dr Smith provided continuous support and constant, unfailing encouragement, whilst challenging me in every step and at every stage of the project. Her care and concern for my personal wellbeing reinforced the support, advice, assistance and tutelage she provided at every level of the research journey … from technical through to structural, methodological to conceptual. Her detailed feedback on multiple revisions of each draft of every chapter challenged me to express my ideas more clearly, forcing me to grapple with difficult conceptual issues. Above all, it was she who challenged me to squarely confront the issue of conceptualising 'law' that lies at the heart of this thesis. I am profoundly and eternally grateful, and these words seem so inadequate to express my deep sense of appreciation.

I would like to extend my sincere thanks to Ian and Laurel Fisher for their generous donation of the Watervale Award, which allowed me to devote more time and energy to completing the thesis. I am also very grateful for the University Research Scholarship (Domestic) and Australian Government Research Training Program Fee-Offset Scholarship I received in 2017.

I acknowledge with special gratitude the research community at NCIS, especially Professor Cressida Fforde, Dr Bill Fogarty, Dr Siobhan McDonnell and my friends and fellow PhD scholars, Sidha, Ed, Claire, Benny, Corrine, Veronica, Annie, Fleur, Kate, Adam, Kerrie, Anna, Serene, and Alicia. A very special acknowledgment goes to my dear friend, Katherine Aigner,

whose companionship, comradery and deep friendship throughout the many highs and lows of this long PhD journey has brought me so much happiness and laughter. I would also like to acknowledge the network of Indigenous studies colleagues at CAEPR and across the ANU. In particular I thank Dr Janet Hunt for her ongoing interest in my research.

I would also like to acknowledge the ANU College of Law for their ongoing support, particularly for taking me in and supporting me in the final stages of my research candidature. Thanks to HDR Director, Associate Professor Dr Kate Ogg, to Professor Desmond Manderson and Professor Anthony Connelly for conversations about my research, and to my friend and colleague, Associate Professor Judith Jones.

Special thanks also go to the ANU Researcher Development team, especially Professor Inger Mewburn and Victoria Firth-Smith, for their encouragement and support over many years. Thank you to the staff at the ANU libraries, especially University Librarian, Roxanne Missingham, and digital literacy trainer, Candida Spence, who assisted me with the thesis formatting.

I would also like to express my heartfelt appreciation to Dr Ian Walker and the vibrant, tightknit, multicultural and scholarly community at Toad Hall, the 'finest house on the river' and my home on the ANU campus.

Last but certainly not least, I cannot begin to express my deep gratitude to my loved ones, who have been my inspiration and my comfort.

I especially want to acknowledge my late mother, Gwendolene, whose nurturing enabled me to walk my own path and to be true to myself, whose intellect and curiosity inspired me to think critically and who taught me to respect Indigenous Australian cultures, knowledges and expertise, and my father Bill, who has always been my rock and my role model, who has ever provided me with wise counsel, and who inspired in me a value for ethics and a taste for the study of law, inspiring me by example to always give of my best.

To Jenny and John, who have been like second parents to me, thank you for the inspiration of your example and your endless love, support and understanding; to say it is deeply appreciated is an understatement.

To my dear family and friends who have been there for me through dark times and good — especially my wonderful sister Jane and my brothers David and Jonathan, step-father Derek, my treasured friends Karen and Ivan, Lizzy and Nick, Jackie, Dee, Shelby, Lily, Chip and the Henriss family, my cousins Maree, Isla, Sally and Brigitte, and Patricia and Rob Boyle and the Boyle family — words are utterly inadequate to express my profound gratitude for your tireless support, love, friendship, and allegiance, and your tolerance and understanding of my absences when the thesis called me.

To my partner, Peter, words cannot express my gratitude for your love, your generous support and understanding and your unfailing encouragement. And to my beloved children, Sasha, Jake, and Ziggy, who have consistently encouraged and supported me to live my best life, whose obvious delight in my research means the world to me, and who have sacrificed so much to support me in this venture, and Ryder who has brought so much joy into my life, this is for you. Thank you, my darlings.

Abstract

Indigenous Australians describe their traditional law as complex experiential, grounded and relational systems founded on rich philosophical and spiritual heritage. And yet for two hundred years, the sovereignty of the Anglo-Australian legal system was premised upon the notion that Indigenous Australian peoples were without law at all. Now, since the landmark 1992 decision of the High Court of Australia in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (‘*Mabo*’), the continuing existence of Indigenous Australian ‘traditional laws and customs’ is explicitly acknowledged in contemporary Australian law. This thesis is about the ideas of ‘law’ that enabled the existence of Indigenous Australian law to be denied and subsequently recognised. It is about the ways that Indigenous Australian law has been conceptualised in British and Anglo-Australian legal thought.

This research asks how Indigenous Australian law is conceived in the Anglo-Australian legal doctrine that recognises its existence. I trace two hundred years of British and Anglo-Australian legal theory to understand how Indigenous Australian law was historically portrayed relative to the concept of ‘law’. I investigate the theoretical underpinnings of the contemporary legal doctrine of recognition as disclosed by the leading judgment in the High Court decision of *Members of the Yorta Yorta Community v Victoria* (2002) 214 CLR 422 (‘*Yorta Yorta’*) — the most significant decision concerning the recognition of Indigenous Australian law since *Mabo*. I thus interrogate the jurisprudence that lies at the heart of Anglo-Australian sovereignty, and problematise the Anglo-Western concept of ‘law’ itself.

In this thesis, I demonstrate that the theoretical foundations of the current ‘recognition’ of Indigenous law are virtually identical to those of ‘terra nullius’. The theories relied upon by the High Court in *Yorta Yorta* not only contain a similar civilised–primitive dualism to those of terra nullius, but explicitly use negative perceptions of Indigenous Australia as the epitome of people without law. I conclude that the very definition of Indigenous Australian ‘traditional laws and customs’ in contemporary Australian law is based upon a denial of its status as ‘law’. Further, since these negative perceptions of Indigenous Australia have been deliberately used to determine the conceptual parameters of ‘law’, I conclude that the modernist Anglo-Western concept of law itself depends upon the denial of law to Indigenous Australia.

Table of Contents

The Construct of Indigenous Australian 'Traditional Laws and Customs' in Contemporary Australian Law: A Conceptual Analysis ..... **i**

Declaration ..... **iii**

Acknowledgement of Country ..... **v**

Acknowledgements ..... **vii**

Abstract ..... **xi**

Table of Contents ..... **xiii**

PART I INTRODUCTORY **1**

CHAPTER ONE INTRODUCTION **3**

I. OF JURISTS AND JURISPRUDENCE 3

A The recognition of 'traditional laws and customs' 5

B A Denial of the Status of 'Law'? 8

II. RESEARCH AIM, OBJECTIVES, AND QUESTIONS 11

III. CONCEPTUALISING 'LAW' 12

A The Word 'Law' 13

B Indigenous Australian Accounts of Law 14

C Diversity and Plurality in Anglo-Western Jurisprudence 15

IV. THEORETICAL FRAMEWORK 22

A An Ethos of Pluralism 22

B An Ethic of Respect 27

V. A PLURALIST METHODOLOGY 29

A Critical Legal Theory and Deconstruction 29

B Deconstructing Law 33

C Deconstructing the Legal Recognition of Indigenous Law 35

D The Interplay of Text and Context 35

E Methods 37

VI. SCOPE AND SIGNIFICANCE 39

VII. OVERVIEW OF THESIS 41

PART II THEORETICAL FOUNDATIONS OF TERRA NULLIUS **43**

CHAPTER TWO THE DENIAL OF LAW **45**

I. INTRODUCTION TO PART II 45

II. THE DENIAL OF LAW: INTRODUCTION TO CHAPTER TWO 46

III. THE CONCEPTUAL CONSTRUCT OF LAW 48

A Civil Society and the State of Nature 49

B The Law of Nature 53

C Theories of Legal Evolution 57

D Blackstone's *Commentaries on the Laws of England* 59

IV. TERRA NULLIUS 62
V. CONCLUSION 76
CHAPTER THREE INDIGENOUS AUSTRALIANS IN BRITISH LEGAL THOUGHT 79
I. INTRODUCTION 79
II. THE FIRST HALF-CENTURY OF COLONISATION 79
A Late 18th Century 79
B Early 19th Century: John Austin 81
C In Conclusion: The Early Decades (1770–1850) 86
III. HISTORICAL JURISPRUDENCE AND LEGAL PRIMITIVISM 86
A Sir Henry Maine 87
B Legal Primitivism 88
C Historical Jurisprudence: Sir Paul Vinogradoff 91
D The End of an Era 92
IV. INFLUENCES ON MID-20TH CENTURY ANGLO-AUSTRALIAN JURISPRUDENCE . 93
A Roscoe Pound 93
B Developments in Legal Anthropology 94
C Neo-Evolutionary Legal Theories 96
D Law in the Making 98
E In Conclusion: The Final Period (1926–1945) 102
V. DECONSTRUCTING THE CIVILISED–PRIMITIVE DUALISM 103
VI. CONCLUSION 106
PART III THEORETICAL FOUNDATIONS OF THE RECOGNITION OF INDIGENOUS AUSTRALIAN LAW 107
CHAPTER FOUR 'TRADITIONAL LAWS AND CUSTOMS' IN CONTEMPORARY AUSTRALIAN LAW 109
I. INTRODUCTION TO PART III 109
II. THE ACKNOWLEDGEMENT OF 'TRADITIONAL LAWS AND CUSTOMS' IN CONTEMPORARY AUSTRALIAN LAW 109
III. AN HISTORICAL OVERVIEW 110
A Pre-*Mabo*: The Continuing Denial Of Indigenous Law 110
B *Mabo* and the Acknowledgement of Indigenous Law 114
C The Post-*Mabo* Era 117
IV. THE *YORTA YORTA* LITIGATION 119
A The Trial 119
B The Appeal to the Full Court 121
C The High Court Decision 122
D Reactions to the High Court Decision 126
V. *LOVE V COMMONWEALTH* 128
VI. CONCLUSION: THE RECOGNITION OF TRADITIONAL LAWS AND CUSTOMS IN CONTEMPORARY AUSTRALIAN LAW 129

CHAPTER FIVE THE THEORETICAL FOUNDATIONS OF 'TRADITIONAL LAWS AND CUSTOMS' IN THE *YORTA YORTA* DECISION 131
I. INTRODUCTION 131
II. A CLOSER LOOK AT THE JUDICIAL REASONING IN *YORTA YORTA* 131
A Traditional Laws and Customs as a Normative System 132
B The Impact of the Intersection on the Indigenous Normative System 134
C The Inextricable Link Between a Society and its Laws and Customs 135
D The Requirement of Continuity of Society and Laws and Customs 136
III. THE USE OF LEGAL THEORY IN *YORTA YORTA* 137
A Implicit Use of Theory 138
B Explicit Use of Theory 144
C The Absence of Indigenous Concepts of Law 147
IV. CONCLUSION 148
PART IV THEORY IMPLICITLY RELIED UPON IN *YORTA YORTA* 149
CHAPTER SIX THE PRE-LEGAL SOCIETY IN HART'S CONCEPT OF LAW 151
I. INTRODUCTION 151
II. HERBERT HART'S CONCEPT OF LAW 152
A Hart's Account of a Legal System 155
B The 'Step from the Pre-Legal into the Legal World' 159
C Law as an Affair of Rules 161
III. THE PROBLEM OF THE 'PRIMITIVE' IN HART'S CONCEPT OF LAW 163
A 'Primitive Communities' and 'Primitive Law' 164
B Actual or Imaginary, Primitive or Simple? 166
C Legal Evolution 167
IV. 'MANY STUDIES OF PRIMITIVE COMMUNITIES' 168
A Hart's Claims about Primitive Communities 169
B Hart and Legal Primitivism 170
C Hart's End Notes 176
D The Position of Indigenous Australians in Hart's Scheme of Legal Evolution 180
V. THE PRE-LEGAL–LEGAL DUALISM 181
A An Analytic Device 181
B 'White Man's Magic' 184
VI. IMPLICATIONS FOR THE *YORTA YORTA* DECISION 185
VII. CONCLUSION 189
PART V THEORIES EXPLICITLY RELIED UPON IN *YORTA YORTA* 191
CHAPTER SEVEN LAW AND SOCIETY IN THE JURISPRUDENCE OF JULIUS STONE 193
I. INTRODUCTION TO PART V 193
II. IN PROFESSOR JULIUS STONE'S WORDS … 195
A The Jurisprudence of Julius Stone 197

III. INDIGENOUS AUSTRALIANS IN STONE'S JURISPRUDENCE 199
A A Framework of Social Types 199
B Law and Society in Evolution 200
C Social Types or Evolutionary Scale? 202
IV. THE QUOTE IN (AND OUT OF) CONTEXT 204
A The Location of the Quote 204
B A Misconstruction of Stone's Jurisprudence 205
C After 'The Province' 209
V. JULIUS STONE, ABORIGINAL RIGHTS AND NATIVE TITLE 211
A Social Justice and Minority Rights 211
B Julius Stone and the Movement for Indigenous Civil Rights 213
C Julius Stone and Native Title in Australia 214
D Great and As Yet Insoluble Puzzles 219
VI. CONCLUSION 220
CHAPTER EIGHT LAW AND SOCIETY IN THE JURISPRUDENCE OF GEORGE PATON AND TONY HONORÉ 223
I. INTRODUCTION 223
II. IN PATON'S JURISPRUDENCE … 223
A Paton's Jurisprudence 224
B The Quote in Context 225
C Society as a Precondition for Law 228
D The Positioning of Indigenous Australia apropos 'Law' 229
E Some Context on the 'Text-Book' 229
III. AS PROFESSOR HONORÉ HAS POINTED OUT … 233
A The Legal Mind of Tony Honoré 234
B Groups, Laws and Obedience 236
C An Evolutionary Tale 239
IV. CONCLUSION 242
CHAPTER NINE THE INEXTRICABLE LINK 243
I. INTRODUCTION 243
II. LAWS AND CUSTOMS DO NOT EXIST IN A VACUUM — AND NEITHER DOES LEGAL THEORY 244
A 'Juliusprudence' 245
B George Paton and Jurisprudence at Melbourne Law School 249
C Tony Honoré, Oxford and another Rhodes Scholar 252
D The Final Link 252
III. THE GENEALOGY OF THE LAW–SOCIETY CONNECTION 253
IV. CONCLUSION 256
PART VI CONCLUSION 259

CHAPTER TEN A DE-CONSTRUCTION OF 'TRADITIONAL LAWS AND CUSTOMS' IN CONTEMPORARY ANGLO-AUSTRALIAN LAW 261
I. INTRODUCTION 261
II. THE CONSTRUCT OF 'TRADITIONAL LAWS AND CUSTOMS' 262
III. INDIGENOUS AUSTRALIANS AS PRIMITIVE 'OTHER' 264
A The Civilised–Primitive Binary 264
B The Impact of the Dualism upon the Recognition of Indigenous Australian Law 266
IV. THE CONCEPT OF 'LAW' 268
V. CONCLUSION 270
BIBLIOGRAPHY 271
A Articles/Books/Reports 271
B *Cases* 325
C *Legislation* 327
D *Treaties* 327
E Newspaper Articles 327
F *Other* 328
APPENDIX JULIUS STONE, ABORIGINAL RIGHTS AND NATIVE TITLE 333
I. INTRODUCTION 333
II. SOCIAL JUSTICE AND MINORITY RIGHTS 333
III. JULIUS STONE AND THE INDIGENOUS RIGHTS MOVEMENT 335
A Sydney University and Student Action for Aborigines 336
B Constitutional Reform 339
C Julius Stone and Native Title in Australia 344
IV. CONCLUSION 350

PART I

INTRODUCTORY

CHAPTER ONE
INTRODUCTION

I. OF JURISTS AND JURISPRUDENCE[1]

This thesis is about the way Indigenous Australian law is conceptualised in the Anglo-Australian legal doctrine that recognises its survival.[2] The aim of the research is to analyse the conceptual basis for the legal construct of Indigenous Australian 'traditional laws and customs' in contemporary Australian law.

Indigenous Australian scholars describe their traditional law as a way of living which emanates from, and connects people to, their territorial lands.[3] Law is seen as part of a rich relational philosophy in which human and other natural beings are related and interconnected with the natural world — including the land and ancient spirit ancestors — throughout the rhythms and cycles of the earth and of life.[4]

Yet, until the closing decade of the 20th century, the orthodox legal view had been that Indigenous Australian peoples were without law.[5] This perception had been enabled by the application of a Western paradigm of law and the corresponding exclusion of Indigenous Australian knowledges of their own law.[6] It was the perceived absence of law (together with other negatively interpreted indicia of 'civilisation') that had been used to justify the application

[1] I use the term **'jurisprudence'** interchangeably with 'legal theory' to describe the theoretical study of law. Unless otherwise specified, I do not use it in its alternative meaning to describe case law.

[2] I use the collective term, **'Indigenous Australian'**, to refer to the Indigenous peoples of Australia, inclusive of Aboriginal and Torres Strait Islander peoples. I acknowledge that 'Indigenous' is a colonial/postcolonial term that does not reflect the diversity of identities and cultures of Australian First Nations peoples; however, I use it in accordance with accepted international and domestic legal and academic discourse. At times, the words 'Aboriginal' and/or 'Torres Strait Islander' are interchanged for 'Indigenous Australian', where the specificity is appropriate. I use the adjective **'Anglo-Australian'** in relation to the Australian legal system, law and legal theory where appropriate to emphasize the British colonial origins of the Australian state and to differentiate it from 'Indigenous Australian'.

[3] See, eg, Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law*, (Routledge, 2015) ('*Raw Law*'); CF Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011).

[4] Ibid. Because it is the term used by Indigenous scholars, and for other reasons set out below, I refer to the traditional law of Indigenous Australian peoples as 'law'.

[5] *Cooper v Stuart* (1889) AC 286; cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*').

[6] The basis for the denial of Indigenous Australian law is explored in Part II of the thesis. I use the term '**Western**' in a general sense to describe the Occident. I acknowledge that 'Western' is itself a Eurocentric term (as is 'Occident') with its origins in the division of the Ancient Roman Empire into East and West, the later reference to Eastern and Western Europe, and to Europe as West and Asia as East. Where I specifically refer to common law countries, I use the term 'Anglo-Western' (see n 36 below).

of the doctrine of terra nullius (land belonging to no one) to the Australian continent, providing the basis for the British assertion of sovereignty over the territory.[7]

The denial of Indigenous law endured for over two hundred years as the foundation of Anglo-Australian legal sovereignty, until it was finally corrected by the High Court of Australia in its landmark *Mabo* decision in 1992.[8] In no uncertain terms, the High Court declared that the theoretical justification for the application of terra nullius to Australia, the idea that Indigenous Australian peoples were 'so low on the scale of civilisation' as to be without law, had no place in the common law of Australia.[9] Although the extent to which the doctrine of terra nullius was effectively jettisoned by the High Court in *Mabo* is debatable (the Court held that the acquisition of sovereignty was not justiciable and confirmed the classification of Australia as 'settled' for purposes of the reception of British law),[10] the Court emphatically rejected the notion that the Indigenous peoples of Australia had no law, explicitly acknowledging the continuing existence of Indigenous law.[11]

The ostensible rejection of terra nullius and belated acknowledgement of history in *Mabo* left a conceptual and quasi-historical space where the discourse of terra nullius had been displaced. That space was an opportunity for a respectful recognition of Indigenous laws, jurisdictions, and sovereignties.

Some ten years after the *Mabo* decision, at the dawn of the 21st century, the High Court clarified the recognition of Indigenous law by the common law, retrospectively reconciling the reception of common law with the continuing existence of Indigenous law. In *Members of the Yorta Yorta Community v Victoria* ('*Yorta Yorta*'), the Court held that an intersection of normative systems — common law and Indigenous law — occurred at the time of acquisition of sovereignty by the British.[12]

[7] I use the term **'terra nullius'** broadly to refer to the legal principles justifying the acquisition of sovereignty over Australia by the British. The history of the application of the doctrine of terra nullius to Australia is discussed in Parts II and III of this thesis.

[8] *Mabo* (n 5).

[9] Ibid 39, 41–2, 58 (Brennan J, Mason CJ and McHugh J concurring), 109 (Deane and Gaudron JJ).

[10] The question of the extent to which the Court rejected the doctrine of terra nullius is explored in Part III of the thesis.

[11] *Mabo* (n 5) 58–60 (Brennan J, Mason CJ and McHugh J concurring), 110 (Deane and Gaudron JJ).

[12] (2002) 214 CLR 422 ('*Yorta Yorta*').

The continuing existence and operation of the traditional law of Aboriginal and Torres Strait Islander peoples is now explicitly acknowledged in Australian law, under both the common law and the statutory native title regime.[13] In an emerging case law on the subject, the High Court has confirmed the common law recognition of the survival of Indigenous law.[14] Since the recent decision in *Love v Commonwealth* ('*Love*'), it is clear that although the recognition of Indigenous law developed in the context of native title law, it is not limited to native title but is part of a broader principle of the common law.[15]

A nascent doctrine of recognition has thus replaced the denial of law, that had been enshrined in the doctrine of terra nullius, as a foundational principle of the common law of Australia. My aim in this doctoral thesis is to deconstruct this contemporary legal recognition of Indigenous Australian law. I ask how Indigenous Australian law is conceptualised within Anglo-Australian legal thought in the wake of the apparent rejection of terra nullius.

A The recognition of 'traditional laws and customs'

The designation of Indigenous Australian law as 'traditional laws and customs' derives from the leading judgment of Brennan J in *Mabo*. 'Native title', he stated in a much-quoted passage, 'has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.'[16] That clause, referring to traditional laws acknowledged and traditional customs observed, was repeated in substantially the same terms in the *Native Title Act 1993* (C'th). Under the definition of native title in that Act, native title rights and interests have their source in the traditional laws and customs of the claimant people.[17] The interpretation of 'traditional laws and customs' under the *Native Title Act*, and the relationship between the received common law and Indigenous law following the acquisition of sovereignty, was authoritatively determined by the High Court in *Yorta Yorta*.

[13] *Mabo* (n 5); *Yorta Yorta* (n 12); *Love v Commonwealth* (2020) 375 ALR 597; [2020] HCA 3 ('*Love*'); *Native Title Act* 1993 (C'th) s223.
[14] *Mabo* (n 5); *Yorta Yorta* (n 12); *Love* (n 13). I trace the emergence of this case law of recognition in Part III of the thesis.
[15] *Love* (n 13). See the discussion in Part III.
[16] *Mabo* (n 5) 58 (Brennan J, Mason CJ and McHugh J concurring).
[17] *Native Title Act* 1993 (C'th) s223(1)(a); *Western Australia v Ward* (2002) 191 ALR 1, 17.

The leading judgment in the *Yorta Yorta* case was striking, in that it was unusually theoretical. The judgment was striking not only because of the philosophical nature of the reasoning, but for the overt reliance on legal theories as legal authority. In considering the meaning of 'traditional laws and customs', the justices of the High Court reverted to first principles, invoking theoretical considerations of concepts of 'law'.

Here was an opportunity for the Court to engage with Indigenous Australian approaches to 'law', to consider alternative conceptions of 'law' that were consistent with Indigenous Australian accounts of their traditional law. It was an opportunity to define traditional laws and customs in a way that reflected Indigenous Australian peoples' understandings of their own law.

Instead, the leading judgment in *Yorta Yorta* was replete with references to British and Anglo-Australian legal theories. The reasoning appeared to adopt the discourse of legal positivism that had dominated British jurisprudence in the 20th century.[18] Indigenous traditional law and custom was described as a singular system of norms or rules — the way in which 'law' is conceived in legal positivist jurisprudence. Implicit in that discourse are a range of concepts with culturally specific origins in British legal theory. At first glance, it appeared that the High Court had reproduced the application of a Western paradigm of law to Indigenous Australian law, which had so characterised terra nullius. And it had apparently done so in the context of defining Indigenous law itself.

The apparent reliance upon specific works of British and Anglo-Australian jurisprudence in the authoritative legal interpretation of Indigenous Australian 'traditional laws and customs' immediately gives rise to a number of questions. Don't those theories primarily concern the institutionalised legal systems of Britain and Australia? How do they conceptualise 'law', and more specifically, is it conceptualised in such a way as to include (or otherwise) Indigenous law? How is Indigenous Australian law positioned in those texts vis-à-vis the Western institutionalised concept of law? And what informed the choice of legal theories used in the

[18] This aspect of the judgment has been noted by a number of academic commentators: see, eg, Kirsten Anker, *Declarations of Interdependence: A Pluralist Approach to Indigenous Rights* (Routledge, 2014) ('*Declarations of Interdependence*'); Shaunnagh Dorsett and Shaun McVeigh 'An Essay on Jurisdiction, Jurisprudence, and Authority: The High Court of Australia in *Yorta Yorta* (2001)' (2005) 56 *Northern Ireland Legal Quarterly* 1 ('An Essay on Jurisdiction'); H. Patrick Glenn, 'Continuity and Discontinuity of Aboriginal Entitlement' (2007) 7 *Oxford University Commonwealth Law Journal* 23.

judgment? These questions give rise to the central aim and objectives of this research, which are set out below.

The *Yorta Yorta* decision generated a wealth of commentary, but little of it addressed questions such as these.[19] Most of the commentators focused on the letter of the law and its deficiencies. Much of the scholarly discussion concerned the implications of the decision for native title law in Australia.[20] The Court's account of the legal conditions and implications of the acquisition of sovereignty by the British has been the subject of some critique, as has its non-recognition of Aboriginal sovereignty.[21] Comparatively little of the literature, however, has focused on the theoretical lineage informing these aspects of the judgment. Those commentators who have addressed the theoretical aspects of the judgment have noted the reliance upon positivist legal theory, in particular analytical jurisprudence and the influence of HLA Hart.[22] In a notable work on the subject, Indigenous rights scholar and legal theorist, Kirsten Anker, analysed the Court's use of legal theory, concluding that it resulted in a paradigm of law that was positivist, singular, state-centred, rule-oriented, written, and hierarchical:

> We thus have a picture of the Court's legal theory … it consists of positivism (the source of law in social fact distinguished by analytical criteria), centralism and monism (locating law in a single set of (state) institutions) and prescriptivism and chirographism (law consists of rules articulated — and able to be expressed in written form — by legal agents and received by legal subjects).[23]

[19] The extensive literature on the *Yorta Yorta* decision is reviewed in Part III of the thesis.

[20] See, eg, Richard Bartlett, *Native Title in Australia* (3rd ed, LexisNexis Butterworths, 2015); Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (The Federation Press, 2008); Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (2nd ed, Aboriginal Studies Press, 2009); Australian Law Reform Commission, *Connection to Country: Review of the* Native Title Act 1993 *(C'th)* (Report No 126, April 2015).

[21] Strelein (n 20); Francesca Dominello, 'Beyond Symbolism: Aboriginal Sovereignty and Native Title' (2008) 13 *Journal of the Australasian law Teachers Association*; Shaunnagh Dorsett and Shaun McVeigh, 'Section 223 and the Shape of Native Title: The limits of Jurisdictional Thinking' in Lisa Ford and Tim Rowse, *Between Indigenous and Settler Governance* (Routledge, 2013), Daniel Lavery, 'The British Acquisition of New Holland: a Residuum of Allodial Sovereignties' (PhD Thesis, James Cook University, 2015).

[22] Anker, *Declarations of Interdependence* (n 18); Dorsett and McVeigh 'An Essay on Jurisdiction' (n 18); Glenn (n 18); Bruce Rigsby, 'Social Theory, Expert Evidence, and the *Yorta Yorta* Rights Appeal Decision' in Louis Knafla & Haijo Westra (eds) *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* ((UBC Press, 2010) 53; Bruce Rigsby, 'Custom and Tradition: Innovation and Invention' [2006] *Macquarie Law Journal* 8.

[23] Anker, *Declarations of Interdependence* (n 18) 75. Anker's discussion of the Court's use of theory in the *Yorta* decision is discussed further in Part III of the thesis.

To date, however, there has not yet been an investigation of how all the theories relied upon in the judgment inform the resulting construct of Indigenous law that emerges as that recognised by the common law.

The High Court decision in *Yorta Yorta* remains one of the most significant decisions concerning the recognition of Indigenous Australian law by the common law since the rejection of terra nullius in *Mabo*. In this thesis, I closely examine the leading judgment, critically investigating the theoretical foundations of the interpretation of 'traditional laws and customs' by the High Court in that decision.

This doctoral research is concerned with the legal interpretation of Indigenous Australian 'traditional laws and customs', but it is not about the detail or content of those traditional laws and customs, nor is it an attempt to elucidate those laws and customs as understood by Indigenous Australian peoples. Dreaming cosmologies, Country, Dreamtime tracks and song lines, and the systems of knowledge and ontologies which characterize Aboriginal accounts of law, are not the subject of this thesis. That is not my story to tell.

Instead, the stories that weave through this thesis concern the writing and teaching of jurisprudence and tell a tale of juristic epistemology. The subject matter of this thesis is Anglo-Australian legal thought (and its portrayal of Indigenous Australian law) manifest in primary legal and jurisprudential texts. It is those texts — the High Court judgment itself and the theories relied upon therein — and what they say about traditional laws and customs, that form the object of my research.

B A Denial of the Status of 'Law'?

Despite the ostensible rejection of the doctrine in *Mabo*, some scholars have argued that the fiction of terra nullius remains embedded as the foundation of contemporary Australian law. In spite of the apparent acknowledgement of Indigenous law — that watershed moment of 'recognition' — it has been argued that the Court in *Mabo* failed to recognise Indigenous law as 'law', and that Anglo-Australian law still fails to accord Indigenous law the status of 'law'.

For example, Indigenous Australian scholar, Irene Watson, argues that the 'act of state' doctrine, by which the High Court has repeatedly held that the acquisition of sovereignty by the British cannot be challenged in an Australian court, ensures the continuation of terra nullius as

the founding doctrine for the Australian state.[24] Watson further argues that by preserving the 'mythical skeleton of legitimacy', the High Court in *Mabo* perpetuated the colonial project, which 'has emerged and grown from a denial of Raw Law, constructing instead First Nations Peoples as beings without law — uncivilised and without society':[25]

> Our law was "known" to the coloniser as myth, legend or lore, and was seen in the same way that the old people were in their nakedness, as not really being "properly" human but rather heathen and barbaric. Likewise, our law was not really law, but a set of customs and myths of primitive peoples.[26]

Watson's argument is that it is not only the denial of Aboriginal sovereignty, but the continuing exclusion of Indigenous Australian knowledges and understandings of their own laws that ensures the continuation of terra nullius and the continuing failure to recognise Aboriginal law as 'law': '[t]he ongoing exclusion by the state of Aboriginal laws, knowledges and philosophies maintains a colonial terra nullius.'[27]

Eminent Australian legal theorist, Margaret Davies, points out that the 'recognition' of Indigenous Australian law in *Mabo* was not really a 'recognition' of Indigenous law beyond a mere recognition that it exists.[28] She argues that the reason for the failure to meaningfully recognise Indigenous law as 'law' lies with the dominant Western concept of law itself, according to which law is perceived as 'singular (one law governs one territory)',[29] state-centred,[30] 'separable from morality and culture, and institutionalised'.[31] The problem lies not just with what counts as law, but also with who decides it:

> [In *Mabo*], the High Court effectively excluded recognition of Indigenous law as law, because it reinforced the unique power of Australian law to decide what counts as law. Yet

[24] Irene Watson, 'Indigenous People's Law-Ways: Survival Against the Colonial State' (1997) 8(1) *Australian Feminist Law Journal* 39.
[25] Watson, *Raw Law* (n 3) 1.
[26] Watson, *Raw Law* (n 3) 62.
[27] Irene Watson, 'Re-Centring First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10(5) *AlterNative: An International Journal of Indigenous Peoples* 508, 512.
[28] Margaret Davies, *Asking the Law Question* (Thomson Reuters, 4th ed, 2017) 320 ('*Asking the Law Question*').
[29] Ibid 322.
[30] Margaret Davies, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87, 102 ('The Ethos of Pluralism').
[31] Davies, *Asking the Law Question* (n 28) 322.

> Indigenous law exists independently of Australian state law and it is a failing of the centralist model of law that it is unable to recognise that fact.[32]

Davies contends that the problem arises 'because of the in-built limitations of the positivist, singular, statist conception of law, revealed so clearly in *Mabo*, which prevent equal dialogue between the two systems.'[33] Similarly, Kirsten Anker argues that the failure of the High Court in *Mabo* to recognise Indigenous law as 'law' was repeated in the *Yorta Yorta* decision. Again, according to Anker, the problem was the dominant Western concept of law used by the Court: singular (or monist), state-centred and positivist.[34]

These arguments about the exclusion of Indigenous knowledges about their own laws, and the use instead of a Western, state-centred, positivist model of 'law', give some clarity about the apparent failure of Anglo-Australian law to accord Indigenous law the status of 'law'. But there is a further important aspect that remains unexplored.

The Western theories of law that have contributed to the singular, state-centred, model of law have not been written in a vacuum of information about Indigenous systems of law, which have long been the subject of anthropological study in the West. Indeed, many Western legal theorists actively engaged in the debate during the 19th and 20th centuries that specifically deliberated the issue whether Indigenous law could count as 'law'.[35]

Accordingly, this thesis poses the question of how — and to what extent — perceptions of Indigenous law have influenced Anglo-Western (specifically British and Anglo-Australian) theories of law,[36] and in turn, to what extent those theories have been influential in shaping the construct of Indigenous Australian law in *Yorta Yorta*. These questions are elucidated in more detail below.

---

[32] Davies, 'The Ethos of Pluralism' (n 30) 102.

[33] Ibid 102.

[34] Anker, *Declarations of Interdependence* (n 18). I discuss Anker's analysis of the Court's use of theory in the *Yorta* decision further in Part III of this thesis.

[35] It is well-known, for example, that the eminent 20th century legal philosopher, HLA Hart, engaged in this debate, denying that 'primitive law' could amount to a legal system: HLA Hart, *The Concept of Law* (Oxford Clarendon Press, 1961). See the discussion in Part IV of this thesis.

[36] I use the term '**Anglo-Western**' to refer to the Anglicised parts of the Western world which have common law legal systems and a legacy of connection to Britain through the history of British colonisation. Where appropriate, I use it in preference to 'Western' to distinguish it from those parts of the Western world which have colonial histories through the imperialism of continental Europe.

II. RESEARCH AIM, OBJECTIVES, AND QUESTIONS

The overall aim of this research is to ascertain how Indigenous Australian law is conceptualised in the nascent Anglo-Australian legal doctrine of recognition. In order to achieve that central aim, an interrelated subset of research objectives will be pursued:

- First, to investigate the theoretical foundations of the denial of Indigenous law in the doctrine of terra nullius.

- Second, to investigate the theoretical foundations of the recognition of Indigenous law in the doctrine of intersecting normative systems.

- Third, to interrogate the leading majority judgment in *Yorta Yorta* for the use of legal theory, both explicit and implicit, and to reveal any implicit philosophical or ideological assumptions in the text of the judgment.

- Fourth, to situate the theoretical texts disclosed by that process within the history of British and Anglo-Australian legal thought.

- Finally, to further critically examine those same texts for their treatment of Indigenous Australian law, investigating how Indigenous Australian law is positioned (if at all) in relation to the concept of 'law' as defined or described in the texts.

These thesis aims and objectives can, in turn, be articulated as specific research questions that need to be answered.

The major research question is: How is Indigenous Australian law conceptualised in the Anglo-Australian legal doctrine that recognises its existence? The subsidiary research questions are as follows:

- First, what were the theoretical foundations of terra nullius?

    - What theories (and/or theoretical principles) informed the denial of law and what is their genealogy? How (if at all) do those theoretical texts treat Indigenous Australian law, and how do they position Indigenous Australian law vis-à-vis the concept of 'law' as described in the texts?

- Second, what are the theoretical foundations of the interpretation of Indigenous Australian 'traditional laws and customs' by the High Court in the doctrine of intersecting normative systems in the *Yorta Yorta* judgment?
    - What theories have informed the construct of 'traditional laws and customs' and what is their genealogy?
    - How (if at all) do those theoretical texts portray Indigenous Australian law, and how do they position Indigenous Australian law apropos the concept of 'law' as defined in the texts? How does this compare with the ways that Indigenous Australian law has historically been conceptualised in British and Anglo-Australian legal thought?
    - How does this impact the recognition of Indigenous Australian law in Anglo-Australian legal doctrine?
- Finally, has the treatment and relative positioning of Indigenous law relative to the concept of 'law' had any impact on the way 'law' is conceptualised in those texts?

To answer these questions, the thesis problematises the very concept of 'law' itself and unpacks the legal meanings given to it, in the intercultural context of British and Anglo-Australian law's construction of Indigenous Australian law.

III. CONCEPTUALISING 'LAW'

There are vast conceptual differences between Indigenous Australian and Anglo-Australian ways of conceptualising law. Without homogenising either tradition, the epistemological and ontological differences between Indigenous and Anglo-Australian accounts of law — differences as fundamental as time and space — are immense. Within the Anglo-Western legal tradition alone, there are multiple ways of approaching questions of the nature of 'law', and multiple ways of conceptualising 'law'. In this section, by way of providing a general contextual overview for the thesis, I briefly introduce some aspects of the plurality of concepts of 'law', prefaced with a note on terminology.

A The Word 'Law'

In this thesis, I use the term 'law' in a range of different, albeit related, contexts. First, the subject matter of this thesis concerns theoretical concepts or constructs of 'law'. Second, I refer to the law of the Anglo-Australian legal system as 'law'. Finally, I also use the term 'law' to refer to the laws of the manifold jurisdictions of Indigenous Australian peoples.

I acknowledge, however, that there are some senses in which that terminology may be inadequate. For instance, it is apparent from the most cursory consideration that the use of the singular 'law' masks a plurality of laws and legal jurisdictions.[37] In addition, the use of the English word 'law' may favour an interpretation of Indigenous Australian law in terms of an Anglocentric construct of 'law', and obscure differences between Indigenous Australian and Anglo-Australian concepts of 'law'. I avoid using the term 'lore', as in Western legal parlance it is often taken to represent not just something different, but something less than law, more equivalent to myth or folklore. I also avoid the terminology 'customary law' as it is a Eurocentric term with its source in European legal history.[38] A more appropriate terminology would use the nomenclature for 'law' in the myriad Indigenous local languages; however, there is not a single pan-continental Indigenous language term that is considered by Indigenous Australians broadly to be a near equivalent translation. I therefore use the English term 'law' in accordance with its use by Indigenous legal scholars.[39]

---

[37] This is the case for both Anglo-Australian and Indigenous Australian law. In relation to the latter, Ambellin Kwaymullina points out that the 'many Aboriginal legal orders of our many Countries are now often spoken of as if they form a single body of law. But the use of the singular to describe these legal systems … hides a truth: that the Aboriginal legal tradition was always an international tradition': Ambellin Kwaymullina, 'Aboriginal Nations, the Australian Nation-State and Indigenous International Legal Relations' in Irene Watson (ed) *Indigenous Peoples as Subjects of International Law* (Taylor & Francis, 2017) 5, 5 ('Aboriginal Nations').

[38] Customary law had played a significant role in the historical development of English and European systems of law. The common law system has been portrayed as having its origins in English customary law, and, indeed, as a regime of customary law in itself: see AWB Simpson, 'The Common Law and Legal Theory' in *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, 1987) 359; Alan Cromartie, 'The Idea of Common Law as Custom' in Amanda Perreau-Saussine and James B Murphy (eds) *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press, 2007) 203; Gerald J Postema, *Bentham and the Common Law Tradition* (Oxford University press, 2019) 3–78. For an overview of the history of customary law in England and Europe, although they do not question the value of the terminology for Indigenous peoples' law, see: David J Bederman, *Custom as a Source of Law* (Cambridge University Press, 2012) 17–41 (Bederman's work is also problematic for the use of the term 'pre-literate' to describe Indigenous peoples); Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters* (Routledge, 2016) 14–32.

[39] See, eg, Black (n 3); Watson, *Raw Law* (n 3); Kwaymullina, 'Aboriginal Nations' (n 37); Mick Dodson, 'From 'Lore' to 'Law': Indigenous Rights and Australian Legal Systems (1995) 20(1) *Alternative Law Journal* 2.

By using the same word — law — for both Indigenous and non-Indigenous Australian law, I hope to convey a sense of parity between them, without diminishing their differences.[40]

B Indigenous Australian Accounts of Law

When Indigenous Australian scholars describe Indigenous philosophies of law, they depict law as part of a non-anthropocentric, relational worldview, in which the land and waters feature as the repository of law.[41] Although a study of the nature, form and content of Indigenous Australian law and jurisdiction is outside the scope of this thesis, a brief overview of Indigenous commentators' accounts of law serves to highlight some of the key areas of difference between Indigenous and Anglo-Australian ways of conceptualising law, and provides an important initial counterpoint to the discourse of deficit and denial that characterised terra nullius.

The sketch that follows is based upon the works of Professor Irene Watson and Dr Christine Black, both Australian Indigenous legal scholars.[42] Their accounts resonate with the accounts of many other Indigenous Australian authors, and describe certain commonalities in the philosophies of law of Indigenous peoples across Australia.[43] The overview that follows is therefore not intended to provide an essentialised account of some homogenous entity of

[40] I thank my friend and colleague, Ed Wensing, for suggesting the word parity in this context: Edward Wensing, 'Land Justice for Indigenous Australians: How Can Two Systems of Land Ownership, Use and Tenure Coexist with Mutual Respect Based on Parity and Justice?' (PhD Thesis, The Australian National University, 2019).

[41] Watson, *Raw Law* (n 3); Black (n 3).

[42] In *Raw Law*, Professor Irene Watson describes the philosophy of law and governance of her people, the Tanganekald and Meintangk peoples, extrapolating to include commonalities across the jurisprudence of other first nations' peoples of Australia and the world. While Watson gives an overview of the jurisprudence of her peoples, she acknowledges that, because of prohibitions within her law on revealing the sacred, she reveals little of the actual law. Watson explicitly claims not to speak on behalf of other Indigenous peoples, nor to draw a meta-narrative on Indigenous law: Watson, *Raw Law* (n 3). Dr Christine Black positions herself as a woman of the Kombumerri and Munaljarlai peoples of Southeast Queensland. In her book, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence*, Black draws on previously published law stories by senior law men and women from various First Nations of Australia to develop a framework for understanding Indigenous jurisprudence: Black (n 3).

[43] See, eg, Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Australian Humanities Review* 181 (first published in (1999) 3 *Worldviews: Environment, Culture, Religion* 105); Kwaymullina, 'Aboriginal Nations' (n 37); Ambellin Kwaymullina, 'Seeing the Light: Aboriginal Law, Learning and Sustainable Living in Country' (2005) 6(11) *Indigenous Law Bulletin* 12; Ambellin Kwaymullina and Blaze Kwaymullina, 'Learning to Read the Signs: Law in an Indigenous Reality' (2010) 34(2) *Journal of Australian Studies* 195. These accounts are drawn from predominantly Aboriginal authors, and therefore may not reflect Torres Strait Islander perspectives. The first-hand accounts of Indigenous law men and women tendered in support of native title claims, in the archives of the National Native Title Tribunal and Federal Court of Australia, form a cumulative body of evidence and are an invaluable resource in relation to Indigenous Australian law, inclusive of Aboriginal and Torres Strait Islander perspectives.

'Indigenous Australian law', but to provide insight into some of the conceptual features shared across the diversity of Indigenous Australian perspectives of law.

Watson and Black depict Indigenous Australian law as grounded in the Dreamtime, according to which the laws were laid down into the earth by the Dreaming spirit ancestors, and remain ever present. The ancestor spirits created the landscape — patterning humans to certain tracts of land — and continue to pass down the knowledge of the law through songs and stories. The basis for law is not merely the governance of humans, but the balance of the universe, including the land and all natural and spirit beings.

Law is therefore immanent in the land and in the natural world. Law is lived rather than imposed; it is experienced, embodied, expressed and learnt through the actions of ancestral, natural and human beings. Law lives in song, in stories, life-ways, dance and land. It is honoured and sustained in ceremony, in an ongoing cycle of renewal.

Like the Indigenous concept of time — which is cyclical and interwoven with space — law is not linear or hierarchical, but simultaneously ongoing and cyclical, capable of continual renewal. The cycle of continual renewal helps to explain the survival of Indigenous law despite the impact of colonialism. Where the practice of living the law has died back, the law remains latent in the land, and can be rejuvenated. The purpose of law is not limited to the regulation of human society, and its existence is not dependent upon human observance.

C Diversity and Plurality in Anglo-Western Jurisprudence

In the Western tradition, debates about the nature of 'law' are as old as the Western academe itself. From Plato, Aristotle and Cicero in the ancient philosophical tradition, Thomas Aquinas in the medieval scholastic period, to the jurists of the modern and post-modern era, there have been multiple approaches to questions of how to understand the nature of 'law', and hence multiple ways of conceptualising 'law'. As epistemological trends in academia have waxed and waned, approaches to questions about the nature of 'law' — and its relationship to social

customs and moral, ethical and religious mores — have varied, from 'natural law' to positivist, analytical to realist, historical and sociological to linguistic.[44]

In this section, I highlight the epistemological and ontological multiplicity of Anglo-Western concepts of 'law'. By briefly sketching the diversity of approaches within British and Anglo-Australian jurisprudence during the first centuries of Anglo-Australian history, I indicate a range of possible ways of conceptualising law that were available to the High Court at the time of the *Yorta Yorta* decision in 2002. This discussion of the plurality of concepts of 'law' provides a broad contextual overview for the examination of the theoretical texts cited in the majority judgment in *Yorta Yorta* (which forms the subject matter of the thesis), and provides a segue to the next section, in which I outline the theoretical framework and methodologies for the thesis.

At the time of the colonisation of Australia, English jurisprudence was dominated by two quite distinct schools of thought — common law theory and legal positivism.[45] Less dominant as a distinct school, but still infusing much legal scholarship, were the vestiges of natural law theory.

Common law theory emphasised the customary origins of the English common law and is exemplified by the 18th century works of Sir Matthew Hale and Sir William Blackstone.[46] In his influential *Commentaries on the Laws of England*, published just before Cook's visit to the east coast of Australia in 1770, Blackstone characterised English common law as comprising the ancient customs of the realm, which had acquired the status of law through the recognition of their long usage over time immemorial.[47] Common law theories presented the common law

[44] These multiple approaches to the theory of law are immediately apparent from the divisions within most contemporary textbooks on jurisprudence; see, eg, MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 9th ed, 2014).

[45] Gerald Postema notes that these 'two major contenders on the field of English legal theory' had emerged in the 17th century 'at the birth and early infancy of the modern era': Postema (n 38) 38.

[46] Matthew Hale, *The History of the Common Law of England and an Analysis of the Civil Part of the Law* (1713); William Blackstone, *Commentaries on the Laws of England* (1765–1769). For commentary on the development of common law theory, see generally JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth* Century (Cambridge, 1957); Simpson (n 38) 359; Cromartie (n 38) 203; Bederman (n 38); Postema (n 38) 3–78; see also Shaunnagh Dorsett, 'From Time Immemorial: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry' (2002) 26 *Melbourne University Law Review* 32.

[47] William Blackstone, *Commentaries on the Laws of England* (1765–1769) Book 1, 17; 63–92. Blackstone endorsed Hale's thinking in this regard.

as a timeless entity.[48] With its origins in the almost mystical pre-history (before the known history) of the English people, the common law was characterised in classical common law theory as embodying the accumulated wisdom of the people from time immemorial.[49] Both Hale and Blackstone emphasised the antiquity, rather than the origin, of the ancient customs, since they regarded the origin as virtually impossible to discover.[50]

Natural law theory, originating in ancient Greek philosophy, had influenced European and English legal thought throughout the late middle ages and early modern era through the influence of Christian scholarship.[51] The basis of natural law theory is the 'assertion that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason'.[52] These moral principles form the natural law, which in turn provides a basis for positive (human-made) law.[53] Many English legal treatises of the 17th and 18th century had been framed in terms of natural law,[54] but it fell out of popularity with the rise of legal positivism in the late 18th and early 19th century,[55] and remained dormant in England and Australia until the late 20th century.[56]

Legal positivists were highly critical of both common law and natural law theories.[57] They carefully delineated 'law' from other social or cultural norms (such as moral, religious, ethical or customary norms), and separated — and ultimately privileged — questions of 'what law is' from questions about 'what law ought to be'.[58] Analytical theorists, concerned to answer the

[48] See the discussion in Pocock (n 46) 30–55; see also Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (LexisNexis, 2nd ed, 2003) 22–36.

[49] Pocock (n 46) 30–55; Cotterrell (n 48) 24.

[50] Hale (n 46) 85–88; Blackstone (n 47) 67.

[51] The work of the medieval Scholastic, Thomas Aquinas, is still seen as the 'paradigm' of natural law theory: John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980), quoted in MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 7th ed, 2001) 105.

[52] Freeman (n 51) 90.

[53] Ibid 89–102.

[54] The English social contract theories of Thomas Hobbes and John Locke were framed in terms of natural law (albeit in a limited way): see Chapter Two below. Blackstone began his discussion of the nature of law in the *Commentaries* with a restatement of natural law principles: Blackstone (n 47) 38–44.

[55] Brian Z Tamanaha, 'The Third Pillar of Jurisprudence: Social Legal Theory' (2015) 56 *William and Mary Law Review* 2235, 2238–9 ('The Third Pillar of Jurisprudence').

[56] Freeman (n 51) 120–123; Tamanaha, 'The Third Pillar of Jurisprudence' (n 55), 2238–9.

[57] See Postema (n 38); Freeman (n 51) 200–1; Cotterrell (n 48) 114–7.

[58] See, eg, HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593. One of the influential founders of legal positivism, Jeremy Bentham, was mainly interested in 'censorial jurisprudence' (addressing the question of what law ought to be) as a basis for law reform — unlike his successor John Austin. However, as a result of the phenomenal influence of Austin's work, the positivism that dominated English jurisprudence was analytical (see the discussion in Chapter Three below).

question of 'what law is', either defined or described law by attempting to discern its distinctive features that distinguished it from other types of normative phenomena.[59] In other words, they were concerned to identify a set of criteria by which the legal could be distinguished from the non-legal.

Writing about Western nation states, the criteria for law were identified by reference to Western-type legal systems. Positivist analytical theories were therefore inadequate — and inappropriate — to describe the legal order of societies with very different socio-legal organisation. Having set the criteria for law by reference to a Western nation state, any variation from that state would not fit the criteria. It is not surprising then, that critics have argued that the positivist model of law is inappropriate when applied to Indigenous societies.[60]

Although legal positivism dominated British jurisprudence throughout the latter decades of the 19th and much of the 20th century, it was by no means the only style of legal theory in Britain or Australia during the first century or two of Anglo-Australian history.[61] Historical and comparative jurisprudence ('historical jurisprudence') rivalled legal positivism in popularity for much of that time.[62] Historical jurisprudence and its successor, sociological jurisprudence (accompanied by realism and a resurgence of natural law theory in America) challenged the limits legal positivist thought had placed around law and legal theory. Both historical and sociological jurisprudence saw 'law' as something more interconnected with society, and drew upon the social sciences to understand the nature of law and its role in society.[63] Although primarily concerned with understanding the nature of law in Western society, sociological jurists acknowledged different types of socio-legal order in different types of societies.[64] The sociological school was relatively popular in Australia during the mid-20th century.[65] The post-

[59] See, eg, John Austin, *The Province of Jurisprudence Determined* (first published 1832).

[60] This is not a recent observation; in the 19th century, one of the classics of legal positivism (John Austin's theory) was criticised on the basis that it did not adequately account for law in any societies other than contemporary Western European societies: Wilfred E Rumble, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in Nineteenth-Century England* (Continuum, 2005) 151.

[61] See Chapter Three below.

[62] See Tamanaha, 'The Third Pillar of Jurisprudence' (n 55); Neil Duxbury, 'English Jurisprudence between Austin and Hart' (2005) 91(1) *Virginia Law Review* 1.

[63] See Tamanaha, 'The Third Pillar of Jurisprudence' (n 55).

[64] See, eg, Julius Stone, *The Province and Function of Law: Law as Logic Justice and Social Control* (Associated General Publications, Sydney, 1946).

[65] This was largely as a result of the work of Julius Stone in particular: see the discussion in Part V of this thesis.

war period, however, saw a revival of legal positivism, which again dominated British and Anglo-Australian jurisprudence during the latter half of the 20th century.[66]

Given the dominance of this style of thinking about law, the apparent use of positivist discourse by the High Court justices in *Yorta Yorta* could be seen as unsurprising. However, the positivist approach had been under sustained attack within legal scholarship for at least a generation prior to the *Yorta Yorta* judgment at the turn of the 21st century. Critical legal scholars — including feminist, critical race and post-modern legal scholars — had challenged the homogeneity, objectivity and separability of modernist theories of law. Although it could be argued that in 2002 these critical theories were still seen as 'alternative', they had nevertheless gained acceptance in the mainstream commentaries of jurisprudence.[67] The combined impact of their sustained criticism of the dominant discourse was to highlight the contingency, cultural specificity and exclusivity of the positivist analytical approach.

Beyond the disciplinary confines of law, throughout the latter decades of the 20th century, a wealth of international decolonising literature such as postcolonial and settler colonial theories, anti-colonial and Indigenist critiques, had challenged the authority of colonial sovereignties, histories, narratives, and discourses.[68] New generations of Indigenous Australian lawyers and scholars brought Indigenous perspectives into academic and legal discourse.[69] In the wake of

[66] The resurgence of legal positivism coincided with HLA Hart's appointment to the Chair of Jurisprudence at Oxford University, his famous debate with Harvard Professor Lon Fuller, and the publication of *The Concept of Law* (n 35). Natural Law theory also experienced a brief revival with the publication in 1980 of *Natural Law and Natural Rights* by Hart's former student, Australian legal philosopher, John Finnis: Finnis (n 51).

[67] Approximately one quarter of *Lloyd's Introduction to Jurisprudence* in 2001 was devoted to critical theories of law: Freeman (n 51).

[68] See, eg, Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds) *Marxism and the Interpretation of Culture* (University of Illinois Press, 1988) 271; Homi K Bhabha, 'The Other Question — The Stereotype and Colonial Discourse' (1983) 24(6) *Screen* 18; Homi K Bhabha, 'The Commitment to Theory' (1988) 5(1) *New Formations* 5; Patrick Wolff, 'Nation and Miscegenation: Discursive Continuity in the Post-Mabo Era' (1994) 36 *Social Analysis* 93; Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (University of Queensland Press, 2000); Robert A Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, 1990). These theories were complemented in Australia by a 'new' history, such as the work of historian Henry Reynolds, which challenged the orthodox history of 'peaceful settlement': eg, Henry Reynolds, *The Law of the Land* (Penguin, 1987); see also Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995). A series of official inquiries described the continuing legacy of the history of government policy and practice, as well as law, upon the Indigenous Australian population: see, eg, *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 2; Australian Human Rights Commission, *Bringing Them Home* (Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 1997).

[69] Such as Noel Pearson, Mick Dodson, Larissa Behrendt, Marcia Langton, Aileen Moreton-Robinson and Irene Watson, for example.

the *Mabo* decision, a critical jurisprudence emerged that was directed at the foundations of Anglo-Australian sovereignty and the origins of Australian law.[70] These perspectives and critiques informed a critical jurisprudence of colonialism, which drew attention to the role of law as an instrument of continuing colonialism.[71] At the very least, this critical literature highlighted the point that Anglocentric positivist analyses of 'law' may not be appropriate in the context of a discussion of the nature of Indigenous law.

More appropriate, in terms of Western theory, to the recognition of Indigenous law by the law of the Anglo-Australian state would have been legal pluralism (the coexistence of multiple legal orders within a single territory). Legal pluralism had emerged in the field of legal anthropology primarily as a way of describing the coexistence and interrelation of Indigenous peoples' law with the legal orders of the colonising powers (in those countries where Indigenous law had been acknowledged).[72] As such, it would appear to have been the most appropriate type of theory relevant to the contact between, and co-existence of, Indigenous and Anglo-Australian systems of law, that was the subject of the *Yorta Yorta* judgment. However, although the idea of legal pluralism had long been accepted within the social sciences, and had been of considerable interest to socio-legal scholarship and sociological jurisprudence, it did not significantly impact legal theory until the turn of the 21st century (and in 2002, when the *Yorta Yorta* judgment was handed down, was still 'cutting edge').[73] It was not until the end of the 20th

[70] See, eg, Peter Fitzpatrick, 'No Higher Duty: *Mabo* and the Failure of Legal Foundation' (2002) 13 *Law and Critique* 239; Shaunnagh Dorsett and Shaun McVeigh, 'Just So: "The Law Which Governs Australia is Australian Law" (2002) 13 *Law and Critique* 289. Douzinas and Geary have identified this jurisprudence as a particularly Australian strand of 'Critical Legal Studies' which they describe as 'Oz Crit': Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart, 2005) 247–253.

[71] See, eg, Irene Watson, 'Naked Peoples: Rules and Regulations' (1998) 4 *Law, Text, Culture* 1; Watson, 'Indigenous Peoples' Law-Ways' (n 24); Irene Watson 'Power of the Muldarbi: The Road to its Demise' (1998) 11(1) *Australian Feminist Law Journal* 28 ('Power of the Muldarbi'); Irene Watson, 'Buried Alive' (2002) 13 *Law and Critique* 253; Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992); Peter Fitzpatrick, '"Enacted in the Destiny of Sedentary Peoples": Racism, Discovery and the Grounds of Law' (2000) 1(1) *Balayi: Culture, Law and Colonialism* 11; Peter Fitzpatrick, *Modernism and the Grounds of* Law (Cambridge University Press, 2001); Williams (n 68).

[72] See the discussion in Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375, 381–386 ('Understanding Legal Pluralism').

[73] In the seventh edition of *Lloyd's Introduction to Jurisprudence* published in 2001, immediately prior to the *Yorta Yorta* decision (handed down in December 2002), a brief discussion of legal pluralism is located within the chapter on anthropological jurisprudence: Freeman (n 51) 919–921. Apart from a couple of ground-breaking articles published in the late 1990s, most of the earliest articles by legal theorists in this area were published in the first decade of the 21st century (after the *Yorta Yorta* decision). Similarly, a number of influential works of legal history that document an historical acceptance of a plurality of legal orders in the early decades of Australian colonial history, or use legal pluralism as a framework for legal histories of

century, in an era of increasing globalisation, that the terminology of legal pluralism began to be deployed to describe the layers of interrelated laws and systems of law in the international and transnational arena, and legal pluralism began to gain traction within legal scholarship more generally.[74] Despite an initial tension between legal pluralism and legal theory,[75] a broad trend towards a pluralist jurisprudence is currently discernible in legal theory — although approaches to such a pluralist jurisprudence vary greatly, and its subject matter has been described as 'contested and obscure'.[76] Although the history of legal pluralism as a school of thought derives from the colonial experience of coexisting laws and the recognition of Indigenous law by colonial legal systems, the 'pluralist turn' in contemporary jurisprudence is far more wide-ranging.

If there is one thing that the history of Anglo-Western legal theory has demonstrated, it is that there are many different ways of thinking about and conceptualising 'law', even within the common law tradition. At the time the justices of the High Court were considering the meaning of Indigenous Australian 'traditional laws and customs' at the turn of the 21st century, a range of theoretical approaches to conceptualising 'law' were available to them. Textbooks of jurisprudence included a diversity of schools of thought, including legal positivism and analytical jurisprudence, natural law, sociological jurisprudence and a range of critical legal theories, including theories of race and colonialism.[77] Although the major Indigenous-authored

empires and Indigenous peoples, were published after the *Yorta Yorta* decision had been handed down: see, eg, Lauren Benton and Richard J Ross (eds), *Legal Pluralism and Empires, 1500-1850* (Cambridge University Press, 2002); PG McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004); Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous people in America and Australia, 1788–1836* (Harvard University Press, 2010); Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Harvard University Press, 2016); Shaunnagh Dorsett and John McLaren (eds), *Legal Histories of the British Empire: Laws, Engagements and Legacies* (Routledge, 2014).

[74] William L Twining, *Globalisation and Legal Theory* (Northwestern University Press, 2000); William Twining 'Normative and Legal Pluralism: A Global Perspective' (2009–2010) 20 *Duke Journal of Comparative and International Law* 473 ('Normative and Legal Pluralism'); Tamanaha, 'Understanding Legal Pluralism' (n 72) 887–90.

[75] Deriving partly from disciplinary differences between the empirical epistemologies of the social sciences and the speculative epistemology of philosophy: Margaret Davies, 'Pluralism and Legal Philosophy' (2006) 57 *Northern Ireland Legal Quarterly* 577 ('Pluralism and Legal Philosophy'). See also Emmanuel Melissaris, 'The More the Merrier: A New Take on Legal Pluralism' (2004) 13(1) *Social and Legal Studies* 57.

[76] Nicole Roughan and Andrew Halpin, 'Introduction' in Nicole Roughan and Andrew Halpin (eds) *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press, 2017) 2. Roughan and Halpin describe pluralist jurisprudence broadly as 'theories of law moving beyond, within or without the state': at 1.

[77] See, eg, the seventh edition of *Lloyd's Introduction to Jurisprudence*, published in 2001, immediately prior to the *Yorta* decision: Freeman (n 51).

theories of Indigenous jurisprudence, such as those of Watson and Black, were not published until the decade following the *Yorta Yorta* decision, a number of articles including the early works of Watson were available.[78] Legal texts concerning Australian Indigenous legal issues were increasingly drawing upon Indigenous perspectives and anthropological studies of Indigenous Australian law and governance.[79] And legal pluralism, which had been prominent in the social sciences since the 1970s, was beginning to impact legal scholarship.

The diversity and plurality within and between Indigenous and Anglo-Australian ways of conceptualising 'law' demonstrates the epistemological, ontological and even axiological plurality of concepts of 'law'. This idea of plurality of and within concepts of 'law' has inspired the theoretical framework for this thesis.

IV. THEORETICAL FRAMEWORK

This thesis is a work of critical legal scholarship that embraces both an ethos of pluralism and an ethic of respect for Indigenous Australian ways of knowing and understanding their own law.

The term 'ethos of pluralism' was coined by legal theorist Margaret Davies, and this theoretical framework is based upon her theory of 'unlimiting' the ways we think about law.[80] The ethic of respect, itself a manifestation of the ethos of pluralism, has been informed by the values and ethical standards required for Indigenous studies research. I now consider each of these aspects of the theoretical framework in turn.

A An Ethos of Pluralism

Although pluralist jurisprudence has moved beyond its colonial history, legal pluralism retains particular relevance as a discourse for describing the continuing existence and survival of Indigenous law, and the potential for meaningful recognition of Indigenous law by the state

[78] See, eg, Graham (n 43); Watson, 'Indigenous Peoples' Law-Ways' (n 24); Watson 'Power of the Muldarbi' (n 71).

[79] See, eg, Peter Hanks and Bryan Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (Allen & Unwin, 1984); Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues: Commentary and Materials* (2nd ed, LBC, 1997); Martin Hinton, Elliot Johnston, Daryle Rigney (eds) *Indigenous Australians and the Law* (Cavendish, 1996).

[80] Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge, 2017) ('*Law Unlimited*').

legal system.[81] In this section I outline the influence of pluralism for legal theory and its impact on the ways 'law' has been and can be conceptualised, before setting out the pluralist framework for the thesis.

Legal pluralism has posed a number of challenges for the discipline of jurisprudence, bringing into question some fundamental aspects of how law has been conceptualised. First, legal pluralism challenges the monism of mainstream jurisprudence, which continues to centre the legal systems of nation states in theories of 'law'. By decentring state law, legal pluralism has broadened and extended the notion of law. In doing so, however, pluralism has encountered a perplexing and enduring problem … that of deciding upon an agreed definition of 'law' in order to identify its multiple manifestations within a defined territory.[82]

This issue of agreeing upon a definition for 'law' is a familiar one for legal theorists, having occupied jurists (who, after all, devoted the entire subject area of jurisprudence to it) for millennia. For legal pluralism, the problem lies in the difficulty of defining 'law' in a way that captures non-state legal orders while adequately distinguishing legal from other societal normative phenomena.[83] Another problem identified by post-modern and critical theorists was that in attempting to define law, many theories of legal pluralism fell into the 'error' of essentialism: the assumption that 'law' had an 'essence' (as opposed to being culturally constructed) and could be objectively defined at all.[84]

As theorists have grappled with these issues, various responses have been proposed, including abandoning 'legal' pluralism in favour of 'normative' pluralism,[85] linguistic plurality (avoiding ascribing a definition to law by accepting as law 'whatever people identify and treat … as

[81] Kirsten Anker has described the synergies between legal pluralism and post-colonial/anti-colonial and Indigenist jurisprudence: Kirsten Anker, 'Postcolonial Jurisprudence and the Pluralist Turn: From Making Space to Being in Place' in Nicole Roughan and Andrew Halpin (eds) *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press, 2017) 261, 263.

[82] Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869, 875–9.

[83] Ibid 878–9. See also the discussion in Brian Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27(2) *Journal of Law and Society* 296, 298 ('A Non-Essentialist Version of Legal Pluralism'). Davies questions whether this issue is as problematic as has been made out: Davies, 'Pluralism and Legal Philosophy' (n 75) 578–9.

[84] Tamanaha argues that the problem arises from the assumption that 'law is a fundamental category which can be identified and described, or an essentialist notion which can be internally worked on until a pure (de-contextualised) version is produced': Brian Tamanaha, 'The Folly of the "Social Scientific" Concept of Legal Pluralism' (1993) 20 *Journal of Law and Society* 192, 201; see also Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (n 83) 299.

[85] Twining, 'Normative and Legal Pluralism' (n 74); Tamanaha, 'Understanding Legal Pluralism' (n 72).

"law"'),[86] and the call for theories of legal pluralism themselves to become more pluralistic.[87] Another response to these problems has been to shift the focus from the level of 'law', to the level of the legal subject moving between different normative systems ('critical legal pluralism').[88]

Another way in which pluralism has influenced legal theory has been in thinking about the plurality inherent in various concepts of 'law'. On one level, the immanent pluralism of state law is apparent in the diversity of jurisdictions and 'plurality of sources, subjects, interpretations and institutions' that together make up 'the law'.[89] On another level, the plurality inherent in concepts of law has been demonstrated by critical theorists who have exposed the contradictions and heterogeneity within modernist accounts of a coherent, objective and homogenous system of law.[90] Margaret Davies argues that although many contemporary legal theories have not used the terminology of pluralism, their critique of the singularity of much mainstream legal theory demonstrates the plurality within modernist concepts of law.[91] She suggests that although many of these critical theories have not used the label of pluralism, they are 'nonetheless arguably motivated by a pluralist ethos'.[92]

Davies proposes a broader 'unlimited' way of thinking about 'law' that incorporates plurality and materiality.[93] She argues that 'only by developing a more open concept of law, which can recognise and accommodate cultural, sexual and other forms of difference, will non-state laws such as Indigenous law … be acknowledged'.[94] I use Davies' theory of 'unlimiting' the ways we think about law and her idea of an 'ethos of pluralism' as a broad framework for the conceptual analysis in this thesis.

[86] Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (n 83) 313.
[87] Melissaris (n 75).
[88] See, eg, Martha-Marie Kleinhans and Roderick A Macdonald, 'What is a Critical Legal Pluralism' (1997) 12(2) *Canadian Journal of Law and Society* 25; Melissaris (n 75); Anker, *Declarations of Interdependence* (n 18). Anker argues that critical legal pluralism is the best approach for recognition and dialogue between Indigenous and non-Indigenous law in Australia.
[89] Davies, 'The Ethos of Pluralism' (n 30) 112.
[90] Davies, 'The Ethos of Pluralism' (n 30) 108.
[91] Davies, 'The Ethos of Pluralism' (n 30) 109–10.
[92] Davies, 'The Ethos of Pluralism' (n 30) 108.
[93] Davies, *Law Unlimited* (n 80). While I discuss plurality here, I defer the discussion of materiality to later in the chapter.
[94] Davies, 'The Ethos of Pluralism' (n 30) 112.

I take the concept of 'pluralism' to mean the coexistence of incommensurable phenomena. This understanding is drawn from Davies, who describes pluralism as 'a situation in which incommensurable things coexist in a comparative space'.[95] According to Davies, pluralism 'refers to the situation where two or more theoretical objects (persons, legal systems, values, cultures) come into contact with each other conceptually or physically, but cannot be reduced to a singular form'.[96]

The element of incommensurability overcomes the persistent problem of deciding upon an agreed definition of 'law' that historically plagued legal pluralism. If the notion of pluralism rests upon the impossibility of reducing differing concepts of law to a singular form, then the inability to reach a singular definition of law is no longer problematic (indeed it becomes an indispensable part of the very suggestion of legal plurality).

The ethos of pluralism manifests throughout this thesis on four levels, as follows:

First, the acceptance that Indigenous ways of law exist independently of the Australian state legal system and that Indigenous ways of conceptualising law are vastly different, indeed, incommensurable, with Anglo-Australian ways of conceptualising law. This accords with the fundamental premise of legal pluralism that assumes the possibility of co-existence of incommensurable ways of doing and knowing 'law',[97] without attempting to define law in an essentialist 'one size fits all' way.[98]

Second, the acceptance of, and respect for, Indigenous Australian knowledges and expertise in relation to their own law, and ways of conceptualising (it) as 'law'. This synthesises with the ethic of respect, which is set out below.[99] These first two levels of pluralism are premises upon which this thesis is based, and provide a broad framework for the research.

[95] Davies, *Law Unlimited* (n 80) 10.
[96] Ibid 10.
[97] Davies, 'Pluralism and Legal Philosophy' (n 75); Davies, 'The Ethos of Pluralism' (n 30); Tamanaha, 'Understanding Legal Pluralism' (n 72).
[98] Davies, 'The Ethos of Pluralism' (n 30); Tamanaha, 'Understanding Legal Pluralism' (n 72); Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (n 83); Davies, 'Pluralism and Legal Philosophy' (n 75).
[99] It also accords with Brian Tamanaha's non-essentialist version of pluralism that what counts as law is what people say counts as law, which avoids the problem of essentialising 'law' (Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (n 83)), but I am unsure how helpful this is, or whether it detracts from the significance of the respect.

Third, the plurality inherent within concepts of 'law' — the acceptance that whichever way law is conceptualised, it will be inherently plural. The bulk of the research and analysis in the thesis reflects this third level of pluralism. This thesis unpacks the plurality of conceptual elements within that part of Anglo-Australian legal doctrine that constructs the legal meaning of traditional laws and customs. It does so by deconstructing the various aspects of the way Indigenous law has been constructed in Anglo-Australian law, examining the perspectives and other conceptual elements that have contributed to that construct, their sources and their limits, and analysing their interdependence. This reflects what Davies has described as the ethos of pluralism.

As mentioned above, Davies argues that critical legal theory that rejects the homogeneity, objectivity and coherence of 'law' and its 'separation from other social and political normative spheres' is pluralist in its ethos.[100] Critical legal scholars have challenged the limits placed around 'law' by singular, homogenous, coherent and contained accounts of law, arguing instead the instability and permeability of those limits.[101] Davies argues that these critical theories demonstrate the inherent plurality of law by demonstrating its reliance upon an 'other', some external factor which in modernist accounts is positioned outside 'law', such as a plural, heterogeneous society, or some political or social force.[102] It is the reliance upon an 'other', something(s) excluded or denied by the limits placed around the concept of 'law', that nevertheless intrudes into, and is essential to the concept, that demonstrates the inherent plurality of 'law'.[103] Davies describes these critical legal theories as having a broader ethos of pluralism, even if not self-identifying as pluralist. The use of critical theory in this thesis to expose the plurality inherent in the construct of traditional laws and customs is explained further in the methodology section below.

The fourth level of pluralism in the thesis is integral to its methodological infrastructure. The two major aspects of the methodology — one based upon text, the other upon context — could be seen as incommensurable, albeit complementary. They represent the themes of plurality and materiality respectively and are discussed below. The unique combination of these diverse

[100] Davies, 'The Ethos of Pluralism' (n 30).
[101] Margaret Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (Pluto Press, 1996) ('*Delimiting the Law*').
[102] Davies, 'The Ethos of Pluralism' (n 30) 109–10.
[103] Ibid.

aspects within the methodology is yet another aspect of the pluralist theme that threads through this thesis.

The other theme that runs through this thesis, and forms the other axis of the theoretical framework, is what I have called an ethic of respect.

B An Ethic of Respect

This doctoral research is underpinned by an ethic of respect for Indigenous Australian knowledges and expertise in their traditional law. That ethic has been informed by the values of the emerging international, multidisciplinary field of critical Indigenous studies research and scholarship.

Critical Indigenous studies scholarship shares the broad aim of promoting Indigenous agency through centring Indigenous knowledges, perspectives, epistemologies, and methodologies.[104] Research in critical Indigenous studies necessitates an understanding of the historical role of Western research in the colonisation of Indigenous peoples, and awareness of the potential for research concerning Indigenous peoples to reproduce colonising attitudes and colonialism.[105] The need for researchers to avoid complicity in continuing colonialism has resulted in a heightened consciousness of the role of the researcher in research that impacts Indigenous peoples,[106] and a practice of self-reflexivity on the part of the researcher.[107]

The ethic of respect that frames this research thus draws upon these insights from critical Indigenous studies: the value of respecting Indigenous Australian knowledges and epistemologies, and awareness of the role that research and researcher can play in perpetuating

---

[104] See, eg, Aileen Moreton-Robinson and Maggie Walter, 'Editorial' (2008) 1(1) *International Journal of Critical Indigenous Studies* 1; Aileen Moreton-Robinson (ed) *Critical Indigenous Studies: Engagements in First World Locations* (University of Arizona Press, 2016) ('*Critical Indigenous Studies*').

[105] See, eg, Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, 2012); Bagele Chilisa, *Indigenous Research Methodologies* (SAGE, 2012); Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (University of Toronto Press, 2009); Lester-Irabinna Rigney, 'Internationalization of an Indigenous Anticolonial Critique of Research Methodologies: A Guide to Indigenist Research Methodology and its Principles' (1999) 14(2) *Wicazo Sa Review* 109 ('Internationalization').

[106] Ibid.

[107] This practice of self-reflexion is readily apparent, for example, in Alissa Macoun, 'Colonising White Innocence: Complicity and Critical Encounters' in Sarah Maddison, Tom Clark and Ravi de Costa (eds) *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage* (Springer, 2016) 85; Jennifer M Nielsen, 'The Problem with Research' in Dorota Gozdecka and Anne Macduff (eds) *Feminism, Postfeminism, and Legal Theory: Beyond the Gendered Subject* (Routledge, 2019) 117.

— or decolonising — the continuing impacts of colonialism upon Indigenous peoples. These insights have informed my development of an ethic of respect, that has in turn guided my research project.

The ethic of respect informs the framework of my research in three main ways:

First, the acceptance of Indigenous Australian knowledges as authoritative with respect to their own law. This acceptance of the authority of Indigenous Australian expertise synergises with the ethos of pluralism discussed above. In questioning the epistemological implications of the choice of legal theories used as legal authority in the *Yorta Yorta* judgment — and how Indigenous knowledges about Indigenous law are positioned in relation to that authority — my research considers whether Indigenous Australian peoples are positioned as the subjects (knowers) of legal knowledge, or are regarded instead as objects of legal knowledge: are Indigenous knowledges (and the Indigenous holders of those knowledges) recognized as the source of authoritative information about Indigenous law?

Secondly, the ethic of respect involves being explicit about my position as a non-Indigenous researcher. The capacity for non-Indigenous scholars to engage in contemporary Indigenous studies research is contested,[108] and the position of the non-Indigenous researcher can be a highly fraught, difficult and political space.[109] Being conscious of — and self-reflexive about — my role as a non-Indigenous researcher means acknowledging my position within the dominant Western academy and settler coloniser paradigm.[110]

[108] The position taken by some Indigenous Australian scholars, such as Aileen Moreton-Robinson, that by virtue of their knowledge, perspectives, ethical and cultural protocols, only Indigenous scholars can undertake Indigenous Studies research, has been challenged as essentialist by other Indigenous scholars such as Saami scholar, Jelena Porsanger. The issue is divisive, and the uncertain and changing nature of the debate is demonstrated in the work of Indigenous Australian scholar, Lester-Irabinna Rigney, whose early work limited 'Indigenist' research to Indigenous scholars, but who changed his position in his later (unpublished) doctoral thesis. See Aileen Moreton-Robinson, 'Introduction: Locations of Engagement in the First World' in Moreton-Robinson) *Critical Indigenous Studies* (n 104) 3, 4; Jelena Porsanger, 'An Essay About Indigenous Methodology' <http://septentrio.uit.no/index.php/nordlit/article/viewFile/1910/1776> 109); Rigney, 'Internationalization' (n 105) 118; Lester-Irabinna Rigney, 'Indigenous Research Epistemologies: A Historical Journey of Conviction, Contradiction and Transformation' (PhD Thesis, Flinders University, 2007) 16.

[109] I thank the National Centre for Indigenous Studies at ANU, through its founding director, Professor Mick Dodson and his immediate successor and interim director, Professor Asmi Wood, for providing a safe and inclusive space for me to conduct my research and writing.

[110] While simultaneously asserting my 'otherness' to the dominant paradigm, as a woman, as a mother and a carer, and as someone whose life and career have been chronically impacted by disability.

Thirdly, following on from my position as a non-Indigenous researcher, the ethic of respect involves turning the focus of my research away from the law and governance of Indigenous peoples and back onto Anglo-Australian concepts of law. As noted above, my research is not research into or about Indigenous Australian peoples, nor the content of their knowledges or law. By using Western critical theoretical methods to critically analyse and evaluate Anglo-Australian legal doctrine and legal thought, and the way Indigenous Australian law has been perceived and constructed within the discourse of that discipline, I turn the research lens squarely back onto Anglo-Western (specifically Anglo-Australian) concepts of law.

The ethic of respect, as its name suggests, is an ethical or axiological positioning that informs the foundational premises of this research and imbues a consciousness and affective awareness throughout the thesis.

The theoretical framework for this thesis is thus structured around axiological and epistemological axes. The axiological axis comprises the ethic of respect for Indigenous Australian expertise in relation to their law. The epistemological axis is grounded in the (Western) scholarly tradition of (pluralist) critical legal theorising. Both axiological and epistemological axes are informed by the ethos of pluralism.

V. A PLURALIST METHODOLOGY

The methodological infrastructure of the thesis comprises an innovative combination of 'deconstruction' and 'materiality'.[111] In this section, I set out each aspect of the methodology and justify their combination. Finally, I describe the plurality of methods used for this research project.

A Critical Legal Theory and Deconstruction

Deconstruction was introduced to the discipline of law by scholars associated with 'Critical Legal Studies' in the 1980s,[112] and since then has been used a tool for analysis by critical legal

[111] The meaning of these terms is discussed below.

[112] Critical Legal Studies writers employed a range of deconstructive techniques (including 'trashing') to demonstrate, inter alia, how the ostensible neutrality of law masks ideology and politics, perpetuating inequality and injustice, how the apparent naturalness of legal categories and rules masks their contingency, and the internal contradictions and political nature of legal principle. See generally, Pierre Schlag, 'A Brief Survey of Deconstruction' (2005–2006) 27 *Cardozo Law Review* 741, 743–5; Robert Gordon, 'Law and Ideology' (1988) 3(1) *Tikkun* 14 extracted in Freeman (n 58) 1056–0163.

scholars of various persuasions.[113] The term 'deconstruction' has a range of interrelated meanings and is practised in a range of styles, from the broader, more general, to highly specific and technical. At its most general, 'deconstruction' is used almost interchangeably with critical analysis. In its more technical sense, it refers to the techniques based upon the work of Jacques Derrida, who coined the term.[114] Derrida himself provided a number of definitions of deconstruction over the course of his career.[115]

Derrida argued that meaning derives from linguistic differences.[116] As a consequence, concepts are determined by their difference from other concepts: 'concepts are determined by what they are not; by what is absent'.[117] According to Derrida's theory, what is excluded (or marginalised) from a concept always leaves a 'trace' of itself in what is included (or centralised) in that same concept.[118] As Davies puts it, 'since concepts are constituted within a philosophical system, they can never be pure: they will always contain within them the trace of otherness — the exclusion of which is necessary to their formation'.[119]

Davies has described deconstruction as 'a practical intervention in established modes of thinking, which destabilises the stereotypes, value-judgments, and categories upon which theories are inevitably constructed'.[120] In the broadest sense, it refers to the notion of de-

[113] Deconstruction has been used in Critical Race, Feminist, and Postmodern legal scholarship, for example. As to whether the style of deconstruction used in those theories conforms to the technical Derridean sense of the term, or whether Derridean deconstruction can be 'used as a tool', and whether it can be used interchangeably with 'critical analysis', see Schlag (n 112).

[114] Derrida's work is notoriously difficult to read and to understand, and although I have relied primarily upon Derrida's translated works, I have also drawn upon secondary sources to understand Derrida's theory and its implications for law, in particular the work of Margaret Davies: Margaret Davies, 'Derrida and Law: Legitimate Fictions' in Pierre Legrand (ed) *Derrida and Law* (Ashgate, 2009) 71 ('Derrida and Law'); Davies, *Delimiting the Law* (n 101); Davies, *Asking the Law Question* (n 28). Other secondary sources include Jack M Balkin, 'Deconstruction' in Dennis Patterson (ed) *A Companion to the Philosophy of Law and Legal Theory* (2nd ed, 2010, Blackwell, 361); JM Balkin, 'Deconstructive Practice and Legal Theory' (1987) 96(4) *Yale Law Journal* 743; David Mikics, *Who Was Jacques Derrida? An Intellectual Biography* (Yale University Press, 2009).

[115] For an overview of these various definitions, see Leonard Lawlor, 'Jacques Derrida' *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/spr2021/entries/derrida/>.

[116] Davies, *Asking the Law Question* (n 28) 384.

[117] Ibid 384.

[118] Jacques Derrida, *Positions*, tr Alan Bass (Continuum, 2nd ed, 2004) 23–5 ('*Positions*').

[119] Davies, *Asking the Law Question* (n 28) 384.

[120] Ibid 344.

constructing categories of thought, in order to see how they are constructed.[121] Derrida pointed out that this is not a negative operation:

> But the undoing, decomposing, and desedimenting of structures — was not a negative operation. Rather than destroying, it was also necessary to understand how an 'ensemble' was constituted and to reconstruct it to this end.[122]

This operation of undoing and reconstructing an ensemble to understand its constitution takes place using a 'double gesture'.[123]

Derrida pointed out that in Western philosophy, many concepts take the form of a conceptual opposition.[124] In these binary oppositions, 'we are not dealing with the peaceful coexistence of a vis-à-vis, but rather with a violent hierarchy'.[125] Derrida's argument was that in a conceptual opposition, '[o]ne of the two terms governs the other (axiologically, logically etc) or has the upper hand'.[126] One term dominates the other, being 'philosophically regarded as superior, while the other term is marginal, a lesser version, or simply a negative'.[127] The structure of the opposition is 'conflictual and subordinating'.[128] It is violent because 'the dominant term is formed by the exclusion and repression of the subordinate term'.[129]

The double movement involves simultaneously overturning the hierarchy and reinscribing the lesser term as the origin of the first.[130] The first phase (in a structural rather than chronological sense)[131] 'is to overturn the hierarchy at a given moment'.[132] This involves showing how the dominant term is dependent upon the lesser term for its meaning (just as the lesser term is dependent upon the dominant). The two terms are therefore mutually dependent, deriving their

---

[121] Ibid 387.
[122] Jacques Derrida, 'Letter to a Japanese Friend' in Wood and Bernasconi (eds), *Derrida and Difference* (Northwestern University Press, Evanston, 1988) 3 quoted in ibid.
[123] Derrida, *Positions* (n 118) 38.
[124] Derrida has, however, been criticized for presenting Western philosophy as 'monolithic and homogenous': Lawlor (n 115).
[125] Derrida, *Positions* (n 118) 39.
[126] Ibid 39.
[127] Davies, *Asking the Law Question* (n 28) 386.
[128] Derrida, *Positions* (n 118) 39.
[129] Davies, *Asking the Law Question* (n 28) 386.
[130] Derrida, *Positions* (n 118) 39–43.
[131] Derrida says that 'the word *phase* is perhaps not the most rigorous one … [i]t is not a question of a chronological phase … [t]he necessity of this phase is structural': Derrida, *Positions* (n 118) 39.
[132] Ibid 39.

meaning from the differentiation between them. In the first phase therefore, we recognise that some kind of decision has instituted the hierarchy between the opposing terms.[133] The second phase involves seeing the lesser term in a new light, as the original or more foundational of the two, and this means 'the irruptive emergence of a new "concept", a concept that can no longer be … included in the previous regime'.[134]

The deconstruction of a binary opposition does not destroy the opposition ('the hierarchy of dual oppositions always re-establishes itself'),[135] but it enables the original 'decision' that instituted the hierarchy to become visible. The deconstruction 'effects a disturbance of the apparent certainty of any opposition', which 'is revealed to be non-natural, and operating by a logic of exclusion'.[136] It thereby 'generates altered understandings of dominant views'.[137]

In his later work, 'Force of Law', Derrida described deconstruction as being practised in two styles.[138] Lawlor has pointed out that this involved a new and refined definition of deconstruction that was 'less metaphysical and more political', and that the two styles do not correspond to the two phases in his earlier definition.[139] In 'Force of Law', Derrida stated:

> Deconstruction is generally practiced in two ways or styles, although it most often grafts one on to the other. One takes on the demonstrative and apparently ahistorical allure of logico-formal paradoxes. The other, more historical or more anamnesic, seems to proceed through readings of texts, meticulous interpretations and genealogies.[140]

The first style described here is more structural, examining logical paradoxes or perplexities, while the second, the anamnestic or genealogical style of deconstruction, 'recalls the history of a concept or theme'.[141]

---

[133] Lawlor (n 115).
[134] Derrida, *Positions* (n 118) 39.
[135] Ibid 39.
[136] Davies, *Asking the Law Question* (n 28) 387.
[137] Ibid 388.
[138] Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992) 3, 21 ('Force of Law').
[139] Lawlor (n 115).
[140] Derrida, 'Force of Law' (n 138) 21 (spelling in original).
[141] Lawlor (n 115).

Davies notes that deconstruction can have political and ethical outcomes.[142] By exposing dogma, 'it opens the founding assumptions of Western philosophy for critical examination'.[143] Secondly, by revealing the way meanings are constructed, 'it is possible to envisage new meanings'.[144] Finally, it can invoke an 'ethical imperative of hospitality':

> Receptiveness to the other (whatever the axis of difference) is the logical consequence of deconstruction, since it not only challenges the fixity of abstractions, but also of fundamental philosophical oppositions such as that between subject and object, or self and other.[145]

B Deconstructing Law

Davies has drawn upon Derrida's work to deconstruct the conceptual limits of 'law' that have been drawn in modernist Anglo-Western jurisprudence.[146] In particular, she utilises Derrida's idea of the 'law of genre', that the way we distinguish any sphere of knowledge from any other depends upon there being some distinguishing characteristic by which we can recognise it as belonging to that genre: 'there is then a "law of genre" — basically that a "trait" sets the limits of any conceptual territory such as science, philosophy or law, determining what falls within the genre, and what falls outside'.[147] The distinguishing characteristic, the mark or trait which defines the genre, cannot itself belong to the genre. What makes a poem a poem, for example, is not itself a poem. There is therefore 'a paradox which besets the definition of any genre':[148]

> And the paradox is … simply that the limit (or "mark" etc) which defines the genre, can itself never be either inside or outside the genre. Because it is itself a principle of definition and must inhere in everything which forms a part of the genre, it cannot wholly be outside, yet nor can it be wholly inside, since as a designation it is not itself one of the objects of a genre.[149]

---

[142] Davies, *Asking the Law Question* (n 28) 388.
[143] Davies, *Asking the Law Question* (n 28) 388.
[144] Ibid 388.
[145] Ibid 388, citing Jacques Derrida, *Of Hospitality* (Stanford University Press, 2000). Cf Jacques de Ville, *Jacques Derrida: Law as Absolute Hospitality* (Routledge, 2011), who claims that such an 'ethical-liberal reading' entails 'an unjustified and unfortunate domestication of Derrida's thinking', and that 'Derrida's concern with the other has much more radical consequences': at 9. See also Schlag (n 112) 749–51.
[146] Davies, *Delimiting the Law* (n 101); see also Davies, 'Derrida and Law' (n 114).
[147] Davies, *Asking the Law Question* (n 28) 391.
[148] Ibid 391.
[149] Ibid 391.

Davies applies this notion of the law of genre to legal theories which attempt to elucidate the nature of law by distinguishing it from other phenomena.

In mainstream modernist legal philosophy, and legal positivism in particular, Davies argues that the notion of a 'legal system' has been used to draw the conceptual boundaries by which law can be distinguished from non-law.[150] Such theories identify an ultimate principle or principles through which law is united into a system and by which law can be identified:

> [T]he legal system is conceptually limited in positivist thought by some frontier (or frontiers) unifying what is law. Everything that is law shares some mark or characteristic with everything else that is law, and this property of law is the defining boundary of the legal system. Whether or not something is within the system can be discerned by the presence of such a mark or characteristic. Moreover, and very importantly for positivist thought, whether or not a set of rules is a legal system can be determined 'objectively' by the presence of such a unifying rule.[151]

Davies interrogates the ultimate validating principles in major positivist legal theories, concluding that they neither belong completely within the system which they validate and determine, nor do they belong entirely outside the system (since they mark each law within the system):[152]

> Whatever makes a law legal is not itself a law (it is, for instance, a presumption), but rather the conceptually prior condition of law, the limit of law which polices the boundary between law and non-law. The mark is therefore 'remarkable' for its absence from the category which it defines. However, although it is absent in this way, it is also present, because *each* object within the genre is marked by it. It leaves a trace, to use another Derridean term, in every object within the genre. It is not only an outer edge, but an internal imprint, meaning that there is never a clear distinction between the outside and inside of a category or system, because the inside carries through it the trace of the other.[153]

---

[150] Davies, *Delimiting the Law* (n 101) 24.

[151] Ibid 24–5.

[152] Davies interrogates Hart's 'rule of recognition' and Kelsen's 'basic norm', which perform a similar dual function in that they are both the law of every law and 'the limit of legality which binds the system into a totality excluding the non-legal'. She argues that neither the rule of recognition (which, while ambiguous as to its status as a rule, is also a social fact found in the practices of legal officials) nor the basic norm (which is itself not a norm but a presupposition) belong completely within the system which they validate and determine: ibid 24–30.

[153] Davies, 'Derrida and Law' (n 114) 78.

There is therefore a paradox and an arbitrariness, rather than a logic or necessity, about the limits of the concept of law.[154]

Since the ultimate validating principle is posited as the source of law's legitimacy, this arbitrariness exposes the force or violence at the heart of law's foundations: 'the supremacy of the singular, homogenous law which is defined by a conceptually impermeable frontier cannot be sustained except by force'.[155] Davies argues that the boundaries drawn around 'law' within modernist Anglo-Western theories, and indeed the project of modernist jurisprudence itself, act therefore as apologists for (rather than critics of) the sovereignty or ultimacy of law.[156] By interrogating the conceptual boundaries of law, however, we can critically examine the foundations of legal authority.[157]

This is particularly important in terms of the significance of my thesis since it is at the foundations of the Anglo-Australian legal system that the past exclusion, and recent recognition, of Indigenous law occurs.

C Deconstructing the Legal Recognition of Indigenous Law

I draw upon these theories to deconstruct the legal recognition of Indigenous Australian law. Using the idea of deconstruction as the genealogy of a concept, I explore the genealogy of British and Anglo-Australian jurists' attitudes to Indigenous Australian law and their positioning of it relative to 'law'. I use the double gesture of Derrida's deconstruction of binary oppositions to interrogate relevant conceptual oppositions within Anglo-Australian legal thought. Drawing upon Davies' theory of the limits of law, I explore how the limits of British and Anglo-Australian concepts of law have been determined in relation to Indigenous law. The methods of deconstruction are set out more fully below.

D The Interplay of Text and Context

The deconstruction methodology has typically been used with decontextualized texts; in Derrida's well-known words, 'il n'y a pas de hors-texte' (literally 'there is no outside-text', or,

[154] Ibid 81–2.
[155] Ibid 81.
[156] Ibid 81–2.
[157] Derrida, 'Force of Law' (n 138). See also ibid 82–90.

to use Spivak's translation, 'there is nothing outside the text').[158] Although for Derrida, the 'text' was not confined to words but included all meaning (ie all 'reality'),[159] the use of Derrida in legal theory has resulted in a focus on language and text to the neglect of the human and physical aspects of 'law'.[160] This in turn has led to an emphasis upon abstracted concepts and a diminution of the social and material constituents of 'law'.[161]

The second aspect of my methodology restores the author and agents, and complexity. It provides context to otherwise decontextualized texts and grounds the principles for which they are authority. This new and innovative methodology demonstrates the *contingency* of theoretical texts — that the theories themselves are not neutral, but are culturally and historically specific. It is based on the idea that there is more to conceptualising 'law' than metaphysical concepts described in theoretical texts, there are *authors* of texts who lived and wrote in specific historical, cultural, socio-political conditions, and *agents* who decided which texts to use.

By emphasising the interplay between text and context, this methodology resonates with another aspect of Davies' theory of unlimiting the ways of conceptualising law that informs the theoretical framework of this thesis. Davies argues that materialism (the 'inseparability … of matter and meaning')[162] as well as pluralism should be included in a more open, less limited, theory of 'law'.[163] Materialism challenges the dominance of language and discourse, by bringing physicality and materiality into theory.[164] Davies argues that 'material factors *produce* law as an effect; that there is a *dynamic relationship* between a discursively separated law and the social sphere; and that *law is essentially material*.'[165] I extend this idea of materiality to theories written about 'law'.

[158] Jacques Derrida, *Of Grammatology*, tr Gayatri Chakravorty Spivak (Johns Hopkins University Press, 1976) 159.
[159] Jacques Derrida, *Limited Inc*, tr S Weber et al (Northwestern University Press, 1988) 148; see also de Ville (n 144) 4.
[160] Davies argues that although Derrida's emphasis on text was 'an emphasis on materiality as the coming together of abstract and physical', the use of Derrida in legal theory (including Davies' own earlier work) 'did often de-emphasise matter and its role, and fixate on more abstracted notions of text, force, deconstruction of binaries, and so on': Davies, *Law Unlimited* (n 80) 52.
[161] See the discussion in Davies, *Law Unlimited* (n 80).
[162] Ibid 43.
[163] Ibid (n 79).
[164] Ibid 42.
[165] Ibid 44 (emphasis in original).

To avoid an over-emphasis upon abstract concepts of 'law', I supplement the analysis of texts with an examination of the historical, scholarly and legal context of their authorship. I could use the decontextualized texts to write a polemic, but that would ignore much of the social and human complexity, and give the texts too much power. Instead, I deconstruct the material, as well as the theoretical, genealogy of the treatment of Indigenous Australia in Anglo-Australian legal thought. In so doing, I chart the cultural and historical contingency of legal ideas and legal doctrine.

E Methods

I employ an array of interdisciplinary methods in order to undertake the full range of research into the thesis's interconnected questions and objectives.

Doctrinal legal research and analysis is used to set out the legal significance and doctrinal importance of the thesis, and provide the subject matter for the analysis of legal concepts. I use legal research and analysis techniques to identify the development and current state of legal doctrine relating to the emergent common law recognition of Indigenous law, and establish the legal authority of the High Court decision in *Yorta Yorta*, thereby justifying the focus of my analysis on the reasoning of the leading judgment.

The objects of the analysis in this thesis are primarily British and Anglo-Australian legal theories, particularly the theories which form the theoretical foundations of the reasoning in the *Yorta Yorta* judgment. The judgment itself is also an object of analysis. I supplement the analysis of these primary texts with provision of context. In order to situate the theories in their historical, scholarly and legal context, I research the historical, biographical and contemporary academic literature, and supplement this where necessary by conducting primary research into historical archives. The information derived from this contextual research is used to inform my understanding of the texts, as described below.

The methods of analysis I use in the thesis are various forms of deconstruction.[166] These forms, corresponding to the different styles of deconstruction described in the methodology, take place

[166] I note Pierre Schlag's reservations about using deconstruction as a toolkit, which would 'relegate deconstruction to the choices of an autonomous individual subject who could use it for any and all normative ends': Schlag (n 112) 746–9. Schlag's reservations are directed to the deployment of deconstruction for a normative purpose. However, I take Davies' point that exposing the construction of

on four main levels. The levels are not distinct tiers, but overlap, intersect, and build upon each other.

The first level — the least technical style — involves exposing the construction of 'traditional laws and customs' by dismantling and identifying its component legal and philosophical building blocks. Using this style of deconstruction, I undertake a close reading of the leading judgment in *Yorta Yorta*, critically analysing the legal reasoning for the use of theory. I reveal implicit philosophical and theoretical assumptions as well as explicit references to and reliance upon theory. I then scrutinise each of the theories that inform the Court's construction of 'traditional laws and customs' in turn, paying close attention to the way 'law' is conceptualised (and its capacity to adequately encompass Indigenous law) and appraising the way Indigenous law is treated in each. This basic level of deconstruction occurs throughout most of the chapters of the thesis, and provides the basis for the other levels of deconstruction.

The second level is the broader genealogical, or anamnestic, style of deconstruction — charting the history and lineage of the perceptions of Indigenous law revealed in the process of analysing those theories. I methodically research the scholarly context of each work and its authorship to reveal the pedigree of their attitude to and ideas of Indigenous Australian law. In addition to primary and secondary juristic texts (including published works, drafts, lecture notes, and speeches), I examine historical and biographical material (including bibliographic records, newspaper articles, personal papers and correspondence), anthropological studies, and historical and academic commentaries. I use my findings to document the genealogy of the Anglo-Australian treatment of Indigenous Australian law revealed by the texts cited in *Yorta Yorta*. The genealogy reveals influences on the texts, any links and relationships between the authors, and any correlation between the development of legal doctrine and the history of legal theories, thereby recording the epistemology of foundational legal concepts. This genealogical style of deconstruction is woven throughout each chapter of the thesis.

The third level involves examining the limits of the unpacked component conceptual elements, and their exclusions. As noted above, any attempt to define 'law' ultimately sets finite limits for the concept of 'law'. 'Descriptive' theories set limits by what they exclude from the

meanings can open assumptions based on those meanings for critique and create opportunities for new understandings: Davies, *Asking the Law Question* (n 28) 388.

description. The leading judgment in *Yorta Yorta* engages in a similar exercise to determine the foundational elements of 'law' generally, and traditional laws and customs specifically. The limits of 'law' are determined by, and in turn, determine what is excluded from 'law'. At this level of deconstruction, I investigate the conceptual boundaries of 'law' in each of the theories relied upon in *Yorta Yorta*, identifying what was centralised or otherwise included, and what was marginalised or excluded — specifically in relation to the relative positioning of Indigenous law. Like the genealogical style, this type of deconstruction is endemic throughout each chapter of the thesis. The bulk of the deconstruction in the thesis takes place on these first three levels.

The fourth level builds a more in-depth analysis, using the deconstruction of binary oppositions to unpack what is excluded from 'law', and expose the hidden trace of the excluded elements within 'law'. Using this process, I examine the relationship between Indigenous and Anglo-Australian law as portrayed within Anglo-Australian legal thought. Drawing upon Davies' theory of the limits of law, I explore the implications of the way the conceptual boundaries of Anglo-Australian concepts of law have been determined in relation to Indigenous law — not only for the construct of Indigenous law, but for the construction of the Anglo-Western concept of law itself. I ask how Anglo-Western law has perceived *itself* in relation to Indigenous law,[167] and how that relationship has informed the conceptual boundaries of Anglo-Western concepts of law. The analysis in the thesis progressively builds to this level of deconstruction, which occurs mainly in the final chapters of the thesis.

These modes of deconstruction are not deployed as discrete methods but as an integrated and cohesive framework. The intersection and iteration of the various styles of deconstruction enables the compounding of the analytical insights, yielding a technique capable of more robust analysis than the mere aggregate of methods.

VI. SCOPE AND SIGNIFICANCE

This thesis is an investigation into the theoretical and conceptual constitution of the construct of 'traditional laws and customs' in contemporary Australian law. It is an interrogation of the jurisprudence that underpins the legal recognition or acknowledgement of Indigenous law. I

[167] I accept that this expression of Anglo-Western law perceiving itself projects a reification of law. It could be expressed more accurately. This is just a shorthand way of describing the way Anglo-Western law has been perceived within its own disciplinary confines by Anglo-Western jurists.

now clarify the scope of the project, by specifying areas of potential research that are either *not* covered by this thesis or are not the *focus* of this research.

As pointed out above, this research is not about Indigenous law as it is understood by Indigenous Australian peoples, but rather how it has been portrayed in Anglo-Australian legal thought.

This thesis is not a doctrinal legal treatise about the law relating to the recognition or acknowledgement of Indigenous law, nor is it an investigation into the extent of that legal recognition. Although I trace the historical development of the legal doctrine of recognition, I do so in order to establish the state of the law and to justify my focus on the interpretation of 'traditional laws and customs' in the leading judgment in *Yorta Yorta*. I am primarily concerned with the *nature of the construct* of Indigenous law rather than the *extent of its recognition* within Anglo-Australian legal doctrine.

Similarly, the scope of the thesis does not extend to 'conflict of laws' issues, such as potential legal implications that might arise from the co-existence of dual or plural systems of law or overlapping jurisdictions. Nor does it extend to the incorporation of aspects of Indigenous law into particular ad hoc areas of law such as criminal defences and sentencing, or land rights and heritage legislation, as was the subject matter of the Australian Law Reform Commission report into the *Recognition of Aboriginal Customary Laws*.[168]

The focus for my analysis is the conceptualisation of Indigenous law as enunciated by the High Court in the *Yorta Yorta* decision. As pointed out above, this choice was informed by the primary importance of the *Yorta Yorta* decision as legally authoritative in this area, the extensive interpretation of 'traditional laws and customs' in that case, the significance of the doctrine of intersecting normative systems taking the place of terra nullius at the foundation of the Anglo-Australian legal system, together with the focus by the Court on theoretical aspects of the law. If the decision in *Love* had been handed down during the formative stages of this doctoral research, it would also have made a valuable focus for the analysis. However, it was handed down after I had concluded the research and was in the final stage — writing up — of

[168] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, June 1986).

the project. I have not, therefore, been able to include an extended analysis of the theoretical foundations of that decision.

Finally, although the subject matter of the analysis in the thesis occurs in the context of the law relating to Anglo-Australian sovereignty, the scope of the thesis does not extend to a thorough investigation of legal or historical issues of sovereignty. These issues may arise to some degree, but they are not the focus of the research. Similarly, I do not approach the idea of 'law' through the lens of concepts such as 'sovereignty' or 'society', although they may arise tangentially as aspects of constructs of law.

Nevertheless, the significance of this thesis lies in its interrogation of the jurisprudence that forms the basis of Anglo-Australian legal sovereignty. As such, it creates a space for a respectful dialogue about the coexistence of Indigenous and Anglo-Australian law and an opportunity for reconciliation.

VII. OVERVIEW OF THESIS

The thesis is comprised of six parts. Each part is in turn comprised of one or more related chapters.

Part I of the thesis consists of this Introduction chapter, in which I have set out the aims and objectives, research questions, legal background, critical framework, methodology and methods used in the thesis.

The second part of the thesis (comprising two related chapters) addresses the theoretical foundations of the denial of law used to justify terra nullius. In Chapter Two, I examine the state of British jurisprudence immediately prior to first contact with Indigenous Australian peoples and trace the legal history of the doctrine of terra nullius in Australia. In Chapter Three, I explore how the law of Indigenous Australian peoples was depicted in British legal thought, from the time of the first contact between British and Indigenous Australian peoples until the mid-20th century. I thereby chart the genealogy of Anglo-Australian treatment of Indigenous Australian law, specifically engaging with the question of its positioning in relation to concepts of 'law'.

In the third part of the thesis, comprising two chapters, I identify the theoretical foundations of the recognition of law. In Chapter Four, I trace the development of Anglo-Australian legal

doctrine leading to the recognition of Indigenous law, and establish the legal significance of the High Court decision in *Yorta Yorta*. In Chapter Five, I closely analyse the reasoning of the leading judgment in *Yorta Yorta*, interrogating it for evidence of legal theory. The theories disclosed by that analysis become the subject matter of the rest of the thesis.

The fourth part of the thesis is concerned with the implicit theoretical foundations of the judgment, and comprises a single chapter, Chapter Six. In it, I examine the work of HLA Hart, and investigate how Indigenous Australians are positioned in his concept of law. I consider the utility and applicability of Hart's work in this context, and the implications of the use of his theory for the interpretation of Indigenous Australian law.

Part V of the thesis, comprising three related chapters, is devoted to the theories explicitly cited and relied upon as authority by the Court, specifically those of Julius Stone (Chapter Seven) and George Paton and Tony Honoré (Chapter Eight). I interrogate each of the theories for their portrayal of Indigenous Australia, and examine the relative positioning of Indigenous Australians vis-à-vis the concept of 'law'. I situate each work in its scholarly, legal and historical context and mark its place in the genealogical lineage of Anglo-Australian legal thought. In Chapter Nine, I consider the choice of legal theories used as authority in the judgment, questioning why the justices of the High Court chose to rely upon those particular theories. Finally, having completed the genealogy behind the High Court's treatment of Indigenous Australian law, I consider the implications of the reliance upon these theories in the judgment.

Part VI contains the final chapter (Chapter Ten), in which I draw my conclusions.

PART II

THEORETICAL FOUNDATIONS OF TERRA NULLIUS

CHAPTER TWO
THE DENIAL OF LAW

I. INTRODUCTION TO PART II

In this second part of the thesis, I address the issue of how Indigenous Australian law has historically been conceptualised in British (and hence Anglo-Australian) legal thought. My objective is to uncover the theoretical foundations of the denial of law inherent in the application of the doctrine of terra nullius to Australia. The recognition of Indigenous law that is the subject matter of this thesis occurred in the context of the ostensible overturning of terra nullius by the High Court of Australia. Understanding the thought patterns underpinning terra nullius (insofar as they relate to the denial of Indigenous law), therefore, forms an important starting point in my quest to understand the conceptual construction of Indigenous law as it was subsequently recognised.

In the Introduction to this thesis, I framed the research question addressing the theoretical foundations of terra nullius in two parts. The first is, what theories (and/or theoretical principles) informed the denial of law? The second is: how (if at all) do those theoretical texts treat Indigenous Australian law, and how do they position Indigenous Australian law vis-à-vis the concept of 'law' as described in the texts? The following two chapters in this part of the thesis address these two related research questions respectively.

In this chapter (Chapter Two), I analyse primary British theoretical texts from the period leading up to the establishment of the colony of New South Wales in 1788 in order to understand how the jurisprudence of the era enabled the denial of law. I trace the legal history of the doctrine of terra nullius as the acknowledged foundation of Anglo-Australian sovereignty, critically examining primary and secondary legal and historical documents to reveal the patterns of thought that formed the basis for the application of the doctrine.

In Chapter Three, I survey British (and Anglo-Australian) legal thought from the period from first contact between British and Indigenous Australian peoples until the mid-20th century. I closely examine primary and secondary legal and jurisprudential texts, exploring how the law of Indigenous Australian peoples is depicted.

The research in this part of the thesis provides the scholarly legal and theoretical background for the analysis of the theoretical basis of the interpretation of 'traditional laws and customs' by the High Court in the *Yorta Yorta* judgment.

II. THE DENIAL OF LAW: INTRODUCTION TO CHAPTER TWO

The denial of Indigenous Australian law played a major role in the legal justification for the application of terra nullius to Australia. In this chapter, I ask how it was possible for the British colonisers to deny that Indigenous Australians had 'law' in the face of a general acceptance of Indigenous Australian law and custom during the early decades of colonisation. The answer is provided by examining what counted as 'law' in British legal thought during that era.

In this chapter, therefore, I outline key features of the major British legal theories from the period immediately preceding the colonisation of Australia.[1] Because the scope of this thesis is limited to British and Anglo-Australian legal thought, the emphasis in the chapter is on British theories, to the exclusion of equivalent European legal and political theories of a similar ilk.[2] However, because 'terra nullius' refers to two equivalent (but not identical) doctrines — one a doctrine of British imperial law and the other an international law doctrine — the discussion also includes a section on the development of these ideas in the context of European theories of the law of nations (the emerging international law), particularly those (such as the work of Vattel) that were influential in British legal thought. Having outlined the core criteria for 'law' in contemporary British legal thought, I then scrutinise the key legal documents in which terra nullius was declared as the foundation of British sovereignty over Australia, examining the theoretical justifications advanced in support of the doctrine.

At the risk of repetition, some further points of clarification about the scope and purpose of this chapter are necessary here:

First, the application of the doctrine of terra nullius to Australia has been the subject of much historical, legal and constitutional scholarship relating to imperial policy, colonial practice and international law and custom. A veritable wealth of academic works has addressed salient issues

[1] Theories written after the establishment of the first British colony in Australia are the subject of the next chapter.

[2] I acknowledge, however, that the development of British theories did not occur in isolation from the development of similar ideas throughout Europe and the analytical distinction between British and European political thought is therefore somewhat artificial.

such as Indigenous sovereignty and Indigenous rights, the role and significance of land to settler colonial projects (and related theoretical justifications such as notions of cultivation and property), empires, power and other dynamics in international relations, and so forth. Secondly (and similarly), many of the theories discussed in this chapter are not just theories of law. They are also theories of political philosophy, political economy, government and international relations and there is a vast body of scholarship addressed to these theoretical works in those contexts. I do not seek to emulate the breadth of this scholarship in this chapter, as such an extensive study is patently far beyond its scope. The chapter does not, therefore, extend to providing an exhaustive account of British and European legal thought in the centuries leading up to colonisation of Australia, nor to providing a comprehensive history of British policy, practice or imperial law in relation to the colonisation of Australia, nor yet to explore influential concepts other than that of law, such as property and cultivation (although these may arise tangentially).

As noted above, this chapter is directed to the research question of *what theories or theoretical principles informed the denial of law*. My objective is therefore twofold: to examine British theories of the period leading up to and including the colonisation of Australia *to identify what counted as law* (and what didn't); and to sketch the application of the doctrine of terra nullius *insofar as it relates to the recognition and/or denial of Indigenous law*, in order to answer the question of what theories informed the denial of law.

My aim is to elucidate, as clearly and relatively succinctly as possible,[3] the conceptual mechanism that allowed the acknowledged law and jurisdiction of Indigenous Australia to be denied the *status* of 'law'. The discussion introduces the relevant aspects of the works of the major thinkers of the period — drawing out key concepts — which are then utilised in the analysis of the documents containing the relevant declarations of terra nullius.

[3] For that reason, I have focussed on primary theoretical texts and kept much of the commentary to annotation in the footnotes.

III. THE CONCEPTUAL CONSTRUCT OF LAW

The authoritative legal statement of the application of terra nullius to Australia is contained in the decision of the Judicial Committee of the Privy Council in *Cooper v Stuart*.[4] In that decision, the Privy Council confirmed that the British acquisition of sovereignty over the then colony of New South Wales was based upon settlement of 'practically unoccupied' territory, rather than conquest over, or cession of, territory occupied by sovereign peoples. The major criterion, upon which settlement was distinguished from conquest or cession as a mode of acquisition of sovereignty, was whether there was 'an established system of law':

> There is a great difference between the case of a Colony acquired by conquest or cession, *in which there is an established system of law*, and that of a Colony which consisted of a tract of territory practically un-occupied, *without* settled inhabitants or *settled law*, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.[5]

The legal justification for the classification of New South Wales as 'practically unoccupied' was thus based largely upon the notion that its Indigenous peoples were without law.[6]

Cooper v Stuart was decided in 1889, a century after the establishment of the first British colony on the lands of the Gadigal people in what is now Sydney. The Privy Council's dogmatic assertion of a complete absence of 'settled law' (not to mention 'settled inhabitants') belies the fact that some of the earlier colonial documents — including decisions of the New South Wales Supreme Court — had recorded an acknowledgement that Indigenous Australian peoples had their own laws.[7] This general and indeed, judicial, acknowledgement that Indigenous Australian peoples had their own laws, however, failed to be translated into a full legal recognition of their

[4] *Cooper v Stuart* (1889) AC 286. *Cooper v Stuart* was finally overruled in *Mabo v Queensland [No 2]* (1992) 175 *CLR* 1 ('*Mabo*').

[5] *Cooper v Stuart* (n 4) (emphasis added).

[6] The other criterion referred to by the Privy Council, 'settled inhabitants', incorporates the elements of land use (cultivation), possession and ownership, and is beyond the scope of this chapter.

[7] These documents are set out later in the chapter. See eg, *R v Ballard or Barrett* [1829] NSWSupC 26; reported in Dowling, *Proceedings of the Supreme Court*, Vol. 22, Archives Office of New South Wales, 2/3205, 98; *R v Bonjon* [1841] NSWSC 92 reported in (1998) 3(3) *Australian Indigenous Law Reporter* 410; cf *MacDonald v Levy* (1833) 1 Legge 39; [1833] NSWSupC 47. *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35. See also Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous people in America and Australia, 1788–1836* (Harvard University Press, 2010) and Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen and Unwin, 1995) ('*An Unruly Child*'), who document the historical acknowledgement of a degree of legal pluralism, particularly throughout the first half-century of colonisation.

laws 'as law'. Instead, the legal dogma, that Indigenous Australian peoples were 'without settled law', ultimately persisted throughout that first century of colonisation. The apparent paradox, that the existence of Indigenous Australian law could be acknowledged not only as a matter of fact, but of law, but at the same time, fail to be legally recognised *qua* law, is understood only by examining the conceptual construct of law against which it was measured.

A Civil Society and the State of Nature

In the European Enlightenment period, scholars had conceived of law as belonging exclusively to 'civil society', which was juxtaposed against a lawless pre-legal condition, a 'state of nature'. The origin of law lay in the formation of civil society, and the two (law and civil society) were conceptually interdependent. Enlightenment theorists speculated about the moment law and government emerged from the pre-legal state of nature, via a 'social contract'.[8]

The term 'state of nature' was coined by the British theorist, Thomas Hobbes, in his classic work *Leviathan* in 1651.[9] The state of nature refers to a state of human existence prior to the introduction of political organisation, government and law. This 'natural condition'[10] was thus a state of anarchy and, according to Hobbes, a state of war, 'where every man is Enemy to every man',[11] and 'the life of man, solitary, poore, nasty, brutish, and short'.[12] In the state of nature, individuals have some minimal natural rights (although these are obviously insecure) to exercise self-preservation, and to make their own judgements about righting wrongs done to them. In order to gain security, individuals enter civil society via a 'social contract', whereby

[8] Social contract theory had appeared in the works of Plato (there is a version in *The Republic*, for example) but it is most famously associated with the modern political theory of the Enlightenment theorists, Thomas Hobbes, John Locke and Jean-Jacques Rousseau. These theories emerged in the context of chronic and repeated conflicts over political power in England and throughout Europe. Because the scope of this thesis is limited to British legal thought (as mandated by the scope of theories relied upon by Australian courts, particularly the High Court), this discussion will focus on the British social contract theorists (Hobbes and Locke) to the exclusion of the Genevan, Rousseau.

[9] Thomas Hobbes, *Leviathan* (Penguin, first published 1651). Pinpoint references are to Thomas Hobbes, *Leviathan* (Penguin, first published 1651, 1968 ed). Tuck points out that although the term originated with Hobbes, the concept was 'already present in effect in the works of Hugo Grotius, the founder of the modern natural law school': Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, 1999) 6. Hobbes wrote in the context of the British crisis over sovereignty between monarchy, parliament and people of the 17th century; for background on Hobbes' life and work, see Richard Tuck, *Hobbes* (Oxford University Press, 1989); Noel Malcolm, 'A Summary Biography of Hobbes' in Tom Sorrell (ed), *The Cambridge Companion to Hobbes* (Cambridge University Press, 1996) 13.

[10] Hobbes (n 9) 183.

[11] Ibid 186.

[12] Ibid (spelling in original).

they assign their natural rights to the state in return for security. It is in the transition from a state of nature to civil society that law (together with government) emerges.

The 'social contract' is an heuristic device, 'a wholly formal and analytic construct that can be used as a means of presenting … political ideals.'[13] The state of nature was conceived as an *analytically* prior condition, rather than an *historically* prior condition.[14] Hobbes' state of nature has been described as a 'hypothetical condition [that] would exist if there were no common power able to restrain individuals, no law and no law-enforcement'.[15] Hobbes certainly acknowledged that there may never have been such a time 'over all the world'.[16] It was the governance of civil society that Hobbes was concerned with, and the state of nature an imaginary condition in which the key characteristics of civil society are lacking. Not only is there an absence of law and government, but there is also an absence of cultivation and commerce, as well as science and the arts.[17] The distinguishing feature of the state of nature, then, is *absence*, or *lack*. The impact of the state of nature–civil society dualism for theories of law, is that law is only possible on the civil society side of the dualism. The state of nature, by its very construction, is an absence of law.

Having constructed an admittedly imaginary state, characterised by the lack of law, government, cultivation, commerce, science and the arts, Hobbes pointed to the Indigenous peoples of America as an example of a people living in the state of nature. Hobbes claimed that 'the savage people in many places of *America* … have no government at all; and live at this day in that brutish manner'.[18] The effect of suggesting that the Indigenous peoples of America lived in a state of nature was to immediately overlook, and effectively dismiss, their socio-political and legal organisation, economy, land use and culture, and classify it merely according to the apparent absence of the institutions and characteristics of European civil society. By

[13] MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 7th ed, 2001) 111.

[14] See John Rawls, *A Theory of Justice* (Oxford University Press, 1972) 12. Hobbes conceived of his political theory as a *science* of politics (rather than a treatise drawn from historical study) but he did not devalue the importance of historical understandings of politics: Alan Ryan, 'Hobbes' Political Philosophy' in Sorrell (n 9) 208. For an analysis of Hobbes' ideas on the historical development of civil society, see Robert P Kraynak, 'Hobbes on Barbarism and Civilisation' (1983) 45(1) *Journal of Politics* 86.

[15] CB Macpherson, 'Introduction' in Hobbes (n 4) 40.

[16] Hobbes (n 9) 187.

[17] Ibid 186.

[18] Ibid 187 (emphasis in original). For a discussion of Hobbes' views on America, see Pat Maloney, 'Hobbes, Savagery and International Anarchy' (2011) 105(1) *American Political Science Review* 189. Maloney notes that, compared to Locke's prolific invocation of America, Hobbes' reference is more of a 'cameo appearance': at 189.

means of the application of the civil society–state of nature dualism, the existence of law in Indigenous American societies immediately became a conceptual impossibility.

Less than thirty years after the publication of Hobbes' *Leviathan*, the social contract device was used by another British writer, John Locke, in *Two Treatises of Government* ('*Two Treatises*').[19] Whereas Hobbes had envisaged the state of nature as a state of war, Locke perceived it as a type of 'Garden of Eden',[20] with one serious shortcoming: property ('life, liberty and estate') was insecure.[21]

Locke argued that as God had given the earth to all men in common, in the state of nature all men had ownership of land in common.[22] The addition of labour to the common property gave rise to a right of private property.[23] Labour, for Locke, was limited to cultivation: '[a]s much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common'.[24] No other type of land use or land management was envisaged, and hence only cultivation gave rise to property rights. It was to secure private property as well as life and liberty, that man entered civil society via the social contract.[25]

Locke assumed that the state of nature and social contract were historically possible, despite the apparent lack of historical evidence.[26] Locke also explicitly referred to Indigenous America throughout the Second Treatise as the prime example of people still living in the state of nature.[27] The frequent emotive references to Indigenous Americans appear to justify the

[19] John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (first published 1689). Pinpoint references are to John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Digireads, first published 1689, 2005 ed). Like Hobbes, Locke's work was written in the context of the British crisis of sovereignty, a conflict over political power similar to those which were chronic throughout Europe: see the discussion in James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge University Press, 1993) 9–68.

[20] Locke (n 19) 72–76.

[21] Ibid 97.

[22] Ibid 79.

[23] Ibid Chapter V, 79–87.

[24] Ibid 81.

[25] Ibid 97.

[26] Ibid 103–106. See generally: Tully (n 19) 9–68; Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford, Clarendon Press, 1996) 21–44.

[27] Tuck has pointed out that there are 'in the region of twenty-five important references to America or the Indians in the course of the work, most of them being in the early theoretical chapters of the Second Treatise': Tuck (n 9) 168. Tully and Arneil have argued that Locke based his impressions of America on a

colonisation of their lands; indeed, it has been argued that Locke's *Two Treatises* were 'written as a defence of England's colonial policy in the New World'.[28]

For Locke, it is law and legal institutions that are conspicuously absent in the state of nature, and which are the distinguishing features of civil society. In the state of nature, 'there wants an established, settled known law', 'a known and indifferent judge', and power of 'due execution'.[29] Instead, each person is judge and executioner in their own cause.[30] It is these rights that are given up to join civil society,[31] and it is this that distinguishes between civil society and the state of nature:

> Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them, and punish offenders, are in civil society one with another: but those who have no such common people, I mean on earth, are still in the state of nature, each being, where there is no other, judge for himself, and executioner; which is, as I have before shewed it, the perfect state of nature.[32]

As it had for Hobbes, the identification by Locke of Indigenous American peoples with the state of nature overlooked their socio-political organisation and social order,[33] labelling them instead with lack of law and governance.

---

selective use of his extensive library of travel books (accounts of European exploration and colonisation of the new world) and his own involvement in colonial administration: Arneil (n 26); Tully (n 19) 137–176.

[28] Arneil (n 26) 2. Locke was heavily involved in English colonial affairs (holding positions with the Lord Proprietors of Carolina, the Council of Trade and Plantations and the Board of Trade) and made significant investments in colonial projects: see the discussion in Tully (n 19) 137–176; Arneil (n 26). Tuck argues that Locke's concentration on America arose not only out of his interest in the colonising projects, but also as a refutation of the approach being taken by William Penn in acknowledging the rights of the Indigenous inhabitants to their territory in the foundation of Pennsylvania: Tuck (n 9) 177-8.

[29] Locke (n 19) 109–110. For a discussion of Locke's concept of the state of nature, see Shirley Robin Letwin, *On the History of the Idea of Law*, ed Noel B Reynolds (Cambridge University Press, 2005) 117–120.

[30] Locke (n 19) 110. Tully has pointed out that this description of individual pre-legal redress in Locke's account of the origins of political power would also 'have been seen as historically plausible by his audience' since it aligned with aspects of European legal history prior to the 13th century: Tully (n 19) 21.

[31] Locke (n 19) 110.

[32] Ibid 97–8.

[33] Keal points out that situating America in a state of nature 'meant disregarding both Amerindian political organisation and the Amerindian system of property': Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press, 2003) 99.

B The Law of Nature

Hobbes' work was significant not just for British political and legal thought, but for the natural law theory of the emerging international law.[34] Hobbes had postulated that, in international society, (nation) states were equivalent to individuals in a state of nature.

Hobbes had considered that the social contract had the effect of transferring the individual (sovereign) natural rights to the state upon the formation of civil society. It was the assignation of those rights to the state that created the sovereignty of the state. The state thus became the holder of the natural rights, and was equivalent, in international society, to an individual in the state of nature. States in international society had certain natural rights and were governed only by the laws of nature.

Following Hobbes, European scholars 'transformed the concept of natural law from a universal moral code for humankind into a bifurcated regime comprised of the natural rights of individuals and the natural rights of states'.[35] European theorists, Samuel Pufendorf and Christian Wolff, drew upon the state of nature to extrapolate the natural rights, and correlative duties, of states under the 'law of nature'. The terms 'law of nature' and 'law of nations' were used interchangeably.

Pufendorf's *The Law of Nature and Nations* was published in 1672,[36] not long before Locke's *Two Treatises*. As Locke would later do, Pufendorf disagreed with Hobbes' depiction of the state of nature as a state of war. Pufendorf perceived the state of nature as an actual, not hypothetical state, represented by the historical condition of human society and by the contemporary international order.[37] As 'the international realm was a persuasive refutation of Hobbes' concept of the state of nature: nations could and often did live in peace with one

[34] There is a vast and growing literature on the history and theoretical influences on the development of the jus gentium in the context of European 'age of discovery', expansion and colonisation of the 'new world'; see, eg, Lauren Benton and Richard J Ross (eds), *Legal Pluralism and Empires, 1500-1850* (Cambridge University Press, 2002); PG McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004); Ford (n 7); Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Harvard University Press, 2016); Shaunnagh Dorsett and John McLaren (eds), *Legal Histories of the British Empire : Laws, Engagements and Legacies* (Routledge, 2014).

[35] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 20. Anaya adds that '[t]his transformation has been called "the most important intellectual development of the seventeenth century subsequent to Grotius".

[36] Samuel Pufendorf, *De Iure Naturae et Gentium* (first published 1672).

[37] Tuck (n 9) 150.

another without the necessity of a common power over them', Pufendorf argued that 'the same could be said about individuals in a state of nature'.[38]

Christian Wolff also perceived the state of nature as one of sociability.[39] Both Pufendorf and Wolff used the natural law of nations to argue for greater natural obligations on states to behave in ways that were mutually beneficial.[40] The distinction between individuals and states was reinforced. Pufendorf and Wolff 'accepted Hobbes' vision of humanity as a dichotomy of individuals and states, and they began developing a body of law focused exclusively on states under the rubric the "law of Nations"'.[41]

Whether the state of nature was conceived as an analytic device or an actual historical condition, Tuck has pointed out that all these writers assumed that it was a possible state of affairs and were prepared to give empirical evidence of actual examples.[42] The Indigenous peoples of America were commonly cited as examples of people living in a state of nature.

The distinction between the natural rights of the individual and the natural rights of states was enhanced in the work of Swiss writer, Emmerich de Vattel. In *The Law of Nations*,[43] Vattel was laudatory of England (as the prime example of civilisation),[44] and his work was well received there.[45] Vattel built on the theories of Hobbes, Locke and Wolff to develop 'the idea of a discrete body of law concerned exclusively with states.'[46] The influence of Hobbes and Locke

[38] Ibid 141–2.
[39] See the discussion in ibid 187–191.
[40] See the discussion in ibid 140–165; 187–191.
[41] Anaya (n 35) 20.
[42] Tuck (n 9) 7–8.
[43] Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (first published 1758). Pinpoint references are to the anonymous English translation of 1797.
[44] See, eg, Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (first published 1758, 1797 edition) 89 [24]. Alex Castles has noted that Vattel was such an anglophile that although *Law of Nations*, first published in 1758, was printed in Europe, it was marked as being published in London ('partly for commercial reasons but also as a compliment from the author to the country to which he was so attached'): Alex Castles, *An Australian Legal History* (Law Book, 1982) 16.
[45] McHugh notes that Vattel's work 'became the handbook of the Foreign Office and relied upon by legal practitioners in England simply because it brought theory and practice together so effectively': McHugh (n 34) 110. According to Castles, '[i]n this period, counsel could refer to the "illustrious name of Vattel" in English courts and it would be assumed that his views would be accorded great respect': Castles (n 44) 16.
[46] Anaya (n 35) 20.

is readily apparent in Vattel's work.[47] The distinguishing feature of civil society is the capacity for (and institutions of) law:

> It is essential to every civil society (*civitati*) that each member have resigned a part of his right to the body of the society, and that there exist in it an authority capable of commanding all the members, of giving them laws, and of compelling those who should refuse to obey.[48]

Civil society is contrasted with the state of nature, which, like Pufendorf and Wolff, he considered to be a state of sociability. International society consisted of independent nations in the state of nature,[49] and Vattel elaborated on the natural rights and correlative natural duties of states under the law of nature.[50]

For Vattel, one of the primary obligations on states under the law of nature is to cultivate the land, since '[t]he whole earth is destined to feed its inhabitants, but this it would be incapable of doing, if it were uncultivated'.[51] Those who are too lazy to cultivate are liable to have their lands possessed by those who are more industrious:

> There are [those] who, to avoid labour, chuse to live only by hunting, and their flocks. This might, doubtless, be allowed in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its small number of inhabitants. But at present, when the human race is so greatly multiplied, it could not subsist if all nations were disposed to live in that manner. Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have therefore no reason to complain, if other nations, more industrious, and too closely confined, come to take possession of a part of those lands.[52]

On this basis, Vattel indicated that, '[t]he establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them'.[53]

---

[47] See the discussion in Tuck (n 9) 195 and Keal (n 33) 97.
[48] Vattel (n 44) 'Preface' 14.
[49] Ibid 68 [4].
[50] Vattel defined the law of nations as 'the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights': ibid 67 [3].
[51] Ibid 129 [81].
[52] Ibid 129–30 [81] (spelling in original).
[53] Ibid 130 [81].

Although Vattel conceded that tribal peoples held a communal ownership of their tribal lands, the failure to cultivate renders occupation of land less than a 'true and legal possession':

> We have already observed in establishing the obligation to cultivate the Earth, that these Nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their removing their habitations through these immense regions *cannot be taken for a true and legal possession*; and the people of Europe, too closely pent up, finding land of which these nations are in no particular want, and of which they made no actual and constant use may lawfully possess it, and establish colonies there.[54]

While this less than 'true and legal possession' rendered Indigenous lands vulnerable to usurpation by European colonisers, the right to establish colonies on the lands of Indigenous peoples was nevertheless limited to taking sufficient land for the needs of the colony and no more.[55]

In his seminal work on Indigenous peoples in international law, James Anaya pointed out that the dichotomy between individual and state in Vattel's *Law of Nations* 'is not alive to the rich variety of intermediate or alternative associational groupings actually found in human cultures, nor is it prepared to ascribe to such groupings any rights not reducible either to the liberties of the citizen or to the prerogatives of the state'.[56] Anaya points out the impact of the application of the individual–state dichotomy to Indigenous peoples:

> To enjoy any rights as distinct communities, Indigenous peoples would have to be regarded as nations or states. Otherwise, Indigenous peoples would be conceptually reduced to their individual constituents, presumably in a state of nature, and their rights of group autonomy would not be accounted for.[57]

[54] Ibid 216 [209].
[55] Ibid 129–30 [81]. See the discussion in Henry Reynolds, *The Law of the Land* (Penguin, 3rd ed, 2003) 22 ('*The Law of the Land*').
[56] Anaya (n 35) 20.
[57] Ibid 22.

However, since the recognition of states in international law was determined by a 'standard of civilisation',[58] international law failed to recognise Indigenous peoples as nations or states.

The effect of the 'standard of civilisation' was that '[t]he civilised, those endowed with civilisation, were recognised as proper subjects of international law. The uncivilised, those lacking civilisation, were left outside of international law'.[59] As a result, '[b]y excluding the political or social agency of the "uncivilised", only "civilised" nations could participate in the project of international law'.[60] The dichotomy of civilised and uncivilised masked the heterogeneous complexities of social organisations and peoples,[61] and 'denied the possibility of comparison or mutual recognition among them'.[62] Indigenous peoples were instead regarded as individuals in a state of nature, governed only by the laws of nature, and their sovereignty was not recognised. The identification of Indigenous peoples with the state of nature side of the dualism, and state sovereignty on the opposite civil society side, had resulted in the inability of international law to recognise Indigenous peoples as sovereign peoples.

C Theories of Legal Evolution

The social contract theories, such as those of Hobbes and Locke, were the precursors of theories of legal evolution in the latter part of the 18th century. Hobbes' description of a pre-legal state as the absence of cultivation and commerce, prompted theories linking the evolution of law to the development of societies with more 'advanced' modes of subsistence.[63] During the mid-18th century, immediately prior to Cook's 'discovery' of Australia, Scottish Enlightenment scholars theorised that law followed social development through respective evolutionary stages

[58] The 'standard of civilisation' in international law has been the subject of a number of significant studies: see, eg, Gerrit Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press Oxford, 1984); Wilhelm G Grewe, *The Epochs of International Law* (Walter de Gruyter, 2013). Grewe attributed 'the equation of the international legal community with the *sociiete des nations civlisees* in the 19th century' primarily to 'British policy and British thinking on the practice and theory of international law'. See also Brett Bowden, 'The Colonial Origins of International Law, European Expansion and the Classical Standard of Civilisation' (2005) 7 *Journal of the History of International Law* 1; Brett Bowden, *The Empire of Civilisation: The Evolution of an Imperial Idea* (University of Chicago Press, 2009); Brett Bowden, 'In the Name of Progress and Peace: The "Standard of Civilisation" and the Universalising Project' (2004) 29(1) *Alternatives: Global, Local, Political* 43.

[59] Liliana Obregon, 'The Civilized and the Uncivilized' in Bardo Fassbender and Anne Peters (eds) *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 917, 918.

[60] Ibid 917, 918–9.

[61] Anaya (n 35) 20.

[62] Obregon (n 59) 917, 918.

[63] Ronald L Meek, *Social Science and the Ignoble Savage* (Cambridge University Press, 1976) 17.

dependent upon the means of subsistence.[64] Scottish Enlightenment writers, John Dalrymple,[65] Henry Home (Lord Kames)[66] Adam Smith and John Millar,[67] theorised that legal evolution followed social evolution through four stages: hunting, pasturage, agriculture and commerce.[68] Unlike the state of nature, which was conceived as an analytically prior condition, the earlier evolutionary stages were portrayed as historically prior.

Adam Smith, author of *Wealth of Nations*,[69] gave a series of lectures in the 1760s on legal evolution, in which he outlined four stages of human social development.[70] Contrasting 'civilised nations' with 'savages and barbarians',[71] Smith was concerned to account for 'the development of society from savagery to civilisation'.[72] He argued that the earliest form of society was that of hunters, in which government and law were minimal. This first stage of social and legal development is exemplified by the Indigenous inhabitants of North America. Subsequent to the hunter stage was that of shepherds, followed by agriculture and finally commerce. Smith did not publish his lectures on legal evolution, but his ideas were 'developed, popularised and disseminated' by his pupil, John Millar.[73]

[64] Because of their emphasis on stages, these evolutionary theories became known as 'four stage' or 'stadial' theory. See generally, Meek (n 63); Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press, 1980) 23-50 ('*Legal Evolution*'); Peter Stein, 'The Four-Stage Theory of the Development of Societies' in Peter Stein, *The Character and Influence of the Roman Civil Law: Historical Essays* (Bloomsbury, 2003). As Neil Hargraves has noted, 'that stadialism arose in Scotland was not coincidental: 18th century Scotland was in many ways a museum of archaic social forms, from the "barbarous" highlanders to the feudal remnants of the lowlands. The jarring co-existence of pre-modern and modern led to the veritable obsession of several generations of Scottish thinkers … with the phenomenon of social change': Neil Hargraves, 'Enterprise, adventure and industry: the formation of 'commercial character' in William Robertson's *History of America*' (2003) 29 *History of European Ideas* 33, 35.

[65] John Dalrymple, *An Essay towards a General Theory of Feudal Property in Great Britain* (1757).

[66] Kames, *Historical Law Tracts* (Edinburgh, 1758).

[67] John Millar, *The Origin of the Distinction of Ranks: Or an Inquiry into the Circumstances Which Give Rise to Influence and Authority in the Different Members of Society* (first published 1771). Pinpoint references are to John Millar, *The Origin of the Distinction of Ranks: Or an Inquiry into the Circumstances Which Give Rise to Influence and Authority in the Different Members of Society* (Basil, first published 1771, 1791 ed).

[68] Dalrymple and Kames specified only the first three stages, although Kames later added the fourth: see Stein, *Legal Evolution* (n 64) 25–8.

[69] Adam Smith, *Wealth of Nations* (first published 1776).

[70] The lectures were given in Glasgow during Smith's occupancy of the Chair of Moral Philosophy, and have recently been published, as *Lectures on Jurisprudence*, from student notes*:* Adam Smith (ed Ronald L Meek, David Raphael and Peter Stein), *Lectures on Jurisprudence* (Oxford University Press, 1976). The lectures contain many of the concepts which would later inform *Wealth of Nations*: Hargraves (n 64) 35. See also the discussion in Stein, *Legal Evolution* (n 64) 29-46.

[71] See, eg, Meek (n 63) 115.

[72] Ibid.

[73] Stein, *Legal Evolution* (n 64) 46.

According to Millar, legal development was dependent upon social and economic progress.[74] Millar argued that as societies move through the stages from hunting, pastoralism to agriculture, a more complex form of government and hence law is necessitated.[75] Like Smith, Millar presented Indigenous Americans as examples of 'savages'.[76] As representatives of the earliest stage, it followed 'that the Indigenous inhabitants of America had remained at a stage long since surpassed by civilised European societies. It took no great leap of imagination to conclude from this that as the Indians had not progressed from this primitive stage, as had the Europeans, they were lesser beings than were Europeans'.[77]

D Blackstone's *Commentaries on the Laws of England*

Echoes of both the civil society–state of nature dualism and the theories of legal evolution can be seen in the classic work on English law, Blackstone's *Commentaries on the Laws of England*.[78] Although Blackstone based the 'law of nations' upon the laws of nature applying to states as they would to individuals in a state of nature,[79] he questioned the historical veracity of a Hobbesian state of nature (in the sense of disconnected individuals in a state of constant war):

> This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted; and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind.[80]

Blackstone preferred an evolutionary account of the 'primitive origin of mankind' describing a general progression from families to tribes, pasturage to agriculture.[81] In the earliest stage of human existence, a 'state of primeval simplicity: as may be collected from the manners of the American nations' and 'the ancient method of living among the first Europeans themselves',

[74] Ibid.
[75] Millar (n 67).
[76] Millar (n 67) 162.
[77] Keal (n 33) 75.
[78] William Blackstone, *Commentaries on the Laws of England* (1765–1769). Judge, politician and legal academic, Sir William Blackstone is credited with making the common law a subject of academic worth and his *Commentaries* were a synthesis and systematization of English common law: see Richard A Cosgrove, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (New York University Press, 1996) 21–49.
[79] William Blackstone, *Commentaries on the Laws of England* (1765–1769) Book 1, 43 ('*Commentaries* Book 1'). In the *Commentaries*, Blackstone combined the heritage of natural law theory with elements of legal positivism; in this respect, Cosgrove has described Blackstone as 'the Janus of English jurisprudence, looking backward to the natural law tradition and forward to legal positivism and the beginnings of modern English jurisprudence': Cosgrove (n 78) 22.
[80] Blackstone, *Commentaries* Book 1 (n 79) 47.
[81] Ibid.

property was communal.[82] The introduction of 'the art of agriculture' gave rise to private property,[83] and it was in order to protect private property, that 'recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws …'[84] Blackstone thus aligned the introduction of agriculture with the origin of law, and positioned Indigenous Americans prior to civil society, government and law.

According to Blackstone, the laws of nature afforded a right to migration. While 'the soil and pasture of the earth remained still in common as before, and open to every occupant,' and 'when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seise upon and occupy such other lands as would more easily supply their necessities'.[85] The laws of nature, for Blackstone as for all these writers, were the basis of the law of nations. Hence, under the law of nations, there was 'the right of migration, of sending colonies to find new habitations when the Mother Country was overcharged with inhabitants'.[86] Unlike Vattel, who had insisted that the usurpation of Indigenous lands was justified, Blackstone limited the migration right to land not already inhabited: 'so long as it was confined to the stocking and cultivation of desart uninhabited countries, it kept strictly within the limits of the law of nature':[87]

> But how far the seising of countries already peopled and driving out and massacring the innocent and defenceless natives, merely because they differed from the invaders in language, in religion, in customs, in government or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilising mankind.[88]

[82] William Blackstone, *Commentaries on the Laws of England* (1765–1769) Book 2, 3 ('*Commentaries* Book 2').
[83] Ibid 7.
[84] Ibid 8. For Blackstone, the social contract was an analytical device, rather than historical basis, for the foundation of law and government: Blackstone, *Commentaries* Book 1 (n 79) 47–8.
[85] Blackstone, *Commentaries* Book 2 (n 82) 6.
[86] Ibid 7.
[87] Ibid (spelling in original).
[88] Ibid. As Lavery has pointed out, 'the seizing of countries already peopled by "defenceless natives" was, to Sir William Blackstone, contrary to the law of nature: Daniel Lavery, 'The British Acquisition of New Holland: A Residuum of Allodial Sovereignties?' (PhD Thesis, James Cook University 2015) 61.

Blackstone was clear that the right of migration did not extend to claiming lands already occupied. This passage indicates that Blackstone did not envisage 'desart, uninhabited' territories as encompassing lands occupied by Indigenous peoples at all.[89]

Blackstone classed the colonisation of the Indigenous lands of America as conquest or cession, 'being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties'.[90] Colonisation acquired by 'driving out the natives' was contrasted to that based on the occupation of uninhabited land.[91] This is the context in which the oft-quoted passage, relied upon in support of the contention that New South Wales was acquired on the basis of being uninhabited, is situated:

> Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it is held, that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.
>
> 0ur American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties.[92]

Blackstone's *Commentaries* provided 'the classic statement of English law on the eve of European occupation of Australia'.[93] The *Commentaries* acquired such authority in the early

[89] This point is argued convincingly by Daniel Lavery: Lavery (n 88) 56–62.
[90] Blackstone, *Commentaries* Book 1 (n 79) 105.
[91] Ibid 104–5.
[92] Ibid (spelling in original).
[93] Wilfred Prest, 'Antipodean Blackstone: The *Commentaries* "Down Under"' (2003) 6 *Flinders Journal of Law Reform* 151, 152.

years of colonisation 'that they were treated as reverently as any superior court judgment.'[94] The issue on which Blackstone's authority was most often invoked was that of the legal status of the colony and the reception of English law.[95]

IV. TERRA NULLIUS[96]

As Blackstone's text attests, British imperial law at the time of the colonisation of Australia recognised three main avenues for the acquisition of new territory: conquest, cession by treaty, and occupation of uninhabited land. These correlated to (and according to Blackstone were based upon) those recognised by the European law of nations.[97] The mode of acquisition determined the law applicable in the new colony, so the question of the category under which the territory had been acquired had important and immediate consequences for the colony.

No treaties were made between the British and Indigenous Australian peoples, and sovereignty over Australia was never formally ceded, a fact that continues to drive the push for constitutional reform in Australia.[98] Of the remaining two options, conquest and occupation (settlement), the High Court has confirmed the classification of Australia as 'settled' for the purposes of the reception of British law,[99] despite its ostensible repudiation of terra nullius.[100]

The provenance of the doctrine of terra nullius as applied to Australia is complex, contested and abstruse. The term 'terra nullius', a legal 'term of art',[101] was not used in the Australian context until the latter part of the 20th century,[102] and even its usage in international legal discourse appears to be relatively recent, dating from the early 20th century.[103] However, the doctrine itself — relating to the acquisition of sovereignty over uninhabited territory by discovery and occupation — has a long history in international law (although the validity of its

[94] Kercher, *An Unruly Child* (n 7) xii.
[95] See Prest (n 93) 158.
[96] A 'trigger warning' is necessary here; the discourse of terra nullius is deeply offensive.
[97] Blackstone, *Commentaries* Book 1 (n 79) 104–5.
[98] See, eg, *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017).
[99] *Mabo* (n 4). The Court distinguished between the acquisition of sovereignty, which it held is not justiciable in a municipal court, and the effect of the mode of acquisition upon the municipal law: see the discussion in Chapter Four.
[100] The vexed question of the extent to which the Court rejected the doctrine of terra nullius is discussed in Part III of the thesis.
[101] *Advisory Opinion on the Western Sahara* (Spain v Morocco) [1975] ICJ Reports 12.
[102] *Mabo* (n 4).
[103] See Andrew Fitzmaurice, 'The Genealogy of Terra Nullius' (2007) 38(129) *Australian Historical Studies* 1; Lavery (n 88).

extension to populated territory is doubtful).[104] Since the decision in *Mabo*, the term 'terra nullius' has also been widely used to describe the equivalent doctrine in British imperial constitutional law, the extended doctrine of 'settlement' (at least insofar as it applied to Australia).[105]

The British doctrine of 'settlement' dates back to the early 1700s, when a new category of colonial acquisition, 'plantation' of uninhabited territory, was added to conquest as a mode of acquisition in British imperial law.[106] The difference was that, unlike conquered territories in which the local laws remained in force subject to the imperial prerogative power of the Crown (unfettered by the limitations of English common law),[107] settled colonies in uninhabited territories (where, by definition, there was no local law) imported the laws of England as 'the birthright of every [English] subject'.[108] This position was immortalised in Blackstone's commentaries, who added the qualification that the imported laws were limited to those applicable to the conditions of the colony.[109] There is nothing in Blackstone which indicates that acquisition by settlement could apply to territory already occupied.[110] However, Blackstone did refer to the distinction between settled and conquered colonies being founded upon the law of nations,[111] which by that stage included Vattel's extension of occupancy to populated but uncultivated land.

Despite the doubtful validity of the extension of terra nullius to populated territories, it ultimately came to be accepted, within the Anglo-Australian legal system at least, as the basis for British sovereignty over the Australian continent.[112] Far from a *fait accompli*, however, it appears that the doctrine was deployed as a matter of policy and practice long before it was

[104] See the decision by the International Court of Justice in *Advisory Opinion on the Western Sahara* (n 100). See also the discussion in Lavery (n 88).

[105] The treatment of 'terra nullius' by the High Court in that case is confusing (see Part III); the Court wholeheartedly rejected the notion of 'terra nullius', while accepting that Australia fell into the category of 'settled colony' for the purposes of the reception of English law. Daniel Lavery argues that this resulted in a deeply embedded doctrinal paradox in the *Mabo* decision: Daniel Lavery, 'No Decorous Veil: The Continuing Reliance on an Enlarged Terra Nullius Notion in *Mabo [No 2]*' 43(1) *Melbourne University Law Review* 233.

[106] Castles (n 44) 9–12, citing Privy Council memorandum *Case* No 15, *Anonymous* (1722) 2 Peere Williams 75.

[107] The legacy of *Calvin's Case*, see Castles (n 44) 1–8.

[108] Castles (n 44) 10, citing Privy Council memorandum *Case* No 15, *Anonymous* (1722) 2 Peere Williams 75. The same wording was repeated in Blackstone: Blackstone, *Commentaries* Book 1 (n 79) 105.

[109] Blackstone, *Commentaries* Book 1 (n 79) 104.

[110] See the discussion in Lavery (n 88).

[111] Blackstone, *Commentaries* Book 1 (n 79) 104.

[112] *Cooper v Stuart* (n 4); cf *Mabo* (n 4).

formally incorporated into law,[113] and its initial application to Australian territory was uneven, opportunistic, incremental, and contested.[114] There is therefore no single document (or set of documents) containing a formal *prospective* declaration of terra nullius as the foundation of the British claim to sovereignty. Rather, it must be discerned from statements in a series of relatively unconnected documents relating to various colonial legal issues such as the reception of English law into the colony, the extent of colonial jurisdiction, and other constitutional issues pertaining to the colony.

The first clear statements from Britain that claimed the acquisition of sovereignty based upon the occupation of uninhabited land (as opposed to conquest or cession), were contained in legal opinions from the Colonial Office concerning the powers of the colonial governors.[115] Constitutionally, the powers of the colonial governors were vastly different depending upon whether the colony was acquired by settlement as opposed to conquest or cession, so the legal advice concerning the mode of acquisition was critical.[116] In two separate legal opinions, one in 1819 and the other in 1822, the Colonial Office stated that the basis upon which British sovereignty over the Colony of New South Wales had been acquired, was by occupation of a 'desert' and/or 'uninhabited' land.[117] No justification for the appellation, of lands that were obviously occupied, as 'uninhabited', was offered.[118]

A series of cases heard by the newly formed Supreme Court of New South Wales in the 1820s and '30s concerned colonial jurisdiction over Aboriginal people. Initially, it had been the policy of the colonial government and judiciary not to interfere in disputes where the only parties were

[113] Larissa Behrendt, 'The Doctrine of Discovery in Australia' in Robert J Miller, Jacinta Ruru, Larissa Behrendt and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010) 179; Stuart Banner, *Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska* (Harvard University Press, 2007) 26.

[114] See generally Reynolds, *The Law of the Land* (n 55); Banner (n 113); Behrendt (n 113); Ford (n 7); Kercher, *An Unruly Child* (n 7); Henry Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Allen & Unwin, 1996) ('*Sovereignty*'); Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law*, (Routledge, 2015).

[115] The issues addressed by these legal opinions concerned the power of the governor to levy taxes and make laws by proclamation. The context of these legal opinions is discussed in Behrendt (n 113) 179–80; Banner (n 113) 26–7.

[116] As to the difference in the constitutional powers of colonial governors in the different types of colonies, see Castles (n 44) 7–14.

[117] 'Messrs Shepherd and Gifford to Earl Bathurst' (15th February 1819) in Frederick Watson (ed) *Historical Records of Australia* (1922) series 4, vol 1, 330, 330; J Stephen, 'Validity of Statute, 20 George II, c 19 in the Colony' (1822) in Frederick Watson (ed) *Historical Records of Australia* (1922) series 4, vol 1, 412, 414.

[118] As Lavery argues, '[f]ar from any legal sophistry, it was just unadorned misstatement. Yet this convenient fiction restrained any further discourse': Lavery (n 88) 104–5.

Indigenous.[119] However, this policy was tested in a series of cases concerning the jurisdiction of the Court over Aboriginal Australians for crimes committed inter se.

An acknowledgement of Indigenous laws, and acceptance of Indigenous jurisdiction, is apparent in the 1829 decision of the New South Wales Supreme Court in *R v Ballard ('Ballard')*.[120] In *Ballard*, the Court (Forbes CJ and Dowling J) held that although the Court had jurisdiction 'in cases of wrongs committed between Aborigines and Europeans', it did not have jurisdiction in cases 'in which the only parties are Aborigines'. The Court noted that it had been the policy of the judges and government of New South Wales not to interfere in disputes between 'the aboriginal natives'.[121]

In the leading judgment, the Chief Justice (Forbes CJ) acknowledged that Indigenous Australians were 'governed by the laws of [their] tribe'.[122] Forbes' reasoning invoked a Hobbesian state of nature–civil society distinction. He used a form of social contract theory to argue that Indigenous Australians had not entered into civil society, but remained in a state of nature. They had therefore not given up any of their natural rights:

> There is one most important distinction between the savage and civilised state of man, namely that amongst savages there are no magistrates. The savages decide their differences upon a principle of retaliation. They give up no natural rights. This is not merely a matter of theory but practice. In the civilised state, man gives up certain natural rights, in exchange for the advantage of social security, and other benefit arising from the institutions of civilised life. … it is known as matter of experience that the savages of this part of the globe, have a mode of dressing wrongs committed amongst themselves which is perfectly agreeable to their own natures and dispositions, and is productive, amongst themselves, of as much good, as any novel or strange institution which might be imparted to them. In the absence of a magistracy which is an institution peculiar to an advanced state of refinement, the savage is governed by the laws of his tribe — and with these he is content. In point of practice, how could the laws of England be applied to this state of society? [123]

[119] *R v Ballard* (n 7). See the discussion in McHugh (n 34) 159–162.
[120] *R v Ballard* (n 7).
[121] Ibid 101.
[122] Ibid 103.
[123] Ibid 102–3.

Dowling J agreed with the judgment of Forbes CJ, adding:

> Until the aboriginal natives of this Country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human, or divine, which ought to justify us in interfering with their institutions even in such an interference were practicable.[124]

Dowling had prefaced his judgment with the caveat 'the point comes upon me entirely by surprise, and therefore I have had no opportunity of considering it in a manner satisfactory to my own mind'.[125] He made some further comments in the nature of obiter dicta, noting that 'these are general observations suggested on the occasion, without meaning them to have the effect of judicial determination'.[126]

Regarding relations between the colonists and the Indigenous peoples, Dowling stated that '[w]e have a right to subject them to our laws if they injure us, but I know of no right possessed by us, of interfering where their disputes or acts, are confined to themselves and affect them only'.[127] He extended this notion to offences against property, in a statement of obiter that appeared to accept Indigenous Australian property rights:

> The same principle applied to the preservation of property, although the notions of property may be very imperfect in the native. The Englishman has no right to wantonly deprive the savage of any property he possesses or assumes a dominion over. On the other hand the native would be responsible for aggressions on the property of the Englishman.[128]

The obvious recognition of Indigenous Australian laws in the judgment of Forbes CJ, together with the apparent recognition of jurisdiction and property in that of Dowling J, has led eminent legal historian, Bruce Kercher, to argue that 'this important judgment [*R v Ballard*] was based on a recognition that there were at least two bodies of law in New South Wales, those of the British and those of the ancient peoples who had been there before 1788'.[129]

---

[124] Ibid 106–7.
[125] Ibid 106.
[126] Ibid 109.
[127] Ibid 108.
[128] Ibid 108–9.
[129] Bruce Kercher, *Outsiders: Tales from the Supreme Court of NSW, 1824–1836* (Australian Scholarly, 2006) 58 ('*Outsiders*'). See also Ford (n 7) 168–9.

Kercher further argued that the recognition of Indigenous law and property in the *Ballard* decision was at odds with the doctrine of terra nullius.[130] This argument, however, concedes too much to the judicial reasoning. Forbes CJ, while recognising that the Aboriginal peoples had their own laws, did not acknowledge that those peoples were sovereign peoples, or that their 'laws' were on an equal footing with the English. Instead, he argued that the Aboriginal people were still in a state of nature (not having entered a civil society, they had not given up their natural rights). Therefore, the 'laws' he referred to, he perceived to be the laws of nature, such as the right to be a judge in one's own cause and settle one's own disputes, not the laws of a sovereign people.

In addition, the dicta in Dowling J's judgment regarding Aboriginal rights to property does not conflict with the Lockean notion of property in Vattel and Blackstone, since both writers acknowledged that there are property rights in common in the state of nature (albeit imperfect and insecure). Kercher argues that 'Dowling did not show how the property rights of the Aborigines would be protected by his court's law, but he did say that they should be'.[131] However, Dowling's statement that '[t]he Englishman has no right to wantonly deprive the savage of any property he possesses or assumes a dominion over' does not contradict Vattel's insistence that Indigenous land holdings, not amounting to full legal possession, are vulnerable to appropriation by industrious sovereign nations. Vattel makes it clear that it is not private appropriation by individuals, but public appropriation by a nation state that is allowable under the law of nations.[132]

The judgment, although it contains some recognition of Indigenous law and Indigenous property rights, founds those laws and rights in the laws of nature that apply to individuals in the state of nature. There is a distinction drawn in the judgment between the sovereign laws of civil society and the absence of such law in the state of nature. The decision is not, therefore, inconsistent with the doctrine of terra nullius. Indeed, it demonstrates the conceptual mechanism that would enable a judicial recognition of tribal laws to fall short of the qualification for 'settled law'.

[130] Kercher, *Outsiders* (n 129) 58.
[131] Ibid.
[132] See the discussion in Matthew Craven, 'Colonialism and Domination' in Fassbender and Peters (n 52).

Many of the cases heard before the Supreme Court in New South Wales during this period concerned the reception of English law into the colony. One such case is *MacDonald v Levy*,[133] decided in 1833, which contains an unambiguous statement that the reception of law was based upon the uninhabited land principle:

> I take it to be clear law, without the aid of an Act of Parliament to make it such that 'if an uninhabited country (as this at the time of its settlement must be considered to have been, for *the wandering tribes of its natives, living without certain habitation and without laws* were never in the situation of a conquered people , or this colony that of a ceded country); if such a country be discovered and planted by English subjects, all the English laws then in being which are applicable to their situation, and the condition of an infant colony, are immediately their birthright, and as their applicability arises from their improving condition, come daily into force. *They are not in the situation of persons who go to settle in a conquered country, where laws have pre-existed, and which continue to exist* until changed by lawful authority. It they have not the law of England for their guidance, they have none.[134]

Here, it is again apparent that it was the *absence of law* (the 'wandering tribes of … natives' were 'without laws'), together with absence of cultivation, the key features of the state of nature, that was raised to justify the classification of 'uninhabited country'.

The decision in *Ballard* (that the Supreme Court did not have jurisdiction over Indigenous Australians for crimes committed inter se), was overruled in *R v Murrell* ('*Murrell*'),[135] some seven years after the *Ballard* decision. In *Murrell*, decided in 1836, the Supreme Court of New South Wales held that 'aboriginal natives of this colony are amenable to the laws of the Colony for offences committed within it against the persons of each other and against the peace of our Lord the King'.[136] The leading judgment of Burton J (Forbes CJ and Dowling J concurring) contained the two elements of terra nullius, absence of law and absence of property in the land:

> 1st although it be granted that the aboriginal natives of New Holland are entitled to be regarded by Civilised nations as a free and independent people, and are entitled to the

[133] *MacDonald v Levy* (n 7). The issue in that case was whether the usury laws of England applied in the colony.
[134] Ibid (Burton J) (emphasis added). Although Burton J's was a dissenting judgment, on this issue he did not differ from the majority. The question before the Court was whether the usury laws of England applied in the colony and Burton J dissented on the issue of the effect of the *Australian Courts Act 1828.*
[135] *R v Murrell* (n 7).
[136] Ibid (Forbes CJ, Dowling and Burton JJ).

> possession of those rights which as such are valuable to them, *yet the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilisation, and to such a form of Government and laws, as to be entitled to be recognised as so many sovereign states governed by laws of their own.*
>
> 2ndly, That a tract of country before unappropriated by any one has been taken into actual possession by the King of England…[137]

In this judgment, Burton J acknowledged that Indigenous Australians were 'a free and independent people' entitled to the possession of rights, but used the civil society construct to deny them sovereignty and law: since the 'various tribes had not attained' a sufficient standard in terms of numbers, civilisation, government and laws, they were not 'entitled to be recognised as … sovereign states governed by laws of their own'. [138] *Murrell* 'became the founding precedent for the application of what is now known as terra nullius in Australia'.[139]

Kercher argues that the judgment in *Murrell* is a complete change of direction by the Court, and 'based on very different principles' from that in *Ballard.*[140] But although the outcome was different, the reasoning is not dissimilar. In both cases, it was considered that the Indigenous peoples were in a state of nature. As a result, they retained certain natural rights (such as that of self-preservation) that individuals have in the state of nature or under the laws of nature. Burton J in *Murrell*, although ignoring the diversity of Indigenous Australian peoples, acknowledges that that the Indigenous people are a 'free and independent people… entitled to the possession of those rights which as such are valuable to them'. However, not having attained

[137] Ibid (Burton J) (emphasis added).

[138] Burton J had prepared a longer version of the judgment in case he had been in the minority. According to Bruce Kercher, Burton appeared to have seriously considered the notion that Aboriginal Australians had their own legal systems, but rejected it. Burton's assessment of Aboriginal law was influenced by the missionary, Lancelot Threlkeld, who acknowledged Indigenous Australian law and methods of dispute resolution, but was of the opinion that it would be a mercy to them to be brought under the protection and power of British laws. Kercher notes that Threlkeld's 'sympathies for Aborigines were genuine, within the Eurocentric limits of nineteenth-century humanitarianism'. Burton's reasoning followed the lines of Threlkeld's submission, opining that Aboriginal practices were 'lewd practices', 'consistent with a state of the greatest darkness and irrational superstition': Kercher, *An Unruly Child* (n 7) 10; Reynolds, *Sovereignty* (n 114) 62, citing *New South Wales Supreme Court Papers* 5/1161, 234, 239. Burton J's notes for the longer version of the judgment are in the same archive file as the judgment itself: Bruce Kercher, '*R v Ballard, R v Murrell* and *R v Bonjon*' (1998) 3(3) *Australian Indigenous Law Reporter* 410.

[139] Kercher, *Outsiders* (n 129) 59.

[140] So much so, that he speculated as to why Forbes and Dowling had contemplated such a change of direction: TD Castle and Bruce Kercher, *The Dowling Legacy: Foundations of an Australian Legal Culture 1828 to 1844* (Francis Forbes Society for Australian Legal History, 2005) 27. See also Ford's discussion of the Supreme Court's changing approach to the issues of plurality, jurisdiction and territoriality: Ford (n 7) 158–182.

the state of civilisation with its attendant government and laws, they cannot be regarded as a sovereign state. This is almost identical to the reasoning in *Ballard*. Although there is a recognition in *Ballard* that the Indigenous people are an association of people with their own laws, there is an assumption that they are either still in a state of nature, or at least have not attained the standard of civilisation that entitles them to be considered a sovereign people or state.

A year after the decision in *Murrell* was handed down, the report of the British House of Commons Parliamentary Select Committee on Aboriginal tribes in British colonies recognised that it would be 'absurd' and 'palpably unjust' to apply British laws to Indigenous Australians.[141] Nevertheless, the Select Committee affirmed that Aboriginal Australians should be subject to British law, applied however with 'the utmost indulgence … for their ignorance and prejudices'.[142] The Committee confirmed that it was by means of the civil society–state of nature construct that Indigenous Australian sovereignty was denied.[143] The report declared that the Indigenous Australian peoples were '*so entirely destitute … even of the rudest forms of civil polity*, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded'.[144] The Select Committee maintained the assertion of British sovereignty ('[h]er Majesty's sovereignty over the whole of New Holland is asserted without reserve),[145] but recognised that the Aboriginal people had a right to their own lands ('the land has been taken from them without the assertion of any other title than that of superior force').[146] Despite recognising 'the injustice of this encroachment', the Committee decided that 'there is no reason to suppose that either justice or humanity would now be consulted by receding from it.'[147] Instead, the Committee proposed a broad and wide-ranging system of protection. The guidelines for the protection system included the setting aside of sufficient land, 'education of the young' by missionaries, and '*such short and simple rules as may form a temporary and*

[141] *Report of the UK Parliamentary Select Committee on Aboriginal Tribes (British Settlements)* (Aborigines Protection Society, 1837) 84.
[142] Ibid 79–80.
[143] Ibid 125.
[144] Ibid (emphasis added).
[145] Ibid 126.
[146] Ibid 125. This combination of assertion of sovereignty together with recognition of Indigenous rights to land is consistent with the international law and common law of the time: see Lavery (n 88).
[147] *Report of the UK Parliamentary Select Committee on Aboriginal Tribes (British Settlements)* (n 141) 126.

provisional code for the regulation of the Aborigines, until advancing knowledge and civilization shall have superseded the necessity for any such special laws'.[148]

The issue of colonial jurisdiction over Indigenous Australians was again addressed in 1840, in a report by Captain George Grey[149] to Lord John Russell. Lord Russell forwarded Grey's report to Governor Gipps of New South Wales, noting that although Grey's 'valuable suggestions' were based upon his observations in Western Australia, 'they appear to me fit for adoption generally within your Government, subject to such modifications as the varying circumstances of the Colony may suggest'.[150] Grey believed that the principle of limiting colonial jurisdiction over Indigenous Australians was erroneous.[151] Although Grey referred to the laws of Indigenous Australians as 'laws', he described them as so 'barbarous' and 'savage' that:

> it would appear not only impossible that any nation subject to them could ever emerge from a savage state, but even that no race, however highly endowed, however civilised, could in other respects remain long in a state of civilisation if they were submitted to the operation of such barbarous customs.[152]

Such 'savage and traditional customs should not be confounded with a regular code of laws'.[153] Yet again, the civilised–savage dichotomy was used to deny Indigenous 'laws' the standing of 'law'. Grey submitted that 'the Aborigines of this Country' should be amenable to the British laws of the colony.[154] Although Governor Gipps of New South Wales was agreeable to this since it reflected the position already taken in that colony, the governor of Western Australia

[148] Ibid 127 (emphasis added). The Australian Law Reform Commission noted that this suggestion for special laws 'does not appear to have been taken particularly seriously by the Australian colonies': Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, June 1986) [43]. Interestingly, the recommendation for a broad, all-encompassing, scheme of protection in 1837 predates the theories of social Darwinism to which the protection era has been attributed.

[149] Grey 'was to have a significant impact upon native policy in the British Empire of the mid-nineteenth century': McHugh (n 34) 162.

[150] Russell concluded with an instruction to forward Grey's report on to the governor of New Zealand and the superintendent of Port Philip: Lord John Russell to Sir George Gipps (8th October 1840) in Frederick Watson (ed) *Historical Records of Australia* (1922) Series 1, Vol 21, 33.

[151] George Grey, 'Report upon the Best Means of Promoting the Civilisation of the Aboriginal Inhabitants of Australia', enclosed in Captain Grey to Lord John Russell (4th June 1840) in Frederick Watson (ed) *Historical Records of Australia* (1922) Series 1, Vol 21, 33, 34.

[152] Ibid.

[153] Ibid 35.

[154] Ibid.

disagreed, noting in particular that this might only be practicable in so far as criminal law was concerned.[155]

In a final, flourishing, finale to the issue of the recognition of Indigenous law and jurisdiction, the resident judge in the Port Phillip district of New South Wales, Willis J, departed from the principle in *Murrell*, holding that he was not bound by the decision of the Full Court in that case. In the 1841 case of *R v Bonjon*,[156] Willis J held that:

> respecting the aborigines, it appears that they are by no means devoid of capacity — *that they have laws and usages of their own* — that treaties should be made with them — and that they have been driven away, from Sydney at least, by the settlement of the colonists, but they still linger about their native haunts.[157]

Willis J held that the colony of New South Wales 'stands on a different footing from some others for it was neither an unoccupied place, nor was it obtained by right of conquest and driving out the natives, nor by treaties'.[158] Citing the passages from Vattel concerning the non-legal possession of Indigenous lands rendering them vulnerable to usurpation by European colonisers, Willis J opined that it was 'upon the above principle, I think, and not by mere occupancy of a desert spot, by conquest, or by cession, that this colony was acquired'.[159] As a result, he held that

> I am not aware of any express enactment or treaty subjecting the Aborigines of this colony to the English colonial law, and I have shown that the Aborigines cannot be considered as Foreigners in a Kingdom which is their own. From these premises rapidly indeed collected, I am at present strongly led to infer that the Aborigines must be considered and dealt with, until some further provision be made, as *distinct, though dependent tribes governed among*

[155] McHugh (n 34) 162–3.
[156] *R v Bonjon* (n 7).
[157] Ibid (emphasis in original). In reaching this conclusion, Willis J referred to the submission of former Attorney-General, Saxe Bannister, to the Select Committee of the House of Commons, who, 'after complaining, that, in his time in New South Wales, an interpreter (between the Aborigines and colonists) could not be found to come into any court of justice, says, "we ought forthwith to begin, at least, to reduce the laws and usages of the Aboriginal tribes to language, print them, and direct our courts of justice to respect those laws in proper cases." Hence, it is evident, according to Mr. Bannister's testimony, that the Aborigines of this colony have laws and usages of their own.'
[158] Ibid.
[159] Ibid.

> *themselves by their own rude laws and customs*. If this be so, I strongly doubt the propriety of my assuming the exercise of jurisdiction in the case before me.[160]

In the event, the defendant was remanded and the issue of jurisdiction reserved.[161] The judgment attracted strong criticism from the Chief Justice, on the basis that it contradicted that of the Full Court in *Murrell*.[162]

Almost fifty years later, the application of the terra nullius doctrine to Australia was confirmed by the Privy Council decision in *Cooper v Stuart*. The issue in *Cooper v Stuart* concerned the extent of the reception of English law; in particular, the question was whether the English rule against perpetuities was part of the law of the colony. The judgment, delivered by Lord Watson,[163] contained the famous statement that New South Wales was 'a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants, or settled law, at the time when it was peacefully annexed to the British dominions'.[164] The wording in *Cooper v Stuart* marked a slight shift in the British and colonial discourse used to justify the acquisition of sovereignty, which until then had been asserting that the territory was 'uninhabited' or 'unoccupied', without the qualifying 'practically'.[165]

Lord Watson relied upon the well-known passage from Blackstone's *Commentaries* about the extent of reception of English law:

---

[160] Ibid (emphasis added).

[161] Ibid. Julie Cassidy notes that '[u]ltimately, the prosecution did not proceed. The Crown Prosecutor, unable to produce certain crucial pieces of evidence, entered a *nolle prosequi*. Bonjon did not escape punishment: in accordance with Aboriginal customary law he was killed by his victim's kin': Julie Cassidy, 'The Impact of the Conquered/Settled Distinction regarding the Acquisition of Sovereignty in Australia' (2004) 8 *Southern Cross University Law Review* 1, 10 n 59.

[162] McHugh (n 34) 164. See also Behrendt (n 113) 182. Willis J was subsequently removed from office. Rizetti has argued that Willis crafted his judgment specifically in the context of his struggles with the other members of the judiciary and with the local authorities, and that this accounts for why it had been largely overlooked: Janine Rizetti, 'Judge Willis, Bonjon and the Recognition of Aboriginal Law' (2010) *ANZLH e-journal*; see also Janine Rizetti, 'From Foundational Case to Footnote: Judge Willis' Opening Address in the Case of *R v Bonjon*' (2017) 88(1) *Victorian Historical Journal* 69. For an overview of Willis' judicial career, see BA Keon-Cohen, 'John Walpole Willis: First Resident Judge in Victoria' (1972) 8 *Melbourne University Law Review* 703.

[163] The judgment was delivered by Lord Watson on behalf of Lord Watson, Lord Fitzgerald, Lord Hobhouse, Lord Macnaghten and Sir William Grove.

[164] *Cooper v Stuart* (n 4).

[165] Lavery (n 88) 125–128.

> It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force. …[166]

As Daniel Lavery has convincingly argued, the Privy Council's 'reliance on Blackstone's *Commentaries* as authority for the extrapolation of principle from the "uninhabited" to the "practically unoccupied" is … most tenuous'.[167] Lavery points out that the passage from the *Commentaries* cited by the Privy Council was not applicable to territories already inhabited by Indigenous peoples:

> [T]he elision from the 'uninhabited' species to the 'practically unoccupied' species made in his name by the Judicial Committee of the Privy Council in *Cooper v Stuart*, was unprecedented and lacking principled authority. Textually, contextually, and historically, it is a difficult argument to sustain when Sir William Blackstone plainly states his position in the Commentaries and rails against 'the seizing of countries already peopled' and 'the driving out and massacring the innocent and defenceless natives'. Far from supporting the annexation of whole territories populated by the 'defenceless natives', Blackstone passionately inveighed against the seizing of countries already peopled. Sir William Blackstone was thus ill-served by the Judicial Committee in *Cooper v Stuart.* Blackstone's text was extrapolated far beyond anything for which the *Commentaries* provide support.[168]

Nevertheless, 'despite its doubtful validity, both legally and historically, until the *Mabo (No 2)* decision, *Cooper v Stuart* was regarded as unquestionably authoritative of the legal basis of the British acquisition of the territory of New South Wales'.[169]

Although the occupation of the lands of Indigenous peoples was not justified by Blackstone, as it was by Vattel, Blackstone's failure to recognise the possibility of Indigenous law being 'law' enabled the categorisation of Indigenous Australian peoples in *Cooper v Stuart* as being 'without settled law'. The identification of Indigenous peoples, by Blackstone, with the state of primeval simplicity, prior to the evolution of agriculture or law, ultimately enabled the denial of law that led to the application of terra nullius.

[166] Blackstone, *Commentaries* Book 1 (n 79) 104–5, cited in *Cooper v Stuart* (n 4).
[167] Lavery (n 88) 129.
[168] Ibid 133–4.
[169] Ibid 134.

The theoretical foundation of the application of the doctrine of terra nullius to Australia, the proposition that the Indigenous peoples were without law or other accoutrements of civilisation, was emphatically rejected by the High Court in *Mabo.*[170] Although the Court did not reconsider the acquisition of sovereignty, it did examine the introduction of the common law to the Australian colonies following the acquisition of sovereignty.[171] In doing so, the Court clearly rejected the theoretical foundations of the extended doctrine of terra nullius (that the Indigenous peoples were 'so low on the scale of civilisation' as to be without law or property). In the leading judgment of Brennan J, it was 'the *theory which was advanced to support* the introduction of the common law of England'[172] to the Australian colonies that Brennan rejected as 'unjust and discriminatory',[173] and 'contrary both to international standards and to the fundamental values of our common law'.[174] It was '*the basis of the theory*', the 'discriminatory denigration of Indigenous inhabitants, their social organization and customs', which Brennan rejected as 'false in fact and unacceptable in our society'.[175]

In rejecting the theoretical basis of terra nullius, Brennan J specifically referred to the statement of Lord Watson in *Cooper v Stuart* that the colony of NSW was 'without settled inhabitants or settled law',[176] and to the statement of Lord Sumner in *In re Southern Rhodesia* that '[s]ome tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society'.[177] These statements, rejected as discriminatory, false and unacceptable by Brennan J, reflect both the civil society–state of nature dualism and the legal evolution theories of the era.

---

[170] The extent to which the doctrine of terra nullius was rejected as the basis for the reception of the common law is examined in Chapter Four. At the very least, commentators agree that the Court rejected the *idea* or *discourse* of terra nullius, if not the doctrine itself; see, eg, Ulla Secher, 'The Reception of Land Law into the Australian Colonies Post-*Mabo*: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of Continuity Pro-Tempore' (2004) 27(3) *UNSW Law Journal* 1, 18; David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18(1) *Sydney Law Review* 5, 30.

[171] *Mabo* (n 4) 32 (Brennan J, Mason CJ and McHugh J concurring), 95 (Deane and Gaudron JJ).

[172] Ibid 38 (Brennan J, Mason CJ and McHugh J concurring) (emphasis added).

[173] Ibid 42.

[174] Ibid.

[175] Ibid 40 (emphasis added). In their joint judgment, Deane and Gaudron JJ held that it is the *impact* of the doctrine of terra nullius, the dispossession of Aboriginal peoples (which they describe as the 'darkest aspect of the history of this nation') which requires its rejection: at 109.

[176] *Cooper v Stuart* (n 4) cited in *Mabo* (n 4) 38–9 (Brennan J, Mason CJ and McHugh J concurring).

[177] *In re Southern Rhodesia* (1919) AC 211, 233-234 cited in *Mabo* (n 4) 39, 41 (Brennan J, Mason CJ and McHugh J concurring).

V. CONCLUSION

Even prior to the first contact between British and Indigenous Australian peoples, the capacity for British concepts of law to recognise Indigenous law as 'law' was limited. A century or more of British juridical theory, informed by similar theories of continental Europe, had limited the concept of law in such a way as to exclude the possibility of Indigenous law being perceived or recognised as law per se. British and European theories of law written before any real contact had been made with Indigenous Australians, had used perceptions of Indigenous peoples in other parts of the world, particularly Indigenous Americans, to bolster their theories of a primeval state of human society without law.

The civil society–state of nature construct was used throughout the legal discourse of the 19th century to deny the recognition of Aboriginal law as the law of sovereign peoples. Despite judicial acknowledgement that Indigenous Australian peoples had their own laws, this did not translate into a legal recognition of their laws 'as law'. Indigenous Australians, it was repeatedly argued, had not attained the state of civil society, due to the apparent absence of European-style institutions of law and government. Therefore, since they were not classed in the civil society category, the use of the dualism only afforded one other alternative, the state of nature. As the state of nature is characterised by an absence of law, the application of the dualism mandated that difference be overlooked in favour of absence.

It was thus the civil society–state of nature dualism and its corollary in international law, that only civil societies could be recognised as states, that enabled the denial of law and sovereignty that resulted in the claim that the territory was 'unoccupied' or 'uninhabited' with 'no settled law'. The fact that Indigenous Australian peoples' laws were acknowledged as a matter of fact, and even of law, but failed to be recognised as 'law', demonstrates the prime importance of the conceptual construct of law against which they are measured.

This is why the theoretical foundations of the reasoning in *Yorta Yorta* are so profoundly important. An acknowledgment of the recognition that the Indigenous inhabitants of Australia had, and continue to have, their own systems of law, will not necessarily result in a respectful recognition of those laws *as law* unless the conceptual construct of law used by the court is appropriate.

The legal disavowal of Indigenous Australian law remained the foundation of the Anglo-Australian legal system throughout the 19th and most of the 20th century. In the next chapter, I trace developments in British jurisprudence during that period, from the time of the first establishment of the colony of New South Wales through to the mid-20th century, when the works cited by the High Court in *Yorta Yorta* were published. I examine how British ideas of what counts as 'law' developed during that time, specifically in relation to the continuing disqualification of Indigenous Australian law. The study in this part of the thesis charts these changing ideas and their influence on the theories underpinning the interpretation of 'traditional laws and customs' in *Yorta Yorta*.

CHAPTER THREE
INDIGENOUS AUSTRALIANS IN BRITISH LEGAL THOUGHT[1]

I. INTRODUCTION

In this second chapter of Part II, I sketch the perception and treatment of Indigenous Australian law and society in British legal thought, from the time of the first contact between British and Indigenous Australian peoples, through until 1945.[2] This survey of legal theory performs a number of functions. First, it provides an historical overview of the way 'traditional laws and customs' have been perceived in Anglo-Australian jurisprudence. Secondly, it sets out the theoretical context of the declarations of the application of the terra nullius doctrine in Australia, which occurred in key legal decisions throughout this period. Finally, it is a study in juridical influence: it provides the scholarly background for the texts relied upon by the High Court in *Yorta Yorta*. Many of the theories discussed in this chapter are therefore directly relevant to the discussion of the texts relied upon in *Yorta Yorta* and are revisited in later chapters of this thesis.

The material is surveyed chronologically and divided into three main periods. In the first section, I examine British jurisprudence in the decades immediately following first contact, and in the second, the evolutionary jurisprudence popular in the late 19th and early 20th centuries. The third section covers the generation immediately prior to 1946, when the first of the texts cited by the High Court in *Yorta Yorta* were published. In the final part of the chapter, I chart my deconstruction of the portrayal of Indigenous Australian law in British legal thought.

II. THE FIRST HALF-CENTURY OF COLONISATION

A Late 18th Century

One of the earliest references in British legal theory to Indigenous Australian socio-legal organisation was by Scottish Enlightenment scholar, John Millar. As described in the previous chapter, Millar had produced a theory of legal evolution based upon modes of subsistence. In *Origin of Ranks*, published in 1771, Millar postulated a universal social and legal evolution,

[1] With apologies to Robert A Williams, Jr, whose book, *The American Indian in Western Legal Thought: The Discourse of Conquest* (Oxford University Press, 1990) inspired this sketch of the portrayal of Indigenous Australians in British legal discourse.

[2] A 'trigger warning' is again necessary here. The discourse of deficit and disparagement that characterises many of these (mis)representations of Indigenous law and society is deeply offensive.

progressing from hunting to pastoralism, agriculture and commerce.[3] As societies move through the stages from hunting to agriculture, more complex forms of government and hence law are necessitated.[4]

Millar's theory contains the opposing concepts of civilisation and barbarity; it also demonstrates the assumption that the contemporary social and economic organisation of one people could represent the history of another:

> When we survey the present state of the globe, we find that, in many parts of it, the inhabitants are so destitute of culture, as to appear little above the condition of brute animals; and even *when we peruse the remote history of polished nations, we have seldom any difficulty in tracing them to a state of the same rudeness and barbarism*.[5]

In *Origin of Ranks*, Millar cited Indigenous Americans as exemplifying the state of barbarity: the 'rudest form' of government could be found among the Indians of America, who subsist mostly by hunting and fishing.[6] However, there is evidence that later in his career, Millar also included Indigenous Australians as evidence of that state.

Millar was Professor of Civil Law at Glasgow University from 1761 until his death in 1801, during which time he lectured on Scots and English law, and on Government.[7] Sets of student lecture-notes from Millar's lectures survive and are housed in the University of Glasgow Library.[8] An extract from the lecture notes of Millar's lectures on Government contains a reference to Indigenous Australians.[9] According to the lecture notes, Millar specifically identified Indigenous Australians, the inhabitants 'of the Terra Australis', in addition to Indigenous Americans, as examples of 'Hunters and Fishers or mere Savages'.

---

[3] John Millar, *The Origin of the Distinction of Ranks: Or an Inquiry into the Circumstances Which Give Rise to Influence and Authority in the Different Members of Society* (first published 1771). Pinpoint references are to the 1791 edition published by Basil: John Millar, *The Origin of the Distinction of Ranks* (Basil, first published 1771, 1791 ed).

[4] Ibid 3–4.

[5] Ibid 2 (emphasis added).

[6] Ibid 162.

[7] See William C Lehmann, *John Millar of Glasgow 1735–1801: His Life and Thought and his Contributions to Sociological Analysis* (Cambridge, 1960) 57–8.

[8] Ibid 57.

[9] The extract is set out in Ronald L Meek, *Social Science and the Ignoble Savage* (Cambridge University Press, 1976) 165-6. The provenance of the lecture notes is discussed by Meek at 165.

The legal evolution theories of the Scottish Enlightenment contributed to the contemporary scholarly environment which saw the denial of the existence of law in Indigenous Australian societies and justified the application of 'terra nullius' to their lands. Within decades of first contact, and prior to any opportunity to know or understand the nature of their societies or law, Indigenous Australians were specifically placed at the earliest stage of social and legal evolution.

B Early 19th Century: John Austin

One of the most salient developments in British jurisprudence coinciding with the early decades of the British colony in New South Wales was the publication of John Austin's *The Province of Jurisprudence Determined*.[10] Few legal theorists have had as much influence on British and Australian jurisprudence as Austin.[11] Renowned as the founder of the analytical 'school', his legacy can be seen in the dominance of legal positivism throughout the 20th century.[12] Given that the jurisprudence based on this tradition has been said to inform the interpretation of 'traditional laws and customs' in *Yorta Yorta*,[13] Austin's attitude to, and treatment of, Indigenous Australian law is of critical importance.

In *The Province of Jurisprudence Determined*, Austin distinguished what is 'properly called' law from other normative systems and other linguistic uses of the term 'law'. Describing law as the commands of a sovereign, he claimed that one of the characteristics of law 'properly so called' is that it is confined to a 'politically independent society'. As had Hobbes and Locke, he distinguished between people living in a state of nature (a negative state or state of anarchy)[14] and those in independent political societies.[15] Austin's concept of the origin of political

[10] John Austin, *The Province of Jurisprudence Determined* (first published 1832). Pinpoint references are to John Austin, *The Province of Jurisprudence Determined*, ed David Campbell and Philip Thomas (Ashgate, first published 1832, 1998 ed).

[11] See HLA Hart, 'Introduction' in John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence*, ed HLA Hart (Weidenfeld and Nicolson, first published 1832, 1954 ed).

[12] See below.

[13] See, eg, Kirsten Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Routledge, 2014) 75.

[14] See, eg, Austin (n 10) Lecture V.

[15] For the influence of Hobbes and Locke upon Austin, see John Stuart Mill, 'Austin on Jurisprudence' (1863) 118 *Edinburgh Review* 438. See also Hart (n 11) xvi; Wilfred E Rumble, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in Nineteenth-Century England* (Continuum, 2005) 14–18.

governments is a form of social contract theory similar to that of Hobbes: to escape the state of anarchy, the bulk of the people consent to form a political community.[16]

For a society to be classed as a politically independent society, Austin specified that the 'bulk of its members must be in a habit of obedience to a certain and common superior' who is not themselves habitually obedient to anyone.[17] It must also be comprised of a considerable number of people.[18] As clarification, he pointed to the two extremes that are easily identifiable as either a politically independent society or a society in the state of nature. The extreme of the politically independent society is 'the ordinary state of England, and of every independent society somewhat advanced in civilisation'.[19] At the other extreme is the state of nature, or the 'natural society', such as 'the state of the independent and *savage societies which subsist by hunting or fishing in the woods or on the coasts of New Holland*'.[20] Indigenous Australian societies were thus perceived by Austin as the epitome of the state of nature.

Austin then described what he called an independent society in the 'savage condition':

> As the bulk of the given society is not in a habit of obedience to one and the same superior, *there is no law* … which can be called the law of that given society or community. The so called laws which are common to the bulk of the community are purely and properly customary laws: that is to say, laws which are set or imposed by the general opinion of the community, but which are not enforced by legal or political sanctions. The state which I have briefly delineated is the ordinary state of *the savage and independent societies which live by hunting or fishing in the woods or on the coasts of New Holland*. It is also the ordinary state of the savage and independent societies which range in the forests or plains of the North American continent….[21]

Here again, Austin used Indigenous Australian societies as the prime example of a society which has *no law*.

Austin thus created carefully constructed limits around what is 'properly' law. The politically organised society, equated to advanced civilisation, is central to his account. The state of nature

[16] See Lecture VI: Austin (n 10) 153. See also the discussion in WL Morison, 'Introduction' in Austin (n 10) xvi.
[17] Austin (n 10) 153.
[18] Ibid 156.
[19] Ibid 154.
[20] Ibid 154 (emphasis added).
[21] Ibid 157–8 (emphasis added).

is conceived of in opposition to the civilised political state, and placed outside the conceptual confines of law. Austin clearly portrayed Indigenous Australian societies as the archetype of the state of nature, deliberately and expressly excluding them from having 'law'.

Consisting of a portion of Austin's lectures delivered between 1829 and 1833 at the newly opened University of London,[22] *The Province of Jurisprudence Determined* was first published in 1832 — just prior to the foundational cases for the application of terra nullius to Australia (*MacDonald v Levy*[23] in 1833 and *R v Murrell*[24] in 1836). It is unknown whether Austin's work had any influence on the judgments of the New South Wales Supreme Court in those cases. Certainly, the major ingredients of the reasoning in the *Murrell* and *Ballard* decisions — the use of the social contract device and state of nature–civil society dualism — are consistent with his theory. So too, the depiction of local Indigenous laws as tribal law, but not 'law', was consistent with his statement that the 'so called laws' of the Indigenous societies of New Holland were merely customary laws and not properly 'law' at all. However, these key features, while consistent with, are not unique to Austin's theory — although he was one of the first British theorists to single out Indigenous Australian societies as the epitome of the lawless state of nature. Since *The Province of Jurisprudence Determined* did not receive widespread recognition until it was republished posthumously in 1861,[25] it is arguable that Austin's theory had no influence on the decisions of the NSW Supreme Court in the 1830s.

However, Austin was not entirely unconnected to the declarations of terra nullius made in England and in the colony of New South Wales during the 1820s and 1830s. One of Austin's few close friends was Sir James Stephen,[26] the highly influential permanent undersecretary of the Colonial Office.[27] Stephen had been the author of one of the very first statements of terra

[22] See Rumble (n 15); Lotte Hamburger and Joseph Hamburger, *Troubled Lives: John and Sarah Austin* (University of Toronto Press, 1985) 53–60. Austin was appointed Professor of Jurisprudence and the Law of Nations at the University of London, which opened in 1828: Hamburger at 33.

[23] (1833) 1 Legge 39; [1833] NSWSupC 47.

[24] (1836) 1 Legge 72; [1836] NSWSupC 35.

[25] That Austin's work had a legacy at all is largely due to the efforts of his wife, Sarah Austin, in republishing after Austin's death his *The Province of Jurisprudence Determined* and publishing the lectures in the 1860s; Sarah's 'achievement was not so much to perpetuate his reputation as to establish it': Hamburger (n 22) 192.

[26] Ibid 98.

[27] Stephen had worked as legal counsel for the Colonial Office since 1813, and in 1825 accepted the post of permanent counsel to the Colonial Office and Board of Trade. In 1834, he was appointed assistant under-secretary of state for the colonies and in 1836 under-secretary of state for the colonies (giving up his position

nullius, the 1822 legal opinion for the Colonial Office on the status of the New South Wales colony, in which he had confirmed that New South Wales had been acquired 'neither by conquest nor cession, but by the mere occupation of a desert or uninhabited land'.[28] Stephen also had a close relationship with at least two of the judges of the New South Wales Supreme Court, Chief Justice Forbes and Stephen's own uncle, Justice John Stephen. James Stephen had formed 'an enduring association' with Sir Francis Forbes when they worked together at the Colonial Office prior to Forbes taking up his position as the first Chief Justice of the newly established Supreme Court of New South Wales in 1824.[29] Stephen's uncle, John Stephen, owed his appointment as first puisne judge of the Supreme Court to his nephew James' influence at the Colonial Office,[30] and joined Chief Justice Forbes on the Supreme Court just a year after its establishment.[31] They were joined by Justice James Dowling in 1828.[32] Justice John Stephen had retired in 1832 and it was his replacement, Justice William Burton, who sat with Forbes and Dowling on the *MacDonald v Levy* and *Murrell* cases. Given Austin's firm friendship with James Stephen, and Stephen's close relationship with two of the judges, there is a possibility that word of Austin's theory had reached the members of the NSW Supreme Court during the late 1820s and early '30s.

Whether or not Austin's theory had any influence on the early statements of terra nullius, it was immensely influential by the time of the Privy Council's affirmation in *Cooper v Stuart* in 1889,[33] that New South Wales had been 'without settled inhabitants or settled law' at the time of British colonisation.

---

in Board of Trade). His influence over colonial policy was so great that so that he was said to have 'literally ruled the colonial empire', earning the sobriquet 'King Stephen': Leslie Stephen, 'Stephen, James (1789–1859)' 54 *Dictionary of National Biography, 1885–1900* 163, 163 <https://en.wikisource.org/wiki/Stephen,_James_(1789-1859)_(DNB00)>; JE Egerton, 'Stephen, Sir James (1789–1859)' *Australian Dictionary of Biography* < http://adb.anu.edu.au/biography/stephen-sir-james-2694>; Samuel Clyde McCulloch, 'James Stephen and the Problems of New South Wales, 1838–1846' 26(4) *Pacific Historical Review* 353, 353.

[28] J Stephen, 'Validity of Statute, 20 George II, c 19 in the Colony' (1822) in Frederick Watson (ed) *Historical Records of Australia* (1922) Series 4, Vol 1, 412, 414.

[29] CH Currey, 'Forbes, Sir Francis' (1784–1841) 1 *Australian Dictionary of Biography* (first published 1966) <http://adb.anu.edu.au/biography/forbes-sir-francis-2052>.

[30] CH Currey, 'Stephen, John (1771–1833)' 2 *Australian Dictionary of Biography* (first published 1967) <http://adb.anu.edu.au/biography/stephen-john-1292>.

[31] Ibid.

[32] TD Castle and Bruce Kercher, *The Dowling Legacy: Foundations of an Australian Legal Culture 1828 to 1844* (Francis Forbes Society for Australian Legal History, 2005) 5.

[33] *Cooper v Stuart* (1889) 14 App Cas 291.

The influence of Austin's work on British and Anglo-Australian jurisprudence has been well documented.[34] As HLA Hart wrote in 1954, 'Austin's influence on the development in England of the subject has been greater than any other writer. For English Jurisprudence has been and still is predominantly analytical in character'.[35] Neil Duxbury, writing of developments in English jurisprudence in the century between Austin and Hart, notes that English jurisprudence during that time was so dominated by Austin's legacy, that the only alternative perspective of any note was the historical jurisprudence developed by Maine (which, as Duxbury points out, is today barely mentioned in textbooks on the subject).[36] Such was the dominance of the tradition inspired by Austin's work, that 'from the mid-nineteenth century onwards, there were few English jurists who were not, in some way or another, influenced by Austin'.[37]

Austin's legacy was the dominance of positivist analytical jurisprudence in British legal theory. The clear demarcation of what is properly 'law' from other normative systems — moral, ethical, religious and customary — was virtually unchallenged.[38] However, the purely conceptual analysis of fundamental legal ideas that was inspired by Austin involved a significant narrowing of his approach to jurisprudence.[39] The idea of Austin as 'the founder of a theoretical jurisprudence that did not depend upon empirical research', has been entrenched in the juridical mindset since at least the late 19th century.[40] Recent scholarship has challenged this accepted view of Austin and demonstrated the extent to which Austin was an unapologetic, if flawed, empiricist.[41] Austin's limited empiricism enabled him to use his British perception of

[34] See generally Rumble (n 15); WL Morison, *John Austin* (Edward Arnold, 1982); Neil Duxbury, 'English Jurisprudence between Austin and Hart' (2005) 91(1) *Virginia Law Review* 1.
[35] Hart (n 9) xvi.
[36] Duxbury (n 34) 2.
[37] Ibid 16.
[38] Rumble points out that while the widespread acceptance of the positivist separability thesis was 'Austin's most enduring legacy to English jurisprudence', that acceptance paradoxically often involved critique of Austin: Rumble (n 15) 191.
[39] Ibid; Morison (n 34).
[40] Cosgrove charts the development of this conception of Austin, pointing out that it was John Stuart Mill's influential review article in 1863, suggesting that Austin's theory was an attempt to 'construct a system of knowledge by deductive means', which was partly responsible. Certainly by the late 19th century, the view of Austin as 'simply an analyst of fundamental legal ideas without any wider range of interests' had become 'enshrined in the jurisprudential tradition': Richard A Cosgrove, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (New York University Press, 1996) 102–3.
[41] Rumble (n 15); Morison (n 34). Morison claimed that 'Neo-Austinian thinking has resorted to various forms of rationalism in an effort to defend Austin's empirical propositions from empirical attack and thus has saved some of Austin's conclusions at the expense of his empirical framework': WL Morison, 'Some Myth about Positivism' (1958) 68(2) *The Yale Law Journal* 212, 230. Rumble points out that 'Austin's commitment to this

Indigenous Australian societies to portray them as the archetypal state of nature (in contradistinction to the putatively advanced civilisation of British society and law). By excluding the law of Indigenous Australian societies from the concept of 'law', Austin thus denied them even the possibility of law.

C In Conclusion: The Early Decades (1770–1850)

From the time of first contact with Indigenous Australian peoples in the late 18th century, British jurists referred to Indigenous Australian societies and law as 'evidence' of the origins of law. During the early decades of colonisation, two very different styles of legal theory presented the origins of law either as the earliest stage in legal evolution or as an analytically prior condition. In each of these theories, Indigenous Australian societies and law were explicitly cited as examples of the original state of society and law. Indigenous Australia had replaced Indigenous America as representative of the primitive 'other' in British jurisprudence.

III. HISTORICAL JURISPRUDENCE AND LEGAL PRIMITIVISM

The latter half of the 19th century was distinguished by the burgeoning popularity of evolutionary theories. 1861 saw the publication of Sir Henry Maine's *Ancient Law*,[42] regarded by legal theorists as the inaugural work of the English school of historical jurisprudence, and by anthropologists as one of the foundations of legal anthropology. In textbooks on jurisprudence, English historical jurisprudence is considered to begin and (almost) end with Maine. Virtually forgotten, or at least discounted, in the annals of legal theory is a body of evolutionary theories of law which form the beginnings of legal anthropology. In this section of the chapter, I appraise (for their depiction of Indigenous Australian law) the major works of English historical jurisprudence and early developments in British legal anthropology that were produced during the period 1860 to 1925.

epistemology [empiricism] was qualified and imperfect, if not contradictory. Nevertheless, a very favourable attitude towards empiricism underlies much of his work': Rumble at 135.

[42] Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (John Murray, 1861). Pinpoint references are to the reprint of the 1861 edition by Thoemmes Press: Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (first published 1861, 1996 reprint of 1861 edition, Thoemmes Press, 1996).

A Sir Henry Maine

The publication of Maine's *Ancient Law* in 1861 coincided with the posthumous republication of Austin's *The Province of Jurisprudence Determined.* Both works were immediately immensely popular.[43] They were both still influential in 1889, when the Judicial Committee of the Privy Council handed down its decision in *Cooper v Stuart*. Maine was critical of Austin's theory on the basis that it was only valid for contemporary Western European societies, and 'inapplicable to many other non-Western, or pre-modern, organised political societies'.[44] He was especially critical of theories of social contract and natural law, seeking instead to develop an understanding of law through an exploration of its historical development.

Maine traced the evolution of law through the history of Indo-European societies,[45] relying upon Greek, Roman, biblical and European sources. For evidence of the earliest legal conceptions, he turned to the epic poems of Homer, 'not as a history of actual occurrences, but as a description, not wholly idealised, of a state of society known to the writer'.[46] As Maine's theory was restricted to Indo-European peoples, Indigenous Australian peoples do not feature in it.

Maine divided the history of law into six main phases. In the early three stages, law is stationary and capable of only gradual evolution;[47] it cannot be explicitly changed by a deliberate act.[48] The (in)capacity of law to change was, for Maine, the defining feature that distinguished the early stages in evolutionary progression from the later stages. He perceived the stagnation of law at a primitive stage as the norm.[49] His later three stages, which feature diverse means of enabling change in the law as a response to social change, were applicable only to 'progressive societies', which Maine argued were extremely rare.[50] The notion that 'primitive law' was

[43] Rumble (n 15) 132.
[44] Ibid 151. However, Rumble argues that Maine's attitude to Austin was complimentary in many respects: at 132–169. See also Hart (n 11) xi.
[45] Cosgrove points out that Maine's concentration on Indo-European peoples may have been due to 'the contemporary interest in comparative philology': Cosgrove (n 40) 91.
[46] Maine (n 42) 2.
[47] Ibid 23–4.
[48] Ibid 21.
[49] Ibid 22–4.
[50] Ibid. Maine appears to have perceived evolution from stagnation to progression as a fortuitous and almost inexplicable circumstance. Although he contended that the progressive societies were extremely rare, he does not seem to have based this 'progression' on the inevitability of evolutionary development or upon racial superiority: see, eg, the discussion in Alan Diamond (ed) *The Victorian Achievement of Sir Henry Maine:*

stationary, and only capable of gradual change over time, was to pervade British jurisprudence until the time of Hart.

B Legal Primitivism

Ancient Law was followed by a flurry of publications on 'primitive law' and 'primitive society' during the 1860's and '70s.[51] Largely as a reaction against the analytic device used by the Enlightenment philosophers, legal and ethnological scholars produced theories of the evolution of law and society.[52] Instead of the philosophical concept of an original or natural state, these scholars sought an understanding of the culture and institutions of a society through the history of its traditions.[53] Empirical data replaced analytic philosophy as the epistemology of choice.[54]

In an era in which evolutionary theories were becoming increasingly popular,[55] these works were explicitly evolutionist. They were characterized by the search for the origins of Western law, and operated under what has been described as a 'paradigm of loss'.[56] Most of the writers were not just legally but also classically trained,[57] so Roman law and the classics of Ancient Greece, Rome, and the Levant formed the basis for their theories of social and legal evolution.[58] With the exponential growth of colonialism in the latter part of the century, this evidence was complemented by ethnographic information about contemporary Indigenous societies, which were perceived to exist in a condition resembling the pre-history of Western society.[59] As

A Centennial Reappraisal (Cambridge University Press, 1991). Despite the apparent correlation between Maine's theory of legal evolution and Darwin's *Origin of the Species*, which had been published two years earlier than Maine's *Ancient Law*, Stein points out that Maine's lectures which formed the basis for *Ancient Law* had in fact been drafted earlier and could not therefore have been influenced by the publication of Darwin's well-known work: Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press, 1980) 88.

[51] Authors such as JJ Bachofen, JF McLennan, EB Tylor and Lewis Henry Morgan produced theories of the evolution of law and society.

[52] Scholars such as EB Tylor and JF McLennan. Stein points out that McLennan pre-empted Maine's 'status to contract' principle of legal evolution: Stein (n 48) 85.

[53] Kaius Tuori, *Lawyers and Savages: Ancient History and Legal Realism in the Making of Legal Anthropology* (Routledge, 2015) 54.

[54] Ibid.

[55] Evolutionary theories dominated the social sciences in the latter half of the 19th century: Norbert Rouland, *Legal Anthropology* (Athlone Press, 1994) 24. Herbert Spencer's theory of social evolution, for example, was published as *First Principles of a New System of Philosophy* in 1862. Spencer later considered the implications of social evolution for law in *Justice* (1891).

[56] Rouland (n 55) 54.

[57] Ibid.

[58] Ibid.

[59] For example, German comparative lawyers and legal ethnologists, Josef Kohler and Albert Herman Post, gathered large quantities of ethnographical data from German colonial sources. They formulated universal theories of legal ethnology and produced vast comparative studies during the 1880s and 1890s.

ethnographic data was gathered from colonial sources, this information was interpreted and presented in ways that conformed to pre-existing ideas of the origins of Western law.[60]

The ethnographic material relied upon by scholars in this era is now regarded as methodologically unsound.[61] Potential bias in the collection of data was compounded by the evolutionary theoretical framework used by the scholars.[62] According to evolutionism, all societies pass through the same stages of social, economic and legal development.[63] Unilinear theories of evolution prescribe a certain order in which these phases take place.[64] Progression through each stage is characterized by a general increase in complexity, with 'simple' societies at the lowest stage and highly complex societies at the highest end of the scale.[65] Contemporary Indigenous and tribal societies were perceived to be simpler than European societies, with some peoples being assessed as simpler, and thus lower on the scale, than others.

Legal ethnologists were interested in how order was maintained in societies with no apparent politico-legal structure. Their studies suggested that far from being anarchical, as had previously been thought, 'acephalous' communities were highly ordered. The question of how order was maintained in the absence of Western legal apparatus was initially answered by suggesting that customs and traditions were followed automatically.[66] The main features of these early studies were the notion of unquestioning adherence to custom (which was assumed to be non-legal), the role of group attitudes in enforcing the 'customary' rules, the influence of religion and superstition in those group attitudes, and the relatively stable and unchanging nature of 'customary law'.

A now almost forgotten work by Sidney Hartland encapsulates the methodology and assumptions of this era. Hartland was a British lawyer, amateur anthropologist and folklore scholar in the evolutionist tradition.[67] *Primitive Law* is a work of comparative legal ethnology, written from an explicitly evolutionist perspective. Hartland used extensive examples from

[60] Tuori (n 53).
[61] Simon Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (Penguin, 1979) 189.
[62] Rouland (n 55) 24.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Roberts (n 61) 190.
[67] RR Marett, 'Edwin Sidney Hartland' (1927) 38(1) *Folklore* 83; JL Myres, 'Edwin Sidney Hartland' (1927) 27 *Man* 143.

ethnographic literature and cited an encyclopaedic array of studies of Indigenous peoples from all over the globe. The book contains numerous references to Indigenous Australians.[68]

Hartland described his subject matter as the study of order in societies lower on the evolutionary scale: 'the rules which govern societies in the lower culture'.[69] Information about contemporary Indigenous societies was interpreted as evidence, together with European historical sources, of the early stages of human history and social evolution. Throughout the work, he referred to some societies as being 'higher' or 'lower' than others, and generally referred to 'Australian Blackfellows' as among the 'lowest peoples'.[70]

According to Hartland, 'primitive' law is indistinguishable from religious, moral or superstitious mores; it 'is in truth the totality of the customs of the tribe'.[71] He subscribed to the view that 'primitive' peoples are 'bound hand and foot' to follow traditional customs.[72] Like Maine, he believed that those customs remained stagnant and could only evolve very slowly and gradually.[73]

Hartland's *Primitive Law* filled 'a long existent gap in the literature of the subject in English',[74] as many of the works of comparative legal ethnology had been published in Europe.[75] However, by the time it was published in 1924, the evolutionist school of thought was losing popularity, and the comparative method of legal ethnology was being superseded.[76]

[68] Aboriginal peoples referred to in Hartland include the Gamilaraay (Kamilaroi), Gunai (Kurnai), Yuin, Butchulla, Arrernte, Anmatyerr, Kaytetye, Warumungu, Luritja, Arabana, Warumungu, Djargurd wurrung, Ngarrindjeri, Dja dja warrung (Jajaurung), Bunganditj (Boandik) nations.

[69] Edwin Sidney Hartland, *Primitive Law* (Methuen, 1924) 8.

[70] See, eg, ibid 74, 126.

[71] Ibid 5.

[72] Ibid 78.

[73] Ibid 200–202. The one exception is caused by contact with Europeans: at 200.

[74] HE Barnes, 'Hartland, Primitive law' (1925) 4(1) *Social Forces* 196, 198.

[75] The vast studies produced by Josef Kohler and Albert Herman Post, for example.

[76] See, eg, the critical review in Barnes (n 74). Tuori has said of Hartland's book that it was 'the last testament of legal primitivism': Tuori (n 53) 94.

C Historical Jurisprudence: Sir Paul Vinogradoff

One of Sir Henry Maine's successors to the Corpus Chair of Jurisprudence at Oxford,[77] Sir Paul Vinogradoff was an erudite and cosmopolitan historian and comparative jurist,[78] but not formally a lawyer.[79] Inspired in part by Maine,[80] he undertook a vast work of historical and comparative jurisprudence.

Vinogradoff's unfinished magnum opus, *Outlines of Historical Jurisprudence*,[81] was a study of various types of law at different developmental stages. Conscious to avoid the generalizations which had been criticized in Maine's work,[82] he 'used all his great learning and his great intellectual powers to map and chart accurately the ground which Maine had only surveyed'.[83] Vinogradoff had not intended to cover the entire field, however, but to study 'ideological types' occurring throughout history — that is, historical types treated in ideological rather than chronological order.[84] Despite acknowledging that his scheme was 'restricted in the main to the evolution of juridical ideas within the circle of European civilisation',[85] Vinogradoff nevertheless insisted that 'in tracing earlier stages it is bound to take into account materials collected by anthropological inquiries from a wider range, in fact from all inhabited parts of the world'.[86] He justified his use of anthropological materials as evidence of the earliest stages in

[77] Vinogradoff is regarded as the most significant of Maine's successors to the chair of jurisprudence in terms of his contribution to historical and comparative jurisprudence. Maine had in fact been succeeded as Corpus Professor of Jurisprudence at Oxford in 1883 by Sir Frederick Pollock, remembered as a great common law jurist rather than a jurisprudent: Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004). Vinogradoff succeeded Pollock to the chair in 1903: FH Lawson, *The Oxford Law School: 1850–1965* (Oxford at the Clarendon Press, 1968) 109.

[78] Vinogradoff was described by Gierke as '*der Mann der alle Rechte kennt und alle Sprachen spricht*' (the man who knows all laws and speaks all languages): F de Zulueta, 'Paul Vinogradoff, 1854–1925' (1926) 42 *Law Quarterly Review* 202, 209. See also WS Holdsworth, 'Professor Sir Paul Vinogradoff 1854- 1925' 11 *Proceedings of the British Academy* (1924-5) 487; HAL Fisher, 'Paul Vinogradoff: A Memoir' in *The Collected Papers of Paul Vinogradoff* (Oxford at the Clarendon Press, 1928) vol 1, 3; WS Holdsworth, 'Sir Paul Vinogradoff: The Scholar' (1926) 4 (12) *The Slavonic Review* 529, 544.

[79] Peter Stein, 'Vinogradoff, Sir Paul Gavrilovitch [Pavel Gavriilovich Vinogradov] (1854 –1925)' *Oxford Dictionary of National Biography* (23 September 2004) <https://doi.org/10.1093/ref:odnb/36664>.

[80] Vinogradoff, Paul, 'The Teaching of Sir Henry Maine' in Paul Vinogradoff, *The Collected Papers of Paul Vinogradoff*, ed HAL Fisher (Oxford at the Clarendon Press, 1928) vol 2, 173, 174; Holdsworth (n 76) 486, 491.

[81] Paul Vinogradoff, *Outlines of Historical Jurisprudence* (Oxford University Press, 1920–22). Only the first two volumes were published before his death. These volumes covered the first three of Vinogradoff's six legal types.

[82] Vinogradoff, 'The Teaching of Sir Henry Maine' (n 80) 173, 189; see also Vinogradoff's discussion of Maitland's criticism of Maine: Paul Vinogradoff, *Outlines of Historical Jurisprudence: Volume I Introduction—Tribal Law* (Oxford University Press, 1920) 147 ('*Historical Jurisprudence: Volume I*').

[83] Holdsworth (n 78) 486, 491.

[84] Vinogradoff, *Historical Jurisprudence: Volume I* (n 82) 158–160.

[85] Ibid 158.

[86] Ibid.

legal evolution on the basis that the 'most rudimentary forms of culture' provide 'simpler combinations and more clearly defined natural conditions' and the multiplicity and variety of studies 'offer welcome opportunities for comparative investigation'.[87]

Vinogradoff's scheme consisted of six 'types' of law at various stages of legal development. The first was pre-legal and the second 'tribal law'.[88] These earliest historical types were followed by civic law, medieval law, individualistic jurisprudence, and beginnings of socialistic jurisprudence respectively.[89] The pre-law type, a study of the 'origins' of law in totemistic society, was based predominantly on ethnographic studies of Australian Aboriginal societies.[90] In comparison, his sources for the following type, 'tribal law', which involved decisions of chiefs, were the Homeric epics and Caesar's writings on the ancient Germanic tribes. The law of contemporary Indigenous Australian peoples was thus unequivocally positioned at an evolutionary stage prior to the very beginnings of law and predating thousands of years of European legal development.

D The End of an Era

In summary, the decades spanning the turn of the 20th century had seen the flourishing of 'legal primitivism', in which ethnographic information about contemporary Indigenous societies was used to supply the quest for evidence of the origins of Western society and law. The obvious circularity — that the ethnographic studies, which were influenced by pre-existing ideas of the origins of Western law, were in turn used as 'evidence' of those very origins — demonstrates the deeply embedded constructedness of the concept of 'primitive' in contrast to the notion of 'civilisation'. One of the features allocated to the construction of the primitive during this period was to prove remarkably resilient in 20th century legal theory: namely the alleged incapacity to effect legal change.

---

[87] Ibid 138.

[88] Ibid 158.

[89] Ibid.

[90] The studies cited by Vinogradoff include NW Thomas, *Kinship Organization and Group Marriage in Australia* (1906); AW Howitt, 'The Dieri and Other Kindred Tribes of Central Australia' (1891) 20(1) *Journal of the Anthropological Institute of Great Britain and Ireland* 30; Baldwin Spencer and Francis Gillen, *The Northern Tribes of Central Australia* (1904); Baldwin Spencer and Francis Gillen, *Across Australia* (1912); H Ling Roth, *The Aborigines of Tasmania* (1890); RH Matthews, *Notes of Some Native Tribes of Australia* (Royal Society of New South Wales, 1906).

In British legal thought during this period, Indigenous Australian societies were portrayed as living proof of the primal origins of law itself. Positioned at opposing ends of an evolutionary scale, Indigenous Australian legal organisation was conceptualised as the antithesis of British law, which represented the peak of civilisation and the pinnacle of legal evolution.

By the mid-1920s, with disciplinary developments in anthropology and the diminishing popularity of the unilinear model of evolutionary theory, the historical and comparative school of jurisprudence was in decline. Vinogradoff's death in 1925 effectively marked its demise, and Oxford would thereafter be dominated by the analytical school.[91] The notion of legal evolution, however, was to remain influential in British and Anglo-Australian legal thought.

IV. INFLUENCES ON MID-20TH CENTURY ANGLO-AUSTRALIAN JURISPRUDENCE

The period from 1926 to the end of the Second World War coincided with the formative stage of the academic careers of the jurists cited by the High Court in *Yorta Yorta*. The major developments in Anglo-Western jurisprudence during that time were happening not in England, however, but in the United States. The sociological jurisprudence emerging in America at that time would prove to have a significant influence on Australian jurisprudence in the mid-20th century. Accordingly, the scope of this section of the chapter extends beyond British and Anglo-Australian jurisprudence to take those influences into account.

A Roscoe Pound

Well-known American sociological jurist, Roscoe Pound, took a teleological approach to legal evolution, in that he assumed that law evolved to achieve an ultimate goal or purpose.[92] He was critical of Vinogradoff's division of ideological types of law, arguing that they were based not upon *legal* organisation, but upon *socio-political* organisation (and the two are not coincident).[93] According to Pound, legal order ought to be studied by reference to types of legal,

[91] Duxbury attributes the dominance of analytical jurisprudence to a number of factors, including the stultifying effect of Austin's long shadow, the failure of historical jurisprudence to fulfil the 'epistemic requirements' of the evolving university culture, the nature of the nascent university law faculties, and the relative strength of the legal profession vis-à-vis the legal academy: Duxbury (n 34).

[92] In this, Pound was influenced by the philosophies of Kant and Hegel: Roscoe Pound, *Jurisprudence* (West Publishing Co, 1959) vol I, IX ('*Jurisprudence*').

[93] Pound thought that the law derives chiefly of traditional materials, art, and ideals 'transmitted and developed by teaching, which are continually but gradually reshaping to meet condition of the time and place. The political conditions of the time by no means give them character, although they do exert a gradual influence in remaking them': ibid 367.

as opposed to political, ordering.[94] He proposed an understanding of the teleological end of law by examining the development of all legal systems.[95] To that end, he developed an evolutionary scheme 'which explained the growth of all legal systems', and 'suggested that law had an internal dynamism impelling it toward an ultimate goal'.[96] Pound conceptualised five ideological stages of legal development, from 'primitive law' through to the 'socialisation of law'.[97]

Pound argued that 'law, in the analytical sense, arises in the transition from a kin-organised society to a politically organised society'.[98] He therefore proposed a pre-legal state in kin-organised society, prior to the first 'primitive law' stage (similar to Vinogradoff's sequence of 'tribal law' following 'origins in totemistic society'). In relation to the emergence of 'primitive law' from the 'origins of social control' in kin-organised societies, Pound cited excerpts from Vinogradoff,[99] Seagle,[100] and Hartland.[101] As each of these excerpts explicitly refer to Indigenous Australians societies, it is clear that Pound, like Vinogradoff, perceived that Indigenous Australian societies represented a pre-law stage of social control prior to the very earliest phase of legal evolution.

B Developments in Legal Anthropology

The publication of Bronislaw Malinowski's *Crime and Custom in Savage Society* in 1926 is generally regarded as marking a turning point in legal anthropology.[102] Malinowski revolutionised both the methodology of field work and the theoretical analysis of the

[94] Ibid.

[95] Roscoe Pound, 'The End of Law as Developed in Legal Rules and Doctrines' (1914) 27 *Harvard Law Review* 195 ('The End of Law'); Roscoe Pound, *Outlines of Lectures on Jurisprudence* (Cambridge Harvard University Press, 5th ed, 1943) part 2 (*Lectures*); Pound, *Jurisprudence* (n 92) ch 7.

[96] David Wigdor, *Roscoe Pound: Philosopher of Law* (Greenwood Press, 1974) 215.

[97] Pound, 'The End of Law' (n 95); Pound, *Lectures* (n 95) 40–8. In later work, Pound envisaged the possibility of a further stage, 'A Law of the World': Pound, *Jurisprudence* (n 92) 367–457.

[98] Law can also arise from the transition from religious to political social control: Pound, *Jurisprudence* (n 92) 369. For a broad overview of Pound's work in relation to 'primitive law', see Edward B McLean, *Law and Civilisation: The Legal Thought of Roscoe Pound* (University Press of America, 1992).

[99] The reference to Vinogradoff is to the first two stages: 'origins in totemistic society' and 'tribal law' in Paul Vinogradoff, *Historical Jurisprudence: Volume I* (n 82) 163–369.

[100] For a discussion of Seagle's work in this context, see below. The excerpt cited by Pound is William Seagle, *The Quest for Law* (Alfred Knopf, 1941) 27–149.

[101] Pound cites the entire book of Hartland (n 69). Pound also cites Post, Hobhouse, Malinowski's introduction to Hogbin's *Law and Order in Polynesia*, and Llewellyn and Hoebel's *The Cheyenne Way*: Pound, *Lectures* (n 95) 40.

[102] Roberts (n 61) 190; cf Tuori (n 53).

maintenance of order.[103] He was the first to acknowledge that 'law' may consist in a whole range of social phenomena beyond those recognized by Western legal systems.[104] He argued that law ought to be defined by function and not by form, and emphasised that 'deviance and resistance are to be found in *all* legal systems'.[105]

The period following the publication of Malinowski's work was characterized methodologically by a rise in anthropological field work and theoretically by two parallel approaches to understanding law and order — one which remained constrained by Western legal concepts, and another (influenced by Malinowski) which took a broader approach to questions of order and dispute.[106] The former approach continued to perceive law in Western terms, as consisting in norms or rules.[107] Under this approach, normative behaviour was considered 'normal', deviance not. Centralised institutions were considered necessary to promulgate rules and centralised sanctions for deviance, and conflict resolution was determined by the application of norms or rules.[108] Under the broader, more holistic approach, deviance and conflict were seen as 'normal'.[109] Studies taking this approach focused on processes by which conflicts were resolved,[110] and rejected a Western legal framework for their analysis.[111]

The rule-centred approach gathered momentum throughout the 1930s and '40s, and continued into the 1950s. With the rejection of the notion of automatic obedience to custom, there had been a rise in seeing Western-type 'law' in Indigenous communities.[112] Many field studies presented the law of these communities as 'an affair of rules, courts and enforcement agencies, the whole operating very much in the manner of our own legal system'.[113] These studies

[103] See Roberts (n 61) 191.
[104] John M Conley and William M O'Barr, 'Back to the Tobriands: The Enduring Influence of Malinowski's Crime and Custom in Savage Society' (2002) 27(4) *Law and Social Inquiry* 847, 867.
[105] Ibid 867. See also I Schapera, 'Malinowski's Theories of Law' in Raymond Firth (ed), *Man and Culture: An Evaluation of the Work of Bronislaw Malinowski* (Routledge, 1957) 139–155.
[106] Roberts (n 61); Rouland (n 55).
[107] Rouland (n 55) 37.
[108] Ibid.
[109] Ibid.
[110] Ibid 40.
[111] Roberts (n 61) 198.
[112] Rouland (n 55) 38; Roberts (n 61) 192.
[113] Roberts (n 61) 192. Roberts identifies two major 'pitfalls' of attempting to pigeonhole Indigenous systems of social order into Western legal categories: first, the identification of material which is 'legal' involves a differentiation which is not found in the society concerned, and secondly that material may be distorted when 'compressed into a "legal" mould'.

produced lists of rules categorized according to concepts found in Western legal systems.[114] The majority of these studies reflect the assumption 'that this normative material bears the characteristics of legal rules, and that individual norms are effective to determine the outcome of disputes in which they are invoked'.[115] Not surprisingly, many of these inventories were used (and indeed some commissioned) as manuals in colonial administration.[116]

One of the major works of legal anthropology from this period combined aspects of the law-centred approach with broader issues of social control.[117] Llewellyn and Hoebel's *The Cheyenne Way*[118] took a normative approach in that it was 'concerned with how legal rules are formulated and changed and with how disputes are "judged"'.[119] However, it broke with disciplinary, methodological tradition by intensively studying disputes for the first time.[120] Another influential work that combined the normative approach with the studying of disputes, Gluckman's *The Judicial Process among the Barotse of Northern Rhodesia*,[121] would be published in 1955. Both of these works, together with Malinowski's *Crime and Custom in Savage Society*, would later be cited by HLA Hart in *The Concept of Law*.[122]

C Neo-Evolutionary Legal Theories

Studies of order in Indigenous communities were also utilised during this period in a variation of evolutionary theory. While rejecting the notion of a unilinear evolutionary path, neo-evolutionary works described a general 'transition from the simple to the complex' using comparative stages of socio-economic and legal development.[123] This approach was epitomised by the works of two lawyers on either side of the Atlantic. British barrister Alan Diamond and American attorney William Seagle were both practising lawyers, who perpetuated the use of

[114] Roberts (n 61) 192; Rouland (n 55) 238.
[115] Roberts (n 61) 192.
[116] Ibid; Rouland (n 55) 38.
[117] Roberts (n 61) 197; Rouland (n 55) 38.
[118] KN Llewellyn and EA Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, University of Oklahoma Press, 1941).
[119] Roberts (n 61) 197.
[120] Ibid.
[121] M Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (Manchester University Press, 1955).
[122] HLA Hart, *The Concept of Law* (Oxford Clarendon Press, 1961) 244. See Chapter Six.
[123] Rouland (n 55) 34.

ethnographic information about Indigenous peoples as evidence of earlier stages in legal evolution.

Although his subject matter was law from its earliest, pre-history beginnings,[124] Diamond's sources of information were observations 'by past and present authors, of the life and laws of the primitive peoples surrounding them'.[125] He followed a scale developed by Hobhouse, Wheeler and Ginsberg, which organised societies into grades according to mode of production, such as hunters (at the lower end of the scale), pastoralists and agriculturists (at the high end).[126] Indigenous Australians were placed in the lowest grade, that of Lower Hunters,[127] and comprise the vast majority of peoples listed in that category in Hobhouse, Wheeler and Ginsberg's work.[128] In Diamond's discussion of law 'before the evolution of courts',[129] he cited 'the Australian aboriginal communities of the Stone Age' as examples of 'communities standing at the lowest grades of progress'.[130]

Diamond argued that 'custom' in Indigenous societies cannot be classed as law.[131] Most of the customary rules will never become law, with only a handful of rules 'in the direct line of the history of law' which are merely 'traces of the beginnings' of law. In his later work Diamond maintained the neo-evolutionary approach,[132] and continued to explicitly place Indigenous Australians in the earliest stage or stages.[133]

[124] AS Diamond, *Primitive Law* (Watts, 1935) 1 ('*Primitive Law*'). *Primitive Law* went into a second edition in 1950, and was followed by AS Diamond, *The Evolution of Law and Order* (Watts & Co, 1951) ('*Evolution of Law and Order*') and AS Diamond, *Primitive Law: Past and Present* (Methuen, 1971) ('*Past and Present*').

[125] Diamond, *Primitive Law* (n 124) 5.

[126] Hobhouse, Wheeler and Ginsberg studied correlations between socio-political institutions and 'stages of economic culture': LT Hobhouse, GC Wheeler and M Ginsberg, *The Material Culture and Social Institutions of the Simpler Peoples: An Essay in Correlation* (Chapman and Hall, 1915) 7.

[127] LT Hobhouse, GC Wheeler and M Ginsberg, *The Material Culture and Social Institutions of the Simpler Peoples; An Essay in Correlation* (Chapman & Hall, 1930) 31, 32.

[128] Ibid 30–32.

[129] Diamond, *Primitive Law* (n 124) 185.

[130] Ibid.

[131] Ibid 191.

[132] Diamond, *Evolution of Law and Order* (n 124); Diamond, *Past and Present* (n 124). In the latter work, Diamond separated the anthropological materials from the historical, but maintained the approach of identifying stages in the evolution of law by approximation with economic types of society.

[133] Diamond, *Evolution of Law and Order* (n 124) 7-26; Diamond, *Past and Present* (n 124) 158, 161, 169 (food gatherers) and 173 (early hunters).

In the United States, a similar approach was taken by William Seagle, who described three main phases in the growth of law, corresponding to primitive, archaic, and mature types of law.[134] 'Primitive law', according to Seagle, 'would far better be called primitive custom, for it represents the pre-legal age, and is the "law" of those preliterate peoples who have not yet developed courts but have nevertheless recognized social rules and have discovered means of coping with social conflicts'.[135] It is 'the typical law of hunters and herdsmen who have as yet effected only the most rudimentary forms of political organization'.[136] Seagle explicitly referred to Indigenous Australian communities in relation to 'primitive law';[137] indeed, he noted that '[t]he Australian tribes are particularly good examples of political innocence.'[138]

D Law in the Making

At Oxford meanwhile, the immediate consequence of Sir Paul Vinogradoff's death was the production of a work which I argue was profoundly influential in legal education in both Britain and in Australia. Although a winner of the prestigious Swiney Prize for Jurisprudence, the legacy of CK Allen's *Law in the Making* has largely been overlooked.

Carleton Kemp (CK) Allen was an Australian lecturer in law at Oxford during the 1920s, who briefly occupied the chair of Jurisprudence:[139] appointed in 1929, he resigned to take up the position of Oxford Secretary to the Rhodes Trustees in 1931.[140] Nevertheless, his impact on the law students of Oxford was long-lasting, both through the impact of his book, *Law in the*

[134] Seagle (n 100).
[135] Ibid xv.
[136] Ibid.
[137] Ibid 28, 37, 39.
[138] Ibid 28. Indigenous Australians are also explicitly referred to in relation to primitive law at 37 and 39.
[139] Allen was a lecturer in law and jurisprudence at Oxford from 1919 until his appointment to the Chair in 1929: AL Goodhart, 'Sir Carleton Kemp Allen 1887–1966' (1967) 53 *Proceedings of the British Academy* 391, 393; ET Williams, 'Allen, Sir Carleton Kemp (1887-1966)', rev Tony Honore, *Oxford Dictionary of National Biography* (Oxford University Press, 2004); Brian Simpson, *Reflections on* The Concept of Law (Oxford University Press, 2011) 26.
[140] Allen also took on the new title of 'Warden of Rhodes House': Anthony Kenny, 'The Rhodes Trust and its Administration' in Anthony Kenny (ed) *The History of the Rhodes Trust 1902-1999* (Oxford, 2001) 1, 34; KC Wheare, 'Allen, Sir Carleton Kemp (1887 – 1966)' *Australian Dictionary of Biography* Volume 7 (MUP, 1979); Williams (n 137).

Making, and through his influence over the Rhodes Scholars,[141] many of whom were law students.[142]

Early in his career, Allen had acted as assistant to Vinogradoff, 'help[ing] to prepare several of his books, including his best-known work *Historical Jurisprudence,* for the press'.[143] Allen had also attended the regular research seminars held by Vinogradoff,[144] acclaimed and (for Oxford) innovative, continental-style seminars in research methods.[145] Following Vinogradoff's unexpected death, Allen was invited to deliver the Tagore lectures in Calcutta in his stead.[146] These lectures on the sources of law formed the basis of *Law in the Making.*[147] First published in 1927, *Law in the Making* became an instant classic and was prescribed as essential reading for generations of law students, both in the UK and in Australia.[148] In England, the conclusion of the reviewers was that 'it should be read and re-read by every law student',[149] and 'no one who aspires to think seriously about law can ignore it'.[150]

In *Law in the Making*, Allen took an explicitly evolutionary perspective on the historical development of law. Although, as was popular at the time, Allen did not commit to a particular order as being ultimately correct, he did specify an approximate order for the evolutionary

[141] As Warden of Rhodes House until 1952, Allen had contact with all the Rhodes scholars, and general oversight of their work, progress and conduct (although the primary responsibility for the scholars was with their Colleges): see Carleton Kemp Allen, 'The Rhodes Scholars and Oxford 1931–52' in Godfrey Elton (ed) *The First Fifty Years of the Rhodes Trust and the Rhodes Scholarships* (Oxford, 1956) 129, 135-6, 151.

[142] The Faculty of Law was one of the disciplines most affected in the early years of the Rhodes scholarships, as law was very popular amongst the Rhodes scholars, and the BCL (Bachelor of Civil Law) developed rapidly during this time: Francis Wylie, 'The Rhodes Scholars and Oxford 1902-31' in Elton (n 141) 93-4. Lawson wrote that it 'is probably not an exaggeration to say that for many years the Rhodes Scholars formed the backbone of the [law] school': Lawson (n 77) 111.

[143] Goodhart (n 139) 392. Allen expressed a debt of gratitude to Vinogradoff in his inaugural lecture: Carleton Kemp Allen, 'Status and Capacity' in Carleton Kemp Allen, *Legal Duties and Other Essays in Jurisprudence* (Oxford Clarendon Press, 1931) 28.

[144] Lawson (n 77) 108.

[145] The best description of these seminars is in de Zulueta (n 78), 207–8. See also Holdsworth (n 78) 486, 499-500; Fisher (n 78) 32-35, 39.

[146] Dorothy Allen, *Sunlight and Shadow* (Oxford University Press, 1960) 24; Williams (n 139); Lawson notes that Allen had 'deputised for Vinogradoff' in delivering the Tagore Lectures: Lawson (n 77) 128.

[147] Carleton Kemp Allen, *Law in the Making* (Oxford University Press, 1927). Unless otherwise specified, pinpoint references are to the 3rd edition: Carleton Kemp Allen, *Law in the Making* (Oxford, 3rd ed, 1939) ('*Law in the Making*').

[148] See below. Publication of *Law in the Making* went into seven editions, with subsequent editions appearing in 1930, '39, '46, '51, '58, and '64.

[149] DTO, 'Law in the Making. By Carleton Kemp Allen' (1928) 3(2) *Cambridge Law Journal* 324, 325.

[150] HA Hazeltine, 'Law in the Making By Carleton Kemp Allen' (1928) 44 *Law Quarterly Review* 236, 238.

development of material sources of law.[151] This approximate order consisted of custom 'as the raw material of law', judicial interpretation,[152] equity, and finally, legislation.[153]

The first chapter of *Law in the Making*, which concerns the role of custom in the historical development of the common law, begins with the notion of habit. Inferring that habit derives from instinct, Allen argued that although, in general, humans have evolved beyond purely instinctive behaviour, 'primitive' humans have barely passed that stage. Unlike Vinogradoff, Allen produced no 'evidence' from anthropological studies, referring vaguely to 'many societies of which we have evidence', and stating that 'it is not difficult to either imagine or to find definite records of [such] societies'.[154] Remarkably similar statements would be used decades later by HLA Hart.[155]

That Indigenous Australians are included in the most primitive stage of legal evolution is clear by the only reference to a specific people in the work. In an extraordinary passage, Allen wrote:

> In man, habit is not entirely automatic, though in the more primitive forms of social grouping it is very nearly so. There is not a vast difference between the automatism of an ant and the tribal habits of an Australian aboriginal; the ant, indeed, in many respects has the better of the comparison.[156]

This preposterous and extremely offensive analogy compares Indigenous Australian peoples unfavourably with insects. Indigenous Australian peoples were not just disqualified from having law; they were effectively disqualified from being human.

No evidence was adduced to support the claim of automatism. Whatever the basis for the claim, the statement remained unchanged (and virtually unchallenged) in three editions of *Law in the Making* over twenty years.[157] For English and Australian audiences, the analogy between

[151] Allen, *Law in the Making* (n 147) 60–1.
[152] Allen presented custom as preceding judicial interpretation although he acknowledged that some scholars (in an apparent reference to Maine) argued that judicial interpretation precedes custom.
[153] Allen, *Law in the Making* (n 147) 61.
[154] Ibid 64.
[155] See Chapter Six below.
[156] Allen, *Law in the Making* (n 147) 62 (emphasis added).
[157] The third edition remained the most used edition until the fifth and sixth editions in the 1950s, probably due to the shortages which affected the publication of the fourth edition during the Second World War. The statement was removed from the fourth edition in 1946, but this edition was not widely used.

Indigenous Australian peoples and ants was apparently unremarkable. *Not a single English or Australian reviewer in three decades* commented on the analogy.

While the reviews in England were full of praise, subsequent editions of *Law in the Making* drew increasingly strongly-worded criticism from the US reviewers.[158] Of the third (1939) edition, Harvard Professor of Law, Sidney Post Simpson,[159] pointed out in a long review in the *Modern Law Review* that recent developments in legal anthropology had been ignored.[160] Simpson was specifically critical of the offensive analogy.[161] The comments made by Simpson appear to have prompted the removal of the offending sentences.[162]

By the fourth edition, published in 1946, the passage had been replaced by a more generic statement, '… it is only a fine line between the instinctive behaviour of certain higher organisms and of primitive man'.[163] Although the specific reference to Indigenous Australians had been removed, the meaning remained the same. Indigenous peoples are categorised as closer to 'higher organisms' than sentient beings. The more generic sentence remained unchanged in later editions of the book.[164] Because of the substitution of the text from one edition to the next, it is clear that the meaning of the term 'primitive man' in the later editions is based upon Indigenous Australians.

There is therefore a deliberate dualism in *Law in the Making*, between the civilised common law system of Great Britain and its primitive customary origins, in which the category of 'primitive' has been constructed explicitly and exclusively from perceptions of Indigenous Australians. Indigenous Australian peoples were excluded from having law, and were virtually excluded from humanity and from sentient being.

---

[158] See, eg, Burke Shartel, 'Law in the Making by Carleton Kemp Allen, Second Edition' (1931) 29 *Michigan Law Review* 542; 'Law in the Making By Carleton Kemp Allen Second edition' (1931) 31 (4) *Columbia Law Review* 736.

[159] Simpson was a colleague of Julius Stone at Harvard and co-author with Stone of *Law and Society*: see Chapter Seven below.

[160] Sidney Post Simpson, 'English Law in the Making' (1940) 4 (2) *Modern Law Review* 121, 123.

[161] Ibid.

[162] Certainly, Allen appeared to have methodically incorporated alterations in each edition in response to the critics' reviews (for example, the new introductory section in the third edition), although one commentator noted that although Allen incorporated new material, he was reluctant to change his thesis, even if the new material appeared to indicate its necessity: AKRK, 'Law in the Making By Sir Carleton Kemp Allen Sixth Edition' (1958) 7 *International and Comparative Law Quarterly* 770, 771.

[163] Carleton Kemp Allen, *Law in the Making* (Oxford, 4th ed, 1946) 62.

[164] See, eg, Carleton Kemp Allen, *Law in the Making* (Oxford, 6th ed, 1958) 64.

It is difficult to understate the impact of the book on law students. *Law in the Making* remained prescribed reading for the degree at Oxford (and most university law schools in the United Kingdom) throughout the 1930s, '40s, '50s, and '60s. In a survey of jurisprudence teaching in Britain published in 1951,[165] *Law in the Making* was not only essential reading in almost all of the respondent law schools, it was by far the most popular text in terms of prescribed reading.[166] The book was lauded in a presidential address to the Society of Public Teachers of Law in 1953,[167] and topped HLA Hart's list of typical set texts for jurisprudence in Britain in the same year.[168] Of the sixth edition it was said that '*Law in the Making* has been essential reading for students of Jurisprudence in this country for the past thirty years. Indeed, the book has been said to be worth three questions in any Jurisprudence paper'.[169] It was still a prescribed text as late as 1974.[170] In Australia, it appears that *Law in the Making* was similarly widely used in law teaching,[171] being prescribed as late as the late 1970s.[172]

The influence of *Law in the Making* on generations of law students in England and in Australia, therefore, while difficult to quantify, has presumably been profound. Its influence on the authors and works cited by the Australian High Court in the *Yorta Yorta* judgment will be considered in the following chapters.

E In Conclusion: The Final Period (1926–1945)

The period from 1926 to the end of the Second World War saw a gradual shift away from legal primitivism in the field of anthropology, but jurists continued to view ethnographic studies of

[165] RH Graveson, 'The Teaching of Jurisprudence in England and Wales' (1951) 4 *Journal of Legal Education* 127.
[166] Ibid 135.
[167] Denis Browne, 'Reflections on the Teaching of Jurisprudence' (1953) 2 *Journal of the Society of Public Teachers of Law* 79, 84.
[168] HLA Hart, 'Philosophy of Law and Jurisprudence in Britain (1945–1952)' (1953) 2(3) *The American Journal of Comparative Law* 355, 358.
[169] O Hood Phillips, 'Law in the Making By Sir Carleton Kemp Allen Sixth Edition' (1958) 21 *Modern Law Review* 685, 687.
[170] See RBM Cotterrell and JC Woodliffe, 'The Teaching of Jurisprudence in British Universities' (1974) 13 *Journal of the Society of Public Teachers of Law* 73.
[171] In the 1960s, Melbourne law lecturer Frank Maher wrote of Allen and *Law in the Making*, '[t]hrough his Oxford students, who have since taught here, it has had a long and constructive influence in this country': FKH Maher, 'Law in the Making By Sir Carleton Kemp Allen' (1965) 5 *Melbourne University Law Review* 110, 111.
[172] A survey of Jurisprudence teaching in Australasia in the mid to late 1970s listed *Law in the Making* as one of the texts prescribed in Australasian law schools: Alan Fogg, 'Content and objectives of Jurisprudential Teaching in Australasia' (1976–1979) 14 *Journal of the Society of Public Teachers of Law* 261, 276. Other authors include Paton, Dias, Salmond and Lloyd.

contemporary Indigenous peoples as evidence of earlier stages in legal evolution. Indigenous Australian societies were portrayed as an extant example of the earliest, most 'primitive', stage in the development of law.

The civilised–primitive construct thus continued to frame and infuse British jurisprudence during the first century and a half of colonisation in Australia.

V. DECONSTRUCTING THE CIVILISED–PRIMITIVE DUALISM

As I noted in Chapter One, the various styles of deconstruction used as methods in this doctoral research take place on four main levels that intersect and build upon each other. Throughout the past two chapters, I have utilised these forms of deconstruction to analyse the theoretical basis for the rejection of Indigenous law that underpinned terra nullius in Australia.

To provide the basis for the genealogical style of deconstruction later in the thesis, I surveyed British legal thought from the relevant period (beginning before the colonisation of Australia and continuing through to the mid-20th century). I closely examined primary and secondary legal and jurisprudential texts, historical and biographical material, anthropological studies, and historical and academic commentaries. I thus began to chart, and critically interrogate, the genealogy of Anglo-Australian treatment of Indigenous Australian law, specifically engaging with the question of its positioning in relation to concepts of 'law'. This task will continue in subsequent chapters of the thesis.

Using another form of deconstruction — the broadest (and least technical) style of dismantling the component legal and philosophical elements — I closely analysed key legal 'terra nullius' documents, identifying the thought patterns that enabled the disavowal of law and justified terra nullius. I scrutinised the British theories that informed the denial of law, examining how 'law' was conceptualised, and how Indigenous law was treated.

At the next level of deconstruction (in the sense of examining the limits of those component concepts, and their exclusions), I investigated the conceptual boundaries of 'law' in each of those theories, examining what was included and what was excluded. I identified the centrality of the concept of civilisation to British notions of 'law' and the marginalisation of non-European-style legal, political, social and economic arrangements. I demonstrated the impact of the civilised–primitive dualism on Indigenous Australian peoples and the identification of

Indigenous Australia with the state of nature, resulting in the exclusion of Indigenous Australian law from the conceptual boundaries of 'law'. I further demonstrated the explicit positioning of Indigenous Australian law at or outside those conceptual limits — that the primitive 'other' was constructed with express reference to Indigenous Australia, which was portrayed as the epitome of a pre-legal or non-legal condition.

The deconstruction at these levels has provided the foundations for, and begun the task of the fourth style of deconstruction — the deconstruction of binary oppositions. As demonstrated in this chapter, the concept of civilisation retained a central role in British theories of law throughout the 19th and early 20th centuries. Whether conceptualised as a 'civil society' deriving analytically from social contract, or as a result of social evolution, civilisation was perceived to be essential for a society to be capable of law. The necessary connection between civilisation and law was demonstrated by means of an heuristic device — the construction of a primitive condition in which law was absent. The primitive 'other', whether presented as an analytical device or as a stage in legal evolution, represents the original condition of society and law and stands in polar opposition to civilisation. Since the civilised–primitive dualism is a conceptual opposition, it is possible to draw upon insights from Derrida's metaphysics of presence to further deconstruct this binary opposition.

As outlined in Chapter One, this style of deconstruction takes place in a 'double gesture', or two simultaneous phases.[173] The first phase involves demonstrating that the relationship between the opposing concepts is a hierarchy of dominance and subordination.[174] By momentarily overturning the hierarchy, and demonstrating that the dominant term is actually dependent upon the subordinate term, we can infer that the privileging of the dominant term is arbitrary.[175]

The hierarchical nature of the civilised–primitive dualism has been demonstrated throughout the course of this and the previous chapter. For centuries, Anglo-European legal theories have cast the concept of 'civilisation' as integral to the existence of law, representing Anglo-Western legal systems as the acme of 'law' and employing descriptors such as advanced, complex, rational and systematised (features which reflect ideals valued by British and European jurists).

[173] Jacques Derrida, *Positions*, tr Alan Bass (Continuum, 2nd ed, 2004) 38–9 ('*Positions*').
[174] Ibid 39; see also Margaret Davies, *Asking the Law Question* (4th ed, Thomson Reuters, 2017) 386.
[175] Derrida, *Positions* (n 173) 39; Davies (n 174) 386.

This state of legal sophistication is contrasted with a 'primitive' condition. Unlike the notion of the civilised, the primitive is merely a negative image — a means of defining and clarifying the concept of civilisation, rather than the concept of primitive per se. The primitive is characterised by the deficit of the characteristics associated with civilisation: it is rudimentary and simple rather than advanced and complex, superstitious rather than rational, and ad hoc and arbitrary rather than ordered and systematised. The concept of the civilised is therefore the dominant or privileged term. So much so, that the primitive 'other' is merely a foil, strategically designed to highlight the idealised qualities of the civilised.

Implicit in the notion of civilisation, however, is that of development or advancement. The idea of development involves progression or growth, which in turn implies some origin (whether identifiable or not) from which the development takes place. Civilisation as a concept thereby depends upon the notion of origin, and the origin of civilisation is conceptualised as the primitive condition. The concept of civilisation is therefore dependent upon the concept of the primitive. This is the effect of what Derrida called '*différance*' — the meaning of each term is dependent upon the differentiation between them.[176] Because of this mutual interdependence, according to Derrida, each term leaves a 'trace' of itself upon the other.[177] In this instance, the civilised carries in itself the trace of the primitive in that it shares its identity with the primitive as its origin. The primitive represents the past, the civilised the present of the same identity. This is an important point. The idea of the primitive is an idea about Anglo-Western law and its past. As the origin of Anglo-Western law and civilisation, it is the more foundational concept. This is the second part of the double movement, seeing the lesser term in a new light, as the original or more foundational of the two.[178]

This momentary inversion of the hierarchy enables clarity about the scope of the dualism. Although the conceptual opposition between civilised and primitive purports to cover the field of the capacity of any society for law, it is limited to a particular idea about the history of Anglo-Western societies and their law. As this deconstruction demonstrates, the dualism ignores an entire range of legal organisation, reducing that heterogeneity to a simplistic either/or, and thus

[176] Derrida, *Positions* (n 173) 23–6; Davies (n 174) 384–5; JM Balkin, 'Deconstructive Practice and Legal Theory' (1987) 96(4) *Yale Law Journal* 743, 752–3. '*Différance*' is a neologism meaning to differ and defer, and is far more complex than might appear from the way I have described it.

[177] Derrida, *Positions* (n 173) 24.

[178] Ibid 39.

obscuring other possible ways of conceptualising law. It is inapplicable to Indigenous law, for example, because it is only concerned to explain Anglo-Western law. However, it renders Indigenous knowledges about their own law invisible because *there is already a construct which purports to represent the entire category*. It thereby effectively displaces and excludes Indigenous knowledges as an authoritative source of information about their own law.

VI. CONCLUSION

From the moment of first contact, British legal theories consistently presented Indigenous Australian law and socio-legal organisation as an example of a pre-legal state or as 'evidence' of the origins of law. This designation of Indigenous Australian law as non-legal transcended the various schools of thought within British jurisprudence. Perceptions of Indigenous Australian law and society were both informed by, and informed, the conceptual construction of the primitive origin of law. The identification of Indigenous Australia with the state of nature or primitive side of the civilised–primitive dualism affirmed the denial of their law and enabled the entrenchment of terra nullius.

The jurisprudence of this era set the scholarly stage for the Australian and British legal theories of the mid-20th century that were cited by the High Court in *Yorta Yorta*. Those theories form the subject matter of later chapters of the thesis.

In the next part of the thesis, I examine the eventual fate of terra nullius, tracing the historical developments leading to the legal recognition of Indigenous Australian law. I analyse the doctrine of intersection of normative systems that replaced terra nullius as the de jure version of Australia's legal history.

PART III

THEORETICAL FOUNDATIONS OF THE RECOGNITION OF INDIGENOUS AUSTRALIAN LAW

CHAPTER FOUR
'TRADITIONAL LAWS AND CUSTOMS' IN CONTEMPORARY AUSTRALIAN LAW

I. INTRODUCTION TO PART III

The purpose of this third part of the thesis is to identify the theoretical foundations of the recognition of Indigenous law and the interpretation of 'traditional laws and customs' in contemporary Australian law. This is done through a close examination of the theoretical underpinnings of the leading legal authority — the High Court judgment in *Yorta Yorta*.

Part III is divided into two chapters. This chapter comprises a brief historical overview of the legal recognition of Indigenous Australian law, including a sketch of the *Yorta Yorta* litigation — thus situating the High Court decision in *Yorta Yorta* in the context of the development of the law in this area.[1] In the following chapter, I examine the theoretical foundations of the reasoning in the *Yorta Yorta* decision.

II. THE ACKNOWLEDGEMENT OF 'TRADITIONAL LAWS AND CUSTOMS' IN CONTEMPORARY AUSTRALIAN LAW

The legal denial of Indigenous Australian law implicit in the founding doctrine of Anglo-Australian sovereignty, terra nullius, continued throughout the first two hundred years of colonisation. Until the *Mabo* decision at the end of the 20th century, the classification of Australia as 'practically unoccupied, without settled inhabitants or settled law' as enunciated by the Privy Council in *Cooper v Stuart* in 1889, remained accepted as the legal basis for the acquisition of sovereignty and the reception of English law. During that time, despite the anomalous legal position that Indigenous Australians were technically British subjects, and subsequently Australian citizens,[2] the law was used as an instrument of successive government policies to enable the dispossession, displacement, deprivation of liberty, removal of children, confiscation of wages, and abrogation of other human rights of Indigenous Australians.[3] Not

[1] As I noted in Chapter One, an extensive analysis of the legal recognition of Indigenous law within the Anglo-Australian legal system is beyond the scope of this thesis. The purpose of this brief overview is to demonstrate the significance of the leading authority of *Yorta* in the context of the developing law.

[2] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*'); *Love v Commonwealth* [2020] HCA 3 ('*Love*').

[3] The scope of this thesis does not allow me to go into this aspect of the role of Anglo-Australian law as an instrument of colonisation and oppression, but it has been the subject of a number of official reports; see, eg, *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 2; Australian Human Rights Commission, *Bringing Them Home* (Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 1997).

only did the Australian common law fail to protect the fundamental rights of Indigenous Australians (despite the insistence that they were entitled to its protection),[4] its operation effectively deprived them of rights.[5]

In this chapter, I set out the gradual questioning, and recurring reaffirmation, of the doctrine of terra nullius — and its expression in the principle of *Cooper v Stuart* — which then culminated in its rejection in *Mabo*. I sketch the acknowledgement, within Anglo-Australian legal authority, of the existence of Indigenous law and the development of a nascent case law of recognition.

III. AN HISTORICAL OVERVIEW

A Pre-*Mabo*: The Continuing Denial Of Indigenous Law

The historical accuracy of the basis of the principle in *Cooper v Stuart*, that Indigenous Australians had no settled system(s) of law, does not appear to have been judicially considered until 1971. In *Milirrpum v Nabalco*,[6] the first native title case to be brought before an Australian court, Blackburn J of the Northern Territory Supreme Court held that he was bound by the decision of *Cooper v Stuart.*[7] Although opining that, as a matter of historical fact, the representation of Indigenous Australians as being without law was dubious,[8] Blackburn J held that the question of whether sovereignty had been acquired on the basis of occupation or settlement (as opposed to conquest or cession) was a matter of law that could not 'be questioned upon a reconsideration of the historical facts'.[9]

In the course of his judgment, Blackburn J addressed the defendants' submission that 'in the aboriginal world there was nothing recognisable as law at all'.[10] Using an Austinian concept of

[4] See, eg, *R v Murrell* ((1836) 1 Legge 72.

[5] Again, the scope of this thesis does not allow me to explore this topic, but David Ritter has pointed out that Indigenous Australians 'were continually objectified by the operation of the common law and legal discourse in Australia in a manner that completely denuded them of rights': David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18(1) *Sydney Law Review* 5, 11.

[6] (1971) 17 FLR 141 ('*Milirrpum*').

[7] Ibid 242–244.

[8] In what is clearly obiter dicta, Blackburn J observed that 'having heard the evidence in this case, I am, to say the least, suspicious about the truth of the assertions of the early settlers of New South Wales that the aboriginals had no ordered manner of community life': ibid 266.

[9] Ibid 202–3.

[10] The defendants submitted that the question of whether the plaintiffs had a recognisable proprietary interest in their traditional lands could not arise since there was no law at all: ibid 265.

'law',[11] counsel for the defendants had argued that 'before any system can be recognised by our law as a system of law', there must be a definable community and 'some recognised sovereignty giving the law a capacity to be enforced'.[12] Blackburn J held that:

> I do not believe that there is utility in attempting to provide a definition of law which will be valid for all purposes and answer all questions. If a definition of law must be produced, I prefer 'a system of rules of conduct which is felt as obligatory upon them by the members of a definable group of people' to 'the command of a sovereign', but I do not think that the solution to this problem is to be found in postulating a meaning for the word 'law'. I prefer a more pragmatic approach.[13]

Blackburn J thus preferred a Hartian concept of law as a system of rules to the Austinian 'command' theory,[14] but ultimately eschewed the analytical approach in favour of a 'more pragmatic' one.

In relation to the evidence put before him by the Yirrkala plaintiffs of north-eastern Arnhem land, Blackburn J held that:

> The evidence shows *a subtle and elaborate system* highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. *If ever a system could be called "a government of laws, and not of men", it is that shown in evidence before me*.[15]

He held that 'the system of law was recognised as obligatory upon them by [a definable community]',[16] and that an absence of sanctions and machinery for enforcement was not definitive of an absence of law.[17] Consequently, he held that 'I must recognise the system revealed by the evidence as a system of law'.[18]

---

[11] As outlined in Chapter Three, Austin's theory confined law to a set of requisite elements: commands (backed by sanctions) of a sovereign to a politically independent society in the habit of obedience to the sovereign.

[12] The Solicitor General categorized the 'customs and practices' of Indigenous Australians as religious rather than legal: *Milirrpum* (n 6) 266.

[13] Ibid.

[14] Hart's concept of law is discussed in Chapter Six.

[15] *Milirrpum* (n 6) 267 (emphasis added).

[16] Ibid.

[17] His Honour pointed to the example of international law: ibid 268.

[18] Ibid. He went on to hold, however, that although they had a recognisable system of law, it 'did not provide for any proprietary interest in the plaintiffs in any part of the subject land': at 273–4. In any case, the issue was moot, since Blackburn J held that no doctrine of native title existed at common law.

The plaintiffs' action failed, however, since Blackburn J held that the doctrine of communal native title 'does not form, and has never formed, part of the law of any part of Australia'.[19] The judgment provides yet another, more recent, example of the paradox contained within the 'terra nullius' case law — the judicial acknowledgement of Indigenous Australian law while simultaneously upholding the absence of law principle. By treating the existence of Indigenous law as a question of fact, and the absence of law principle as a question of law, the Court was able to maintain the fiction of terra nullius.[20]

The possibility of Aboriginal law and sovereignty was unequivocally denied by a statutory majority of the High Court in the late 1970s, in the case of *Coe v Commonwealth*.[21] The plaintiff had challenged the British acquisition of sovereignty, submitting (inter alia) that 'the aboriginal people have had from time immemorial a complex social, religious, cultural and legal system',[22] and that a sovereign Aboriginal nation existed.[23] He claimed that Australia had been wrongly treated as terra nullius,[24] or alternatively that it had been acquired by conquest.[25]

The case was dismissed.[26] In the leading judgment, Gibbs J affirmed the act of state doctrine, by which acquisition of sovereignty is an act of state the validity of which cannot be challenged in a municipal court.[27] The reception of the British common law, as a consequence of the

[19] Ibid 245. This aspect of the judgment drew criticism from commentators at the time: see, eg, Geoffrey Lester and Graham Parker, 'Land Rights: The Australian Aborigines Have Lost a Legal Battle, But …' (1973) 11 *Alberta Law Review* 189; John Hookey, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia' (1972-1973) 5(1) *Federal Law Review* 85; Richard H Bartlett, 'Aboriginal Land Claims at Common Law' (1983) 15 UWA L Rev 293; cf LJ Priestley, 'Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case' (1974) 6 *Federal Law Review* 150. It was also described as 'wholly wrong' by three Canadian Supreme Court judges in *Calder v Attorney-General of British Columbia* [1973] SCR 313, 416 (Hall J, Spence and Laskin JJ concurring).

[20] Strelein has called this 'fracture' between law and fact a 'hall of mirrors': Lisa Strelein, 'From *Mabo* to *Yorta*: Native Title Law in Australia' (2005) 19 *Washington University Journal of Law and Policy* 225, 241 ('From *Mabo* to *Yorta*').

[21] (1979) 24 ALR 118 ('*Coe*'). The Court being equally divided, the opinion of Gibbs J prevailed: *Judiciary Act 1903* (C'th) s23(2)(b).

[22] *Coe* (n 21) 121.

[23] The plaintiff claimed that an interlocking system of rights and responsibilities between clans and groups across the continent comprised an Aboriginal nation: ibid 121.

[24] Ibid 122.

[25] Ibid 125.

[26] The case was dismissed on procedural grounds; the plaintiff's application for leave to amend the statement of claim was rejected: ibid (Gibbs and Aickin JJ, Jacobs and Murphy JJ dissenting).

[27] Ibid 128 (Gibbs J, Aickin J concurring), affirming *New South Wales v Commonwealth* (1975) 135 CLR 337, 388.

acquisition of sovereignty, was based upon settlement rather than conquest.[28] Gibbs J rejected outright the possibility of Aboriginal sovereignty and capacity for law:

> 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 organs by which sovereignty might be exercised. If such organs existed, they would have no powers*, except such as the laws of the Commonwealth, or of a State or Territory, might confer upon them. *The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain*.[29]

The dissenting judgments, however, indicated a readiness to review the principle in *Cooper v Stuart*.[30] Murphy J held that '[t]here is a wealth of historical material to support the claim that the aboriginal people … had a complex social and political organisation; that their laws were settled and of great antiquity'.[31] The country was not 'terra nullius',[32] and the 'statement by the Privy Council [in *Cooper v Stuart*] may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' land'.[33]

The history of the legal denial of Indigenous law was reflected in the report of the Australian Law Reform Commission into the *Recognition of Aboriginal Customary Laws* in 1986,[34] which also contained recommendations for its recognition.[35] While acknowledging that Indigenous Australian law had been 'denied any formal recognition by the general law as it applied in Australia',[36] the Commission noted some recent measures to accommodate Indigenous law in areas such as criminal defences and sentencing, land rights and heritage legislation.[37] However,

---

[28] Ibid 129 (Gibbs J, Aickin J concurring).
[29] Ibid (Gibbs J, Aickin J concurring) (emphasis added).
[30] Ibid 136 (Jacobs J); 137–8 (Murphy J).
[31] Ibid 137–8 (Murphy J).
[32] Ibid 138 (Murphy J).
[33] Ibid (Murphy J).
[34] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, June 1986) ('*Recognition of Aboriginal Customary Laws*').
[35] Some 20 years later, then Social Justice Commissioner, Tom Calma, noted that none of the findings of the Commission had been implemented. He argued that, 'in order to create a justice system that works for Indigenous Australians, the Australian legal framework must acknowledge and integrate Aboriginal customary Law': Tom Calma, 'The Integration of Customary Law into the Australian Legal System' (Speech, National Indigenous Legal Conference, October 2006) <https://humanrights.gov.au/about/news/speeches/integration-customary-law-australian-legal-system-calma>; Tom Calma, 'The Integration of Customary Law into the Australian Legal System' (2007) 25 *Law in Context: A Socio-Legal Journal* 74, 74.
[36] *Recognition of Aboriginal Customary Laws* (n 34) [58] (citations omitted).
[37] Ibid.

the Commission found that any such recognition of Aboriginal law had been 'erratic, uncoordinated and incomplete'.[38] This is because these instances of recognition had 'occurred by way of exceptions from a general, and continuing, rule of non-recognition'.[39]

B *Mabo* and the Acknowledgement of Indigenous Law

At the time the Commission released its report in 1986, the *Mabo* litigation had been underway for some years. Finally, on 3 June 1992, the watershed moment in Australian legal history occurred as the High Court of Australia handed down its decision in *Mabo v Queensland [No 2]*. The Court rejected the theoretical basis for terra nullius, that the Indigenous peoples of Australia had no law,[40] explicitly acknowledging the existence of Indigenous law not only at the time of sovereignty,[41] but its continuing and ongoing existence.[42]

Despite the apparent rejection of the terra nullius doctrine, the High Court held that the acquisition of sovereignty over Australia by the British cannot be challenged in an Australian court,[43] and confirmed that Australia fell into the category of a 'settled colony' for the purposes of the reception of common law,[44] leading commentators to question whether the doctrine had been rejected at all. Lavery argues that the *Mabo* decision contains a 'deeply embedded doctrinal contradiction' — declaring terra nullius abhorrent while continuing to endorse it as the foundation of Australian sovereignty.[45] Others have observed that the doctrine of terra nullius provided a 'convenient scapegoat',[46] allowing the Court to reaffirm the apparent justness of the Australian common law and legal tradition.[47] Tehan argues that although the

[38] Ibid [85].
[39] Ibid.
[40] *Mabo* (n 2) 39, 41–2, 58 (Brennan J, Mason CJ and McHugh J concurring), 109 (Deane and Gaudron JJ); Toohey J rested his rejection of terra nullius on 'the idea that land which is in regular occupation may be terra nullius is unacceptable, in law as well as in fact': at 182 (Toohey J).
[41] Ibid 39 (Brennan J, Mason CJ and McHugh J concurring), 100 (Deane and Gaudron JJ).
[42] Ibid 58–60 (Brennan J, Mason CJ and McHugh J concurring), 110 (Deane and Gaudron JJ).
[43] Ibid 31 (Brennan J, Mason CJ and McHugh J concurring), 95 (Deane and Gaudron JJ).
[44] Ibid 37–8 (Brennan J, Mason CJ and McHugh J concurring), 79 (Deane and Gaudron JJ), 182 (Toohey J). Ulla Secher argues that the High Court modified the doctrine of reception, in effect recognising 'a new class of settled colony at common law: a settled, yet legally inhabited, colony': Ulla Secher, 'The *Mabo* Decision — Preserving the Distinction between "Settled" and "Conquered or Ceded" Territories' (2005) 24 *University of Queensland Law Review* 35, 36.
[45] Daniel Lavery, 'No Decorous Veil: The Continuing Reliance on an Enlarged Terra Nullius Notion in *Mabo [2]*' (2019) 43(1) *Melbourne University Law Review* 233, 264–5.
[46] Ritter (n 5) 6–7.
[47] See, eg, Shaunnagh Dorsett and Shaun McVeigh, 'Just So: "The Law Which Governs Australia is Australian Law"' (2002) 13 *Law and Critique* 289, 290. David Ritter has claimed that terra nullius was 'a stage edifice

rejection of terra nullius was not strictly doctrinally necessary to the decision (the survival of native title under common law),[48] the 'rejection of terra nullius' was a 'moral and ethical force' that allowed the conceptual space for the survival of rights.[49] In effect, the Court rejected the concept, or discourse, of terra nullius, rather than the doctrine itself.[50] At the very least, as I have argued in Chapter Two, the Court rejected the proposition that the Indigenous peoples of Australia had no law.

What was also rejected, or at least reconsidered, were the consequences of the doctrine on the received law of land tenure. The Court held that although the acquisition of sovereignty is not justiciable, its consequences in domestic law *are* justiciable.[51] In considering those consequences, the Court overturned the proposition that upon acquisition of sovereignty, the Crown had acquired absolute legal and beneficial ownership of all the land.[52] The Court held that Indigenous rights and interests in land ('native title') survived the acquisition of sovereignty.[53]

The Court held that native title rights and interests are sourced in, and governed by, the traditional laws and customs of Indigenous communities.[54] In its seminal formulation by Brennan J, native title 'has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.'[55] In a similar vein, Deane and Gaudron JJ stated that since native title 'preserves entitlement to use or enjoyment under the traditional law or custom of the relevant territory or locality, the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom'.[56] The reference to laws *and* customs

that was demolished so that the good name of the Australian legal system could be redeemed': Ritter (n 5) 6–7.

[48] This point was also made by David Ritter: Ritter (n 5) 6.

[49] Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27(2) *Melbourne University Law Review* 523.

[50] Ulla Secher, 'The Reception of Land Law into the Australian Colonies Post-*Mabo*: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of Continuity Pro-Tempore' (2004) 27(3) *UNSW Law Journal* 1, 18; Ritter (n 5) 30.

[51] *Mabo* (n 2) 32 (Brennan J), 95 (Deane and Gaudron JJ).

[52] Ibid 58 (Brennan J), 109 (Deane and Gaudron JJ), 182 (Toohey J).

[53] Thus burdening the Crown's radical title acquired with sovereignty, but susceptible to extinguishment by an exercise of sovereign power: ibid 57–64 (Brennan J), 109–111 (Deane and Gaudron JJ), 182, 196 (Toohey J).

[54] Ibid 58–60 (Brennan J, Mason CJ and McHugh J concurring), 110 (Deane and Gaudron JJ).

[55] Ibid 58 (Brennan J, Mason CJ and McHugh J concurring).

[56] Ibid 110 (Deane and Gaudron JJ).

reflects both the *legal distinction* (the characterisation of law as legal and custom as non-legal) and the *historical connection* between law and custom in English law.

The Court was clear that traditional law and custom may change over time,[57] and is not 'frozen as at the moment of establishment of a Colony'.[58] The significance and centrality of the laws and customs as the source of rights and interests is evident in the leading judgment of Brennan J (with whom Mason CJ and McHugh J agreed):

> [S]o long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community *living under its laws and customs*, the communal native title survives to be enjoyed by the members *according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs*, as currently acknowledged.[59]

Further,

> Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise.[60]

However, in a well-known and controversial euphemism, Brennan J stated that 'when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared'.[61]

Prior to the *Mabo* decision, the acquisition of sovereignty and the subsequent reception of common law had been predicated upon the absence of Indigenous law. With the rejection of the theoretical basis for terra nullius, and the acknowledgement of the existence of Indigenous law, the Court in *Mabo* was able to reconsider the consequences for Australian law of the acquisition of sovereignty. However, because of the nature of the claim in that case, the Court

[57] Ibid 61 (Brennan J, Mason CJ and McHugh J concurring), 110 (Deane and Gaudron JJ).
[58] Ibid 110 (Deane and Gaudron JJ).
[59] Ibid 61 (Brennan J, Mason CJ and McHugh J concurring) (emphasis added).
[60] Ibid 59–60 (Brennan J, Mason CJ and McHugh J concurring) (emphasis added).
[61] Ibid.

limited its consideration of those consequences to the issue of property law. What was left open in *Mabo* was the question of how to retrospectively account for how the British common law interacted with the law of the Indigenous jurisdictions at the time of acquisition of sovereignty by the British. The answer would not be provided for another ten years, when the High Court finally addressed the issue in *Yorta Yorta*.

C The Post-*Mabo* Era

Following the *Mabo* decision, acknowledgement of Indigenous Australian 'traditional laws and customs' was enshrined in the *Native Title Act 1993* (C'th), which was enacted to legislatively recognise and protect native title.[62] The preamble of the Act recognises Indigenous Australians as the first inhabitants of Australia, noting that the common law of Australia recognises rights and interests 'that [reflect] the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands'. Section 223(1) of the *Native Title Act* defines native title as:

> The communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) The rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) The Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) The rights and interests are recognised by the common law of Australia.

The combination of the references (in paras (a) and (b)) to traditional laws and customs as the source of native title rights and interests, and the reference (in para (c)) to the recognition of those rights and interests by the common law, would later lead the High Court to talk of an 'intersection of normative systems'.[63]

---

[62] *Native Title Act 1993* (Cth) s 3 ('*Native Title Act*'). For an examination and assessment of Australian native title case law against those objectives of recognition and protection, see Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) ('*Compromised Jurisprudence*').

[63] The reference to an intersection of traditional laws and customs with the common law was first made by the Court in *Fejo v Northern Territory* (1998) 195 CLR 96, 128 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); and developed by the joint majority in *Members of the Yorta Yorta Community v Victoria* (2002) 214 CLR 422 (Gleeson CJ, Gummow and Hayne JJ) ('*Yorta Yorta*').

The majority of the *Native Title Act* provisions came into force on 1 January 1994.[64] Shortly thereafter, the Yorta Yorta claimants lodged an application with the National Native Title Tribunal,[65] for a determination of native title over part of their ancestral lands — an area in northern Victoria and southern New South Wales surrounding and including the Murray River.[66] A compulsory mediation process took place between September 1994 and April 1995.[67] When mediation failed, the matter was referred to the Federal Court, and became the first application for a determination of native title to be tried in the Federal Court under the *Native Title Act*.[68] The legal issues in the litigation would centre on the interpretation of the definition of native title, particularly the references to traditional laws and customs and the role of the common law, in s 223(1) of the *Native Title Act*.

In the meantime, in two judgments of the High Court in exercise of its original jurisdiction, Mason CJ confirmed that the decision in *Mabo* did not recognise residual Indigenous Australian sovereignty, or recognise Indigenous law other than for the purposes of native title.[69] In *Walker v New South Wales*,[70] Mason CJ rejected the notion that 'customary Aboriginal criminal law' was recognised by the common law as continuing to exist 'in the same way that *Mabo [No.2]* decided that the customary law of the Meriam people relating to land tenure continues to exist'.[71] Mason CJ held that even if it had survived the acquisition of sovereignty, it would have been extinguished by the passage of criminal statutes. He stated that 'English criminal law did

[64] *Native Title Act* (n 62) s 2(2); Commonwealth, *Gazette: Special*, No S 402, 30 December 1993, 3.

[65] The application was lodged on 21 February 1994: *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 [6] ('*Yorta Yorta* Trial').

[66] The Yorta Yorta Community (now the Yorta Yorta Nation Aboriginal Corporation) comprises the Wolithiga, Moira, Ulupna, Bangerang, Nguaria-iiliam-wurrung, Kwat Kwat, Kailtheban, and Yalaba Yalaba clans, whose traditional lands include the towns of Echuca, Shepparton, Benalla, Corowa and Wangaratta: see Henry Atkinson, 'Yorta Yorta Cooperative Land Management Agreement: Impact on the Yorta Yorta Nation' (2004) 6(5) Indigenous Law Bulletin 23, 23; *Yorta Yorta Nation Aboriginal Corporation* (website) <https://yynac.com.au/>.

[67] Peter Seidel, 'Native Title: The Struggle for Justice for the Yorta Yorta Nation' (2004) 29(2) *Alternative Law Journal* 10, 10. As to the Yorta Yorta experience of the hopes and challenges of the mediation process, see Wayne Atkinson, 'Mediating the Mindset of Opposition: The Yorta Yorta Case' (2002) 5(15) *Indigenous Law Bulletin* 8. See also Mick Dodson, 'Power and Cultural Differences in Native Title Mediation' (1996) 3(4) *Aboriginal Law Bulletin* 8.

[68] *Yorta Yorta* Trial (n 65); *Yorta Yorta* (n 63) 431 [4].

[69] *Coe v Commonwealth* (1993) 118 ALR 193; *Walker v New South Wales* (1994) 182 CLR 45.

[70] *Walker v New South Wales* (n 69).

[71] Ibid 49 (Mason CJ).

not, and Australian criminal law *does not, accommodate an alternative body of law operating alongside it*'.[72]

That decision prompted then Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, to say that '[t]here 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 … provides compromised justice for Indigenous people'.[73] Dodson pointed out that '*it is an absurd position* if our title to land is recognised *but the laws and customs which give meaning to that title are treated as if they do not exist'*.[74]

It was in this context that the Yorta Yorta litigation commenced — the beginning of a process that would continue for almost twenty years.

IV. THE *YORTA YORTA* LITIGATION[75]

A The Trial

The Federal Court trial of the Yorta Yorta claim took place from October 1996 to October 1997.[76] The determination, made by Olney J on 18 December 1998, was to the effect that native title did not exist.[77] Although he held that a significant number of the claimant group were descended from the original inhabitants,[78] Olney J concluded — using Brennan J's 'tide of history' euphemism — that the evidence did not support a finding that the descendants of the original inhabitants had continued to observe and acknowledge the traditional laws and customs. [79]

[72] Ibid 49–50 (Mason CJ) (emphasis added).
[73] Mick Dodson, 'From 'Lore' to 'Law': Indigenous Rights and Australian Legal Systems (1995) 20(1) *Alternative Law Journal* 2, 2.
[74] Ibid (emphasis added).
[75] The summary that follows draws in part upon a case note I have previously published on the High Court decision in *Yorta Yorta*: Diana Henriss-Anderssen, '*Members of the Yorta Yorta Community v Victoria* [2002] HCA 58 (12 December 2002)' (2002–2003) 9 *James Cook University Law Review* 331.
[76] The Yorta Yorta people's experience of the trial is recounted in Atkinson (n 66). The nine-year litigation is described by the claimants' lawyer in Seidel (n 67).
[77] *Yorta Yorta* Trial (n 65).
[78] Ibid [104].
[79] Ibid [129].

The trial judge interpreted ss 223(1)(a) and (b) of the *Native Title Act* as requiring proof of continuity of a society with physical occupancy as well as continuity in the nature of the traditional laws and customs.[80] He found that neither was satisfied by the evidence before him.[81]

In assessing continuity of a society with physical occupancy of the land, Olney J placed considerable weight upon an 1881 petition by a group of Yorta Yorta men for a grant of land.[82] In it, the petitioners stated that 'all the land within our tribal boundaries has been taken possession of by the Government and white settlers; our hunting grounds are used for sheep pasturage and the game reduced and in many places exterminated, rendering our means of subsistence extremely precarious'.[83] They said that they 'feel that our old mode of life is not in keeping with the instructions we have received and we are earnestly desirous of settling down to more orderly habits of industry, that we may form homes for our families'.[84] Despite acknowledging that the petition had been drafted by the mission manager who was known to have aggressively attempted to suppress traditional culture, the trial judge relied upon it as evidence that by 1881 the descendants of the original inhabitants were no longer in possession of the land and had ceased to observe laws and customs based on tradition.[85]

In establishing the nature of the traditional laws and customs of the original inhabitants of the area, the trial judge found the contemporary writings of a squatter to be the most credible source of evidence, and gave less weight to oral Indigenous testimony.[86] His Honour compared contemporary activities of the claimant group to those described by the early colonists.[87] Because these were different, he concluded that the contemporary activities were of recent

[80] Ibid [4], [105], [128], [129]. In interpreting the requirements of s 223(1), Olney J drew upon passages from the judgments of the High Court in *Mabo* to provide the context in which the provision had been developed: at [3].
[81] Ibid [129].
[82] The claimants had tendered this petition as evidence of repeated attempts to assert proprietary interests in their land: ibid [119].
[83] Ibid.
[84] Ibid.
[85] Ibid [119–121].
[86] Ibid [106]. He inferred that the traditional laws and customs (identified by the evidence from colonists) from the 1840s were similar to those at the time of colonisation.
[87] Ibid [122–8].

origin, and did not owe their origin to traditional laws and customs.[88] He concluded that native title had expired.[89]

The decision attracted widespread criticism,[90] particularly in relation to the trial judge's handling of the evidence.[91] In the meantime, the Yorta Yorta applicants appealed to the Full Court of the Federal Court.

B The Appeal to the Full Court

On appeal, the appellants argued that the trial judge had wrongly applied a 'frozen in time' approach, effectively requiring that the traditional laws and customs be frozen in time as at the date of the Crown's assumption of sovereignty, an approach which did not allow for adaptation and change.[92]

However, the Full Court held that although a 'frozen in time' approach would be incorrect, Olney J had probably *not* applied such an approach.[93] The majority held that s 223(1)(c) incorporates common law into the statutory definition — specifically the common law requirement of continuity of an identifiable community and of rights and interests under

[88] Ibid [128].

[89] Ibid [129]. Olney J interpreted the role of the common law recognition of native title rights and interests in s 223(1)(c) as a requirement that the rights and interests had not been extinguished. Because he found that the existence of native title had not been established, he held that it was unnecessary to go into this issue: at [5], [129]–[131].

[90] Aboriginal and Torres Strait Islander Social Justice Commissioner, William Jonas, described the decision as 'a poignant reminder of the injustice contained within the common law's recognition of native title': Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 1999* (Report No 1/2000, 7 April 2000) 7 ('*Native Title Report 1999*').

[91] The criticism came from historians, anthropologists, lawyers and Indigenous leaders: see, eg, Roderic Pitty, 'A Poverty of Evidence: Abusing Law and History in *Yorta Yorta v Victoria* (1998)' (1999) 5 *Australian Journal of Legal History* 41; Natasha Case, 'Tide of History or Tsunami? *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors* (1998)' (1999) 4(17) *Indigenous Law Bulletin* 20; V Kerruish and C Perrin, 'Awash in Colonialism: A Critical Analysis of the Federal Court Decision in the Matter of *Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors*' (1999) 24 *Alternative Law Journal* 3; Katrina Alford, 'White-washing Away Native title Rights: The Yorta Yorta Land Claim and the "Tide of History"' (1999) 13 *Arena* 67; *Native Title Report 1999* (n 85) 7–8; Rod Hagen, 'Ethnographic Information and Anthropological Interpretation in a Native Title Claim: The Yorta Yorta Experience' (2001) 25 *Aboriginal History* 216.

[92] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 180 ALR 655, 659–660 [10]–[12]. The appellants argued that the trial judge's approach of identifying the content of traditional laws and customs in 1788 and then tracing forward to assess whether this traditional connection (as determined) had been substantially maintained, was erroneous. Instead, they submitted, the *Native Title Act* required the assessment of *present* laws and customs as the appropriate starting point. They argued that the trial judge had erred in adopting a 'frozen in time' approach, wrongly equating native title with the existence of a 'traditional society' or traditional lifestyle'.

[93] Ibid 674–5 [67] (Black CJ), 697–9 [171]–[182] (Branson and Katz JJ).

traditional laws and customs.[94] Accordingly, they held that it was open to Olney J on the evidence to find that 'the relevant indigenous community [had] lost its character as a traditional community'.[95] The appeal was dismissed.[96]

The appellants were subsequently granted special leave to appeal to the High Court. They argued that the majority of the Full Court had erred in requiring proof of continuous acknowledgement and observance of traditional laws and customs, resulting in the misconstruction of s 223(1).[97]

C The High Court Decision

The High Court handed down its decision on 12 December 2002, dismissing the appeal by a majority of five to two.[98] The Court held that s 223(1)(c) does not incorporate a pre-existing body of common law into the *Native Title Act*,[99] and that the Full Court had erred in holding that it required continuity, either of traditional laws and customs, or of a society.[100] Of the majority judges, Gleeson CJ, Gummow and Hayne JJ delivered a joint judgment, and Callinan J and McHugh J separate judgments. Gaudron and Kirby JJ (dissenting) delivered a joint judgment.

The joint majority (Gleeson CJ, Gummow and Hayne JJ) took the opportunity to set out some fundamental principles underpinning the relationship between traditional laws and customs and the common law. They held that s 223(1) must be interpreted in light of those fundamental principles.[101] Their reasoning, which will be explored in greater detail in the next chapter, may be outlined as follows:

---

[94] Ibid 684–5 [108] (Branson and Katz JJ).
[95] Ibid 701 [194].
[96] *Members of the Yorta Yorta Aboriginal Community v Victoria* (n 92) (Branson & Katz JJ, Black CJ dissenting).
[97] *Yorta Yorta* (n 63) 424.
[98] *Yorta Yorta* (n 63).
[99] Ibid 453 [76] (Gleeson CJ, Gummow and Hayne JJ), 467 [128] (McHugh J); McHugh J did, however, express reservations about this approach, at 467–8 [129]–[134].
[100] Ibid 457 [92] (Gleeson CJ, Gummow and Hayne JJ), 468 [134] (McHugh J), 463 [111] (Gaudron and Kirby JJ). In obiter (since it was not at issue in this case), the Court confirmed that s 223(1)(c) required that the rights and interests claimed must not be repugnant to the common law: at 453 [77] (Gleeson CJ, Gummow and Hayne JJ), 489 [176] (Callinan J), 462 [110] (Gaudron and Kirby JJ).
[101] Ibid 441 [36]. Nevertheless, their Honours reiterated that a native title claim was constrained by the Native Title Act, and all elements of s 223 must be given effect: at 440 [32]–[33].

Gleeson CJ, Gummow and Hayne JJ held that the fact that native title rights and interests owe their existence not to the common law, but to traditional laws and customs, infers the existence of a normative system other than the common law.[102] Further, the recognition of those rights and interests by the common law points to an intersection between the common law and the traditional laws and customs, an intersection of two normative systems.[103] Their Honours held that this intersection occurred at the time of acquisition of sovereignty over the Australian continent by the British.[104]

According to the joint majority, the consequence for the Indigenous normative system of the assertion of sovereignty by the British, was the loss of its law-making capacity and hence its capacity to validly create new rights, duties or interests.[105] As a result, the joint majority held that only those rights and interests which owe their existence to the normative system that intersected with the common law at the time of sovereignty would be protected by the *Native Title Act*.[106]

Therefore, their Honours held, the 'traditional laws and customs' presently possessed must have their origin in the normative Aboriginal and Torres Strait Islander rules existing prior to sovereignty,[107] and the normative system under which the rights and interests are possessed must have had a continuous existence and vitality since sovereignty.[108] What is required is continuity of the normative system, not of the actual content of those laws and customs, thus allowing for change in the content of those laws and customs.

Citing the 'inextricable link between a society and its laws and customs', their Honours held that the requirement of continuity of the normative system leads to a requirement that the society which observes those laws and customs has continued to exist throughout the period, as a body united in its acknowledgement and observance of the laws and customs.[109]

---

[102] Ibid 439 [31], 441 [37].
[103] Ibid 441 [37]–[40].
[104] Ibid 453–4 [77]. The acquisition of sovereignty was not contested, and the Court affirmed the act of state doctrine: at 441 [37].
[105] Ibid 443–4 [43]–[44].
[106] Ibid.
[107] Ibid 444 [46].
[108] Ibid 444–5 [47].
[109] Ibid 445–7 [49]–[56]; 457 [89].

Their Honours concluded that, as the trial judge's findings in that case were that the society which had once observed the traditional laws and customs had ceased to do so and no longer constituted the society out of which the traditional laws and customs sprang, there was therefore no error of law by the trial judge.[110] They held that the appeal by the Yorta Yorta people must be dismissed.[111]

The other justices constituting the majority of the Court gave different reasons. Callinan J held that s 223 requires a recognisable group, exercising identifiable and reasonably certain laws and customs on and relating to defined land (including physical presence on it), and continuity of these until the time of the determination.[112] He held that the traditional laws and customs must be ones which were in existence at the time of sovereignty.[113] He decided that the trial judge did not err and that the appeal should be dismissed.[114] McHugh J held, without revealing his reasoning on this issue, that the findings of the trial judge were not influenced by any error of law.[115]

The reasoning of the dissenting justices was similar in some respects to the leading judgment, although their conclusion was very different. According to Gaudron and Kirby JJ, for laws and customs to be identified as traditional, they should have their origins in the past, and any changes must have been made in accordance with the shared values or customs of the people who observe them.[116] What is necessary is that the community must be sufficiently organised and cohesive to sustain and adapt traditional laws (continuity of community).[117] The question whether there has been continuity of community is answered by asking whether, throughout the period, there have been persons who have identified themselves and each other as members of the community in question, not by reference to external indicia or observations of non-

[110] Ibid 458 [94]–[96].
[111] Ibid 459 [97].
[112] Ibid 492 [186].
[113] Ibid. It is clear that his Honour was referring to the content of those laws and customs, not the normativity of the system. He required a high degree of continuity and made minimal allowance for change: 492–3 [187]–[188].
[114] Ibid 493–4 [188]–[192].
[115] In relation to the appeal from the Full Court, McHugh J agreed that s 223(1)(c) does not incorporate a pre-existing body of common law into the *Native Title Act*, and therefore held that the Full Court erred: ibid 467–8. In relation to the trial judge's findings, however, although McHugh J did refer to the judgment of Gleeson CJ, Gummow and Hayne JJ, the reference was only to their setting out of those findings, and not to their reasoning: at 468 [135].
[116] Ibid 463–4 [114].
[117] Ibid 464 [116].

members, nor by physical presence in a particular place.[118] Their Honours held that the trial judge did not find lack of continuity of community in that sense, since he was concerned solely with identification of law or customs with respect to utilisation or occupation of land.[119] They held that Olney J erred in holding that the traditional connection with the land must have been substantially maintained since the time sovereignty was asserted.[120] They concluded that the appeal should be allowed.[121]

Given the differences in the reasoning of the majority judgments, the decision contains few principles which could strictly amount to ratio decidendi. The only issue on which McHugh J agreed with the reasoning of Gleeson CJ, Gummow and Hayne JJ was that s 223(1)(c) does not incorporate a pre-existing body of common law into the *Native Title Act*.[122] McHugh J did not otherwise reveal his reasoning — his only other reference to the joint majority judgment was to their Honours' setting out of the trial judge's findings.[123] The only aspect on which Callinan J agreed with the joint majority was obiter (since it was not in issue) to the effect that s 223(1)(c) requires that the rights and interests claimed must not be repugnant to the common law.[124] Therefore, the only principle of law which could strictly constitute ratio is that s 223(1) does not incorporate common law into the Act. Other than that, there is no clear ratio, and technically only the outcome is binding.[125]

Nevertheless, although it does not strictly amount to reasoning of a majority of the Court, the leading judgment of Gleeson CJ, Gummow and Hayne JJ has been accepted as containing the ratio of the decision. The reasoning of the joint majority (not just the decision of the Court) has

[118] Ibid 464–5 [117]–[118].
[119] Ibid 465-6 [121]–[122].
[120] Ibid 466 [123].
[121] Ibid 466 [125].
[122] Ibid 453 [76] (Gleeson CJ, Gummow and Hayne JJ, McHugh J agreeing at 467–8 [128]–[135]).
[123] Ibid 468 [135].
[124] Ibid 453 [77] (Gleeson CJ, Gummow and Hayne JJ, Callinan J agreeing at 488–9 [176]).
[125] In relation to extracting ratio from multiple judgments, see the discussion in Alastair MacAdam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (Butterworths, 1998) 203–213.

been applied as binding authority by the Federal Court,[126] and has been subsequently affirmed by the High Court.[127] For convenience, I will now refer to the joint majority as 'the majority'.

D Reactions to the High Court Decision

The High Court decision in *Yorta Yorta* generated a vast volume of literature. The Court was criticised for upholding the trial judge's decision, given the concerns over his treatment of the evidence.[128] The majority's reasoning was the subject of much scholarly legal critique — largely concerned with the implications of the decision for native title law in Australia.[129] Many commentators expressed concern about the effect of the decision increasing the already onerous burden of proof placed upon native title claimants.[130] Critics pointed to the failure to

[126] See, eg, *Risk v Northern Territory* (2007) 240 ALR 75; *Bodney v Bennell* (2008) 167 FCR 84. See also *Connection to Country* (n 104). This is an illustration of the principle that ratio can sometimes be determined from its subsequent reception and treatment in later cases: see GW Paton and G Sawer, 'Ratio Decidendi and Obiter Dictum in Appellate Courts' (1947) 68 *Law Quarterly Review* 461, 480 cited with approval in *Jones v Bartlett* (2000) 205 CLR 166, 225 (Gummow and Hayne JJ).

[127] Until the *Love* decision almost twenty years later, the only principles that had been subsequently affirmed by the High Court were that native title claims are governed by the provisions of the *Native Title Act* (not the common law) and that all elements of s 223(1) must be given effect: *Northern Territory v Griffiths* (2019) 93 ALJR 327, 340 [19], [21], 368 [158] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). The intersection of the common law with traditional laws and customs was restated by Hayne J in *Queensland v Congoo* (2015) 256 CLR 239, 140 [70]. These are still the only aspects of the *Yorta* judgment insofar as it relates to the *Native Title Act* that have been subsequently affirmed by the High Court. The Court's decision in *Love* affirmed many of the common law principles enunciated by the joint majority: see below.

[128] James F Weiner, 'Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta' (2002) 18 *Land, Rights, Laws: Issues of Native Title* 1; Bruce Buchan, 'The "Tides of History": The Yorta Yorta, Native Title and Colonial Attitudes to Indigenous Sovereignty' (2004) 7(2) *Journal of Australian Indigenous Studies* 3; David Ritter, 'The Judgement of the World: The *Yorta Yorta* Case and the "Tide of History' (2004) 35(123) *Australian Historical Studies* 106; Howard L Highland, 'The Mote in the Common Law's Eye: Dislodging Eurocentric Barriers to Just Recognition of Native Title in the Wake of *Yorta Yorta*' (2007) 13(2) *Washington and Lee Journal of Civil Rights and Social Justice* 349; Samuel Furphy, '"Our Civilisation has Rolled over Thee": Edward M Curr and the Yorta Yorta Native Title Case' (2010) 7(3) *History Australia* 54; Aileen Moreton-Robinson, 'The Possessive Logic of Patriarchal White Sovereignty: The High Court and the Yorta Yorta Decision' (2004) 3(2) *Borderlands e-journal*.

[129] Noel Pearson argued that the Court's rejection of the incorporation of a body of common law into the *Native Title Act* was a misunderstanding of Parliament's intent in enacting the Act and an unjust and unnecessary narrowing of Australian native title law: Noel Pearson, 'The High Court's Abandonment of the "The Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*' (2003) 7 *Newcastle Law Review* 1; see also Lisa Strelein, 'A Captive of Statute' (2009) 93 *Australian Law Reform Commission Reform Journal* 48.

[130] Richard Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015); Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (The Federation Press, 2008); Strelein, *Compromised Jurisprudence* (n 62); Robert French, 'Lifting the Burden of Native Title: Some Modest Proposals for Improvement' (2009) 93 *Reform* 10.

accommodate the impacts of colonisation,[131] or to allow for corresponding change in Aboriginal society and law.[132] Other commentators noted the problematic nature of the term 'traditional',[133] and the introduction of an additional criterion — proof of a continuing native title society.[134] The non-recognition of Aboriginal sovereignty,[135] and the Court's account of the legal conditions and implications of the acquisition of sovereignty by the British,[136] also attracted critique. So too did the problem of inter-cultural translation, and the power of the non-Indigenous judiciary to determine (rights and interests arising under) Indigenous law and society.[137]

Another aspect of the judgment that has come under criticism is the internal logic of the reasoning. Logical inconsistencies have been pointed out, particularly in relation to the paradox of requiring the continued existence and vitality of Indigenous law while simultaneously denying its law-making capacity,[138] and the reliance by the majority upon the trial judge's findings in satisfaction of a quite different test.[139] These issues arise as the result of the use of legal theory in the judgment, and will be explicated further here and in following chapters.

---

[131] Bartlett (n 130) 91; Kirsten Anker, 'Law in the Present Tense: Tradition and Cultural Continuity in *Members of the Yorta Yorta Aboriginal Community v Victoria*' (2004) 28(1) *Melbourne University Law Review* 1 ('Law in the Present Tense'); Daniel Lavery, 'A Greater Sense of Tradition: The Implications of the Normative System Principles in Yorta Yorta for Native Title Applications' [2003] *Murdoch University Electronic Journal of Law* 41, ('A Greater Sense of Tradition'); Kent McNeil, 'The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison' in Knafla and Westra (eds), *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* (UBC Press, 2010) 146.

[132] Bartlett (n 130) 98–99; Young (n 130) 325–330; Strelein, 'From *Mabo* to *Yorta*' (n 20); Lavery, 'A Greater Sense of Tradition' (n 131).

[133] Young (n 130); Lavery, 'A Greater Sense of Tradition' (n 131); Patricia Lane, 'Warming Up Cold Porridge: Amending the Native Title Act' (Legal Studies Research Paper No 10/13, Sydney Law School, University of Sydney, January 2010); Simon Young, 'Cultural Timelessness and Colonial Tethers: Australian Native Title in Historical and Comparative Perspective' (2008) 12(1) *Australian Indigenous Law Reporter* 60.

[134] Bartlett (n 130); Young (n 130); Strelein, *Compromised Jurisprudence* (n 62) 80; Lavery, 'A Greater Sense of Tradition' (n 131); Strelein, 'From *Mabo* to *Yorta*' (n 20) 259–60.

[135] Strelein, *Compromised Jurisprudence* (n 62); Francesca Dominello, 'Beyond Symbolism: Aboriginal Sovereignty and Native Title' (2008) 13 *Journal of the Australasian law Teachers Association*; Shaunnagh Dorsett and Shaun McVeigh, 'Section 223 and the shape of native title: The limits of jurisdictional thinking' in Lisa Ford and Tim Rowse, *Between Indigenous and Settler Governance* (Routledge, 2013).

[136] Daniel Lavery, 'The British Acquisition of New Holland: a Residuum of Allodial Sovereignties' (PhD Thesis, James Cook University, 2015) ('The British Acquisition of New Holland'); Shaunnagh Dorsett and Shaun McVeigh, 'An Essay on Jurisdiction, Jurisprudence, and Authority: The High Court of Australia in *Yorta Yorta* (2001)' (2005) 56(1) *Northern Ireland Legal Quarterly* 1 ('An Essay on Jurisdiction').

[137] Strelein, *Compromised Jurisprudence* (n 62) 78.

[138] Young (n 130) 324; Strelein, 'From *Mabo* to *Yorta*' (n 20) 255.

[139] Lisa Strelein has called this a 'leap of faith', and I have previously referred to it as a 'leap of logic': see Strelein, *Compromised Jurisprudence* (n 62) 81; Henriss-Anderssen (n 75) 338.

In 2015, a substantial proportion of the Australian Law Reform Commission's review of the *Native Title Act* was devoted to the interpretation of s 223 and the implications of the *Yorta Yorta* decision for the burden of proof on native title claimants.[140] The Commission recommended reform of s 223 to allow an explicit acknowledgement that traditional laws and customs may evolve or adapt, a relaxation of the stringent connection requirements, and rejection of the requirement to establish continuation of a society united in and by its acknowledgment and observance of traditional laws and customs. None of these recommendations have been enacted and s 223 remains unchanged. In any case, amendment of s 223 would not necessarily change the common law acknowledgement of traditional laws and customs as elucidated by the majority in *Yorta Yorta*.

V. LOVE V COMMONWEALTH

In its most recent decision concerning the recognition of Indigenous law, *Love v Commonwealth* (*Love*),[141] handed down on 11 February 2020, the High Court reiterated the foundational significance of the common law recognition of Indigenous Australians' connection to country and their traditional laws and customs as the source of that connection.[142] In the clearest acknowledgement yet that the recognition of Indigenous Australians' connection to country has broader implications than property law and is not limited to the recognition of native title, the High Court held that the common law recognition of connection to country prevented the possibility of Indigenous Australians being treated as aliens under the *Constitution*.[143]

Central to all four majority judgments in *Love* was the common law's recognition of the special connection between Indigenous Australians and the land and waters of Australia — a connection that is governed by their traditional laws and customs.[144] Most of the references in

[140] Australian Law Reform Commission, *Connection to Country: Review of the* Native Title Act 1993 *(C'th)* (Report No 126, April 2015) ('*Connection to Country*').

[141] *Love* (n 2).

[142] As I explained in the Introduction to the thesis, the decision in *Love* was handed down as this doctoral research project was in its final stages, and I have not therefore been able to include an extended analysis of the decision in this thesis.

[143] Bell J, Nettle J, Gordon J, and Edelman J (Kiefel CJ, Gageler J and Keane J dissenting). The case concerned the interpretation of the Commonwealth Parliament's constitutional power to legislate with respect to aliens (s 51(xix) of the *Constitution*). All seven members of the Court delivered separate judgments.

[144] *Love* (n 2). Gordon J and Edelman J held that the sovereignty of the Commonwealth of Australia was inextricably tied to its territory, and that since Indigenous Australians have a special connection to the land

the majority judgments to recognition of Indigenous law were expressed as supporting (or governing) the recognition of connection to country, although Nettle J and Gordon J discussed the recognition of traditional laws and customs in their own right. Nettle J's explicit references to the common law's recognition of traditional laws and customs — for example, 'the common law's acknowledgment of traditional laws' and 'the common law's recognition of that society's laws and customs as a foundation for rights and interests enforced under Australian law' — are some of the clearest statements made by the High Court regarding the recognition of Indigenous law.[145] Nevertheless, as with the native title cases, the context in which they were made was primarily concerned with the connection of Indigenous Australians to the land and waters of Australia.

The majority judgments in *Love* affirmed many of the fundamental common law principles enunciated by the joint majority in *Yorta Yorta*,[146] but considerably ameliorated their impact. The survival of traditional laws and customs, their authority with respect to the issues within their jurisdiction, and the significance (and unique position) of Indigenous society vis-à-vis traditional law, were translated in *Love* in a manner more respectful of Indigenous agency with respect to their own law.[147] Of course, the decision in *Love* did not involve, as had *Yorta Yorta*, the application of those principles in the interpretation of the *Native Title Act*.

VI. CONCLUSION: THE RECOGNITION OF TRADITIONAL LAWS AND CUSTOMS IN CONTEMPORARY AUSTRALIAN LAW

The recognition of Indigenous Australian traditional law by the common law of Australia has now been firmly established in Australian law,[148] although that recognition consists of little more than a bare acknowledgement of its continuing existence and operation. Since the decision

and waters of that same territory (a connection recognised by the common law of Australia), they cannot be aliens: at [347]–[349] (Gordon J), [438], [450] (Edelman J). Bell J held that in light of the common law recognition of the unique connection between Aboriginal Australians and their traditional lands, they 'cannot be said to belong to another place' and therefore cannot be treated as aliens: at [73]–[74] (Bell J). Nettle J considered that the historical connection between Aboriginal societies and the territory of Australia under their traditional law at the time the Crown acquired sovereignty over that territory gives rise to a special obligation of protection owed to Aboriginal societies and their members by the Crown in right of Australia. Therefore, an Aboriginal person is outside the ordinary meaning of 'alien' and beyond the legislative power of the Commonwealth to treat as an alien: at [272]–[284] (Nettle J).

[145] Ibid [272] (Nettle J) (emphasis added).

[146] Ibid [264], [268]–[271] (Nettle J), [290], [362]–[365] (Gordon J), [451] (Edelman J).

[147] Ibid [264], [268]–[271] (Nettle J), [290], [362]–[365] (Gordon J), [451] (Edelman J).

[148] *Mabo* (n 2); *Yorta Yorta* (n 63); *Love* (n 2).

in *Love*, it is now also clear that this acknowledgement is not limited to property rights or native title law, but is a broader, more foundational principle of the common law.[149]

The recognition of traditional law also appears to be subsidiary to the recognition of the connection to country that gives rise to native title rights and interests. That may be a result of the interrelationship between law and country in Indigenous worldviews, and the role of law in connecting people to country. Alternatively, it may be merely a consequence of the fact that the Anglo-Australian legal doctrine concerning its recognition has developed in the context of native title. In any case, the recognition of 'traditional laws and customs' appears to be anterior to, and embedded into, the recognition of connection.

[149] Being a common law principle, however, it is potentially susceptible to legislative abrogation. Although it was not in issue in *Love*, two of the majority judgments referred in obiter to that possibility, noting (without deciding the issue) that it would be subject to the constitutional power of Commonwealth Parliament to enact such legislation: *Love* (n 2) [283] (Nettle J), [373] (Gordon J).

CHAPTER FIVE
THE THEORETICAL FOUNDATIONS OF 'TRADITIONAL LAWS AND CUSTOMS' IN THE *YORTA YORTA* DECISION

I. INTRODUCTION

The High Court decision in *Yorta Yorta* remains the authoritative interpretation of 'traditional laws and customs' under the *Native Title Act* and the leading legal authority on the relationship between the received common law and Indigenous law following the acquisition of sovereignty. The leading judgment contains all the conceptual components of the construct of Indigenous Australian 'traditional laws and customs' in contemporary Anglo-Australian law.

In this chapter, I set out the reasoning in the majority judgment in *Yorta Yorta* in more detail, interrogating it for evidence of legal theory. The purpose is to draw out references to, and identify reliance upon, legal theory. I then undertake a preliminary analysis of the use of legal theory in the judgment, to reveal any implicit philosophical or ideological assumptions in the text, and identify the theoretical foundations of its interpretation of traditional laws and customs.

II. A CLOSER LOOK AT THE JUDICIAL REASONING IN *YORTA YORTA*

Gleeson, Gummow and Hayne JJ began their judgment with the observation that consideration of a native title claim must begin with the provisions of the *Native Title Act* (not the common law),[1] and that all elements of the definition of native title must be given effect.[2] The references in s 223(1) — which contains the definition — to rights and interests sourced in traditional law and customs but recognised by the common law, led the majority to observe that there was an intersection of traditional laws and customs with the common law.[3] Before considering each of the elements of s 223(1), therefore, the majority undertook an examination of the relationship between traditional laws and customs and the common law, beginning with a consideration of 'some fundamental principles'.[4]

[1] *Members of the Yorta Yorta Community v Victoria* (2002) 214 CLR 422 (Gleeson CJ, Gummow and Hayne JJ) 440 [32] ('*Yorta Yorta*').
[2] Ibid 440 [33].
[3] Affirming what had been said by the Court in *Fejo v Northern Territory* (1998) 195 CLR 96, 128 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ): *Yorta Yorta* (n 1) 439 [31].
[4] *Yorta Yorta* (n 1) 441 [36].

The first of the fundamental principles involved the change in sovereignty. The majority affirmed the act of state doctrine — the non-justiciability of the Crown's acquisition of sovereignty — and turned their attention to the consequences of the change in sovereignty.[5] The second principle was that upon acquisition of sovereignty, the Crown acquired radical title to the land, but native title rights and interests survived.[6] The rights and interests that survived 'owed their origin to a normative system other than the legal system of the new sovereign power' — the traditional laws and customs of the Indigenous peoples.[7]

A Traditional Laws and Customs as a Normative System

Their Honours then explained why they treated Indigenous law as a normative system or set of norms: because what is recognised is rights and interests, it is clear that the source of the rights and interests 'must be laws or customs *having a normative content* and *deriving, therefore, from a body of norms or normative system* — the body of norms or normative system that existed before sovereignty'.[8] Thus, they explained, the relevant intersection is '*an intersection of two sets of norms*',[9] noting that '[t]o speak of an intersection of two sets of norms, or of two normative systems, does not identify the nature or content of either'.[10]

At this point, the majority noted that 'it may [not] be immediately evident that a reference to "traditional laws acknowledged, and the traditional customs observed" is, in fact, a reference to a body of norms or normative system'.[11] They cautioned about conceiving of a normative system as a 'system' in the sense of a European-type legal system.[12] The footnote reference to that passage of text gives a comparison with an essay by Charles Sampford on legal systems.[13]

Having acknowledged that some may find it difficult to conceive of Indigenous law as anything akin to a legal system, the majority persisted in portraying it as a normative system, saying, '[i]t

[5] Ibid 441 [37].
[6] Ibid.
[7] Ibid.
[8] Ibid 441 [38] (emphasis added).
[9] Ibid (emphasis added).
[10] Ibid 442 [39].
[11] Ibid 441 [39].
[12] Ibid 442 [39].
[13] Charles Sampford, 'Legal Systems and their Place in Legal Theory' in DJ Galligan (ed), *Essays in Legal Theory* (Melbourne University Press, 1984) 165.

is only if the rich complexity of indigenous societies is denied that reference to traditional laws and customs as a normative system jars the ear of the listener'.[14]

In what they described as a 'caveat … about the utility of jurisprudential analysis',[15] the majority eschewed a 'jurisprudential debate' over whether Indigenous law can properly be conceived of as 'law', noting that such questions may not be useful:

> To speak of such rights and interests being possessed under, or rooted in, traditional law and traditional custom might provoke much jurisprudential debate about the difference between what HLA Hart referred to as 'merely convergent habitual behaviour in a social group' and legal rules. The reference to traditional customs might invite debate about the difference between 'moral obligation' and legal rules. A search for parallels between traditional law and traditional customs on the one hand and Austin's conception of a system of laws, as a body of commands or general orders backed by threats which are issued by a sovereign or subordinate in obedience to the sovereign, may or may not be fruitful. Likewise to search in traditional law and traditional customs for an identified, even an identifiable, rule of recognition which would distinguish between law on the one hand, and moral obligation or mere habitual behaviour on the other, may or may not be productive.[16]

The legal theory cited in this passage is drawn from arguably the most well-known legal positivists in the history of British jurisprudence, HLA Hart,[17] and John Austin.[18] Each of the jurisprudential questions concerned the difference between law and other phenomena, an issue which was treated as unhelpful.

In any case, their Honours held that it was unnecessary to distinguish between law and custom because s 223(1) refers to *both* traditional law *and* traditional custom.[19] At the very least, they held, traditional law and customs must comprise rules having a normative quality:

> because the subject of consideration is rights or interests, the rules which together constitute the traditional laws acknowledged and traditional customs observed, and under which the

[14] *Yorta Yorta* (n 1) 442 [40].
[15] Ibid 447 [55].
[16] Ibid 442–3 [41] (citations omitted).
[17] The edition cited by the majority was HLA Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994).
[18] The edition cited by the majority was: John Austin, *The Province of Jurisprudence Determined* (1832) Lecture I (Library of Ideas ed, 1968 impression).
[19] *Yorta Yorta* (n 1) 443 [42].

> rights or interests are said to be possessed, must be rules having normative content. Without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters.[20]

The difference between rules (which have a normative quality) and observable patterns of behaviour was a central feature of HLA Hart's conceptual analysis of law.[21] Hart's analysis of the difference between 'merely convergent habitual behaviour' and legal rules had been referred to by their Honours in the previous paragraph as an avoidable jurisprudential debate, but was nevertheless relied upon in this passage to conclude that traditional law and custom must comprise (normative) rules.

B The Impact of the Intersection on the Indigenous Normative System

Having established that the traditional laws and customs amount to a 'set of norms' or 'normative system', the majority resumed their enumeration of fundamental principles, observing a further consequence of the change in sovereignty for Indigenous law — the impairment of its law-making capacity.

Their Honours held that '[u]pon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties, or interests'.[22] This impairment was the necessary outcome of the change in sovereignty, since '[w]hat the assertion of sovereignty by the British Crown necessarily entailed was that *there could thereafter be no parallel law-making system* in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty …'[23] As a result, the only rights and interests not originating in the new sovereign order, that will be recognised by it, are those that have their origin in pre-sovereignty law and custom.[24]

At this point, the majority again interrupted their consideration of 'fundamental principles' by pointing out a number of implications of this reasoning for the interpretation of the word 'traditional' in relation to laws and customs in s 223(1). Their Honours noted that the term

[20] Ibid.
[21] HLA Hart, *The Concept of Law* (Oxford University Press, 1961).
[22] *Yorta Yorta* (n 1) 443 [43].
[23] Ibid 444 [44] (emphasis added).
[24] Ibid. The majority clarified that although the law-making power of the Indigenous normative system was impaired, some alteration or development of traditional law that occurred after sovereignty in accordance with traditional law and custom may be allowable: at 443 [44].

'traditional' in this context has three aspects. The first is its general meaning, that of transmission through generations of a society, 'usually by word of mouth and common practice'.[25] Secondly, it also 'conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown.'[26] And thirdly, the reference to rights and interests being presently possessed under the traditional laws and customs 'requires that the normative system under which the rights and interests are possessed is a system that has had a continuous existence and vitality since sovereignty'.[27]

The majority held that if the normative system has not continued to exist throughout the period since sovereignty, any 'rights and interests which owe their existence to that system will have ceased to exist'.[28] They continued, 'any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title.'[29]

C The Inextricable Link Between a Society and its Laws and Customs

The majority then returned to first principles, pointing out that laws and customs 'do not exist in a vacuum', but arise out of, and are inextricably linked to, a society.[30] This passage contains the most express reliance upon legal theory in the entire judgment. Three works of jurisprudence, Julius Stone's *The Province and Function of Law*,[31] George Paton's *A Text-book of Jurisprudence*,[32] and Tony Honoré's essay on 'Groups, Laws and Obedience',[33] are not merely referred to, but relied upon as authorities for the proposition that there is an 'inextricable link between a society and its laws and customs'.

[25] Ibid 444 [46].
[26] Ibid.
[27] Ibid 444 [47].
[28] Ibid 445 [47].
[29] Ibid.
[30] Ibid 445.
[31] Julius Stone, *The Province and Function of Law: Law as Logic Justice and Social Control* (Associated General Publications, 1946).
[32] George Whitecross Paton, *A Textbook of Jurisprudence* (Oxford, 1946).
[33] AM Honoré, 'Groups, Laws and Obedience' in AWB Simpson (ed) *Oxford Essays in Jurisprudence* (Second Series, Clarendon Press, Oxford, 1973).

As a result of this 'inextricable link', their Honours held that 'if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality'.[34] If this happens, the native title rights and interests will have ceased to exist.[35] Their Honours clarified that '[i]f the content of the former laws and customs is later adopted by some new society, those laws and customs will then owe their new life to that other, later, society'.[36]

In order to explain this, their Honours again relied upon jurisprudence:

> In so far as it is useful to analyse the problem in the jurisprudential terms of the legal positivist, the relevant rule of recognition of a traditional law or custom is a rule of recognition found in the social structures of the relevant indigenous society as those structures existed at sovereignty. It is not some later created rule of recognition rooted in the social structures of a society, even an indigenous society, if those structures were structures newly created after, or even because of, the change in sovereignty.[37]

The term 'rule of recognition' was coined by HLA Hart, and is a central tenet of *The Concept of Law*. It refers to the ultimate criteria, accepted as binding by legal officials, for validity of all laws in a legal system.[38] Having used the concept of a rule of recognition to explain that the source of validity of the contemporary Indigenous normative system must be the same as for the pre-sovereignty Indigenous normative system, the majority repeated their caution about the utility of jurisprudential analysis using Eurocentric jurisprudence.[39]

D The Requirement of Continuity of Society and Laws and Customs

Finally, having enumerated these fundamental principles concerning the meeting of the common law with Indigenous law at the time of acquisition of sovereignty, the majority turned their attention to the implications of those principles for proof of native title under s 223(1). The majority held that, in order to prove native title, it must be shown that acknowledgement and observance of the laws and customs that existed at the time of sovereignty has 'continued

[34] *Yorta Yorta* (n 1) 445 [50].
[35] Ibid 446 [53].
[36] Ibid.
[37] Ibid 446 [54].
[38] Hart (n 21) ch 6.
[39] *Yorta Yorta* (n 1) 447 [55].

substantially uninterrupted since sovereignty',[40] and that the society 'has continued to exist throughout that period as a body united by its acknowledgement and observance of the laws and customs'.[41] The majority again turned to jurisprudence to help explain their reasoning:

> *To return to a jurisprudential analysis*, continuity in acknowledgement and observance of the normative rules in which the claimed rights and interests are said to find their foundations before sovereignty is essential because *it is the normative quality of those rules* which rendered the Crown's radical title acquired at sovereignty subject to the rights and interests then existing and which now are identified as native title'.[42]

The majority held that since the findings of the trial judge 'were findings about *interruption* in observance of traditional law and custom not about the content of or changes in that law or custom',[43] the appellants had not proven continuity of a society united in its acknowledgement and observance of the laws and customs. The trial judge's findings 'were findings that the society which had once observed traditional laws and customs had ceased to do so and, by ceasing to do so, no longer constituted the society out of which the traditional laws and customs sprang'.[44] The majority concluded, therefore, that the claimants must fail and the appeal be dismissed.[45]

III. THE USE OF LEGAL THEORY IN *YORTA YORTA*

In this second section of the chapter, I analyse the use of legal theory in the majority judgment in *Yorta Yorta*. The purpose of this preliminary analysis is to reveal the theoretical foundations of the interpretation of traditional laws and customs, which will then form the basis of further analysis in the remainder of the thesis.

It is not my aim in this section to undertake a major analysis of the reasoning of the judgment. Although there are many irregularities that are immediately apparent from the logic of the

[40] This requirement follows from the casting of paras (a) and (b) in the present tense, while para (c) refers to the intersection between legal systems that occurred at the time of change of sovereignty: ibid 456 [77–87].
[41] Ibid 457 [89].
[42] Ibid 456 [88] (emphasis added).
[43] Ibid 458 [95] (emphasis in original).
[44] Ibid.
[45] Ibid 458–9 [96–7].

reasoning (such as circularity,[46] logical inconsistency,[47] and internal contradiction)[48] and implications that can be drawn from the judgment regarding the construct of Indigenous law (for example, whether the impairment of its law-making capacity effectively reduces it from a system of law to custom,[49] or whether the use of descriptors such as 'sets of norms' has the effect of downgrading it to a set of protocols), these issues will be addressed later in the thesis. The object of this section is to elucidate what theories are relied upon by the majority, and signpost the discussion of those theories, and their implications, in the remaining chapters of the thesis.

In this section, I first analyse the reasoning for *implicit* philosophical assumptions, drawing out reliance upon theory that is not explicitly acknowledged, and secondly, identify *explicit* reference to, and reliance upon, theory in the text of the judgment. Finally, I compare the construction of traditional laws and customs in the judgment to the concepts of Indigenous law described by Indigenous authors.

A Implicit Use of Theory

At first glance, the language of co-existing normative systems in the majority judgment in *Yorta Yorta* is reminiscent of legal pluralism. The use of a common term ('normative system') to describe both the law of the Indigenous jurisdictions and the received common law connotes a sense of commonality, and even equality, between them. That initial appearance of legal pluralism is enhanced by the majority's rebuttal of an anticipated argument that traditional law and custom would not amount to a normative system. However, upon the intersection of the normative systems, the similarity with legal pluralism ends. The impairment of the law-making capacity of the Indigenous normative system(s) upon intersection with the law of the new sovereign system exposes the appearance of legal pluralism as a façade.[50] The majority insists

[46] The wording of the definition is used to point to fundamental principles, which are in turn used to interpret the wording of the definition.

[47] The conclusion of the judgment does not logically follow from the reasoning: the majority relied upon the trial judge's findings, which did not satisfy the test in their reasoning (see below).

[48] The requirement of the continued existence and vitality of Indigenous law despite the denial of its law-making capacity.

[49] See Shaunnagh Dorsett and Shaun McVeigh, 'An Essay on Jurisdiction, Jurisprudence, and Authority: The High Court of Australia in *Yorta Yorta* (2001)' (2005) 56 (1) *Northern Ireland Legal Quarterly* 1, 11–13 ('An Essay on Jurisdiction').

[50] Anker has described the majority's rejection of legal pluralism as 'incoherent': Kirsten Anker, 'Law in the Present Tense: Tradition and Cultural Continuity in *Members of the Yorta Yorta Aboriginal Community v*

that there can be 'no parallel law-making system'. There is, therefore, no legal pluralism — at the most there is a form of normative pluralism.

On the other hand, the terminology of norms and rules, sets of norms, and normative systems evokes the lexicon of legal positivism and its jurisprudence of analysis. In reverting to first principles, the majority slipped into the language of 20th century analytical jurisprudence. Traditional laws and customs are most frequently described as a 'normative system', but are also variously referred to as comprising 'rules',[51] 'normative rules' or 'bodies of normative rules',[52] 'bodies of norms',[53] and 'sets of norms'.[54] The use of terminology such as 'norms' and 'rules' mirrors the language of the two most influential analytical jurists of the 20th century, Hans Kelsen and HLA Hart. Kelsen famously described law as a hierarchy of *norms*.[55] Hart arrived at a concept of law comprised of *rules.*[56]

In many ways, given the nature of the judicial task, the vocabulary of analytical jurisprudence was a natural language to fall into, because of its preoccupation with what law is, and how to account for its normativity. However, implicit in that language is a host of assumptions, the origin and nature of which are culturally specific. Developed in the context of European systems of law, the paradigm of law for analytical jurisprudence is European, or Western, law. These terms, 'rules', 'norms' and 'normative systems', have been developed as ways of describing particular aspects of Western law, and are not value-free.

The majority demonstrated, however, that it was aware of the danger in importing theoretical analyses and terminology derived from Eurocentric concepts of law:

> reference to a normative 'system' of traditional laws and customs may itself be distracting if undue attention is given to the word 'system', particularly if it were to be understood as

Victoria' (2004) 28(1) *Melbourne University Law Review* 1, 20 ('Law in the Present Tense'). See also Dorsett and McVeigh, 'An Essay on Jurisdiction' (n 49).

[51] *Yorta Yorta* (n 1) 443 [42], [44], 444 [46].

[52] Ibid 442 [40], 444 [46].

[53] Ibid 441 [38], 442 [39], 445 [48].

[54] Ibid 441–2 [38], [39].

[55] Hans Kelsen, *Pure Theory of Law*, tr Max Knight (University of California Press, 1967).

[56] Hart (n 21).

> confined in its application to systems of law that have all the characteristics of a developed European body of written laws.[57]

The majority's concern with the appropriateness of terminology was also, a little later in the judgment, extended to the analytical theories which have been developed in connection with European societies. The majority was aware that they may not be appropriate when applied to societies with quite different concepts of law:

> any analysis of the traditional laws and customs of societies having no well-developed written language by using analytical tools developed in connection with very differently organised societies is fraught with evident difficulty.[58]

Despite its awareness of the intercultural difficulties, the majority's language is one of deficit. The 'traditional laws and customs of societies having *no well-developed written language*' are compared to 'a *developed European body of written laws*'.[59]

Although the majority entered a caveat about the utility of questions of analytical jurisprudence, the judgment is not just replete with the terminology, but comprises a way of thinking about law that can itself be described as an exercise in descriptive legal theory.[60] As pointed out by Dorsett and McVeigh:

> Rhetorically, the majority decision in *Yorta Yorta* is striking for taking up a University jurisprudence — the positivism and analytical language philosophy of 'Oxford Jurisprudence' — to give form to its deliberations … For all that the Majority advises the reader that such work should be treated with great caution … their disavowals did not prevent them from using it to perform a number of tasks within the judgment.[61]

There is an inconsistency between the majority's explicit hesitation regarding the utility of analytical jurisprudence, and their implicit reliance upon it throughout the reasoning. Anker

[57] *Yorta Yorta* (n 1) 442 [39].
[58] Ibid 447 [55] (emphasis added).
[59] The deficit implies a scale of development based upon writing. Indigenous societies are placed at an earlier stage on that scale of development, while European systems of law represent its pinnacle.
[60] Patrick Glenn pointed out that although it was done in a qualified way, the judgment relied extensively on positivist legal philosophy: H Patrick Glenn, 'Continuity and Discontinuity of Aboriginal Entitlement' (2007) 7 *Oxford University Commonwealth Law Journal* 23, 29; see also Kirsten Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Routledge, 2016) 69 ('*Declarations of Interdependence*'); Dorsett and McVeigh, 'An Essay on Jurisdiction' (n 49) 19.
[61] Dorsett and McVeigh, 'An Essay on Jurisdiction' (n 49) 8.

describes the majority's use of legal theory as disingenuous; '[i]t is invoked, waved away as something which "may or may not be fruitful", and yet, once dismissed, continues to hover like a spectre over the remainder of the Court's process of rationalisation …'[62]

The caveat, in effect, acts as a smokescreen. Its concern is to do away with questions relating to whether traditional laws and customs can be conceived of as law or a system of norms at all — questions which would cast doubt upon the capacity of the language of Western legal theory to adequately account for the nature of Indigenous law. But the effect of avoiding these difficult questions is that the majority avoid having to justify their use of analytical jurisprudence.

The caveat effectively allows the excision of a mere part of the analytical project, while appearing to do away with the whole. That appearance allows the importation of assumptions from analytical jurisprudence into the language of the judgment, without going into the necessary justification which would expose the origin and nature of those assumptions.

Having issued the disclaimer, the justices proceeded with an analysis based upon fundamental principles[63] — principles which draw upon concepts with a derivation in 19th and 20th century analytical jurisprudence. 'Jurisprudential analysis', essentially analytical jurisprudence, is drawn upon periodically to support, or assist in explaining, the reasoning,[64] thus demonstrating the synergies between the two.

The terminology used in the judgment indicates the pervasive influence of the concepts associated with analytical jurisprudence. Conceptualising law as a normative system, for example, carries hidden assumptions. A closer look at the logic of part of the reasoning demonstrates this:

The judgment began with a premise that there was an intersection of two normative systems at the time of the Crown's assertion of sovereignty. The result of the change in sovereignty at the moment of intersection is that one of the normative systems loses its law-making capacity, or its law-making capacity is seriously impaired. As a matter of logical deduction, it is not possible to arrive at that conclusion unless a normative system is conceived in a particular way, or unless

[62] Anker, 'Law in the Present Tense' (n 50) 15 (citations omitted).
[63] *Yorta Yorta* (n 1) 441 [36], 445 [48], 447 [55].
[64] See, eg, ibid 446 [54], 456 [88].

there is another (unstated) premise. The conclusion is only possible if the lawmaking capacity of a normative system rests upon another norm — a more foundational norm — that stipulates sovereignty as the source of lawmaking power.[65] Otherwise, purely as a matter of logic, there is no reason why a normative system would lose its law-making power upon a loss, or change, of sovereignty.

This examination of the reasoning demonstrates that the apparently neutral term 'normative system' is a term that carries assumptions from the school of thought from which it derives. According to that school of thought, where law is conceived of as a system of norms or rules, it can only be effective, or internally valid, if it has a foundational norm or rule (however conceived).[66] Kelsen grounded his hierarchy of norms in a basic norm, or *Grundnorm*.[67] Hart grounded his in a 'rule of recognition'.[68] Although there are obvious differences between Kelsen's *Grundnorm*, and Hart's rule of recognition,[69] there are some fundamental similarities in their function in the theories. The basic norm and the rule of recognition provide the ultimate source of validity for all the rules or norms comprising the system, and enable the efficacy of the system itself.

The perceived necessity of a founding principle for the effective functioning of a normative system is implicitly recognised in another passage in the judgment, where the majority explains the requirement of continuity of the normative system and relevant society by reference to a rule of recognition:

> In so far as it is useful to analyse the problem in the jurisprudential terms of the legal positivist, the relevant rule of recognition of a traditional law or custom is a rule of recognition found in the social structures of the relevant indigenous society as those structures existed at sovereignty. It is not some later created rule of recognition rooted in the social structures of a society, even an indigenous society, if those structures were structures newly created after, or even because of, the change in sovereignty.[70]

[65] A similar point is made by Anker, *Declarations of Interdependence* (n 60).
[66] The circularity of this type of argument has been demonstrated by Margaret Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (Pluto Press, 1996).
[67] Kelsen (n 55).
[68] Hart (n 21).
[69] Perhaps the most fundamental difference is that Kelsen's *Grundnorm* is a presupposition, while Hart's rule of recognition is a social fact.
[70] *Yorta Yorta* (n 1) 446 [54].

As Anker notes, however, although the majority required the relevant rule of recognition to be found in Indigenous society, the majority supplanted its own rule of recognition for traditional laws and customs, rather than 'the criteria that are used by Indigenous law men and women'.[71]

The concept of a rule of recognition is central to the majority's reasoning. It is used to explain the impairment of one of the normative systems upon intersection, and how the 'traditional laws and customs' presently possessed could have their origin in the pre-sovereignty rules. It is the explanation for the normative system having had a continuous existence and vitality since sovereignty. It explains why continuity of the normative system does not necessarily entail continuity of actual content (thus allowing for change) of those laws and customs. It is used, finally, to explain the requirement that the society must have continued to exist throughout the period as a body united by its acknowledgment and observance of the laws and customs.

The rule of recognition is therefore one aspect of Hart's jurisprudence that permeates the judgment.[72] Another is Hart's analysis of the normativity that distinguishes rules from patterns of behaviour. As Anker has explained, 'it is hard to make sense of the distinction that the Court maintains between "observable patterns of behaviour" and "rules having normative content" that give rise to rights and interests without reference to Hart'.[73] The difference, for Hart, lies in the distinction between what an outsider might observe and the internal attitudes of those who feel the obligation to conform (the 'internal point of view').[74] Again, as Anker has observed, 'the internal aspect is decidedly missing from Olney J's analysis in the *Yorta Yorta* trial'.[75] Although the trial judge did not make any inquiry into the continuing existence of the society in the sense of a normative system,[76] and so did not find absence of society in the sense

[71] Anker, *Declarations of Interdependence* (n 60) 77.
[72] See also the discussion in ibid 76–7; and Dorsett and McVeigh, 'An Essay on Jurisdiction' (n 49) 8–10.
[73] Anker, *Declarations of Interdependence* (n 60) 78.
[74] Hart (n 21). Bruce Rigsby has suggested that Hart's perspective on normativity differs from that conventionally held by social anthropologists: Bruce Rigsby, 'Social Theory, Expert Evidence, and the *Yorta Yorta* Rights Appeal Decision' in Louis A Knafla and Haijo Westra (eds) *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* (UBC Press, 2010) 69.
[75] Anker, *Declarations of Interdependence* (n 60) 78. This is discussed in the next chapter.
[76] Instead, Olney J found absence of traditional society because *radical change had occurred in the physical use and occupation*, by the society, of the land. He did not inquire into whether the norms of this group of claimants had *the same source of validity* as the norms of their forebears, inquiring instead whether the present norms had substantially *the same content* as the former.

required by the majority of the High Court, his decision was relied upon by them in satisfaction of their test.[77]

HLA Hart's *The Concept of Law* epitomises modern analytical jurisprudence in the Anglo-Commonwealth, and has been extremely influential in the Anglo-Australian legal community. The implications of the use of Hart's work in the reasoning are critically examined in the next chapter.

B Explicit Use of Theory

For the most part, the use of analytical theory throughout the judgment is not specifically acknowledged. There are, however, a number of explicit references to works of legal theory — some of these are in the 'caveat', while others are found in the body of the judgment and are drawn upon to support significant aspects of the reasoning.

The theory cited in the 'caveat' is almost exclusively drawn from HLA Hart's *The Concept of Law*.[78] The only other reference is to Austin's *Province of Jurisprudence Determined*,[79] and that also includes a reference to Hart's discussion in *The Concept of Law*.[80] Each of the specific jurisprudential questions identified in the caveat was derived from Hart, and concerned the limits of 'law'. To the extent that the 'jurisprudential debate' referred to was limited to questions to do with whether Indigenous law can be classed as law, they are thereby (to the extent of the reference) explicitly excluded from consideration in the judgment. However, as demonstrated above, despite the caveat, the judgment is imbued with the conceptual legacy of analytical jurisprudence, particularly that of HLA Hart — indeed, the fact that all of the questions excised from consideration were from Hart, may also be an indication of the influence of his work throughout the judgment.

Another explicit reference to a work of legal theory is made in the preamble to the caveat. Caution is expressed about the use of the word 'system' (as in a legal system or normative

[77] This is despite the majority taking pains to make clear that it is the normativity (not the content) of the traditional laws and customs that must be continuing. I have previously argued that this leap of logic has occurred due to a slight shift in language in parts of the judgment: Diana Henriss-Anderssen, '*Members of the Yorta Yorta Community v Victoria* [2002] HCA 58 (12 December 2002)' (2002–2003) 9 *James Cook University Law Review* 331, 337–9.

[78] Hart (n 17).

[79] Austin (n 18).

[80] *Yorta Yorta* (n 1) [41] n 25.

system) in references to traditional laws and customs.[81] The majority warned that the term 'system' in that context should not be understood 'as confined in its application to systems of law that have all the characteristics of a developed European body of written laws'.[82] The footnote accompanying that text contains a reference to a contrasting view of the concept of systems in legal theory by Charles Sampford.[83]

In his essay, 'Legal Systems and their Place in Legal Theory', Sampford noted that there had been an assumption across all the major jurisprudential schools, that law can and does form some sort of system, and that the task of the theorist is to present law in this way.[84] Against this orthodox view, Sampford argued that 'law is best seen as not systematic at all'.[85] Foreshadowing the trend of critical legal scholarship in the late 20th century, that challenged the modernist view of law as ordered, Sampford argued that 'it is often less illuminating to depict law as systematically ordered than to highlight the disorder within it.'[86]

Anker suggests that the majority in *Yorta Yorta* was *quoting* Sampford, who, she notes, 'ironically, would even deny the systematic character of European law'.[87] However, the footnote reference to Sampford was introduced by the signal 'cf' (meaning to compare with), indicating that the majority were well aware that Sampford's theory represented a contrasting view.

The only passage in the judgment where reliance is placed upon identified works of legal theory as authority for the propositions they are invoked to support, is in the section on the connection between law and society.[88] There the majority supported their point that there is an 'inextricable link between a society and its laws and customs' by citing three sources, all of which are works of British or Anglo-Australian legal theory. Two (the works of George Paton and Julius Stone) are textbooks of jurisprudence published in 1946, which take a sociological approach to the discussion of law and society. The third is an essay by Tony Honoré in the style of analytical

[81] Ibid 442 [39].
[82] Ibid.
[83] Sampford (n 13).
[84] Ibid 166.
[85] Ibid.
[86] Ibid.
[87] Anker, *Declarations of Interdependence* (n 60) 76.
[88] *Yorta Yorta* (n 1) 445.

jurisprudence, first published in 1973. Analysis of these texts, and the implications of their use in the reasoning, are the subject of consideration in Part V of this thesis.

Ironically, given that this passage contains the most overt reliance upon legal theory in the entire judgment, there has been little written about it. There are a couple of probable explanations for this. The first is that the reasoning in the judgment relies upon assumptions drawn from positivist analytical jurisprudence, rather than the sociological jurisprudence represented by two of the writers cited in this passage. The second, related, explanation is that the positivism of the Court's reasoning is at odds with the sociological jurisprudence cited in support of this link. As Anker has stated, 'the mutual implication of law and society is rather selectively and superficially deployed in the *Yorta Yorta* reasoning'.[89] Indeed, the principles enunciated in the passage, a 'series of socio-legal truisms',[90] are used to support a positivist, rather than sociological, position.

The link between law and society is used in the reasoning to support the requirement of a further criterion (the 'society') for the existence of 'traditional law and custom'.[91] Describing necessary features for the identification of law, and setting criteria for its differentiation from other, non-legal, phenomena, is a distinctively positivist pursuit. There are precedents in the classics of legal positivist theory for making a certain kind of society one of the requisite elements for the existence of law. It was a feature of Austin's jurisprudence, one which he denied that Indigenous Australians had. Hart, too, questioned the existence of law in what he called a 'primitive society'. The positivist theme is so ubiquitous in *Yorta Yorta*, and the society element treated in such a positivist way, that it has led to confusion over whether the sociological jurists themselves were positivists.[92] These issues are explored further in later chapters — Hart's pre-legal society is examined in Part IV, and the links between law and society in the works of Paton, Stone and Honoré in Part V.

---

[89] Anker, *Declarations of Interdependence* (n 60) 75.

[90] Ibid 70.

[91] In addition to adding it as a criterion for native title. The majority held that if the society (out of which the body of laws and customs arises) ceases to exist as a group which acknowledges and observes those laws and customs, then the laws and customs cease to have continued existence and vitality. They then added this additional criterion for the continuing existence of law to the requisite proof of native title: requiring proof of continuity of the society which constitutes and gives rise to the normative system, in addition to continuity of the normative system itself.

[92] See, eg, Daniel Lavery, *The British Acquisition of New Holland: a Residuum of Allodial Sovereignties* (PhD Thesis, James Cook University, 2015) 258–9 ('*The British Acquisition of New Holland*').

C The Absence of Indigenous Concepts of Law

All of the theories explicitly and implicitly relied upon in the judgment are works of British or Anglo-Australian jurisprudence. Needless to say, the interpretation of Indigenous Australian law in *Yorta Yorta* bears little resemblance to the accounts by Indigenous Australian scholars. Despite having alluded to an intersection of two very different types of law — despite an ostensible awareness of the dangers of using Western theory to describe Indigenous law, access to a well-established body of knowledge within the Western academe on the nature of Indigenous Australian law,[93] and an extraordinary level of access to first-hand testimony from Indigenous law men and women,[94] — the majority left unconsidered any theory emanating from those with authority or expertise in Indigenous Australian law.

The fundamental concepts of Indigenous law — as outlined by scholars of Indigenous Australian law — are markedly absent from the reasoning. Land, which according to these accounts, is itself the source of the law and connects people with the law, is virtually absent from the majority's version — except in the derivative sense of being the object of rights and obligations arising from the norms of the normative system. Also absent is the natural world, interconnected with people through the law, and in which the law is immanent. Concepts of being, thinking and actualising the law, so prevalent in Indigenous accounts, are absent. Consideration of traditions, songs, stories, art and ceremonies, through which the law is lived, embodied and inherent, are likewise absent. Absent too is consideration of a 'fundamental principle' of Indigenous law — the cyclical, non-linear and non-hierarchical nature of law with its capacity for continual renewal. The philosophies of mutuality and balance, reflected in the relational nature of the law of responsibilities and obligations, are also absent.

Instead, the Court's interpretation of Indigenous law uses criteria describing law in a linear and hierarchical Western sense. Law is seen as a set of rules or norms, entirely divorced from the

[93] This multi-disciplinary body of knowledge includes evidence-based anthropological research (by both Indigenous and non-Indigenous researchers), Indigenous-authored standpoint theory, and Indigenous-authored 'Indigenous jurisprudence'. Many of these studies have been included in texts on Indigenous Australians and the law. In a visual representation of the access of the Court to a repository of this accumulated learning, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), which houses the world's largest collection of material relating to Indigenous Australian cultures and histories, is situated diagonally across Lake Burley-Griffin from the High Court building in Canberra.

[94] The cumulative body of evidence (in relation to Indigenous law) tendered in support of native title claims is a formidable archive, but the High Court's position in relation to such evidence is admittedly constrained.

natural world, and limited to the governance of human behaviour. The linear, non-cyclical view of law is apparent in the concept of an intersection of two normative systems, which would otherwise run parallel. The social reach of the law does not take into account the vast realm of natural and spirit beings, but is limited to a human society.

By this view of the law, cut off from the land and the natural world, and vulnerable to the vagaries of solely human interaction, the law is dependent upon human recognition and is non-renewable. It is unrecognisable as an Indigenous Australian concept of law. And yet it amounts to the legal definition of Indigenous Australian traditional laws and customs.

IV. CONCLUSION

The theoretical foundations of the construct of Indigenous Australian 'traditional laws and customs' in contemporary Australian law are drawn entirely from 20th century British and Anglo-Australian legal theory, and are almost exclusively legal positivist. The interpretation of 'traditional laws and customs' by the High Court in *Yorta Yorta* relies upon concepts and assumptions of positivist analytical jurisprudence, predominantly that of HLA Hart. Although much of the use of legal theory in the reasoning is implicit, several explicit references to specific works of legal theory are made throughout the judgment. For the most part, these references are to legal positivist works of analytical jurisprudence, and even where the works are not of that genre (such as those of Stone and Paton), they are used to support a positivist position in the judgment.

In the following chapters of this thesis, the theoretical texts relied upon in the judgment are further critically examined. The theories of HLA Hart, Julius Stone, George Paton and Tony Honoré are situated within the history of British and Anglo-Australian legal ideas, and explored for their portrayal of Indigenous Australian law. In particular, I investigate how Indigenous Australian law is positioned in relation to the concept of 'law' as defined or described in those texts. Finally, I consider the implications of the use of these theories for the construct of 'traditional laws and customs'.

PART IV

THEORY IMPLICITLY RELIED UPON IN *YORTA YORTA*

CHAPTER SIX
THE PRE-LEGAL SOCIETY IN HART'S CONCEPT OF LAW

I. INTRODUCTION

The influence of HLA Hart's theory in the interpretation of Indigenous Australian traditional laws and customs is problematic because it contains an obvious pre-legal–legal dualism, reminiscent of the state of nature–civil society mechanism that was instrumental in the application of terra nullius to Australia. With an analytic device similar to that used in the Enlightenment theories of Hobbes and Locke, Hart's analysis of the concept of a legal system rests upon a juxtaposition of 'primitive' and modern societies. At the heart of *The Concept of Law*,[1] lies the notion of progression from a 'primitive community' with only primary rules, to an advanced legal system with a combination of both primary and secondary rules.

In this chapter, I investigate how Indigenous Australians are positioned in relation to Hart's pre-legal–legal dualism. This is of critical importance because the positioning of Indigenous Australians on the 'state of nature' side of the Enlightenment dualism resulted in the denial of Indigenous law that enabled the application of terra nullius to Australia. It is especially important given the use of Hart's jurisprudence in the theory of the meeting of Indigenous law with the common law that replaced terra nullius.

I begin this chapter with a brief biographical sketch and an outline of Hart's account of a legal system. I then examine the 'primitive', pre-legal society in Hart's *The Concept of Law*, and its counterpart, the advanced legal system, to analyse the position of Indigenous Australian societies and law in Hart's scheme. Finally, I analyse the construction of the dualism and consider its impact on the interpretation of Indigenous law in the *Yorta Yorta* decision.

[1] HLA Hart, *The Concept of Law* (Oxford Clarendon Press, 1961) ('*The Concept of Law* 1st ed'). The second edition, published posthumously in 1994, contained a postscript written by Hart, but otherwise remained unchanged from the first edition. The third edition, containing an introduction by Professor Leslie Green, was published in 2012. Pinpoint references in this chapter are to the third edition: HLA Hart, *The Concept of Law* (Oxford Clarendon Press, 3rd ed, 2012) ('*The Concept of Law* 3rd ed').

II. HERBERT HART'S CONCEPT OF LAW

Herbert Lionel Adolphus Hart (1907–1992)[2] is widely regarded as the preeminent English-speaking legal philosopher of the 20th century.[3] He is credited with the revival of English jurisprudence and, in particular, legal positivism. Hart revitalised the distinction that the early positivists, Bentham and Austin, had made between the conceptual analysis of law on one hand, and issues of law reform on the other. Like Bentham (and unlike Austin), Hart published in both fields. His earlier work, including *The Concept of Law*, made contributions to the analytical branch of jurisprudence.[4] In his later work, inspired by his commitment to the values of liberalism — such as liberty and equality — Hart's jurisprudence contained arguments for law reform on issues such as abolition of the death penalty and decriminalisation of homosexuality.[5] The biographical detail that follows contextualises Hart's intellectual work and provides important insight into material influences upon it.[6] The relevance of this social, historical and scholarly context will become more apparent later in the thesis, where it is used to consider the impact, upon abstract theories of 'law', of the specific conditions in which they were produced.

Hart spent most of his life and career at Oxford University. Elected to the Chair of Jurisprudence in 1952, he combined an expertise in philosophy with experience of legal practice. From an orthodox Jewish upbringing in Yorkshire, northern England, Hart had been educated at Oxford

[2] Hart was known as Herbert, but published as HLA Hart.

[3] See, eg, Michael Martin, *The Legal Philosophy of HLA Hart: A Critical Appraisal* (Temple University Press, 1987) 3; Nicola Lacey, *A Life of HLA. Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004) ('*The Nightmare and the Noble Dream*') 1; Tony Honoré, 'Herbert Lionel Adolphus Hart (1907–1992): Legal Philosopher' *Oxford Dictionary of National Biography* (Oxford University Press, 2008–14).

[4] Although I have made a general distinction between two periods in his career, Hart did publish in both areas simultaneously. Works of analytical jurisprudence published earlier in his career include HLA Hart, 'Definition and Theory in Jurisprudence' (1954) 70 *Law Quarterly Review* 37; HLA Hart, 'Analytic Jurisprudence in Mid-twentieth Century: A Reply to Professor Bodenheimer' (1957) *University of Pennsylvania Law Review* 105 ('Analytic Jurisprudence'); HLA Hart, 'Positivism and the Separation of Law and Morals' (1957–8) 71 *Harvard Law Review* 593 ('Positivism'); Hart, *The Concept of Law* 1st ed (n 1).

[5] See, eg, HLA Hart, *Law, Liberty and Morality* (Oxford University Press, 1963); HLA Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968).

[6] The biographical details are drawn mainly from the following works (I have reserved pinpoint references for additions and qualifications to the main text): Hart's 1988 interview with David Sugarman in David Sugarman and HLA Hart, 'HLA Hart in Conversation with David Sugarman' (2005) 32(2) *Journal of Law and Society* 267; Lacey, *The Nightmare and the Noble Dream* (n 3); Honoré (n 3); Neil MacCormick, 'HLA Hart: A Biographical Sketch' in *HLA Hart* (Stanford University press, 1981) 1–7 ('A Biographical Sketch'); Joseph Raz, 'HLA Hart (1907–1992)' (1993) 5(2) *Utilitas* 145; AW Brian Simpson, *Reflections on* The Concept of Law (Oxford University Press, 2011).

in classics and philosophy.[7] Although he studied jurisprudence for six months during the time that CK Allen held the chair, he did not complete his academic qualification in law, sitting the Bar exams instead.[8] Hart practised as a barrister for eight years, subsequently working in military intelligence during World War II, before returning to Oxford as a philosophy tutor.[9] During his tenure as a philosophy fellow, he was strongly influenced by the 'ordinary language' philosophy that dominated Oxford philosophy during that period.[10] He was particularly influenced by the philosopher JL Austin (as distinct from the 19th century jurist John Austin) and was a founding member of the discussion group led by Austin that from 1947 met on Saturday mornings to discuss a range of topics including rules.[11]

Hart brought analytical and linguistic philosophical methods to the analysis of law.[12] His lectures at Oxford that formed the basis for *The Concept of Law* were intended as a general descriptive analysis of the distinctive features of a legal system, directed to English law students and lawyers.[13] Hart later appeared to acknowledge that this approach could tend to reinforce a narrow, acontextual and apolitical view of law as an autonomous phenomenon.[14] Nevertheless, he remained committed to the view that analytical positivism should retain a prominent role in

[7] Hart had won a scholarship to study classics at New College, Oxford, graduating with first class honours in 'Greats' in 1929. Lacey's intellectual biography of Hart reveals that his successful assimilation at Oxford (and in his legal career) entailed repression of his Jewish heritage, his regional accent, his sexuality, and recurring feelings of inadequacy: Lacey, *The Nightmare and the Noble Dream* (n 3).

[8] Hart had commenced the Honours School of Jurisprudence in 1929 (under New College Law Fellow, CAW Manning), hoping to obtain a first-class honours degree in one year. In an interview later in life, Hart recalled studying cases rather than texts, and Lacey inferred that despite Manning's interest in legal theory, Hart's study of jurisprudence had consisted solely of learning legal reasoning through reading case law. However, Simpson notes that if Hart was indeed intending to complete the course in one year, he would have had to have included some legal theory, and given Manning's interest in the subject, it seems 'inconceivable' that Hart did not study it with him. See Sugarman and Hart (n 6) 270; Lacey*, The Nightmare and the Noble Dream* (n 3) 40; Simpson (n 6) 28–30.

[9] During World War II, when Hart worked for MI5 on the Ultra material and the disinformation campaign for D-day in 1944, he spent time with Oxford philosophers Gilbert Ryle and Stuart Hampshire, who were also working in MI5. While this inspired Hart to return to philosophy, it was ultimately his political views that influenced his decision to take the philosophy fellowship at New College, Oxford, instead of returning to the bar: ('[h]e came to feel that his life should not be spent at the bar, minimizing the tax liability of the rich'). Those political views would later in his career cause Hart to reject the offer of a knighthood.

[10] In relation to the influence of JL Austin and the 'ordinary language' linguistic philosophy at Oxford, see Lacey, *The Nightmare and the Noble Dream* (n 3) 132–48; Sugarman and Hart (n 6) 273–5.

[11] As to the Saturday morning group, see Lacey, *The Nightmare and the Noble Dream* (n 3) 133–5; Sugarman and Hart (n 6) 273.

[12] For an overview of the philosophical methodologies used by Hart, see PMS Hacker, 'Hart's Philosophy of Law' in PMS Hacker and J Raz, *Law, Morality and Society: Essays in Honour of HLA Hart* (Oxford University Press, 1977) 1, 2–12.

[13] Sugarman and Hart (n 6) 291.

[14] Ibid.

jurisprudence because its rigorous conceptual analysis could provide essential tools for sociological (and other alternative) approaches to jurisprudential issues;[15] analytical jurisprudence, he argued, 'is the beginning, not the end of the answer'.[16]

The legacy of *The Concept of Law* cannot be overstated; it has been described as 'the supreme text of jurisprudence',[17] and is widely accepted as the 'most successful work of analytical jurisprudence ever to appear in the common law world'.[18] Writing at much the same time as the High Court judgment in *Yorta Yorta* was handed down, Nicola Lacey described the success of *The Concept of Law* thus:

> It remains, 40 years after its publication, the main point of reference for teaching analytical jurisprudence and, along with Kelsen's [works], the starting point for jurisprudential research in the analytic tradition. *It has been read by senior judges and has had a distinctive impact on the development of judicial culture in Britain and beyond*.[19]

One reason for its enduring popularity is that, unlike many other works of legal theory, it is eminently readable. Another contributing factor is that *The Concept of Law* is sufficiently flawed to have inspired both analytical jurists (to fill in the gaps and build upon Hart's work)[20] and critics (to use it as a point of departure for alternative theories of law and legal scholarship).[21]

In the next section, I give an overview of Hart's account of the distinctive features of a legal system as set out in *The Concept of Law*, before considering some insights from the wealth of secondary literature it has generated.[22]

---

[15] Ibid 289–91, referring to Hart, 'Analytic Jurisprudence' (n 4).

[16] Sugarman and Hart (n 6) 290.

[17] Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992) 183.

[18] Simpson (n 6) 1.

[19] Lacey, *The Nightmare and the Noble Dream* (n 3) 224 (emphasis added).

[20] See, eg, Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Clarendon Press, 1980). As Peter Hacker has pointed out, '*The Concept of Law* is more of a pioneering work of synthesis in legal philosophy than a conclusive study. Many of the novel distinctions drawn by Hart are not wholly sharp nor unambiguous. Many of the central theses of the book are not merely (as might be expected) controversial, but also not wholly clear': Hacker (n 12) 1.

[21] Most notably the work of Hart's successor to the Chair of Jurisprudence at Oxford: Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977); Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) ('*Law's Empire*').

[22] Because of the sheer volume of synthesised accounts of Hart's jurisprudence and accumulated commentary, it is important to identify and separate Hart's primary text in *The Concept of Law* from the commentary.

A Hart's Account of a Legal System

Hart's main objective in *The Concept of Law* was not to provide a definition for law, but to analyse 'the distinctive structure' of a modern, municipal (Western) legal system and provide 'a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena'.[23] A secondary objective was to clarify the sense in which 'borderline cases', particularly 'primitive law' and international law, consist of 'law' or comprise 'legal systems'.[24]

In the introductory chapters of the book, Hart set out his response to aspects of Austin's theory of law being the commands of a sovereign to a society in habitual obedience. According to Hart, these features do not account for the normativity of law. He criticised Austin's idea of law as a command — an order backed by threat of sanctions — arguing that while some laws do impose obligations, others can confer power. Hart preferred the concept of a rule to that of a command, classing rules as either primary (rules of obligation) or secondary (power-conferring rules). Compared to Austin's notion of habitual obedience, which Hart described as 'merely convergent behaviour', Hart argued that rules have both an internal and external aspect, which account for their normativity. The external aspect 'consists in the regular uniform behaviour which an observer could record'.[25] The internal aspect comprises 'a critical reflective attitude to certain patterns of behaviour as a common standard', which manifests in 'criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified'.[26] It is the internal aspect that distinguishes social rules from habitual behaviour.[27] Law, for Hart, consists in special types of social rules.

Throughout these early chapters, Hart illustrated his arguments by drawing various imaginary societies with a range of recognisable, albeit usually simplified, systems of governance. Some of these imaginary societies take the political structure of an absolute monarchy,[28] others are tribal chiefdoms.[29] Having set out his response to Austin's theory, and in the process introduced

[23] Hart, *The Concept of Law* 3rd ed (n 1) 17.
[24] Ibid.
[25] Ibid 56.
[26] The internal aspect is characterised by 'the normative terminology of "ought", "must" and "should", "right" and "wrong"': ibid 57.
[27] Ibid.
[28] Such as that under the rule of 'Rex I': see, eg, ibid 67–70.
[29] See, eg, ibid 60.

the reader to the idea of primary and secondary rules, Hart began a 'fresh start' in Chapter V. There he set out his theory that it is the union of primary and secondary rules that forms the core of a modern legal system. To demonstrate this, Hart drew upon another imaginary society.

This time, the reader was asked to imagine 'a society without a legislature, courts or officials of any kind.'[30] Such societies would only have primary rules of obligation which are accepted by the majority of the people.[31] Hart stated that, in fact, there are many studies of primitive societies which demonstrate not only that such societies do exist, but also describe the mode of social control achieved without these familiar legal institutions:

> there are *many studies of primitive communities* which not only claim that this possibility [existing without institutions of legislature, courts etc] is realised but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterised rules of obligation.[32]

Although such a social structure is 'often referred to as one of "custom"', Hart preferred not to use that term 'because it often implies that the customary rules are very old and supported with less social pressure than other rules'.[33] Rather, he preferred 'to refer to such a social structure as one of primary rules of obligation'.[34]

If such a society is to exist, the rules must contain basic restrictions on violence, theft and deception. Such rules, said Hart, '*are in fact always found in the primitive societies of which we have knowledge*, together with a variety of others imposing on individuals various positive duties to perform services or make contributions to the common life'.[35] Further, although there will always be the possibility of some non-conformists, the majority of people must accept the rules in order to bring social pressure on all to conform. '*This too*,' said Hart, '*is confirmed by what we know of primitive communities* where, though there are dissidents and malefactors, the majority live by the rules seen from the internal point of view.'[36]

---

[30] Ibid 91.
[31] Ibid.
[32] Ibid (emphasis added).
[33] Ibid.
[34] Ibid.
[35] Ibid (emphasis added).
[36] Ibid 92 (emphasis added).

Finally, in order for such a community to live successfully with only such 'unofficial' primary rules, the community must be small, 'closely-knit by ties of kinship, common sentiment, and belief, and placed in a stable environment'.[37] Otherwise, 'such a simple means of social control' will be defective.[38] As the society grows and develops, the simple system of primary rules will be insufficient to maintain social order. Hart identified three main deficiencies: uncertainty, inability to change and inefficiency.

Uncertainty arises because there is no procedure for settling doubt as to the existence or scope of a rule:

> the rules by which the group lives will not form a system, but will simply be a set of separate standards, without any identifying or common mark, except of course that they are the rules which a particular group of human beings accepts. They will in this respect resemble our own rules of etiquette. *Hence if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt*, either by reference to an authoritative text or to an official whose declarations on this point are authoritative.[39]

The second defect is that the rules are static, and can only change gradually over time. This is because there is no means of deliberately changing the existing rules, or introducing new rules, since that would again involve rules of a different type than primary obligation rules.[40]

The third defect, inefficiency, arises from the lack of institutions or agencies to make definitive rulings regarding infringements of rules.[41] Inefficiency arises in two main ways. Disputes could fester indefinitely without an agency to make an authoritative ruling.[42] And without a special agency to administer sanctions, time and energy are wasted by 'unorganised efforts to catch and punish offenders' and 'smouldering vendettas'.[43] Hart said that 'the history of law … strongly suggests' that the first aspect (the lack of agencies to adjudicate) is a more serious

[37] Ibid.
[38] Ibid.
[39] Ibid (emphasis added).
[40] Ibid 92–3.
[41] Ibid 93.
[42] Ibid.
[43] Ibid.

defect, since 'many societies have remedies for this defect long before the other' (centrally organised sanctions).[44]

The remedy for these defects lies in the introduction of secondary rules, which supplement primary rules. The secondary rules are of three main types, each one a remedy for one of the defects. The introduction of a rule of recognition (a mechanism for determining whether any rule of the system is valid) will remedy the defect of uncertainty.[45] Rules of change (empowering the introduction, amendment and repeal of other rules) remedy the defect of the static nature of primary rules,[46] and rules of adjudication (empowering judicial function) remedy the defect of inefficiency.[47]

Remedying each defect constitutes a step 'from the pre-legal into the legal world' and remedying all three defects 'convert[s] the regime of primary rules into what is indisputably a legal system.'[48] The combination of primary rules with secondary rules of recognition, change and adjudication constitutes the 'heart of a legal system'.[49]

Of all the secondary rules, the rule of recognition is the ultimate rule, 'providing the criteria by which the validity of other rules of the system is assessed'.[50] Being an ultimate rule, it has no other rule providing criteria for its own validity.[51] It is neither valid nor invalid,[52] but 'exists only as a complex … practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.'[53]

The effective functioning of the legal system depends upon general obedience by ordinary citizens to the primary rules, and the acceptance, at least by the officials, of the secondary rules of recognition, change and adjudication.[54] These are the 'two minimum conditions necessary and sufficient for the existence of a legal system'.[55] In a pre-legal society with only primary

[44] Ibid 93–4.
[45] Ibid 94.
[46] Ibid 95–6.
[47] Ibid 96–7.
[48] Ibid 94.
[49] Ibid 98.
[50] Ibid 105.
[51] Ibid 107.
[52] Ibid 109.
[53] Ibid 110.
[54] Ibid 116.
[55] Ibid.

rules, since 'there are no officials', the rules must be widely accepted in the internal sense of a critical reflective attitude by the members of the group.[56] In the more complex legal system, with a combination of primary and secondary rules, it is not necessary for the entire group to have the internal attitude to all the rules, but is sufficient if the officials have a critical reflective attitude of acceptance to the rule of recognition.[57]

Having addressed the first part of his major objective (analysis of the structure of a modern legal system) and shed light upon his secondary objective (one of the borderline cases, 'primitive law'), Hart turned his attention, in the second half of the book, to the other aspect of his primary aim, the relationship between law, coercion, and morality. The closing chapter was addressed to the borderline case of international law. In the second edition, published posthumously in 1994, a 'postscript' was added, in which Hart reiterated that his account of the general form and structure of a legal system was '*descriptive* in that it is morally neutral and has no justificatory aims'.[58]

B The 'Step from the Pre-Legal into the Legal World'

The difference between 'primitive communities' and societies with a 'developed' legal system illuminates both the primary and secondary objectives of *The Concept of Law*. By a clear elucidation of the distinctive features of a municipal legal system (the first objective), Hart's answers to the questions of the borderline cases, 'primitive law' and international law (the second objective), become clear.[59] The answer to both is that although they may contain some semblance of law, neither amounts to a legal system.[60]

---

[56] Ibid 117.

[57] Ibid.

[58] Ibid 240 (emphasis in original). Most of the postscript (unfinished at the time of Hart's death) was devoted to responding to aspects of Ronald Dworkin's critique of Hart's work, and is not directly relevant to this thesis.

[59] Whereas international law is addressed in a separate chapter at the end, the issue of 'primitive law' recurs throughout the book. Interestingly, from an excerpt quoted from the notebook in which Hart 'sketched out his ideas for the book', it appears that Hart initially thought only of international law as the problematic non-standard case; the quotation appears in Lacey, *The Nightmare and the Noble Dream* (n 3) 222.

[60] See the discussion in Neil MacCormick, *HLA Hart* (Stanford University press, 1981) 22–3 ('*HLA Hart*'). In relation to international law, see Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of HLA Hart' (2011) 21(4) *European Journal of International Law* 967; Jeremy Waldron, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?' in Luis Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds) *Reading HLA Hart's* The Concept of Law (Hart Publishing, 2013); David Lefkowitz, 'What Makes a Social Order Primitive? In Defence of Hart's Take on International Law' (2017) 23 *Legal Theory* 258.

There is an element of circularity in Hart's reasoning in this respect. He fulfilled his primary objective by comparing a municipal legal system with a 'primitive' one (which he assumed was pre-legal), and found his answer in the difference between them (the introduction of secondary rules). Then he proceeded to use this very difference between the two to assert that 'primitive' communities do not have legal systems (ie, they are pre-legal), which comes back to his opening premise.

Despite the centrality of this juxtaposition between 'primitive' and 'advanced' to the work as a whole, very little of the extensive literature on *The Concept of Law* has been directed towards it.[61] That Hart's upholding of a Western legal system as the standard case is clearly essentialist has been remarked upon.[62] He claimed as *universal* an analysis drawn from a *particular* type (that of a Western nation state) and *local* (English) legal system. The assumption that there is a single standard case obscures the possibility of diverse and distinct types of law.[63]

It has also been argued that the transition from pre-legal to legal has normative connotations which conflict with Hart's allegedly descriptive exercise (and his avowed legal positivism).[64] The language of deficit — ie, 'defects' cured by 'remedies' — carries a value-laden implication of the benefits of a legal system. It has been argued that in his account of the emergence of law, Hart implicitly justified state authority,[65] or at least the rule of law.[66] For his critics, this is a problem in that it contradicts Hart's own 'separability thesis'.[67] He was adamant that questions of what the law ought to be, are fundamentally different types of question from those about

[61] Notable exceptions are Fitzpatrick (n 17); Anthony Skillen, *Ruling Illusions: Philosophy and the Social Order* (Harvester Press, 1977) 102–7. See also Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (LawBook Co, 2002) ('*Asking the Law Question*').

[62] See, eg, Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001) 150–2. See also Davies, *Asking the Law Question* (n 61); Margaret Davies, 'Derrida and Law: Legitimate Fictions' in Pierre Legrand (ed), *Derrida and Law* (Ashgate, 2009) 71.

[63] Tamanaha (n 62) 151.

[64] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980); Tom Campbell, 'Rewriting Hart's Postscript: Thoughts on the Development of Legal Positivism' 5 *Problema: Anuario de Filosofia y Teoria del Derecho* 23, 31–35. Cf John Gardner, 'Why Law Might Emerge: Hart's Problematic Fable' in Luis Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Hart Publishing, 2013) 81; WJ Waluchow, 'Legality, Morality, and the Guiding Function of Law' in Matthew Kramer et al (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford University Press, 2008) 85, 89–91.

[65] Stephen Guest, 'Two Strands in Hart's Concept of Law' in Stephen Guest (ed), *Positivism Today* (Dartmouth 1996) 29.

[66] Or the related principle of legality. As to the rule of law, see Campbell (n 64) 31–35; as to the principle of legality, see Dworkin, *Law's Empire* (n 21). See also the discussion in Nicola Lacey, 'HLA Hart's Rule of Law: The Limits of Philosophy in Historical Perspective' (2007) 36 *Quaderni Fiorentini* 36.

[67] See, eg, Guest (n 65); Gardner (n 64).

what the law is, although both were important for him.[68] The normative implications of Hart's descriptive enterprise merge one into the other. In his Postscript, however, Hart rejected the notion that his account of the introduction of secondary rules 'as remedies for the defects of an imagined simple regime' justified legal coercion in any way.[69]

C Law as an Affair of Rules

Before turning to the idea of the primitive in Hart's work, it is worth briefly clarifying some of the key concepts in his account of law.[70] Commentators have agreed that Hart's explanations of many of the central concepts in the book are ambiguous and his use of them inconsistent. For sympathetic critics, however, his treatment of these concepts is still valuable, and serves as inspiration and a point of departure for their own theories.[71]

Hart's idea of the internal and external aspects of rules is one such concept. His 'internal point of view' has been credited with introducing the 'hermeneutic', or *Verstehen* (understanding) approach, according to which human action is understood from the perspective of the actor,[72] to analytical jurisprudence.[73] It has been argued however, that Hart's treatment of the internal

[68] This is one aspect of Hart's separability thesis, the complexity of which is demonstrated by Hart's analysis of the relationships between law and morals: see Hart, 'Positivism' (n 4); Hart, *The Concept of Law* 3rd ed (n 1) 185–212. As Matt Kramer commented, '[t]he so-called separability thesis is in fact a congeries of theses': Matt Kramer, 'HLA Hart' (2011) 5 *Problema: Anuario de Filosofia y Teoria del Derecho* 11, 15.

[69] Hart, *The Concept of Law* 3rd ed (n 1) 249–50. Hart acknowledged that his descriptive enterprise is evaluative in the sense of designating some features as having more importance than others, but denied that it was morally justificatory: Sugarman and Hart (n 6) 288.

[70] This brief discussion will focus on those aspects of Hart's theory that are relevant to this thesis. There are obviously many aspects of Hart's jurisprudence that fall outside the scope of this thesis — his famous debates with Fuller (on the separation of law and morality), Kelsen (on descriptive and analytical jurisprudence), Devlin (where Hart argued for the decriminalisation of homosexuality) and Dworkin (on legal positivism and interpretive theory), for example.

[71] See, eg, Raz, *The Concept of a Legal System* (n 20). For a discussion of this, see William Twining, 'Academic Law and Legal Philosophy: The Significance of Herbert Hart' (1979) 95 *Law Quarterly Review* 557.

[72] The *Verstehen* approach to hermeneutics in philosophy is closely related to the Weberian approach in the social sciences, and is often referred to as the 'hermeneutic method' after the influence of the interpretive theory of hermeneutics in philosophy. See David E Cooper, 'Verstehen' in Ted Honderich (ed) *The Oxford Companion to Philosophy* (Oxford University Press, 2005).

[73] Hacker (n 12) 8–11; MacCormick, *HLA Hart* (n 60) 29–30; Martin (n 3) 21. Since then, the hermeneutic approach has been developed, particularly by Neil MacCormick and Joseph Raz: Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009).

and external points of view is incomplete,[74] and neglects a range of other internal aspects (such as volition),[75] and perspectives (such as that of the legal theorist).[76]

Ambiguity and inconsistency also plague Hart's depiction of primary and secondary rules and his discussion of the interrelationships between them. Secondary rules are sometimes referred to as power-conferring (compared to duty-imposing primary rules of obligation), but at other times they are described as second-order rules (rules about primary rules) as opposed to first-order rules (primary rules).[77] Within the origin story itself, the secondary rules are described alternately as rules and as institutional functions.[78]

Similarly, the rule of recognition is referred to as a secondary rule, but is neither a power-conferring rule,[79] nor just about primary rules but also about other secondary rules.[80] It is also variously referred to as a rule and as a practice,[81] and sometimes referred to in the singular and sometimes in the plural.[82] It has also been observed that the relationship of the rule of recognition with rules of change and adjudication involves a degree of circularity.[83]

Hart's argument that the combination of primary and secondary rules forms the core of a legal system has also been criticised. It has been argued that law consists of more than just rules … it consists of principles,[84] standards,[85] orders and judgments.[86] Further, a legal system consists

[74] MacCormick, *HLA Hart* (n 60) 33–40; Martin (n 3) 20–27; Hacker (n 12) 12–16.
[75] MacCormick, *HLA Hart* (n 60) 33–4.
[76] Martin (n 3) 24–27; MacCormick, *HLA Hart* (n 60) 36–7. See also Hart's comments in the Postscript: Hart, *The Concept of Law* 3rd ed (n 1) 242–4.
[77] L Jonathan Cohen, 'The Concept of Law by HLA Hart: Book Review' (1962) 71(283) *Mind* 395; Hacker (n 12) 19–22; MacCormick, *HLA Hart* (n 60) 103–6; Martin (n 3) 28–30; GLF, 'The Distinction between the Normative and Formal Functions of Law in HLA Hart's The Concept of Law' (1979) 65(7) *Virginia Law Review* 1359.
[78] Lefkowitz (n 60) 260–4.
[79] Raz and MacCormick, as well as a number of others, have concluded that it is, rather, a duty-imposing rule, or rule of obligation: Raz, *The Concept of a Legal System* (n 20) 197–200; MacCormick, *HLA Hart* (n 60) 105. See also Martin (n 3) 35.
[80] See Hacker (n 12) 22–25.
[81] Lefkowitz (n 60) 264–7.
[82] MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 7th ed, 2001) 344.
[83] MacCormick, *HLA Hart* (n 60) 108–111; Martin (n 3) 35–38.
[84] Dworkin, *Law's Empire* (n 21).
[85] MacCormick, *HLA Hart* (n 60) 40–43.
[86] Michael D Bayles, *Harts Legal Philosophy: An Examination* (Kluwer Academic Publishers, 1992) 64–6.

of more than just law; it comprises physical and institutional, in addition to conceptual, elements.[87]

III. THE PROBLEM OF THE 'PRIMITIVE' IN HART'S CONCEPT OF LAW

In contrast, Hart's fictional account of the emergence of a legal system has received comparatively little critical attention.[88] Where it has attracted comment, reactions have varied from sociological critique,[89] to brief but assured defences (often contained in footnote references),[90] to embarrassed silence.[91] There is a reticence notable in scholars otherwise sympathetic to his work: language such as 'unfortunate',[92] 'a pity',[93] and even 'the less said the better'.[94] Some critics have pointed to the paucity of — and incompatibility with — anthropological evidence.[95] Defenders of Hart claim that his account of the 'step from the pre-legal into the legal world' invokes a purely *imaginary* 'primitive society' and is simply a 'genetic' analytic device.[96]

In this section, I examine Hart's use of the term 'primitive' in *The Concept of Law*, and examine what he meant by the term 'primitive communities'. I compare this with his figurative use of imaginary societies throughout the book.

---

[87] Bayles argues that in addition to rules, principles, judgements and orders, law also consists of 'the whole complex of people and facilities … [that] support, develop, and carry out the purposes in having a system of laws': ibid 67. Lefkowitz argues that Hart's account of the need for secondary rules implicitly includes 'specialisation in the performance of governance tasks', and that it is this specialisation, rather than the mere existence or otherwise of secondary rules, that is the major distinction between primitive and advanced societies made by Hart: Lefkowitz (n 60) 260–4.

[88] Apart from the normative implications of his descriptive endeavour. This is typified by one of the monographs devoted to Hart's philosophy, that of Neil MacCormick, who devotes little more than a few paragraphs out of a book of 200 pages to discussion of it: MacCormick, *HLA Hart* (n 60) 108.

[89] See, eg, Fitzpatrick (n 17); Martin Krygier, '"The Concept of Law" and Social Theory' (1982) 2(2) *Oxford Journal of Legal Studies* 155.

[90] See, eg, Waluchow (n 64) 89.

[91] Lacey barely mentioned it in the rather lengthy section on *The Concept of Law* in her intellectual biography: Lacey, *The Nightmare and the Noble Dream* (n 3).

[92] Leslie Green, '*The Concept of Law* Revisited' (1996) 94(6) *Michigan Law Review* 1687, 1698 ('*The Concept of Law* Revisited').

[93] MacCormick, *HLA Hart* (n 60) 108.

[94] Nicola Lacey, 'Do the "Persistent Questions" Persist? Revisiting Chapter I of *The Concept of Law*' in Luis Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Hart Publishing, 2013) 269, 272.

[95] Krygier (n 89); Simon Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (Penguin, 1979) 25; Cohen (n 77). Or indeed any other empirical evidence.

[96] See, eg, Hacker (n 12) 11–12; Waluchow (n 64) 89; Green, '*The Concept of Law* Revisited' (n 92) 1698.

A 'Primitive Communities' and 'Primitive Law'

References to 'primitive' societies pervade the text of *The Concept of Law*, from the introductory passages to the concluding pages.[97] The word 'primitive' itself occurs almost twenty times throughout the book.[98] Although occasionally Hart used the word 'primitive' as an ordinary adjective, on most occurrences it was coupled with the words, 'societies' or 'communities', or the word, 'law'. Ultimately, an imaginary primitive society was invoked to describe a pre-legal state. I first examine those instances where Hart used the word 'primitive' as a general adjective, followed by an examination of his use of the term 'primitive societies'.

Hart used the word 'primitive' as an adjective synonymous with 'unrefined' on a few occasions. A clear example of this is where he discussed a view of justice as restoration of the status quo. He referred to the 'primitive notion' of a thief simply giving back the stolen object, a notion which could be developed and refined by extending it to compensation for injury or loss.[99] Other examples are his references to the 'primitive simplicity of the theory',[100] and 'primitive or rudimentary form of law'.[101]

Apart from these instances, Hart's use of the word 'primitive' occurred in the context of 'primitive law' or 'primitive' societies. Because Hart situated his book squarely within the contemporary academic debate over whether 'non-standard' cases such as 'primitive law' and international law could amount to 'law', his language needs to be interpreted in that context. The term 'primitive' was commonly used in academic practice at that time to denote the peoples of the world who were the objects of anthropological enquiry, whose form of law was described as 'customary law', and who would now be referred to as Indigenous peoples.[102] The term 'primitive law' was the contemporary equivalent, from the mid-19th century until the late 1960s and early 70s, of what is now termed 'legal anthropology'.[103] *The Concept of Law*, based on

[97] The reference first appears on the third page, is iterated no fewer than fourteen times, and makes a final appearance on page 227, a mere ten pages from the end, as well as a number of entries in the notes section.

[98] There are, in fact, eighteen instances of the word.

[99] Hart, *The Concept of Law* 3rd ed (n 1) 165 (emphasis added).

[100] Referring to the theory of law as 'the sovereign's coercive orders': ibid 80.

[101] Referring to physical sanctions 'left to the community at large': ibid 86.

[102] See, eg, *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007).

[103] Kaius Tuori, *Lawyers and Savages: Ancient History and Legal Realism in the Making of Legal Anthropology* (Routledge, 2015) 15. Tuori notes that during this period, the term 'primitive' 'was a neutral academic term much like the term "Indigenous" is now'. Nevertheless, the term 'primitive' was ultimately rejected as an

lectures given by Hart in the 1950s and written up into its final form in 1960,[104] was first published at a time when many academic texts, including those in the disciplines of legal philosophy and legal anthropology, used that terminology.[105]

Almost certainly, Hart would not have intended the offensive connotations now associated with what was then considered a neutral academic term.[106] His strong stance against formal discrimination, particularly racial discrimination, is readily apparent in *The Concept of Law*. Hart reflected that the 'solid gains' of moving from the pre-legal to the legal world are achieved at the cost of risk of discrimination or oppression of less powerful groups in society.[107] His most emotive language was reserved for discriminatory practices.[108] Indeed, although Hart contrasted 'primitive' societies with 'developed' or 'modern' states, he reserved the word 'civilised' to describe those nations whose legal systems do not allow formal discrimination on the basis of race.[109]

academic term precisely because it reflected the lingering assumptions of social evolutionist frameworks and colonial standpoints, which were no longer considered acceptable.

[104] Lacey, *The Nightmare and the Noble Dream* (n 3) 222.

[105] The second edition of Diamond's *Primitive Law* was published in 1950, and would have been up to date in 1952 when Hart began working on the lectures that became the basis of *The Concept of Law.* Hoebel's *Law of Primitive Man* was published in 1954 while *The Concept of Law* was in its formative stages. The first edition of Denis Lloyd's *Introduction to Jurisprudence* was published in 1959 as Hart was close to finishing writing *The Concept of Law*, and uses the language of 'primitive law' and 'primitive societies'. The use of this terminology continued throughout the 1960s. In 1964, CK Allen's *Law in the Making* was still referring to 'primitive' and even 'backward' societies. Diamond's lecture, 'The Comparative Study of Primitive Law', was given in 1965. Barkun's *Law without Sanctions: Order in Primitive Societies and the World Community* was published in 1968. A revised version of Diamond's *Primitive Law* was published as late as 1971, ten years after *The Concept of Law.* The citations of these works are as follows: AS Diamond, *Primitive Law* (Watts, 2nd ed, 1950); E Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge: Harvard University Press, 1954); Dennis Lloyd, *Introduction to Jurisprudence* (Stevens & Sons, 1959) 336–7; Carleton Kemp Allen, *Law in the Making* (Oxford Clarendon Press, 7th ed, 1964) 67; AS Diamond, *The Comparative Study of Primitive Law* (University of London, Athlone Press, 1965); M Barkun, *Law Without Sanctions: Order in Primitive Societies and the World Community* (Yale University Press, 1968); AS Diamond, *Primitive Law, Past and Present* (Methuin, 1971).

[106] Of course, it was only able to be considered neutral because academia operated under the lingering assumptions of social evolutionist frameworks and colonial standpoints.

[107] Hart, *The Concept of Law* 3rd ed (n 1) 202.

[108] See, eg, ibid 200–202, and the use of the terms 'painful' and 'unpleasantly' (at 200–1), and even 'repellent' (at 165).

[109] Ibid 161.

B Actual or Imaginary, Primitive or Simple?

In his introduction to the third edition of *The Concept of Law*, Professor Leslie Green noted that it is the fictional primitive society and the step from the pre-legal to the legal at which the 'critics pounce'.[110] Green argued:

> In this context 'primitive' clearly means simple; it does not mean foolish or barbaric. And the reason simple societies do not have law is not that they aren't sufficiently civilised to have invented it: it is that they do not *need* it.[111]

In examining this claim that by 'primitive' Hart meant simple, not uncivilised, it is necessary to distinguish between references to primitive societies generally and references to a fictional primitive community. Not every reference to a primitive society in *The Concept of Law* is to an imaginary one. In fact, most references to primitive societies are *not* to any imaginary society.

This is most evident in the passage where Hart first drew his fictional pre-legal society, which was based upon a primitive society. There he referred to evidence of the features of actual 'primitive societies' set out in the 'many studies of primitive communities'.[112] Each time he described a feature of the imaginary pre-legal society, he supported it by reference to 'the primitive societies of which we have knowledge'.[113] In this passage Hart referred the reader to the *evidence* of primitive societies three times in one paragraph. In this context it is clear that these references were to actual, not imaginary, societies. Those features allegedly found in actual primitive societies support and add credibility to the imaginary version, which was created with those same features.

Hart certainly described his fictional primitive, or pre-legal, society as a simple one. Indeed, all of the imaginary societies described by Hart throughout the book are simplified versions of diverse types of political systems, the most obvious of which is the simplified version of an absolute monarchy under 'Rex I'. A primitive society with 'customary law' is another such type. All of these different imaginary societies were described by Hart as 'simple'. Some were simpler than others. But not all were 'primitive'.

[110] Leslie Green, 'Introduction' in Ibid xlix.
[111] Ibid l.
[112] Hart, *The Concept of Law* 3rd ed (n 1) 91.
[113] Ibid 91–2.

Further, although Hart did describe his fictional primitive society as simple,[114] he did not depict it as merely simple. He described it as a simple fictional society of the *type* of society governed by 'customary law',[115] that Hart referred to as a primitive society. The differentiation between the simplified imaginary society on the one hand and the society that typifies the *type* of social governance on the other is absolutely clear in the following example. Hart described the 'simplest' imaginary society, an absolute monarchy under Rex, as:

> probably too simple ever to have existed anywhere, and it is certainly not a primitive one; for primitive society knows little of absolute rulers like Rex, and its members are not usually concerned merely to obey but have pronounced views as to the rightness of obedience on the part of all concerned.[116]

Unlike the imaginary absolute monarchy of 'Rex I', the fictional primitive society has not required simplification from the original type. It is apparent that Hart regarded the type of governance consisting of 'customary law' as a simple type in itself. There are many instances throughout the entire book (not just in the course of the 'origin story') where he referred to that type of social structure as simple, for example, 'a simple regime of primary or customary law'.[117] He also reiterated, throughout the course of the book, his claim that these societies not only have a simple type of governance, or 'social organisation', but they are small, closely-knit and isolated.[118]

C Legal Evolution

It is pivotal to Hart's argument that as these simple communities grow, or as conditions change, they will need to develop a more sophisticated legal regime to cope with the problems of uncertainty, stasis, and inefficiency. Here there is a strong undercurrent of social and legal evolution.

In describing and assessing the means of maintaining social order in 'primitive communities', Hart employed the term 'pre-legal'. The terminology of 'pre-legal' and 'legal' suggests that even where the transition is not made, or is not needed, pre-legal denotes an earlier stage, not

[114] See, eg, ibid 93–4.
[115] Hart did not shy away from using the term 'customary law', as he had from the term 'custom'; see, eg, ibid 232.
[116] Ibid 53.
[117] Ibid 232. Other examples occur at 227, 214.
[118] Ibid 92, 198, 227.

just different type. 'Primitive', 'pre-legal' and 'simple' societies are contrasted with 'developed',[119] 'mature'[120] and 'modern'[121] ones. Hart's concept of evolution involves progression from the simple to the complex. The 'primitive society' represents an earlier stage in an inevitable evolution from simple to complex, from pre-legal to legal.[122] Indeed, the introduction of secondary rules of change, adjudication and recognition, which constitute the step from the pre-legal into the legal world, is 'a *step forward as important to society as the invention of the wheel.*'[123]

The positioning of 'primitive societies' at the earliest stage in, or even preparatory to, legal evolution is consistent with the other uses throughout the book of the adjective 'primitive' as meaning 'undeveloped'. The inference of progression from simple to complex is consistent with the adjective 'primitive' meaning rudimentary. It has also been pointed out that Hart's scheme is 'scalar, not bimodal'.[124] Hart did not merely specify two main types, 'pre-legal' and 'legal', but an entire spectrum on a single continuum of evolution.

IV. 'MANY STUDIES OF PRIMITIVE COMMUNITIES'

Hart's claims about the features of 'primitive communities' were made with specificity and clarity, and supported by reference to evidence contained in empirical studies of Indigenous societies. In this section, I attempt to identify the studies to which he was alluding, by examining the empirical claims in the context of the contemporary anthropological literature of the time. I ask whether it is possible to identify which Indigenous peoples were in Hart's contemplation, and in particular, whether his reference to 'primitive communities' could have encompassed Indigenous Australian communities.

As noted above, *The Concept of Law* owes its continuing popularity in part to Hart's characteristic writing style, which is clear and easy to read, and, in general, uninterrupted by footnotes. What references there are, are contained in the few endnotes. As Hart noted that the 'text of this book is self-contained',[125] and recommended the reader to 'read each chapter

[119] Ibid 95, 169, 214.
[120] Ibid 110, 142.
[121] Ibid 20, 26, 45, 60.
[122] It is inevitable in the sense that the step from pre-legal to legal will need to be made once social conditions become more complex.
[123] Hart, *The Concept of Law* 3rd ed (n 1) 42 (emphasis added).
[124] Lefkowitz (n 60) 271.
[125] Hart, *The Concept of Law* 3rd ed (n 1) 277.

through before turning to these notes',[126] the endnotes (and their effect on the text) will be discussed separately below.

A Hart's Claims about Primitive Communities

I begin by distinguishing the empirical claims from the purely speculative. From Hart's references to evidence of the features of actual 'primitive societies' set out in the 'many studies of primitive communities', it is possible to ascertain what Hart understood these empirical studies to show.

There are three core empirical claims. Firstly, there exist at least some societies without 'legislature, courts or officials of any kind', whose 'only means of social control is that general attitude of the group towards its own standard modes of behaviour'.[127] Secondly, there are always rules restricting violence, theft and deception, as well as others imposing 'positive duties to perform services or make contributions to the common life'.[128] Thirdly, 'the majority of the population live by the rules seen from the internal point of view'.[129]

There are further features, for which Hart does not refer specifically to 'evidence' but which he regards as 'plain'. That is that the only community which could live successfully under such conditions must be small, 'closely-knit by ties of kinship, common sentiment, and belief, and placed in a stable environment'.[130]

In addition to these features, there are a couple of further assumptions which become apparent in Hart's discussion of deficiencies. These are firstly, that there is no procedure for authoritatively determining doubt over the content or scope of a rule.[131] Secondly, the rules are static and only capable of changing slowly over time.[132] Thirdly, although the majority of the population live by the rules seen from the internal point of view, there may be 'dissidents and malefactors', for whom there may be sanctions, administered not by an official agency but by the individuals affected or the group at large.[133]

[126] Ibid.
[127] Ibid 91.
[128] Ibid.
[129] Ibid 92.
[130] Ibid.
[131] Ibid.
[132] Ibid 92–3.
[133] Ibid 93–4.

These features suggest that Hart's 'evidence' is more closely aligned with the evolutionary theories of the late 19th century, than with the more contemporary legal anthropology of the mid-20th century.

B Hart and Legal Primitivism

Many of Hart's assumptions — of legal evolution, the equivalence of Indigenous socio-legal organisation to the non-legal 'custom' of English society, the relatively unchanging nature of 'custom' and the overwhelming adherence enforced by the power of group sentiment — are characteristic of the historical and comparative jurisprudence of the late 19th and early 20th century. The works of Henry Maine, Paul Vinogradoff, Carleton Kemp Allen, and Sidney Hartland — described in Chapter Three — share many of these features. As Fitzpatrick points out, this source 'is not explicitly invoked but it pervades Hart's account'.[134]

The assumption that 'customary law' is stationary and capable only of gradual change, reflects the assertion made by Sir Henry Maine in *Ancient Law*.[135] However, there is little else in Maine's theory (apart from the assumption of evolution and search for origins) that coincides with Hart's claims. Maine, whose interest was legal evolution in Indo-European societies, considered that the earliest forms of law were regal judgments.[136] 'Customary law' occurred at a later stage — the age of oligarchies — which succeeded that of kings.[137] Knowledge of customary law was exclusive to aristocracies, who were the administrators and repositories of the law.[138] This is quite different to Hart's notion of a society without secondary rules (and their attendant institutions) where the majority of the community have the critical reflective attitude to the primary rules.

---

[134] Fitzpatrick (n 17) 195.

[135] Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (John Murray, 1861). All pinpoint references are to the reprint of the 1861 edition by Thoemmes Press: Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (reprint of 1861 edition, Thoemmes Press, 1996). *Ancient Law* is discussed in Chapter Three above. Many of Maine's works were in the collection bequeathed by Hart to the Hebrew University of Jerusalem.

[136] Known as 'themistes', these were divinely inspired judgments delivered by kings on a case-by-case basis. Although divinely inspired, their ad hoc nature differentiates them from later notions of natural law: Maine (n 135) 4–9.

[137] Ibid 10–14.

[138] Ibid 11–2.

Hart's claims have more in common with Sir Paul Vinogradoff's pre-legal stage, the origins of law in totemistic society.[139] Unlike Maine, Vinogradoff considered that custom developed not from resolution of disputes, but as an everyday practice.[140] He also assumed that the 'customs and inherited instincts' of Indigenous cultures were so deeply ingrained that they were capable of only gradual adaptation.[141] However, much of Vinogradoff's discussion of this pre-legal stage — based almost entirely upon studies of Indigenous Australia — was centred on the regulation of sexual and marital relations, and thus differs from Hart's conception which focused upon primary rules of obligation such as prohibition of violence and theft.

CK Allen's *Law in the Making* was an influential text during the time Hart produced *The Concept of Law*.[142] Allen had been Professor of Jurisprudence at Oxford during Hart's brief time there as a student of jurisprudence, and although he had since moved on to his position at Rhodes House, was still a member of the Faculty at the time Hart took up the chair.[143] Hart himself had placed *Law in the Making* at the top of his list of typical set texts for the study and teaching of jurisprudence.[144]

Hart's language is evocative of the wording used by Allen in *Law in the Making*. Where Allen had said, 'it is not difficult … to imagine' societies without legislation,[145] Hart claimed that 'it is possible to imagine' a society without legislature, courts or officials.[146] While Allen described 'societies of which we have evidence' governed only by customary rules which are not yet distinctly legal,[147] Hart depicted 'societies of which we have knowledge', which only

[139] Paul Vinogradoff, *Outlines of Historical Jurisprudence: Volume I Introduction—Tribal Law* (Oxford University Press, 1920) 163–212. Vinogradoff's work is discussed in Chapter Three (above).

[140] Ibid 368.

[141] He credits this as the reason for 'the rapid dying out of many aboriginal nations when they come into contact with European settlers or traders. Even apart from the ruthless methods of *conquistadores* and from the ravages of imported diseases, native tribes disappear because they are unable to accommodate their definitely stamped habits of life to new requirements and new conditions': ibid 168.

[142] Carleton Kemp Allen, *Law in the Making* (Oxford University Press, 1927). As Hart cited the 6th edition of *Law in the Making* in *The Concept of Law* (at 294), all pinpoint references in this chapter will be to that edition: Carleton Kemp Allen, *Law in the Making* (Oxford University Press, 6th ed, 1958) 66 ('*Law in the Making* 6th ed'). As to the influence of *Law in the Making*, see the discussion in Chapter 3.

[143] Allen was on the selection committee and it appears that he opposed Hart's appointment in favour of his competitor, a University College colleague of Allen's: Lacey, *The Nightmare and the Noble Dream* (n 3) 150–1.

[144] HLA Hart, 'Philosophy of Law and Jurisprudence in Britain (1945–1952)' (1953) 2(3) *American Journal of Comparative Law* 355, 358.

[145] Allen, *Law in the Making* 6th ed (n 142) 66.

[146] Hart, *The Concept of Law* 3rd ed (n 1) 91.

[147] Allen, *Law in the Making* 6th ed (n 142) 66.

have primary rules of obligation, and are pre-legal. Indeed, the idea that 'customary law' in 'primitive societies' may be a form of law, although not yet have developed a distinctly legal character, is similar to both Hart and Allen.[148] So too is the assumption that Indigenous 'customary law' gives legal theorists a window into the historical origins of English customary law as the antecedent of British common law.[149] However, although Allen's work shares many of Hart's assumptions about Indigenous law, there is one significant difference. While Hart described a majority regarding the rules with the critical reflective attitude and acknowledged that there will be instances where customs are breached, Allen maintained the earlier idea that custom in Indigenous societies was followed automatically and without conscious thought.[150]

One work that is consistent with all Hart's claims is Sidney Hartland's *Primitive Law*.[151] Not only does Hartland's work deal exclusively with societies without 'legislature, courts or officials of any kind', it is also replete with (to quote Hart's words) 'many studies of primitive communities which … depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour'. Hartland's pages are covered with the minutiae of social life gleaned from over a hundred different ethnographic studies. There are at least thirteen different ethnographies of Indigenous Australians alone,[152] to which numerous references are made and from which details and examples are described.

[148] Ibid 66, 143.

[149] See ibid 64–147.

[150] Ibid 64, 144–5.

[151] E Sidney Hartland, *Primitive Law* (Methuen, 1924). See the discussion of Hartland's work in Chapter Three.

[152] The studies of Australian Aboriginal and Torres Strait Islander peoples cited by Hartland are as follows: Alfred William Howitt, *The Native Tribes of South East Australia* (1904); Spencer and Gillen, *The Native Tribes of Central Australia* (1899); Spencer and Gillen, *The Northern Tribes of Central Australia* (1904); GC Wheeler, *The Tribe and Inter tribal relations in Australia* (1910); James Dawson, *Australian Aborigines: The Languages and Customs of Several Tribes of Aborigines in the Western District of Victoria, Australia* (1881); George Taplin, 'The Narrinyeri' in JD Woods (ed), *Native Tribes of South Australia* (1879); Edward M Curr, *The Australian Race: Its Origin, Languages, Custom, Place of Landing in Australia, and the Routes by Which it spread itself over that Continent* (1886) vol II; Robert Brough Smyth, *The Aborigines of Victoria: with notes relating to the habits of the Natives of Other Parts of Australia and Tasmania* (1878); Christina (Mrs James) Smith, *The Boandik Tribe of South Australian Aborigines: A Sketch of their Habits Customs Legends and Language; Also an Account of the Efforts of Mr and Mrs James Smith to Christianise and Civilise Them* (1880); Roth, Walter Edmund, *Ethnological Studies Among the North-west-central Queensland Aborigines* (1897); James Frazer, *Totemism and Exogamy* (1910); WHR Rivers, *History of Melanesian Society* (1914); Alfred Cort Haddon, *Reports of the Cambridge Anthropological Expedition to Torres Straits* (1901) vol V.

Consistently with Hart's claims, Hartland describes rules restricting violence,[153] and theft,[154] as well as others imposing 'positive duties to perform services or make contributions to the common life.[155] Hart's claim that 'the majority live by the rules seen from the internal point of view' and his acceptance that there may be some 'dissidents and malefactors' also accords with Hartland's work. Hartland claims that although the 'savage' is 'hemmed in on every side by the customs of his people',[156] it is not merely habit,[157] but community pressure and the fear of often superstitious repercussions,[158] that enforces the general obedience. Hartland also notes that there are occasional breaches, for which sanctions are provided.[159] Generally, law is enforced by sensitivity to community ridicule and contempt.[160] Hart's claim that there may be sanctions but these would be administered not by an official agency but by the individuals affected or the group at large is also echoed in Hartland.[161]

Hart's assumptions that there is no procedure for authoritatively determining doubt over rules, and no means of deliberately amending or repealing existing rules or introducing new ones,[162] are also consistent with Hartland's view that:

> the laws of peoples in the lower culture … are unwritten. They depend for their validity on general acceptance and recognition. Formal changes are seldom made. There is no authority universally acknowledged which has power to enact fresh laws over the heads of the community, or against its consent.[163]

Similarly, Hart's assumption that the rules are static, and can only gradually evolve, finds an echo in Hartland, who argued that the 'peoples whom we call "primitive", as being nearest the presumed original condition of humanity, are proverbially intensely conservative';[164] '[f]rom

[153] Hartland (n 151) 145–148, 154–5.
[154] Ibid 159, 173, 183.
[155] Ibid 13, 85–88, 119, 121. Unlike Hart's account, however, Hartland's is more concerned with rules governing sexual and marital relations, and witchcraft.
[156] Ibid 138.
[157] Ibid 202.
[158] Ibid 8.
[159] Ibid ch VI 'Sanction'.
[160] Ibid 161–5.
[161] Ibid ch VI 'Sanction'.
[162] Hart, *The Concept of Law* 3rd ed (n 1) 92.
[163] Hartland (n 151) 203.
[164] Ibid 200.

generation to generation they follow the customs of the fathers'.[165] Change happens over time as circumstances change, but so slowly that it is almost imperceptible.[166]

All the societies canvassed by Hartland were small and closely-knit by ties of kinship and common sentiment and belief. He also echoes the necessity for isolation and stability of the environment if the community is to continue to live successfully 'under such a regime.':

> The isolation of the Australian Blackfellows for immemorial ages … has doubtless resulted in the perpetuation of their rudimentary civilization and the continuance of the democratic constitution of the tribe. Had they been subjected to invasion by other peoples they must have been dispossessed of the continent, or a great part of it, and ultimately annihilated, or they must have been conquered by and intermingled with them, so as to form a people with institutions of a much more elaborate character.[167]

The fact that Hart's claims coincide so closely with Hartland's, and differ in significant respects from even the major works of historical jurisprudence, indicates that Hartland could have been a source of Hart's ethnographical information. Although Hartland was not cited by Hart, this is not altogether surprising given that Hart was notoriously lax about referencing.[168] *Primitive Law* is also not amongst the books bequeathed by Hart to the Hebrew University of Jerusalem, which suggests that Hart may not have owned a copy of the book.[169] However, a number of other books cited by Hart and unquestionably influential on his thoughts, were also not in the collection.[170]

Another work that correlates closely with Hart's claims is Alan Diamond's *Primitive Law*.[171] Diamond associated legal evolution with social and economic development, and graded

[165] Ibid 201.
[166] Ibid 202. The one exception is caused by contact with Europeans: at 200.
[167] Ibid 20–21.
[168] Hart's close colleague, collaborator and co-author on *Causation in the Law*, Tony Honoré, is quoted as saying of Hart that 'impatience with the minutiae of scholarship made him unreliable about references': Lacey, *The Nightmare and the Noble Dream* (n 3) 211. Elsewhere Honoré described Hart as 'naturally inaccurate; at times his enthusiasm for a person or idea led him astray. He was untidy and absent-minded beyond the professional norm': Honoré (n 3).
[169] In his will, Hart bequeathed his library to the Hebrew University of Jerusalem. I conducted bibliographic research into that collection as part of my research for this chapter.
[170] For example, Baier's *The Moral Point of View*: Kurt Baier, *The Moral Point of View: A Rational Basis of Ethics* (Cornell University Press, 1958), as to which see below.
[171] AS Diamond, *Primitive Law* (Watts, 1935). For an overview of Diamond's work in relation to Indigenous Australia, see Chapter Three.

societies according to mode of production, with Indigenous Australians dominating the 'lowest' grade.[172] The chapter describing a stage of legal evolution 'before the evolution of courts'[173] encompasses primarily Indigenous Australian and American peoples.[174] Like Hart, Diamond assessed these 'communities standing at the lowest grades of progress' as pre-legal.[175]

This chapter supports most of Hart's empirical claims.[176] It describes societies without legislature, courts or officials,[177] using Malinowski's ground-breaking concept of reciprocity (explained by reference to the attitudes of the society) to explain the maintenance of peace and order.[178] Diamond described an array of 'rules of conduct', religious and secular, ranging from non-compulsory to compulsory.[179] His depiction of a 'class of rule of conduct … which are invariably observed, and which in the opinion of all must be observed',[180] although the rules 'are sometimes broken',[181] is similar to Hart's claim of the majority (albeit with some non-conformists) accepting the rules from the internal point of view.

Diamond considered long-established usage an important basis for the observance of those rules considered binding, but inadequate to describe the diversity or range of rules in such a community.[182] He therefore preferred the term 'rules of conduct' to 'custom' as a general descriptor for the maintenance of order in such societies.[183] In this respect, Diamond's work is similar to Hart's avoidance of the term 'custom' (despite noting that it was the term commonly used for 'such a social structure') in favour of 'primary rules of obligation'.

Diamond's description of those rules which 'are in the direct line of the history of law' — rules dealing with inheritance, marriage, and traces of criminal wrongs — bears some resemblance

[172] Ibid 173–184.
[173] Ibid ch 18.
[174] The peoples assessed by Diamond as 'before the evolution of courts' were those classed by Diamond into the hunter grades, and lower agricultural and lower pastoral grades, and consist of Indigenous Australian and American peoples, as well as some Indigenous Asian and African societies: see ibid.
[175] Ibid 185–93.
[176] This particular chapter is also cited by Hart in his endnotes to this section of the book, as to which see below.
[177] Diamond claimed variously that 'tribal government of any kind is exceptional', 'there has been no evolution of specialised organs for the settlement of disputes between members of the group', and 'no Courts or other communal organs exist even for the purpose of laying down or enforcing any rules of civil law': Diamond (n 171) 187.
[178] Ibid 189–91, citing Malinowski's study of the role of reciprocity in *Crime and Custom in Savage Society*.
[179] Ibid 188–193.
[180] Ibid 188.
[181] Ibid 190.
[182] He did, however, suggest that for some of the rules that term would be appropriate: ibid 191.
[183] Ibid 188.

to Hart's basic rules restricting violence, theft and deception (although he describes rules relating to incest and witchcraft as more common than wrongs such as homicide and theft).[184] His discussion of reciprocity accords more closely with Hart's account, describing obligations to perform services and make contributions to the community.[185]

The deficiencies Hart identified as caused by the lack of rules of recognition, change and adjudication are reflected in Diamond's depiction of the absence of any 'authority possessing power to declare law',[186] or other organs for 'laying down or enforcing any rules'.[187] Further, Diamond's description of wrongs being avenged by friends or family,[188] where 'punishment is inflicted by the community or part',[189] matches Hart's claim about sanctions being administered by individuals or the group at large rather than by an official agency.

Unlike Hartland's work of the same title, the first edition of Diamond's *Primitive Law* was in Hart's collection,[190] and was cited by him in the endnotes to *The Concept of Law*.[191]

C Hart's End Notes

The clarity of Hart's claims about the empirical evidence for the features of his pre-legal society is confused by the end notes. Two of the three endnotes on this section of the book refer to empirical studies.

The first of these relates back to the text where Hart had stated that there are many studies which claim that societies *do in fact exist* without legislature, courts or officials, and depict such societies in detail. Hart effectively contradicted his text in this note, now saying that '[f]ew societies have existed in which legislative and adjudicative organs and centrally organized sanction were all entirely lacking'.[192] This latter statement reflects the rule-centred approach to

[184] Ibid 192–3. In relation to theft, Diamond noted that 'it is in many communities regarded chiefly as an eccentric and amusing peccadillo, characteristic of children or idiots' (at 192).
[185] Ibid 189–91.
[186] Ibid 191.
[187] Ibid 187.
[188] Ibid 192–3.
[189] Ibid 193.
[190] It was one of the titles bequeathed by Hart to the Hebrew University of Jerusalem.
[191] Hart, *The Concept of Law* 3rd ed (n 1) 291.
[192] Ibid.

legal anthropology,[193] which was in vogue at the time of writing and which typically used Western legal concepts, such as rules, institutions and sanctions, to understand and portray the social order of non-Western societies.[194] Underpinning this approach was a notion of formal racial equality,[195] fundamentally opposed to the evolutionary framework that pervades Hart's text, although both approaches used Western legal concepts as the benchmark. This is the only one of Hart's endnotes (of the 121 notes in the entire book) which contradicts the text. This inconsistency has caused confusion as to the nature of Hart's claims. If the account in the text is read in light of the endnote, it appears internally contradictory.[196] Nevertheless, even when read in that context, Hart's claim becomes (at minimum) a claim that at least some such societies exist and are depicted in empirical studies.

Hart then referred the reader, for 'studies of the nearest approximations to this state', to the chapter of Diamond's *Primitive Law* discussed above, Malinowski's *Crime and Custom in Savage Society*, and Llewellyn and Hoebel's *The Cheyenne Way*.[197] These references are a curious and eclectic collection of disparate approaches. While *Crime and Custom in Savage Society* and *The Cheyenne Way* were highly influential at that time,[198] and are now classics of anthropological literature,[199] Diamond's work is the only one that reflects in any way the assumptions made by Hart in the text. None of the works cited actually support the statement

[193] A number of books in the library Hart donated to the Hebrew University belong to this category (PP Howell, *A Manual of Nuer Law: Being an Account of Customary Law, its Evolution and Development in the Courts Established by the Sudan Government* (OUP, 1954); TO Elias, *The Nature of African Customary Law* (Manchester University Press, 1956) and AL Epstein, *Juridical Techniques and the Judicial Process: A Study in African Customary Law* (Manchester University Press, 1954)). However, of the five works cited by Hart in this and the following endnote, only Diamond's *Primitive Law* and Shultz' *Classical Roman Law* appear in the collection.

[194] See Norbert Rouland, *Legal Anthropology* (Athlone Press, 1994) 37–8; Roberts (n 95) 192. See also Sally Falk Moore 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology' (2001) 7(1) *Journal of the Royal Anthropological Institute* 95; Peter Just, 'History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law' (1992) 26(2) *Law and Society Review* 373, 373–5. See the discussion in Chapter Three.

[195] See Moore (n 194).

[196] In his discussion of this section of Hart's work, where he reads the text in conjunction with the notes, Martin notes this contradiction: Martin (n 3) 21. See also Fitzpatrick (n 17) 194.

[197] Hart, *The Concept of Law* 3rd ed (n 1) 291, citing Bronislaw Malinowski, *Crime and Custom in Savage Society* (1926), Diamond (n 171) ch 18, KN Llewellyn and EA Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, University of Oklahoma Press, 1941). See the brief discussion in Chapter Three.

[198] Roberts (n 95) 197; I Schapera, 'Malinowski's Theories of Law' in Raymond Firth (ed), *Man and Culture: An Evaluation of the Work of Bronislaw Malinowski* (Routledge, 1957) 139, 150.

[199] Rouland (n 194) 38.

Hart made in the note either, with the possible exception of *The Cheyenne Way* which combined elements of the rule-centred approach with aspects of the broader dispute resolution approach.

In the second note, which refers to adjudication without organised sanctions, Hart referred the reader '[f]or primitive societies in which provision is made for the settlement of disputes by rudimentary forms of adjudication though no system of centrally organised sanctions for enforcing decisions exists' to an extract from EE Evans-Pritchard on 'ordered anarchy' in *The Nuer* quoted in Gluckman's *The Judicial Process among the Barotse*.[200] Gluckman's work is another classic of legal anthropology which epitomises the rule-centred approach.[201] Gluckman analysed the application of legal rules in Indigenous African dispute resolution, to demonstrate the comparability of African and Western legal thought.[202] In his discussion of the excerpt quoted from Evans-Pritchard's *The Nuer*, Gluckman emphasised that 'even in a society where "self-help" is the enforcing sanction', dispute resolution consists of independent judgments in terms of rights, duties and wrongs, according to 'a *corpus juris* of rules for right doing'.[203] In this note, Hart also made a detailed comment on the history of adjudication in Roman law.[204] This note does support the text, where Hart had stated that 'the history of law … strongly suggests' that many societies developed agencies of adjudication before centrally organised sanctions.[205] The appearance of an historical study of an ancient, defunct society alongside anthropological studies of contemporary Indigenous communities is further illustration of the evolutionary assumptions in Hart's work.

Apart from Diamond's work, the anthropological studies cited by Hart in these two notes are fundamentally dissimilar to nature of the claims Hart made in his text.[206] Hart's junior colleague

[200] Hart, *The Concept of Law* 3rd ed (n 1) 291–2. The reference cited by Hart was to EE Evans-Pritchard, *The Nuer: A Description of the Modes of Livelihood and Political Institutions of a Nilotic People* (Clarendon Press, Oxford, 1940) 117–8, quoted in Max Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia* (Manchester University Press, 1955) 262–3.

[201] Roberts (n 95) 197. See also Chapter Three.

[202] See the discussion of Gluckman's work in Moore (n 194).

[203] Gluckman (n 200) 263. This application of a Western legal framework was not entirely consistent with Evans-Pritchard's own position.

[204] Hart, *The Concept of Law* 3rd ed (n 1) 292, citing Fritz Schultz, *Classical Roman Law* (Clarendon Press, Oxford, 1951) 26.

[205] Hart, *The Concept of Law* 3rd ed (n 1) 93–4.

[206] Peter Fitzpatrick has pointed out one aspect that these studies have in common with Hart; they 'share with Hart the technique of bringing a pre-existing conception of law to bear on the world, a conception corresponding to a type of Occidental law. The world then obliges by confirming that this idea of law is universally real': Fitzpatrick (n 17) 194.

at Oxford, Brian Simpson, claimed that 'Hart's knowledge of the anthropological literature was … scanty'.[207] Certainly Hart's claims about 'primitive communities' demonstrate a lack of familiarity with the complexity and range of contemporary anthropological literature. Given that his work contains little hint of reference to the thinking represented by any of these works other than Diamond, it is likely that Hart was not completely aware of their import.

Simpson suggests that Hart hadn't actually read the works cited in the endnotes (or at least hadn't read them carefully), but found them in Allen's *Law in the Making*.[208] However, these sources were practically ignored by Allen, who continued to adhere to the automaton theory.[209] It is possible, albeit unlikely, that Hart obtained them from another jurisprudence textbook. Although some texts of that era included references to developments in legal anthropology, none contained references to the curious combination cited by Hart.[210] It is more likely that a colleague, or someone else reviewing the text prior to publication, drew Hart's attention to contemporary legal anthropology with its criticisms of evolutionary legal theories and the assumptions made by Hart.[211] If these works had been drawn to Hart's attention after completion of the draft and close to publication, it would explain why they are contained in an endnote, while the text remained unchanged.

It may not be altogether surprising that an analytical legal philosopher of the mid-20th century, with expertise in linguistic philosophy, should demonstrate such a tentative grasp of the range

[207] Simpson (n 6) 173.

[208] Ibid.

[209] In the 3rd edition (1939), Allen cited Savigny, Maine and Vinogradoff, but in a footnote, which first appeared in the 5th edition in 1951, Allen cited Diamond's *Primitive Law* as a *contra* opinion: Carleton Kemp Allen, *Law in the Making* (Oxford, 5th ed, 1951) 63. By the sixth edition, 1958, there is in the same footnote, a further reference to Gluckman: Allen, *Law in the Making* 6th ed (n 142) 66.

[210] If Hart did obtain them from a textbook, it could have been Dennis Lloyd's *Introduction to Jurisprudence*, which was first published in 1959, just as Hart was completing *The Concept of Law*. Lloyd's discussion of 'Custom and the Historical School' records the shift in thought from the evolutionary historical jurisprudence and legal primitivism to the anthropological developments of the first half of the 20th century. Lloyd discussed Malinowski's work, referred to Diamond and Gluckman (but not the extract from Evans-Pritchard's work that was cited by Hart) and outlined Roman Law before turning to the common law: Lloyd (n 105) 335–9. One of the only other jurisprudence texts that contain references to some of the anthropological works cited by Hart is George Paton's *A Textbook of Jurisprudence* (Oxford, 1946), which refers to Malinowski, Diamond's *Primitive Law* and *The Cheyenne Way*.

[211] Possibly Tony Honoré, who gave Hart detailed comments on the draft of the book. Honoré was an expert in Roman law (referred to in detail in the second note) and was also familiar with comparative law and a diversity of legal traditions. Hart acknowledged 'a special debt' to Honoré for his 'detailed criticisms [which] exposed many confusions of thought and infelicities of style': HLA Hart, 'Preface', *The Concept of Law* 1st ed (n 1). See also Lacey, *The Nightmare and the Noble Dream* (n 3) 214; Simpson (n 6) 51, 173.

of approaches to 'primitive law' (characterised by diverse methodological, epistemological and theoretical frameworks) in the anthropological literature of the time. What is interesting then, is the fact that Hart relied upon ethnographic studies at all, or allowed empirical data to obscure what was essentially a purely analytical exercise.[212] The specificity, confidence and certainty of the claims Hart made about 'primitive communities' and 'primitive law', together with his obvious lack of awareness of the depth, range and complexity of the discipline, suggests that he had a single source (or two or more complimentary sources) for his claims, rather than familiarity with a body of literature.

It is unlikely that the studies cited in the endnotes (with the exception of Diamond) are the studies to which Hart was alluding in his origin story. Further, although many of Hart's evolutionary assumptions reflect the general tenor of historical jurisprudence, there is also some divergence between those works and Hart's claims. Most closely aligned with Hart's claims are the two works of the same title, *Primitive Law*: the explicitly evolutionary Hartland and the neo-evolutionary Diamond.

D The Position of Indigenous Australians in Hart's Scheme of Legal Evolution

It is now possible to address the question of which societies or peoples were in Hart's contemplation as the subjects of the studies to which he referred. The studies included in the endnotes encompassed Indigenous peoples of Africa and Oceania (including Australia). The major works of historical jurisprudence, with the exception of Maine, all explicitly portrayed Indigenous Australians as epitomising the earliest stage in legal evolution. The texts that most closely aligned with Hart both specify Indigenous Australians as the 'earliest' or 'lowest' on the evolutionary scale of legal development. Hartland's work encompassed studies of Indigenous peoples of Africa, Australasia, Asia Pacific, North and South America, and the Arctic. It included many references to Indigenous Australians,[213] whom he designated the 'lowest peoples'. Diamond's pre-legal stage encompassed Indigenous Australian and American peoples, together with some Indigenous Asian and African societies.[214] At the 'lowest grade'

[212] As to Hart's attitude to the utility of empirical evidence in the social sciences (in the context of the Hart–Devlin debate), see Lacey, *The Nightmare and the Noble Dream* (n 3) 261.

[213] As noted in Chapter Three, the Australian Aboriginal peoples referred to in Hartland's book include the Gamilaraay (Kamilaroi), Gunai (Kurnai), Yuin, Butchulla, Arrernte, Anmatyerr, Kaytetye, Warumungu, Luritja, Arabana, Warumungu, Djargurd wurrung, Ngarrindjeri, Dja dja warrung (Jajaurung), Bunganditj (Boandik) nations.

[214] Diamond (n 55) 173–8.

on Diamond's evolutionary scale were 'the Australian aboriginal communities of the Stone Age'.[215]

It is quite probable that Hart envisaged Indigenous peoples from anywhere in the world, particularly those colonised by the British, and who formed the subject of many of the works written in English. At the very least, there can be little doubt that Indigenous Australians would have been included in the unspecified primitive societies depicted by Hart as pre-legal.

V. THE PRE-LEGAL–LEGAL DUALISM

In invoking empirical evidence in support of his analytic device, Hart followed in the tradition of the social contract theorists of the Enlightenment era. Hobbes, Locke and later Austin, all relied upon a very limited — and similarly flawed — empiricism to name actual societies that they claimed existed in a 'state of nature'. Hobbes and Locke, writing prior to British colonisation of Australia, identified Indigenous American peoples, whereas Austin, writing in the decades following the establishment of the first British colony in Australia, named Indigenous Australians as exemplifying the state of nature.

Hart's account of the development of a legal system is strikingly similar to the Enlightenment philosophers' theories of the emergence of law from a state of nature. In part, this is due to his use of the same analytic technique.[216] In this section, I examine Hart's use of the analytic origin device, and the dualism it creates.

A An Analytic Device

In order to demonstrate the necessity of key features of legal systems, Hart imagined a condition constructed from their absence. As Peter Fitzpatrick has pointed out, Hart's account is 'almost indistinguishable' from Locke's 17th century theory.[217] In Locke's account, the deficiencies in the state of nature were 'an established, settled known law', 'a known and indifferent judge', and power of 'due execution'.[218] Progression to civil society, via the social contract, cures these

[215] Ibid 185.
[216] Fitzpatrick (n 17) 195.
[217] Fitzpatrick (n 17) 193. The major difference is that Hart did not rely upon the social contract; as to Hart's rejection of the social contract fiction, see MacCormick, *HLA Hart* (n 60) 98.
[218] John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Digireads, first published 1689, 2005 ed) 109–110.

defects by means of 'a common established law and judicature to appeal to, with authority to decide controversies … and punish offenders'.[219]

Another account clearly inspired by Locke was cited by Hart in the third of the endnotes relating to his origin story. Unlike the other two endnotes, the third does not refer to anthropological studies, but to a work on moral philosophy by one of Hart's former philosophy colleagues.[220] In a cryptic note referring to '[t]the step from the pre-legal into the legal world', Hart cited Kurt Baier on 'Law and Custom' in *The Moral Point of View*.[221] Baier's account of law's origins mirrors Hart's so closely that it could have been the source of inspiration for that entire section.[222]

Baier preceded his account, as did Hart, with a description of social rules.[223] Like Hart, instead of attempting a definition of law, he defined a legal system.[224] Baier described societies 'which have not reached this stage of development' as 'prelegal', without 'a system even of primitive law'.[225] In words very similar to those of Hart, Baier said '[i]t is not difficult to imagine how a primitive system of law might have developed in a prelegal society'. He described two key features in the evolution from the pre-legal state to a legal system, which serve functions almost identical to Hart's secondary rules of recognition, adjudication and change. The first feature is

[219] Ibid 97.

[220] Kurt Baier was Hart's contemporary in the Philosophy Faculty at Oxford, and a fellow 'Philosophy Fellow' (Baier was at Magdalen College while Hart was at New College). A Jewish refugee to Australia from Austria, Baier returned to Australia after completing his PhD at Oxford, to take up the Chair in Philosophy at the new Canberra University College (later The Australian National University). It was here during the 1950s that *The Moral Point of View* (published in 1958) was written. Baier later moved to the United States where he occupied the Chair of Philosophy at the University of Pittsburgh for 34 years: 'Kurt Baier' <http://www.otago.ac.nz/philosophy/Baier.pdf>. See also, Bernard Gert, 'Baier, Kurt (1917–)' *Encyclopedia of Philosophy* <https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/baier-kurt-1917>.

[221] Hart, *The Concept of Law* 3rd ed (n 1) 292, citing Baier (n 170) 129–33. This is one of three references to Baier's *The Moral Point of View* in the endnotes.

[222] I have not found a single reference to Baier's work, or its influence on Hart, in all the secondary literature on *The Concept of Law*. Baier, like Hart, was a product of the Oxford linguistic philosophy school and the influence of JL Austin (who examined his PhD), and it may be that the shared ideas came about as a result of the discussions of rules that happened within the exclusive discussion group established by Austin. I have been unable to ascertain whether Baier was included in the group, but the group was established for philosophy tutors such as Baier. Lacey mentions Baier merely as being a Magdalen Philosophy Fellow at the time of Hart's appointment to the Chair of Jurisprudence: Lacey, *The Nightmare and the Noble Dream* (n 3) 149.

[223] Baier (n 170) 125–7.

[224] Baier was prepared to define '*a* law' as a certain part of a legal system: ibid 127.

[225] Ibid 128.

the function of authorised adjudication,[226] which resembles Hart's rule of adjudication. The other is legislation, which serves two functions.[227] The first is to bring about deliberate change in the law (since without it, change only occurs as a result of changes in 'group mores', which is 'notoriously slow and uncertain').[228] This mirrors what Hart describes as rules of change. The second function is 'an established procedure of determining whether a given rule-formula is part of the legal system, that is, whether it is what we call "a valid law"'.[229] This is practically identical to Hart's rule of recognition. The main difference between Baier's account and Hart's is that Hart describes these features as rules, and Baier as functions. If Baier's account was the inspiration for Hart's, this could explain why Hart vacillated in his account between the rules and their functions.

Other features of Baier's description of a 'pre-legal' society also coincide with those of Hart: he described 'the social fabric [as] more closely-knit',[230] and observed that in a 'very small group this type of social pressure [to support social rules of custom] will be very effective'.[231] Elsewhere, Baier drew a general distinction between primary and secondary moral rules,[232] which resembles the way Hart described the interrelationship between primary and secondary rules in this section of his book (where secondary rules are described as being about primary rules). Again, if Baier was the inspiration for Hart's account, this could explain why Hart's description of the distinction between primary and secondary rules in this part of the book is so different from the way he had described it earlier (as the difference between duty-imposing and power-conferring rules).

While Baier's and Hart's accounts were both clearly inspired by the social contract theorists (each bearing a striking resemblance to Locke's theory in particular), there is one noteworthy difference between them. Whereas Baier's account is purely speculative, Hart supported his

[226] The function of adjudication consists of specialization in determining breaches of the rules and administering the appropriate consequences: ibid 127–8.

[227] Baier himself did not specify that there were two separate functions of legislation, but the distinction is apparent from his discussion. See ibid 127–9.

[228] Ibid 129.

[229] Ibid 127.

[230] Ibid 131.

[231] Ibid 128.

[232] For Baier, primary moral rules are those which 'prohibit or enjoin certain types of behaviour, such as "Thou shalt not kill" … and so on', the purpose of which is to 'preserve the moral equilibrium'. Secondary moral rules are designed to restore the equilibrium when it has been upset by some breach of primary rules. Thus, secondary rules prescribe what should happen in the case of a breach of primary rules: ibid 204–5.

claims by reference to ethnographical evidence that societies do in fact exist under conditions such as he described. This difference between the two accounts highlights a critical point about Hart's epistemology. The fact that Hart chose to support with empirical claims, a model which could have stood alone as purely analytical, suggests that he considered the empirical claims to have some substantial significance.

B 'White Man's Magic'

Hart's use of the analytic device is problematic. Even at a purely abstract level — without the added complication of the empirical component — the device results in the creation of a dualism, where one side of the dualism is comprised solely from the lack of features associated with the other side. Hart unequivocally centralised the 'developed', 'mature' legal system of the 'modern' state. He then constructed his fictional pre-legal society from the absence of qualities vital to his concept of the legal (secondary rules of change, adjudication and recognition) in order to demonstrate the necessity of those very features in a 'developed' legal system. In doing so, Hart created a dualism reminiscent of the civil society–state of nature, whereby both sides of the dualism are measured solely by reference to the legal system of an (Anglo-)Western nation state. The pre-legal side of the dualism represents the origins of the legal system, and manifests the converse aspect of its characteristics — simple compared to complex, partial to objective, static to dynamic, inefficient to effective, informal and imprecise to authoritative and valid, and so on. It was by means of just such a conceptual mechanism that Indigenous societies with diverse social, economic and legal organisation, were perceived as lacking 'law' entirely.

The fact that Hart's analytic device is supported by reference to empirical studies of Indigenous societies compounds the problems associated with the dualism. The evolutionary anthropological studies relied upon by Hart were engaged in a similar quest for the origins of Western law.[233] Hart's representations about 'primitive communities' were informed by the construal of Indigenous peoples' law as fulfilling those imagined origins. Both Hart's construction of the pre-legal, and his assumptions about 'primitive' communities, therefore, were informed from the same condition of absence. This is a crucial point. It demonstrates that

[233] See Part II.

Hart's negative perceptions of Indigenous societies, including Indigenous Australian communities, contributed to his construction of the pre-legal state.

The deliberate positioning of Indigenous societies as pre-legal renders the existence of a system of law in these communities conceptually impossible. It was this type of 'white man's magic' that enabled the application of terra nullius to Australia.[234] Its appearance in the theory informing the 'intersection of normative systems' doctrine is concerning to say the least.

VI. IMPLICATIONS FOR THE *YORTA YORTA* DECISION

The pre-legal–legal dualism in Hart's theory, together with the identification of Indigenous Australian communities as 'pre-legal', has grave consequences for the later interpretation of Indigenous Australian law in *Yorta Yorta*.

The majority judgment did not explicitly endorse the dualism, eschewing questions of whether Indigenous law could technically be classified as 'law', and insisting that traditional laws and customs can constitute 'bodies of normative rules' or a 'normative system'. Instead of accepting that in Hart's scheme, Indigenous Australian societies would be 'pre-legal', the majority found that in order to satisfy the requirements of the definition of native title, their 'traditional laws and customs' must fulfil the criteria for a legal system (including a rule of recognition). But neither did the Court reject the dualism, which remains inherent in the construction of the judgment. Instead, the majority merely shifted the classification of 'traditional laws and customs' to the other side of the dualism. The problem with this approach is that the other side is constructed by reference to a purely Western, and essentially British, legal system. Indeed, the benchmark on *both* sides of the dualism is a Western legal system. The legal system is the positive manifestation, and the pre-legal the negative manifestation of the same model. Non-Western and Indigenous perspectives have no place on either side of the dualism, and are thereby rendered invisible and unimportant. The presence (and dominance) of the dualism accounts for the invisibility of Indigenous Australian perspectives of their own law throughout the judgment.

The dualism also explains many of the inconsistencies in the judgment. Despite their avowed intention to treat traditional laws and customs as a normative system (which incidentally

[234] The phrase 'white man's magic' was used by Anthony Skillen to describe Hart's view of law as the cure for the defects in primitive society: Skillen (n 61) 102.

comprised many of the elements of a Hartian legal system), the majority continually conflated Indigenous law with the pre-legal side of the binary. This repeated slippage between the two polarities sheds light on many of the anomalies in the reasoning.

According to Hart's theory, Indigenous Australian societies are pre-legal — comprising bodies of (primary) rules, but lacking rules of change, adjudication and the ultimate rule, a rule of recognition. Their law consists not of a system, but 'a set of separate standards, without any identifying or common mark'.[235] According to this theory, the primary rules in Indigenous societies amount to a set of customs which are little more than protocols — they are less than morals, since they have no system. In this respect, in Hart's own words, they 'resemble our own rules of etiquette'.[236] This explains why, despite insisting that traditional laws and customs could amount to a 'normative system', the majority stopped short of using the term 'legal system'. It also explains why the Court was prepared to insist that traditional law constitutes bodies of normative rules but frequently interchanged the term 'normative system' with descriptors such as 'sets of norms' and 'sets of rules', effectively downgrading it from a system to a set of unconnected conventions.

Similarly, oscillation between the two sides of the dualism explains why the justices anticipated that Indigenous normative systems could continue to function despite the alleged impairment of law-making power. On one reading, the judgment implicitly recognises the capacity of Indigenous normative systems to continue functioning effectively. It describes, and indeed requires, a normative system with continuous existence and vitality. At the same time, the majority held that upon the change of sovereignty, the Indigenous normative system lost its capacity to make new laws. By implication, it thereby lost its capacity to continue operating as a fully functioning normative system. Nevertheless, in order to prove native title, claimants must prove continuity of that normative system, including the same rule of recognition as at sovereignty, making proof of native title virtually impossible.[237] The paradox can only be reconciled by identifying a shift between the legal and pre-legal sides of the binary. Although intending to treat Indigenous traditional law and custom as a normative system, the majority

[235] Hart, *The Concept of Law* 3rd ed (n 1) 92.
[236] Ibid.
[237] See Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2002* (19 March 2003).

continually defaulted to assumptions about the nature of Indigenous societies as pre-legal. A Hartian pre-legal normative regime can, after all, operate effectively without rules of change.

A related inconsistency in the judgment is that while the majority held that the Indigenous normative system could, to some extent, continue to evolve and adapt after the change in sovereignty, they were also unequivocal on the point that the system could not validly create new rights and interests. It is not clear, however, what the difference is between the power to validly adapt and change existing laws and customs and the power to create new ones. If they can validly adapt existing laws and customs, why can't they validly create new ones? Again, this anomaly can only be explained by reference to movement from one side of the dualism to the other. In a Hartian legal system, valid introduction, amendment, and repeal of laws occurs via rules of change and recognition. Neither the introduction of new laws, nor the amendment of existing laws, could occur without a rule of change, and the validity of those laws depends upon a rule of recognition. However, law in a pre-legal society is still capable of organic change and adaptation (albeit only slow and gradual) without rules of change and recognition.

The dualism also helps to explain another inconsistency in the judgment: the logical disconnect between the reasoning and the conclusion. The majority relied upon the trial judge's findings, which did not satisfy the test they had developed in their reasoning. The majority had held that, in order to prove native title, it must be shown that acknowledgement and observance of the laws and customs that existed at the time of sovereignty has continued substantially uninterrupted since then, and that the society 'has continued to exist throughout that period as a body united by its acknowledgement and observance of the laws and customs'.[238] They used the concept of a rule of recognition to explain that the source of validity of the contemporary Indigenous normative system must be the same as for the pre-sovereignty Indigenous normative system.[239] The majority held that since the findings of the trial judge 'were findings about interruption in observance of traditional law and custom',[240] the appellants had not proven continuity of a society united in its acknowledgement and observance of the laws and customs.

However, the trial judge did not make any inquiry into the continuing existence of the society in the sense of a normative system with the same rule of recognition. Instead, Olney J found

[238] *Members of the Yorta Yorta Community v Victoria* (2002) 214 CLR 422, 457.
[239] Ibid 446.
[240] Ibid 458 (emphasis omitted).

absence of traditional society because *radical change had occurred in the physical use and occupation*, by the society, of the land. He did not inquire into whether the norms of this group of claimants had *the same source of validity* as the norms of their forebears, inquiring instead whether the present norms had substantially *the same content* as the former, based upon *an assessment of external indicia* as documented by colonists. This would be equivalent to using the absence of features that an outsider might have observed in the early colony of New South Wales (such as the gallows, stocks, and other external manifestations of capital and corporal punishment) as evidence that the criminal law of New South Wales is no longer part of the same legal system as it was historically — instead of inquiring into whether the rules (laws prohibiting murder, assault, theft of property etc) have the same source of validity as their historical counterparts.

Again, the logical inconsistency resulting from the majority's reliance upon the trial judge's findings can be explained by reference to the Hartian dualism, and the justices' tendency to revert to assumptions about Indigenous societies having pre-legal qualities, while simultaneously requiring the elements of a legal system. Despite requiring a society with the same rule of recognition as at sovereignty, their Honours settled for evidence that would suffice for a pre-legal society, namely continuity of a set of unconnected conventions with no inquiry into a rule of recognition.

Finally, the dualism explains the legal construction of a discreet Indigenous society, relatively insulated from the impacts of colonisation, which will satisfy the test of a native title society. Yet again, this concept can be accounted for by reference to the pre-legal society, which will only be able to continue functioning effectively as long as it remains small, closely knit, and self-contained.

One of the ironies of the use of Hart's theory in *Yorta Yorta* is the central role played by the rule of recognition in the Court's interpretation of Indigenous Australian 'traditional laws and customs'. The rule of recognition is used to explain how the laws and customs presently possessed could have their origin in the pre-sovereignty rules, and to justify the requirement for the normative system having had a continuous existence and vitality since sovereignty. It is used to demonstrate why continuity of the normative system does not necessarily entail continuity of actual content (thus allowing for change) of those laws and customs. And it is used to explain the requirement that the society must have continued to exist throughout the

period as a body united by its acknowledgment and observance of the laws and customs. And yet, according to the very person who devised the concept, Indigenous Australian societies do not have a rule of recognition.

Another irony is that the Commonwealth of Australia, and the states and territories comprising its federal system, could not themselves be said to have the same rule of recognition today as at the time of colonisation. Hart himself had addressed the issue of the rule of recognition in former colonies of the British Empire such as Australia.[241] According to Hart, as a former colony gains independence, 'the ultimate rule of recognition has shifted'; there is a 'new rule'.[242] This illuminates a theme in the majority judgment in *Yorta Yorta*, which made little allowance for the disrupting impact of colonisation on the imperial and colonial, as well as Indigenous, legal systems. The common law of Australia, inherited from England, is presented as a seamless and timeless entity. The only change in sovereignty allowed for in the judgment is the acquisition by the British in 1788. Applying Hart's theory to the Anglo-Australian legal system requires treating the uneven and incremental evolution of its legal independence from Britain as involving fundamental changes in its rule of recognition.[243] The ultimate irony is that the legal system of the Australian nation would fail the test set for Indigenous Australian societies.

VII. CONCLUSION

This chapter has demonstrated that the use of Hart's jurisprudence in the construction of the legal doctrine that replaced terra nullius — the doctrine of the intersection of normative systems — is deeply problematic. Not only are Indigenous Australian societies and law categorised as 'pre-legal', but that very category has been constructed from negative perceptions of Indigenous Australian societies as being symbolic of the deep origins of Anglo-Australian common law. These implications are further analysed in the concluding part of this thesis.

In the meantime, the other theories relied upon in the *Yorta Yorta* judgment are critically examined in the next part of the thesis. The following chapters analyse the theoretical texts

[241] See Hart, *The Concept of Law* 3rd ed (n 1) 120–3.

[242] Ibid 120. For a discussion of the application of this aspect of Hart's theory to the constitutional history of Australia, see Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, 2005) 292–4.

[243] See Oliver (n 242) 292–4.

explicitly relied upon in *Yorta Yorta* in support of the link between law and society. The theories of Julius Stone, George Paton and Tony Honoré are explored for their portrayal of Indigenous Australian law and society and their positioning of Indigenous Australian law vis-a-vis 'law'.

PART V

THEORIES EXPLICITLY RELIED UPON IN *YORTA YORTA*

CHAPTER SEVEN
LAW AND SOCIETY IN THE JURISPRUDENCE OF JULIUS STONE

I. INTRODUCTION TO PART V

In a relatively rare example of judicial reliance upon legal theory as authority for legal principle, the joint majority in *Yorta Yorta* relied upon three works of jurisprudence to support a fundamental principle of the common law. The relevant paragraph, directed to the 'inextricable link between a society and its laws and customs',[1] reads:

> Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone's words, "socially derivative and non-autonomous".[2] As Professor Honoré has pointed out, it is axiomatic that "all laws are laws of a society or group".[3] Or as was said earlier, in Paton's Jurisprudence, "law is but a result of all the forces that go to make society".[4] Law and custom arise out of and, in important respects, go to define a particular society.[5]

This observation of the intricate connection between law and society was extrapolated in the reasoning to found the prescription of a further legal criterion for the survival of 'traditional law and custom' (at least in so far as the common law will recognise its existence). That criterion, a 'society', was defined by the Court as 'a body of persons united in and by its acknowledgement and observance of a body of law and customs'.[6]

The purpose of this part of the thesis is twofold. My major aim is to understand the ways in which Indigenous Australian law has been treated in the theories expressly relied upon by the Court. My secondary aim is to unpack the conceptual connection between law and society as deployed by the Court, and to examine how that connection has been used to limit the recognition of 'law'. Over the course of the next few chapters, I closely examine the theory underpinning this 'society' requirement, investigating the ways in which Indigenous Australian

---

[1] *Members of the Yorta Yorta Community v Victoria* (2002) 214 CLR 422 (Gleeson CJ, Gummow and Hayne JJ) 445 ('*Yorta Yorta*').
[2] Julius Stone, *The Province and Function of Law: Law as Logic Justice and Social Control* (Associated General Publications, Sydney, 1946) 649 ('*The Province*').
[3] AM Honoré, 'Groups, Laws and Obedience' in AWB Simpson (ed), *Oxford Essays in Jurisprudence* (Second Series, Clarendon Press, Oxford, 1973) 1, 2 (''Groups, Laws and Obedience' 1973').
[4] George Whitecross Paton, *A Textbook of Jurisprudence* (Oxford, 1946) 34 ('*A Textbook of Jurisprudence*').
[5] *Yorta Yorta* (n 1) 445.
[6] Ibid.

law and society have been treated apropos the conceptional interdependence of 'law' and 'society'.

The subject matter of this part of the thesis, comprising three chapters, is an examination of the theoretical works cited in the passage quoted above. In this chapter, I examine the quote from Julius Stone, and in the following chapter the quotes from Tony Honoré and George Paton, in the context of the jurisprudence texts from which they originate. I interrogate those texts for their portrayal of Indigenous Australian society and law, and consider how they have positioned Indigenous law relative to the legal systems of other societies. I explore — by way of research into historical archives, as well as biographical, historical and contemporary academic literature — the specific scholarly contexts in which the texts were produced. Finally, in Chapter Nine, I analyse these research findings to understand the material and theoretical genealogy of the interrelated concepts of law and society used in *Yorta Yorta*. The analysis of the texts of the three theories informs the *theoretical* genealogy, and the contextual information the *material* genealogy, of the High Court's use of 'society' as a precondition for 'law'.

As a point of clarification, it is not my object to undertake a detailed analysis of the way the Court conceptualised 'society' per se, as such an analysis is beyond the scope of this thesis. Nevertheless, it is worth briefly noting a couple of points. First, the Court's conceptualisation of society, as a group united in and by its acknowledgement and observance of its laws and customs, has been criticised by anthropologists.[7] The concept of society as a discrete, unified and bounded entity has been rejected in contemporary anthropology in favour of more fluid notions of 'sets of relationships, changing through time, defying reification and certainty'.[8] Secondly, the Court's finding that Indigenous law will expire without continued observance by a human society poses a stark contrast with Indigenous views of 'law' and 'society', which encompass not just human society but the broader natural (and supernatural) world. According to Indigenous accounts, law is conceptualised as simultaneously ongoing and cyclical, and is

[7] See, eg, Kingsley Palmer, 'Societies, Communities and Native Title', in Lisa Strelein (ed), *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010); Patrick Sullivan, *Belonging Together: Dealing with the Politics of Disenchantment in Australian Indigenous Affairs Policy* (Aboriginal Studies Press, 2011).

[8] Palmer (n 7) 145. This fundamental difference in the way the term is used has caused problems for anthropologists working in native title, requiring them to distort their descriptions of native title communities in order to match the legal concept. Palmer likens this to trying to fit a square peg into a round hole: at 145. See also Paul Burke, *Law's Anthropology: From Ethnography to Expert Testimony in Native Title* (ANU E Press, 2011).

thus capable of continual renewal. Its survival, even in the face of severe disruption caused by colonisation, is explained by its source in the land.[9] Irene Watson has likened the survival of the law, with its potential for rejuvenation, to seeds in the ground: where the practice of living it has died back, the law remains latent in the land, so it can be revived as seeds lying in the earth.[10] According to this view, therefore, law does not necessarily expire as a result of interruption in human acknowledgement and observance. These Indigenous concepts of 'law' and 'society' throw into sharp relief the anthropocentric nature of the notions utilised in the *Yorta Yorta* decision.

I now begin my examination of the theories underpinning the Court's connection of law and society with an analysis of the work of Julius Stone.

II. IN PROFESSOR JULIUS STONE'S WORDS …

The quotation from Julius Stone, that law is 'socially derivative and non-autonomous', was taken from *The Province and Function of Law* (*The Province*).[11] Designed as a textbook for the teaching of jurisprudence, it is a compendium of theories of law, society and justice, explained in their historical, socio-political and economic context.

The scope of *The Province* is immense and the detail minute. It provides a vivid contrast to Hart's book, which was also designed as a student text. Compared to the readable *The Concept of Law*, which comprises just 237 pages, *The Province* is 785 pages long and notoriously difficult to read. This contrast is illustrative of differences in their approaches to teaching as well as in their jurisprudence. Whereas Hart's jurisprudence was analytical, Stone preferred the 'sociological' school. Stone's approach was incremental, building upon the accumulated scholarship of the legal and social science academes. Hart questioned the value of textbooks in this style, which he described as 'books about books'.[12]

[9] As Christine Black has described it, 'Law is not dependent on human action for its continuity, for the Law is already posited in the Land': CF Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011) 52.

[10] Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 29.

[11] Stone, *The Province* (n 2).

[12] Of this style of textbook, Hart said 'they are geared to a standard type of examination which compels the student to prepare to regurgitate a huge variety of someone's views on a huge variety of topics': HLA Hart, 'Dias and Hughes on Jurisprudence' (1958) 4 *Journal of the Society of Public Teachers of Law* 143, 143; see also David Sugarman and HLA Hart, 'HLA Hart in Conversation with David Sugarman' (2005) 32(2) *Journal of Law and Society* 267, 281.

These differences bely similarities in their backgrounds. Both from Jewish families in Yorkshire, England, Stone and Hart had each won scholarships to attend Oxford (Exeter and New College respectively) during the late 1920s. Stone was one year ahead of Hart, and in contrast to the latter, completed both undergraduate and graduate qualifications in law.[13] Stone had arrived at Oxford just after the untimely death of Sir Paul Vinogradoff, at a time when the historical and comparative school of jurisprudence at Oxford had reached its zenith. With its emphasis on the importance of the study of society as the context for law, it paved the way for a jurisprudence informed by the humanities.[14] The early influence of Vinogradoff's work would have a lasting impact on Stone's approach to jurisprudence.

Unlike Hart, who had assimilated quite successfully to Oxford life, Stone's experience at Oxford was an unhappy one.[15] His personal experience of anti-Semitism, combined with a consciousness of Jewish history and awareness of the extreme anti-Semitism then impacting upon Jewish peoples in Europe, prompted what would become a lifelong concern with the capacity of law to deliver justice.[16] In particular, it stimulated his interest in the potential for international law to protect minority, non-state populations.[17]

Stone moved to Harvard in 1931, where he worked with Dean Roscoe Pound, teaching jurisprudence.[18] Pound had pioneered a 'sociological jurisprudence' — drawing upon the social sciences to understand the nature and function of law.[19] Stone embraced this approach and

[13] Stone graduated Bachelor of Arts with first class honours in Jurisprudence in 1928 and Bachelor of Civil Law (Hons) in 1930: Leonie Starr, *Julius Stone: An Intellectual Life* (Oxford University Press, 1992) 22.

[14] See Peter Stein, 'The Tasks of Historical Jurisprudence' in Peter Birks and Neil MacCormick (eds), *The Legal Mind: Essays for Tony Honoré* (Clarendon Press, 1986); Brian Z Tamanaha, 'The Third Pillar of Jurisprudence: Social Legal Theory' 56 *William and Mary Law Review* 2235; Stone, *The Province* (n 2) 447–8.

[15] By reason of economy and class, as well as anti-Semitism: Starr (n 13) 12–15. For Hart's experience as a student at Oxford, see Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004) 22–39.

[16] See Starr (n 13) 19; Anthony Blackshield, 'Stone, Julius (1907-1985)' *Australian Dictionary of Biography*, <http://adb.anu.edu.au/biography/stone-julius-15728/text26916>; RLJ Hawke, 'Julius Stone—Humanist, Jurist and Internationalist Inaugural Julius and Reca Stone Memorial Lecture' (1986) 9 *University of New South Wales Law Journal* 1, 2; Justice Gordon Samuels, 'Julius Stone' (Oration at the funeral of Julius Stone, 5 September 1985) (1986) 9 *University of New South Wales Law Review* 9, 12.

[17] Sparked at Oxford, this interest led Stone to pursue a Master of Laws in International Law at University of Leeds, graduating in 1930: Starr (n 13) 19-20, 24; Samuels (n 16) 12; Hawke (n 16) 5.

[18] For an account of Stone's years at Harvard, and his association with Pound, see Starr (n 13) 29–41.

[19] 'Sociological jurisprudence' was thus a study of law in its social context, drawing from a range of social sciences, such as history, sociology, anthropology and economics, rather than a sociology of law: see Brian Z Tamanaha, 'Sociological Jurisprudence Past and Present' (2020) 45(2) *Law & Social Inquiry* 493.

acknowledged a lasting debt to Pound.[20] Now with two doctorates in law in addition to his earlier degrees,[21] Stone was appointed Professor of International Law and Jurisprudence at the University of Sydney in 1942,[22] remaining there until his retirement in 1972.[23]

With this summary biographical account as background, I now introduce the jurisprudence of Julius Stone, and interrogate its relative positioning of Indigenous Australian law and society. I then locate the phrase quoted by the High Court, and examine its context in Stone's jurisprudence. Finally, I investigate Stone's personal involvement in the Indigenous rights movement in Australia to uncover his attitude to Indigenous law, society and native title.

A The Jurisprudence of Julius Stone

With *The Province*, which was published in 1946, Stone promoted the sociological approach to the teaching of jurisprudence.[24] It was thus hailed by critics as the book that Pound would have written.[25] The vast scope of the work, and its density and complexity, dominated the reviews — critics commented on its tremendous range and depth, the extensive references, the effort of reading and understanding it, and the difficulty discerning Stone's own views.[26] Several commentators pointed out that *The Province* was far too complex to be suitable as a students' text.[27]

[20] Julius Stone, 'Preface' in Stone, *The Province* (n 2) ix.

[21] A *Scientia Juris Doctorum* (SJD) from Harvard (1932) and a Doctorate in Civil Law from Oxford (1936): see Starr (n 13) 35, 39.

[22] Starr (n 13) 66.

[23] Ibid 223.

[24] The sociological approach in the scholarship of jurisprudence had not yet been matched by teaching texts, and Stone's purpose with *The Province* was to fill that gap; see Stone, *The Province* (n 2) 30.

[25] See, eg, Cecil A Wright, 'Stone on Jurisprudence' (1947) 7(1) *The University of Toronto Law Journal* 227, 227; Max Rheinstein, 'Stone: The Province and Function of Law' (1948) 16 *The University of Chicago Law Review* 754, 754. See also HLA Hart, 'Philosophy of Law and Jurisprudence in Britain (1945–1952)' (1953) 2(3) *The American Journal of Comparative Law* 355, 360.

[26] W Friedmann, 'The Province and Function of Law; by Julius Stone' (1948) 11 *Modern Law Review* 235; Rheinstein (n 25) 754–5, 761; Walter S Johnson 'The Province and Function of Law: Law as Logic, Justice and Social Control: A Study in Jurisprudence; by Julius Stone' 24 *Canadian Bar Review* 837, 838; Wright (n 25) 234, 237.

[27] See, eg, Friedmann (n 26) 238; WN Harrison, 'The Teaching of Jurisprudence: Reviews of A Text-book of Jurisprudence by George Paton and The Province and Function of Law by Julius Stone' (1948–1951) 1(1) *University of Queensland Law Journal* 63, 66; cf RH Graveson, 'Review: The Province and Function of Law by Julius Stone' (1948) 30 (3/4) *Journal of Comparative Legislation and International Law* 113, 114.

Stone set out his approach to jurisprudence in the opening chapter, 'The Province of Jurisprudence Re-determined'.[28] In an obvious challenge to the limits drawn by Austin,[29] he drew upon Vinogradoff's work to provide the foundation for redetermining the field of jurisprudence — as the 'examination of law in the light of other disciplines', adapted and classified for legal purposes.[30] On this basis, he arrived at a tripartite division of jurisprudence for the purposes of teaching.[31] The first branch covers analytical jurisprudence, which Stone perceived as theories which examine law in terms of logic.[32] The second is sociological and covers theories which examine law in light of the social sciences. The third branch concerns theories which examine law in light of justice, and address the question of 'the ideal, or … ideals, to which we ought to seek to make the legal order conform'.[33]

The structure of *The Province* follows this tripartite division. The first section of the book, entitled 'Law and Logic', is self-contained, since Stone perceived that the analytical approach treats law as 'isolated from society'.[34] The other two sections, 'Law and Justice' and 'Law and Society', are interconnected because, according to Stone, they are both aspects of the same study — the role of law in society.[35]

Because Stone viewed law as the 'product of social conditions',[36] he differentiated between diverse types of social conditions giving rise to distinct styles of legal arrangement. Although he perceived the state-society and its law as only one such type, it dominated his work, both in volume and relative importance. Other types of social (and hence legal) arrangements, were considered in the context of the work of the historical and comparative school of jurisprudence.

[28] The chapter had previously been published as an article: Julius Stone, 'The Province of Jurisprudence Redetermined' (1944) 7(3) *The Modern Law Review* 97.
[29] The title is a play on the title of Austin's *The Province of Jurisprudence Determined* (first published 1832).
[30] Stone, *The Province* (n 2) 24–5 (emphasis added).
[31] Ibid 30–1.
[32] Ibid 31.
[33] Ibid 47.
[34] Ibid. Stone completed the section on 'law and logic' (predominantly directed to analytical jurisprudence) with two chapters on legal reasoning (in which he set out his challenge to the then prevailing declaratory theory — later developed in the first book of his trilogy — for which he is perhaps best remembered). Stone was criticised for thus extending his section on 'law and logic' to include an analysis of judicial reasoning in terms of logic, to which it has tenuous claims: Rheinstein (n 25) 756–8.
[35] Stone, *The Province* (n 2) 387.
[36] Ibid 465.

In the next section of the chapter, I explore Stone's work for his portrayal of Indigenous Australian law.

III. INDIGENOUS AUSTRALIANS IN STONE'S JURISPRUDENCE

A A Framework of Social Types

In the first part of 'Law and Society', Stone outlined 'general lines of past legal development in relation to social development generally', including 'up to our present type of society in the West'.[37] He considered the theories of legal evolution developed by the historical school, such as Maine's evolutionary stages and Vinogradoff's historical types. Just as Pound had criticised Vinogradoff's types for being based upon socio-political rather than legal organisation,[38] Stone was critical of Pound's teleological scheme of legal evolution on the basis that the 'evidence is against the autonomous rise and growth of legal ideas and institutions'.[39] Stone preferred a classification similar to Vinogradoff's — one based on social conditions rather than stages in the evolution of law as an autonomous concept.[40]

Stone noted that both classification by social conditions and classification by legal ideas 'are at variance with the chronological course of history. Both involve abstractions from the concrete historical process.'[41] Classification by social conditions is preferable, however, because 'law is *rather* the product of social conditions *than* the embodiment of ideas with a life cycle of their own'.[42] On this basis, he first identified broad types of social organisation, and then drew out correlations with the legal organisation characteristic of each.[43] He set out his framework as follows:

[37] Ibid 388.
[38] See the discussion in Chapter Three above.
[39] Stone, *The Province* (n 2) 467.
[40] Stone argued that Vinogradoff's methodology was ambiguous (as to whether classification by legal ideals or social conditions formed the basis for his scheme), but noted that the first two 'types' were based upon social conditions; as to the latter types, although their names (individualistic and socialistic jurisprudence) suggest ideological rather than social treatment, they were of course never fully drawn up as only the first two volumes of *Historical Jurisprudence* were finished before Vinogradoff's death: see ibid 465–6.
[41] Stone, *The Province* (n 2) 466.
[42] Ibid 467 (emphasis in original).
[43] Ibid 466.

> (1) Kin-organised societies; (2) Emerging Political Societies; (3) Societies on the rise of commerce; and — in relation to the contemporary scene — (4) Expanding Industrial Societies; and (5) Complex Economically Organised Societies.[44]

In a footnote, he reiterated the warning that 'the five social types mentioned are *not* regarded as necessary phases through which societies pass nor is the order given regarded as even the general order of development'.[45]

B Law and Society in Evolution

Stone's framework of social types had originally been developed as a structure for a casebook on sociological jurisprudence, which was eventually published as a series, *Cases and Readings on Law and Society*.[46] Although published two years after *The Province*, he had written the manuscript ten years earlier. The work for the series was commenced while he was at Harvard in the mid-1930s, and was originally planned as a collaboration with Roscoe Pound.[47] Stone had completed the bulk of the work for this project by 1936, but the collaboration with Pound fell through in 1938.[48] Publication of the manuscript was therefore delayed until after the Second World War.[49] The work was continued in a new collaboration with Sidney Post Simpson,[50] who revised and updated the manuscript for publication in three volumes as *Cases and Readings on Law and Society*.[51] The books are in the 'casebook' style, comprising excerpts from the literature of the social sciences to promote an understanding of law in its social context.

Stone's original structure for the framework consisted of five types, corresponding to those presented in *The Province.* The *Law and Society* Series included a sixth type, 'law, totalitarianism and democracy', added by Simpson. In *The Province*, and in the trilogy which

[44] Ibid.
[45] Ibid 466 n 67.
[46] SP Simpson and J Stone, *Cases and Readings on Law and Society* (West Publishing, 1948–49).
[47] Starr (n 13) 41, 46.
[48] Ibid 46–7.
[49] Ibid 47.
[50] Professor of Law at Harvard (who had written the critique of the third edition of Allen's *Law in the Making*: Sidney Post Simpson, 'English Law in the Making' 4 (2) *Modern Law Review* 121).
[51] Starr (n 13) 113.

followed,[52] Stone wrote of his own framework of social types as including only the first five types.[53]

The first of the social types, 'law in a kin-organised society', is covered in the opening book of the series, entitled *Law and Society in Evolution*.[54] The materials chosen by Stone include excerpts from anthropological, historical and comparative jurisprudence (such as Maine, Vinogradoff, Hartland, Malinowski and Diamond), as well as historical sources (Plato and Aristotle, the Twelve Tables of Ancient Rome and the Code of Hammurabi). Aboriginal Australian societies were expressly included in this social type,[55] together with the Ancient Greeks, Romans and Babylonians.

Stone was clearly aware of the evolutionary implications of combining anthropological materials with historical sources to describe a single 'type' of social organisation:

> Obviously *there is grave danger* in using as a basis for broad generalisation as to primitive law, practices which may happen to be similar as between the Babylonians of 2090BC and the present-day inhabitants of the Tobriand Archipelago. Or between the early Greeks or Romans and the American Indians of the last century.[56]

In an attempt to avoid this danger, he differentiated between the uses of the historical and the comparative material:

> the developed systems of law of the modern world have their roots in certain of the kin-organized societies which are here considered, the Roman and Germanic, and study of these is of direct historical importance. The other materials, whether from ancient societies such as Babylonia which have contributed only indirectly to modern legal institutions or from primitive societies of today … are important mainly for purposes of comparative study.[57]

---

[52] Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1964) ('*Legal System*'); Julius Stone, *Human Law and Human Justice* (Maitland Publications, 1965) ('*Human Justice*'); Julius Stone, *Social Dimensions of Law and Justice* (Maitland Publications, 1966) ('*Social Dimensions*').

[53] Stone, *The Province* (n 2) 466. In *Social Dimensions*, Stone thought it 'better to refrain from any extensive speculation on whether it might be possible to add to the series of types … some sixth type presently emergent': Stone, *Social Dimensions* (n 53) 145.

[54] Sidney Post Simpson and Julius Stone, *Law and Society in Evolution* (Book 1 of Law and Society Series) (West Publishing, 1948) ('*Law and Society in Evolution*'). This volume, containing the first four types, and the second volume covering the fifth type, were written by Stone: Starr (n 13) 114.

[55] Simpson and Stone, *Law and Society in Evolution* (n 55) 26.

[56] Ibid 3 (emphasis added).

[57] Ibid 4.

He justified the grouping together of material on such geographically and temporally diverse societies, as necessary for jurists to identify 'similarities in legal … doctrines and institutions' which result from the 'common element of being organised largely on a kin basis rather than on a political basis'.[58] The purpose of identifying common features of law in 'kin-organised societies' was not to provide any real understanding of socio-legal organisation in those societies, but to better understand law in 'more advanced' (Western) societies:

> The materials which follow illustrate these features of law in kin-organised societies and should be considered from two points of view: First, as a necessary introduction to the function and operation of law as a means of social control *in more advanced types of societies*; second, as throwing light by contrast on the problems of law in *modern society* which will be considered later in this book.[59]

Despite Stone's denial of the social types constituting evolutionary stages or representing a general order of development, the construction of the framework is itself overtly evolutionary.

C Social Types or Evolutionary Scale?

The evolutionary nature of the framework is immediately apparent from the language used by Stone. The title of the first book in the series expressly refers to law and society *in evolution*. 'Early societies' (referring to contemporary Indigenous peoples) are compared to 'more advanced societies', 'simple' with 'complex' or 'modern'. The names of the social types themselves (which include terms such as 'emergent', 'rise' and 'expanding') and their relation to each other, reflect a developmental and historical ordering, which corresponds to the history of Western societies and law. The structure is that of an evolutionary scale organised according to the history of the West.

That the framework is evolutionary is also apparent from the combination of anthropological and historical sources, equating the characteristics of contemporary Indigenous societies with the origins of Western law. Stone not only classed them together; he did so expressly for the purpose of describing commonalities in order to highlight the characteristics of 'modern' systems of law.

[58] Ibid 3–4.
[59] Ibid 3 (emphasis added).

Much of Stone's commentary on the 'kin-organised society' focussed on its difference from 'modern society'. For example, he claimed that the differentiation of law from other forms of social control — such as morals, custom and religion — familiar to Western societies was so alien to kin-organised society that *its absence characterised* social control in such societies.[60] Indeed, 'a large part of the field now covered by law was left untouched by social control in a kin-organised society.'[61]

Many of the other features described by Stone as common to kin-organised societies contrast with the characteristics associated with 'modern' legal systems. In the following extract, he rejected recent field-based anthropological evidence in order to stress superstition and simplicity, features that stand in stark opposition to the supposed rationality and complexity of Western legal systems:

> Despite the recent challenge of Malinowski, the orthodox explanation of the effectiveness of social control in a kin-organised society still seems the most satisfactory. The pressure of a body of custom sanctified by a belief in its supernatural origin points to social opinion and the fear of the gods as the two major weapons in the armoury of rudimentary social control.[62]

This was done for the express purpose of understanding law in contemporary Western civilisation:

> 'the work attempts to ... correlate law with the social sciences … by a comparative and historical study … *directed ultimately and squarely to* the central and pressing problems of the *law in present day civilisation*.[63]

Thus, although Stone was careful to deny a necessary evolutionary order, his framework of social types was deliberately arranged in a scale that led ultimately to Western state societies, with Indigenous Australian societies being explicitly positioned at the opposite end of the scale. The purpose of this arrangement was to better understand Western law — not to promote an understanding of socio-legal organisation in Indigenous societies. Reliance upon this mid-20th century work with its strong evolutionist overtones would therefore appear inappropriate in a

[60] Stone maintained this view despite noting it had been challenged in recent legal anthropology: ibid 2.
[61] Ibid 3.
[62] Ibid 3.
[63] Ibid x (emphasis added).

21st century judgment concerning Indigenous Australian law and its relationship to Anglo-Australian law. In the following section, I locate the phrase quoted in the *Yorta Yorta* judgment and examine its context in Stone's jurisprudence. I then compare the way in which the phrase was used in the reasoning in *Yorta Yorta*.

IV. THE QUOTE IN (AND OUT OF) CONTEXT

A The Location of the Quote

The quotation is located in 'Law and Society', the third part of *The Province*. Stone's purpose in this part of the book was to examine law in the light of its role in social organisation.

'Law and Society' has a broadly chronological structure of three sections. The first section, 'Law and Society in Retrospect' covers historical and comparative jurisprudence and contains Stone's framework of social types. The latter two sections are directed at the fifth socio-legal 'type' identified by Stone, 'modern democratic society'. The second section concerns the extent to which Western legal systems are capable of responding to social needs, and the final section containing the quote covers factors affecting legal stability and change in Western society.[64]

The reference to the 'socially derivative and non-autonomous' nature of law (used by the Court in relation to Indigenous Australian law) was made in the context of the relation between a *state-society* and its law. The sentence begins:

> The starting-point of all inquiries into *the relation of the state-society and its law*, is the socially derivative and non-autonomous character of law…[65]

The context of the sentence quoted was a discussion of law being but one of many forms of social control in a state-society. A large portion of the chapter containing the quote is devoted to theories which question the necessity of state law, including an outline of Herbert Spencer's social evolutionary theory.[66]

The phrase that was quoted by the Court was thus taken out of context. The differentiation of law from other social pressures such as morality, custom and religion was, according to Stone,

[64] This section has been recognised as the most difficult part of the book to follow and understand: Friedmann (n 26) 236-7; Wright (n 25) 236.
[65] Stone, *The Province* (n 2) 619 (emphasis added).
[66] Ibid 653–54. Other theories covered in the discussion include socialist theories of the 'withering away' of the state: at 654–7.

a distinguishing feature of Western law and alien to the kin-organised society.[67] The reference to the law of a state-society is a reference to Stone's fifth sociolegal type, the 'modern democratic society'. It is not only the model of a Western legal system; it is a model which was constructed in contrast to, and expressly excluded, Indigenous Australian societies. The context, a discussion of law being only one of many different social pressures in a state-society, was a theory of law that Stone explicitly stated does *not* refer to Indigenous Australian, or other kin-organised, societies.

This is not a major flaw in the use of the phrase by the High Court. It simply means that the source of the reference was inappropriate. It does not necessarily follow that the idea contained in the reference itself was inappropriate. After all, the theory of law as the product of social conditions was one that underpinned Stone's jurisprudence. A far more serious concern is the way in which the quotation was then used in the judgment, which constitutes either a major misunderstanding of Stone's jurisprudence, or a judicious use of concepts taken in isolation from their meaning.

B A Misconstruction of Stone's Jurisprudence

The dependence of law upon society (the socially derivative character of law) was used by the High Court in the *Yorta Yorta* judgment to set a logical precondition for the existence of law. If there is no 'society' of the requisite kind, there can be no law. This use of legal theory is typical of the positivist analytical school, which is characterised by the view of law as a composite of component *a priori* elements, each acting as pre-requisites for its existence. Significantly, Stone believed that this type of jurisprudence was completely inapplicable to law in any actual community.

Following Vinogradoff, Stone described analytical jurisprudence as attempts to portray law as a logical system,[68] and argued that these theories can only be critiqued on their own terms (ie, the logical veracity of the system). In recognising the validity of analytical jurisprudence within its own domain, Stone departed from the typical stance of the sociological school. Whereas other sociological jurisprudents criticised the component elements of the analytical structure as bearing little or no resemblance to actual law in real communities, Stone argued that this was

[67] Simpson and Stone, *Law and Society in Evolution* (n 55) 2.
[68] Stone, *The Province* (n 2) 24.

beside the point. The analytical project, he claimed, was simply to construct a logical structure that was valid within its own sphere of syllogistic logic. Within that logical sphere (but not outside it) the arguments of analytical jurisprudence could be tested for validity. In this section of the chapter, I set out this aspect of Stone's jurisprudence, in order to demonstrate that the High Court's use of it was, in that respect, misconstrued.

Although Stone was respectful of the scholarship of the analytical school,[69] he saw its application as limited to the esoteric search for 'definitions and premises which will permit us to view the contents of the legal order … as a *logically* (in the syllogistic sense) self-consistent system':[70]

> Usually … this approach treats the law as a body of stable propositions and inquires exclusively into the logical relation between these propositions … In brief, law is treated as isolated from society for the purpose of analysis, synthesis and classification.[71]

Stone argued that, in order to construct a model of law as a composite of logically inter-related components, the model must be divorced from real-world situations:

> What is here respectfully submitted, is that *those definitions do not even belong to "law"* in the sense that what is produced by the use of them necessarily corresponds to what is, or will be, or ought to be applied *as law in any actual community*. These definitions and the deductions from them belong to one dream of arranging a body of law in a logically interdependent system. It "belongs" *neither to any actual society, nor to any actual law*, but to the critique of legal propositions by reference to their logical consistency.[72]

The value of the components of this type of definition of law lies therefore only in the logical consistency of their inter-relationship, and not in their correspondence with any actual system of law. Although Stone was adamant that '*any body of knowledge based upon such patently*

[69] He was particularly respectful of the work of Hans Kelsen, but was (later) less impressed with Hart. *The Concept of Law* was published some time after *The Province*, but three years prior to its relevant successor, *Legal System*. Although Stone devoted an entire chapter of *Legal System* to each of Austin, Kelsen and Hohfeld, no corresponding section was devoted to Hart's theory. Instead, references to Hart's work were woven into commentary throughout those chapters: Stone, *Legal System* (n 53). See also the discussion in Starr (n 13) 158–162; 171–4.

[70] Stone, *The Province* (n 2) 47 (emphasis in original).

[71] Ibid.

[72] Ibid 61 (emphasis added).

artificial presuppositions is not a body of knowledge about any actual society,'[73] he was equally insistent that this type of analysis of law was 'not fallacious within its own proper universe of discourse'.[74]

Stone thus understood analytical jurisprudence as the analysis of law as an internally logical system, and the identification of the constituent elements which together form a logically self-consistent order. One of those constituent elements may well be 'a society' (or a society of a certain type). A well-known example is John Austin's concept of an independent political society.[75]

Austin's definition of an independent political society as one inhabiting a specific territory, where the group renders habitual obedience to a sovereign, who renders no habitual obedience to others, has been the subject of extensive criticism. Stone argued that much of the criticism has been misplaced. He argued that the particular features of Austin's definition were designed to 'distinguish the society in which Austin [was] interested … from all other societies'[76] and to limit his logical system. Stone claimed that Austin set 'an immediate and important limit to his logical system by admitting that he [was] not interested in "law" emanating from any other kind of society than this one.'[77]

Stone argued that it was important to realise that this and other limits were self-imposed.[78] Thus, Stone argued, Austin's society requirement was not so much a claim about society at all, but a logical presupposition for a system of logical analysis of law.[79] Much of the criticism of Austin's definition of society was therefore misplaced:

> it is beside the point for the legal historians and anthropologists to take exception to Austin on the ground that his system does not adequately account for the phenomena of undeveloped societies. Austin never intended to deal with any aspect of any other society than the kind he postulated. It is quite proper for the historian, and the anthropologists, or the sociological jurists, to say that they are not in the least interested in Austin's system,

[73] Ibid 61 (emphasis added).
[74] Ibid 26.
[75] Ibid 58.
[76] Ibid 58, 59.
[77] Ibid 59.
[78] Ibid.
[79] Ibid.

> because they do not think that the matters with which it deals are of significance, or that it does not aid them in understanding what they regard as significant. It is not proper to criticise its validity or usefulness in terms either of societies or of purposes which lie outside its own postulates.[80]

Stone's interpretation of Austin has attracted criticism for neglecting the empiricism in his theory.[81] As outlined in Chapter Three above, Austin used an extremely limited form of empiricism to describe England as the epitome of a society capable of law (a politically independent society), and Indigenous Australian societies as exemplifying the opposite (a state of nature, incapable of having law). In presenting Austin as pure logician, it has been argued that Stone sacrificed accuracy in order to present Austin's theory in the most favourable light.[82]

Nevertheless, for Stone, the gap between the logical analysts' postulates and 'actual' law and society was fundamental. His position on analytical jurisprudence has serious implications for the way in which the High Court used his theory in the *Yorta Yorta* judgment — to establish a certain type of society as a logical precondition for the existence of law. To use Stone's theory of the socially derivative nature of law in this way is to completely misconstrue the entire basis of the jurisprudence of Julius Stone.

For Stone, law does not exist as an autonomous concept, nor as a collection of *a priori* elements.[83] Stone's point is that the form that law takes in any given society is determined by, and dependent upon, the social conditions in that society. This means that the *type* of law is dependent upon the type of social conditions. Although the *existence* of law is dependent upon the existence of society, in the sense that law could cease to exist if the social conditions that gave rise to it disappeared altogether, *the relevant inquiry is into the social conditions themselves* — not into pre-determining an idea of a society capable of law and then applying that notion to a given society to test its legal capacity. That type of logical precondition for the

[80] Ibid 60.

[81] WL Morison, 'Some Myth about Positivism' (1958) 68(2) *Yale Law Journal* 212 (Morison was a colleague of Stone's at Sydney Law School: see WL Morison, 'Law School People 1941–1973' in John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 105). See also Wilfred E Rumble, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in Nineteenth-Century England* (Continuum, 2005) 7–8.

[82] Rumble (n 82) 7–8.

[83] Stone, *The Province* (n 2) 467.

existence of law was emphatically denied by Stone to have any relation to the actual existence of law anywhere.

The phrase that was quoted by the Court was thus taken out of context and its meaning substantially mis-construed. The implications of the former mean that the source of the reference, rather than the reference itself, was inappropriate. This is a minor concern. The latter is a major concern. To use Stone's theory of the socially derivative nature of law to support an *a priori* precondition for the existence of law is to misconstrue his theory in a way that is antithetical to his jurisprudence.

C After 'The Province'

It is interesting that the High Court chose to refer to *The Province*, and not to its later version, updated and published twenty years later. The updated form was a trilogy, each volume representing one of the three parts of *The Province*.[84] The revised version of the 'Law and Society' section was entitled *Social Dimensions of Law and Justice* ('*Social Dimensions*').[85]

In *Social Dimensions*, Stone maintained his classification of social types developed in *Law and Society in Evolution*,[86] but his discussion demonstrated that he was concerned about the validity of the methodology.[87] He acknowledged weaknesses in inferences drawn from the correlations of social and legal phenomena.[88] Ultimately, however, he defended his choice of correlations based on types of social organisation, again stressing that they were not linked to evolutionary or causal concepts. Because they were 'ideal types', he argued that the social types did not actually 'exist in time and space so they should be neither offered nor attacked on the basis of historical ordering in the dimension of time.'[89]

In an unpublished speech in 1967 (just after the publication of *Social Dimensions*),[90] Stone identified further issues concerning his use of this methodology. He noted that this line of theory was facing 'fascinating challenges by two broad trends'. The first was postcolonialism,

[84] Stone, *Legal System* (n 53); Stone, *Human Justice* (n 53); Stone, *Social Dimensions* (n 53).
[85] Stone, *Social Dimensions* (n 53).
[86] Ibid 143.
[87] See ibid 135–7.
[88] Ibid 137.
[89] Ibid 136.
[90] Julius Stone, 'Trends in Jurisprudence in the Second Half Century' (Speech, University of Texas Law School, 24 March 1967) later reprinted in Barbara Drexler Hathaway, *Julius Stone* (Legal Bibliography Series #20, Tarlton Law Library, School of Law, University of Texas, March 1980).

described by Stone as 'the emergence of dozens of new Asian and African states, seeking to combine Western inspired economic, legal and political patterns with their own very different social patterns'.[91] The second was the increasing protection of human rights through international law.[92] He noted that '[t]hese movements *set great and as yet insoluble puzzles for existing bodies of thought concerning the correlations of social and legal development*. They also seem to impose mutual caveats on the other, the exact terms of which still have to be worked out'.[93]

Despite this indication that he was reflecting critically upon his methodology, Stone persisted in maintaining that anthropological studies of contemporary communities could provide insight into the completely separate historical development of Western societies. For example, he commented that:

> For the present state of theory concerning *historical correlation of legal and general social growth*, it is a striking fact and one *very gratifying for jurists*, that the best recent anthropological work, for instance, of Max Gluckman, confirms … the continuing validity of Sir Henry Maine's pioneering positions … [94]

The speech was also peppered with references to 'advanced countries' and 'advanced societies'.[95] It demonstrates that Stone perceived Gluckman's approach to legal anthropology, founded as it was on the idea of formal equality and framed by Western legal concepts, as supporting the correlation of 'types' of societies and legal orders.[96] It is therefore little wonder that Stone found Gluckman's work gratifying.[97]

A short time later, Stone was directly confronted by a challenge analogous to those that he had anticipated. Although not reflected in his published works, I have uncovered evidence that he grappled with the 'great and as yet insoluble puzzles' it posed after the publication of the trilogy in the late 1960s, as a result of his personal involvement in the first native title case heard by an Australian court. In the next section, I draw upon my original archival research into Stone's

[91] Ibid 30.
[92] Ibid 31.
[93] Ibid 31.
[94] Ibid 31 (emphasis added).
[95] See, eg, ibid 32.
[96] A point he had already adverted to in *Social Dimensions* (n 53) 133–4.
[97] Stone's appreciation of Gluckman's work is also apparent throughout *Social Dimensions* (n 53).

support of the Aboriginal rights movement in Australia to tease out the complexities of his attitude to Indigenous Australian law and society.

V. JULIUS STONE, ABORIGINAL RIGHTS AND NATIVE TITLE

Julius Stone's commitment to social justice and minority rights is well known and has been well-documented. Less well known and virtually undocumented is Stone's support of Aboriginal rights, including native title, in Australia.[98] In order to gain a more comprehensive insight into Stone's attitude to Indigenous Australian society and law, I conducted archival research into his personal papers (archived in the National Library of Australia) and the papers of Professor WEH (Bill) Stanner (archived in the collections of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)). The political and historical context for understanding the import of those papers was provided by researching the literature relating to the Aboriginal civil rights and land rights movements. The findings are documented fully in the Appendix to this thesis.

In this section I draw upon those research findings to provide a vignette of Stone's involvement in the Aboriginal rights movement in Australia during the late 1960s. Beginning with an introduction to the commitment to minority rights that characterised Stone's career, I outline the extent to which this commitment extended to support for Aboriginal civil and political rights. I then examine the records of Stone's involvement in the Yirrkala people's claim for native title. I analyse the language used in these documents to gain further insight into Stone's attitude to Indigenous Australian society and law, and his perception of the relationship between Indigenous and non-Indigenous concepts of law and society. Finally, I attempt to reconcile the theoretical basis for his support of Indigenous rights as revealed by this discourse with his treatment of Indigenous Australia in his theory of social types.

A Social Justice and Minority Rights

Stone's commitment to social justice and minority rights was founded in his experience of the extreme anti-Semitism of the early 20th century. His parents had been part of the Jewish exodus from Eastern Europe at the start of the century, migrating to England shortly before Stone's

[98] Apart from a single sentence in Starr's intellectual biography (Starr (n 13) 125), there is no mention at all of this aspect of Stone's work in any published works.

birth, as refugees from Tsarist persecution.[99] His consciousness of anti-Semitism and its prevalence in Europe had prompted Stone's concern with the law's capacity for justice and the protection of minorities.[100] In an era before the United Nations' focus on human rights, his earliest published works related to the protection of the rights of minorities against member states at international law.[101]

Stone became a fierce defender of human rights, and was hostile 'to any form of prejudice and discrimination'.[102] He was concerned that 'positive law often was an instrument of oppression which did not measure up to concepts of justice available to him'.[103] The concept of justice, and its relation to positive law, interested him almost to the point of obsession.[104] His primary concern 'was always with distributive and substantive justice', and with positive law only 'to the extent that it aided or impeded the quest for such justice'.[105] He was, however, 'acutely conscious that the concept of justice was a social and cultural construct'.[106] It is hardly surprising therefore that Stone was supportive of the movement for Aboriginal rights in Australia, which achieved national consciousness during the 1960s.

Nevertheless, Stone's commitment to social justice and minority rights was constrained by his personal positioning as a middle-class man of his time. His commitment to social justice did not extend to an understanding of the impact of patriarchy or heteronormativity, for example. He did not challenge the criminalisation of homosexuality,[107] and his work formed part of the patriarchal legal tradition. Not only did Stone's scholarship completely 'overlook the silencing or omission of women from most discussions of the law',[108] but he benefited from women's unpaid, or poorly paid, labour.[109] However, Stone's openness to change his views is illustrated

[99] Starr (n 13) 1.
[100] See ibid 19–20, 24; Blackshield (n 16); Hawke (n 16) 2–5; Samuels (n 16) 12.
[101] Starr (n 13) 19–20, 26.
[102] Hawke (n 16) 4.
[103] John Goldring, 'Julius Stone and the Study of Law and Society in Australia' (1985) 2 (2) *Australian Journal of Law and Society* 4, 9 ('Tribute to Julius Stone').
[104] Ibid 6–7.
[105] Ibid 9.
[106] Ibid 6–7.
[107] Michael Kirby, 'HLA Hart, Julius Stone and the Struggle for the Soul of Law' 27 *Sydney Law Review* 323, 329.
[108] John Goldring, 'Remarks at the Julius Stone Symposium' (1997) 20 *UNSWLJ* 247, 249 ('Remarks').
[109] He benefited from the unpaid labour of his wife, Reca, who had been a practising dentist prior to marriage, and studied law in addition to her degrees in science and dentistry. Reca 'participated fully in her husband's work', and supported his career in many ways including discussing the content of his projected writings, and typing up numerous drafts of his very lengthy manuscripts: see Starr (n 13) 44; Hawke (n 16) 4. In a similar

by his changing views on the Vietnam war,[110] and Goldring noted that had he lived longer, his attitude to women's work and feminist jurisprudence might have become more accommodating.[111]

It was towards the latter part of his career that Stone became involved in the movement for Aboriginal rights in Australia. His papers indicate that his involvement was sporadic, consisting initially of ad hoc communications indicating his concern for civil rights issues.[112] From 1965, he became more involved, partly due to his position at Sydney University, where student activists had begun to agitate for Aboriginal rights.

B Julius Stone and the Movement for Indigenous Civil Rights

Throughout 1965, Stone petitioned for legal and political reform at both state and federal levels to protect Indigenous Australian civil rights. At the state level, he supported a campaign for a parliamentary inquiry into Aboriginal segregation, inequality and disadvantage in New South Wales, which resulted in major reform of the state's management of Aboriginal affairs.[113] Federally, he actively petitioned for a more robust version of constitutional reform than was ultimately presented to the people in the successful 1967 referendum.[114] The potential constitutional reforms supported by Stone included entrenchment of a prohibition against racial discrimination, a 'special measures' power for the Commonwealth to make special laws for the 'advancement' of Aboriginal people, and the repeal of the discriminatory race power from the

vein, Mary Gaudron, a student of Stone's and later Justice of the High Court, 'was expressly critical of Stone on feminist grounds and … thought that Stone's relationship with Zena Sachs, his research assistant, was exploitative' (on the other hand, Burton pointed out that 'it was because of Stone's encouragement that Sachs studied law, although due to family commitments she did not pursue a professional career'): Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010) 52.

[110] Anthony R Blackshield, 'The Legacy of Julius Stone' 20(1) *University of New South Wales Law Journal* 215, 216.

[111] Goldring argued that '[t]here is little in feminist writing about law that he would have disapproved of, had he thought about it': Goldring, 'Remarks' (n 108) 249.

[112] He communicated with various individuals and organizations in the early 1960s, including Indigenous rights activists, Lady Jessie Street and Shirley Andrews, and the recently formed Federal Council for Aboriginal Advancement (FCAA).

[113] For an account of the campaign by student activists at Sydney University, see Ann Curthoys, *Freedom Ride: A Freedom Rider Remembers* (Allen & Unwin, 2002).

[114] As a result of the referendum in 1967, the Commonwealth Constitution was altered to include Indigenous Australians in the census and to give the Commonwealth power to legislate with respect to Indigenous Australians: *Constitution Alteration (Aboriginals) 1967*.

Constitution.[115] Stone's campaign for these reforms is significant, since they still represent much stronger constitutional protection for Indigenous rights than is currently the case, and are similar in significant respects to some of the recommendations made by the Expert Panel on Constitutional Recognition of Indigenous Australians in 2012.[116]

The language used by Stone in support of these civils rights causes reflects a sensitivity to structural inequality and a sense of responsibility, combined with the dominant assimilationist discourse of the era. Although a major theme in these documents is 'advancement' or 'improvement', his language demonstrates a rejection of deficit discourse (the notion that disadvantage is caused by an inherent disability on the part of Aboriginal people) and an awareness of structural barriers to equality. It also reveals a keen sense of moral and social responsibility, albeit with no explicit indication of the source of that responsibility. It is unclear, for example, whether he understood the responsibility as springing from respect of rights, or to make reparations for past wrongs, but the tone in some of his papers suggests a more paternalistic sense of responsibility.

C Julius Stone and Native Title in Australia

Stone's commitment to Aboriginal rights was further evidenced by his support of land rights. His papers indicate support for two campaigns widely considered to be 'the signifiers of land rights':[117] namely, the Gurindji people's wages claim and land rights cause,[118] and the Yirrkala

[115] The reforms championed by Stone had been proposed by Member of Parliament Bill Wentworth in November 1965. Wentworth's proposal was encapsulated in a proposed private member's bill which was not introduced into Parliament until the following year (Constitution Alteration (Aborigines) Bill 1966). In the meantime, the proposed changes were simply tabled as added clauses to the Government's bill (for a much more limited referendum) on 16 November 1965: Constitution Alteration (Repeal of Section 127) Bill 1965 ('New clauses to be proposed by Mr Wentworth') (*Bills Digest* [210] – 920/16.11.1965 F4351/65).

[116] *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (Report of the Expert Panel, January 2012). Since then, the focus of the movement for constitutional reform has shifted to a proposal for a representative body giving a 'First Nations Voice' to Parliament: see *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017); Referendum Council, *Final Report of the Referendum Council* (30 June 2017); Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018).

[117] Bain Attwood, 'The Articulation of "Land Rights" in Australia: The Case of Wave Hill' (2000) 44(1) *Social Analysis: The International Journal of Social and Cultural Practice* 3, 26.

[118] Beginning as a strike by Gurindji stock workers on Wave Hill cattle station in the Northern Territory, and subsequently a claim for the return of their traditional land, the Gurindji action lasted over nine years, and resulted in the return of some of their land in a highly symbolic handover ceremony by the Whitlam government in 1975, the precursor of land rights legislation in the Northern Territory. See generally, ibid; Bain Attwood, *Rights for Aborigines* (Allen & Unwin, 2003) ch 11, 257–306.

people's native title case. Although Stone had not been actively involved in the Gurindji cause, he played a small role in the initial stages of the preparation of the Yirrkala claim.

The Yirrkala case,[119] described in Chapter Four above, was significant for a number of reasons. It was the first case in which the common law doctrine of native title was argued before an Australian court, and although the claim was rejected, the court acknowledged that the Aboriginal plaintiffs had a 'subtle and elaborate system' of law.[120] The decision was not appealed to the High Court, on legal advice that it might be counter-productive — given the composition of the High Court bench at the time, there was a strong possibility that not only would the appeal be lost, but Blackburn J's finding that there was an Aboriginal system of law relating to land may also have been overturned.[121] Instead, the focus shifted from suing for native title (which depended upon recognition by the courts) to lobbying for statutory land rights — ultimately resulting in land rights legislation in the mid-1970s.[122]

Stone's involvement in the case, at the invitation of members of the Council for Aboriginal Affairs, was in the nature of an informal *amicus curiae* (an advisor who is not representing a party to the litigation). Shortly after the Yirrkala people had instructed their solicitor to take legal action,[123] Stone was invited by Nugget Coombs[124] and Bill Stanner[125] to a seminar at The Australian National University (ANU) to canvass the potential legal issues.[126] In an introductory paper circulated prior to the seminar, Stanner had raised a number of issues,

[119] *Milirrpum v Nabalco* (1971) 17 FLR 141 ('*Milirrpum*'). For background on the history of the Yirrkala land claim, see Attwood (n 118) 215–236; 298–306; Kitty Eggerking, 'Landmarks: Reading the Gove Peninsula' (PhD Thesis, The Australian National University, 2013); Edward Woodward, *One Brief Interval: A Memoir* (Miegunyah Press, 2005) 97–106. For his reflections on the Yolgnu struggle for land rights, see Galarrwuy Yunupingu, 'Tradition, Truth and Tomorrow' (Dec 2008 – Jan 2009) *Monthly* 32-40.

[120] *Milirrpum* (n 119) 267.

[121] Edward Woodward, *One Brief Interval: A Memoir* (Miegunyah Press, 2005) 106.

[122] See Howard Morphy, 'Title to their Land' (1978) 22(9) *Quadrant* 36.

[123] Legal counsel for the Yirrkala plaintiffs had been briefed by mid-1968; for his account of the proceedings, see Woodward (n 121) 97–106.

[124] HC (Nugget) Coombs (recently retired Governor of the Reserve Bank of Australia) was chairman of the Council for Aboriginal Affairs: see Tim Rowse, *Obliged to be Difficult: Nugget Coombs' Legacy in Indigenous Affairs* (Cambridge, 2000); Tim Rowse, *Nugget Coombs: A Reforming Life* (Cambridge, 2002).

[125] WEH (Bill) Stanner was Professor of Anthropology at the Australian National University, and a member of the Council for Aboriginal Affairs. Stanner provided expert advice to the Yirrkala people during the course of the litigation: see DJ Mulvaney, 'Stanner, William Edward (Bill) (1905–1981)', *Australian Dictionary of Biography* <http://adb.anu.edu.au/biography/stanner-william-edward-bill-15541/text26753>.

[126] Letter from HC Coombs to Julius Stone, 13 January 1969. Stone had offered his assistance in a letter to Coombs in January 1969: Letter from Julius Stone to HC Coombs, 9 January 1969, WEH Stanner Collection, AIATSIS, MS 3752, Series 15 Item 2 ('Stanner Collection').

including the question of whether the common law of Australia recognised a doctrine of native title.[127] Stanner also attempted to translate Aboriginal relationships with land by comparison with Anglo-Australian concepts of property.[128]

Documents drafted by Stone in preparation for the seminar are revealing. A letter written to a Canadian colleague, requesting literature on Indigenous land rights in Canada, indicates that he viewed land rights as an issue of justice.[129] The reference to justice in that letter, and the corollary absence of references to responsibilities or to advancement in any of the documents, seems to represent a shift in Stone's rationale for supporting Indigenous rights.[130]

In a memorandum to his colleagues in the Faculty of Law, Stone commented that he was particularly interested in the question of whether the spiritual nature of Aboriginal connection to land could fit within legal categories of ownership, that is:

> whether the "spiritual" relation of a clan to "its" land can be brought within legal categories of possessory title, how far such title is aborted by the "walkabout" patterns of clan life, and the non-exclusiveness and non-continuity of the relation of any particular clan or individual user to "its" or "his" land.[131]

The use of quotation marks around the possessive pronouns indicates that Stone may have had reservations about the possessory nature of Indigenous relation to land.

From a letter to Stanner, it is apparent that Stone's attention was directed not toward common law recognition of native title, but to an older doctrine of common law recognition of customary rights (such as those deriving from English customary law):

[127] The issues raised by Stanner included whether the Yirrkala people's uninterrupted possession of the land amounted to title by adverse possession, and whether the creation of 'a reserve for the use and benefit of aborigines' might be interpreted as transfer of beneficial ownership, or creation of a trust in favour of the Aboriginal inhabitants. A copy of the paper (marked 'for private seminar at ANU; not for circulation or quotation') is in the papers of Julius Stone, heavily underlined and annotated in hand: WEH Stanner, 'The Yirrkala Case', Papers of Julius Stone, National Library of Australia, MS 5166, Series 14, Box 165 ('Papers of Julius Stone, Box 165').

[128] Ibid.

[129] Letter from Julius Stone to Allan Gotlieb, 20 February 1969, Papers of Julius Stone, Box 165 (n 127).

[130] It may alternatively indicate a distinction between the justifications for land rights and civil rights.

[131] Memorandum from Julius Stone to Full Time Colleagues in the Faculty of Law, undated, Papers of Julius Stone, Box 165 (n 127).

> I have directed my mind mainly to the more diffuse questions of how (if at all) we can bring the "spiritual" basis of the aborigine clan's relation to its home tract under the mantle of common law recognition of customary title. The nearest to a starting-point on this is the doctrine of customary rights in the nature of easements…
>
> In this connection, pp75-139 of Max Gluckman's *Ideas of Barotse Jurisprudence* seem close to our concerns, but on one condition. This is that you can provide data on the Yirrkala which does not leave the clan's relation to the land wholly independent of overt elements such as occupation, use, assertion of exclusive enjoyment, hierarchical grant by chiefs or elders, characterising the African situation which Max is discussing.[132]

Stone's reference to Gluckman's work was a search for approximations, within Indigenous law and traditions, to Western legal norms and institutions. The caveat expressed here by Stone was that, in order for the action to succeed, external manifestations of occupation, use and exclusive possession similar to those recognised by common law must be found in Indigenous relations to land. This was reiterated by Stone in the seminar itself.[133]

Stone's contributions to the seminar demonstrate a lack of familiarity with the doctrine of native title as it had developed in other common law countries. He struggled to find some way of translating Aboriginal relationships to land (as explained by Stanner) into concepts of land ownership that would be recognised by the common law. In response to Stanner's concern that the spiritual aspect 'had become a kind of gimmick in the mind of the government' that might undermine the weight of the Yirrkala case, Stone agreed that the spiritual connection should be underplayed for lack of analogy in the common law.[134] In response to a suggestion that the acephalous nature of Indigenous society would not be a legal hindrance to the recognition of rights, Stone said:

> The difference it makes is that when you have hierarchy in the pre-existing native society and allegiances and such like, that is some kind of adjudicating machinery such as you have in the [African] peoples Gluckman deals with — when you have this you are very near in

[132] Letter from Julius Stone to WEH Stanner, 26 February 1969, Papers of Julius Stone, Box 165 (n 127).
[133] 'Yirrkala Land Case: Summary of Discussion at Seminar held at 10.30am on Friday 28th February 1969, Seminar Room 3, RSPacS, ANU', Stanner Collection (n 126) 10 ('Yirrkala Land Case: Summary of Discussion').
[134] 'Yirrkala Land Case; Summary of Discussion' (n 133) 10.

> analogy to what you will find in the common law and therefore your job becomes very much easier.[135]

Stone's comments throughout the seminar indicate that he was acutely conscious of the difficulties of arguing for land title rights under the common law where there were few analogies between Indigenous relations to land and common law concepts of land ownership.

In the end, Stone was unable to provide legal authority in support of the land claim, and his involvement in the case seems to have been limited.[136] In fact, the value of his contribution may have been to alert Stanner to the difficulties of arguing this claim under the common law at that time. This seems to be confirmed in a letter written by Stanner after the seminar to the Yirrkala lawyer, in which he reflected:

> A large number of possible arguments and authorities were examined without, to me, anything truly definite resulting…
>
> The discussion, while extremely informative and helpful to me, left me perturbed on one matter. The historical aspects of applicable law, including the law of real property, as it may touch the case, are so far from being really clear that the Commonwealth and the Company have open to them many possibilities to which ready answers may not suggest themselves during the hearing.[137]

The Yirrkala case was ultimately heard in the Northern Territory Supreme Court in 1970, and the decision handed down in April 1971. The plaintiffs' central contention, that the common law respected rights to land under Aboriginal traditional law and custom, under a doctrine of communal native title — a novel argument for an Australian court at that time — was rejected.[138] Blackburn J held that he was bound by the decision in *Cooper v Stuart*, that Australia was terra nullius. The argument that had interested Stone, recognition of customary title under old common law, was not included in the pleadings.[139]

---

[135] 'Yirrkala Land Case; Summary of Discussion' (n 133) 28.

[136] This may well have been one of those cases which fuelled his frustration with the inability of the law to deliver justice, as described by Goldring, 'Tribute to Julius Stone' (n 103) 9.

[137] Letter from WEH Stanner to Frank Purcell, 5 March 1969, Stanner Collection (n 126).

[138] *Milirrpum* (n 120).

[139] Other arguments that had been canvassed at the seminar, regarding rights arising from adverse possession and the creation of reserves, were included in the pleadings, but formally abandoned prior to trial: *Milirrpum* (n 120) 151.

D Great and As Yet Insoluble Puzzles

These documents indicate that Stone grappled unsuccessfully with the incommensurability of Indigenous and Anglo-Australian concepts of law, and the challenge that posed to the line of theory he espoused — the correlation of social diversity with stages of legal evolution. Although he was clearly aware of the challenges to his theory, as evidenced in his 1967 speech, the puzzle seemed to remain insoluble.

Despite being confronted with expert evidence relating to Indigenous society and law (and committed to Indigenous rights as a matter of justice), Stone continually defaulted to a Western legal framework. This was necessitated by his role as a legal expert, which was to find a way of translating Indigenous relationships with land into legal principles that would be accepted by the Court. The way he sought to do this was by equating Indigenous law and practice with ancient English custom.

Ultimately, Stone's jurisprudence privileged his standpoint as a jurist of the Anglo-Western common law world. Despite broadening legal theory to include a study of its function and purpose in society, the dual tenets upon which he based his approach (the 'examination of law in the light of other disciplines' and the *adaptation and classification* of that information *for legal purposes*) nevertheless ensured the privilege of 'law' (as perceived in the West) over social science. Despite extending the study of law beyond Western societies, his concept of 'law' was shaped by those societies. Anthropological studies of Indigenous communities were of interest and use only for shedding light upon law in *Western* societies. Thus, despite being premised upon the idea that all societies have types of law and legal arrangement, Stone's theory privileged a particular type of socio-legal arrangement, the legal systems of Western states.

Although he denied the autonomy of 'law' per se, and insisted upon its dependence on society, Stone nevertheless upheld (Western) legal concepts as a lens for viewing information about society and law in general. As John Goldring remarked, the 'dominant theme of Stone's jurisprudential work was that we must *keep law central*, and not become historians, philosophers, sociologists or economists … For Stone, jurisprudence consisted largely of applying to law what can be learnt from other disciplines'.[140] As Peter Fitzpatrick has pointed

[140] Goldring, 'Remarks' (n 108) 248 (emphasis added).

out, sociological jurisprudence was still 'a view from within law' and effectively elevated law above society:

> The gist of these social accounts is usually taken to be that law, rather than dominating society, is itself wholly a product of society … Yet if we observe these social accounts more closely, we can find a law that seems to be secure and persistent. The *contradiction between this seeming autonomy and law's social dependence is resolved … in the mythic elevation of law*.[141]

This internal contradiction in Stone's jurisprudence is manifested in his approach to Indigenous rights.

Although his involvement in the movement was minor, Stone's personal papers reveal a gradual shift in his discourse around the basis for Indigenous rights, from assimilation and paternalism, to justice. His discourse in the mid-1960s reflected an awareness of structural inequalities, combined with a sense of social and moral responsibility. By the close of the decade, Stone's language reveals that he saw Indigenous rights, and land rights in particular, as a matter of justice. Despite this, his elevation of Western legal concepts ultimately reinforced the injustice of the status quo (as evidenced by the restatement of terra nullius in the Yirrkala case).

Whether his experience of the movement (particularly the native title case), and apparent change in attitude to the justificatory basis for Indigenous rights, ultimately resulted in a correlative change to Stone's conceptual view of Indigenous Australian law and society is unknown. Although his personal papers indicate that such a change may have occurred after the publication of the trilogy in the mid-1960s, Stone did not publish any further on legal theory after his involvement in the Yirrkala case in 1969.[142]

VI. CONCLUSION

Despite Stone's commitment to justice for Indigenous Australians, his jurisprudence was constrained by his place and his time. His major concern was to understand the nature of law in the social and legal tradition to which he belonged. The framework of social types was

[141] Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992) 6 (emphasis added). Fitzpatrick noted that sociological jurisprudence reached 'an elaborated terminus in the work of Julius Stone': at 7.

[142] Apart from some further work on judicial reasoning between 1969 and 1972, his work after that date was mostly in the area of international law; see Starr (n 13) 184–7; 204–223.

constructed in order to aid that goal. Stone's discussion of law in kin-organised societies was not intended to be an authoritative analysis of law in Indigenous communities, but to illuminate the nature of Western law.

The reliance upon Julius Stone's work in the *Yorta Yorta* judgment was thus inappropriate. The reference itself was to a Western model of law and society that was constructed in contrast to other types of society (and their legal arrangements). These were arranged by Stone on an evolutionary scale for the purpose of better understanding Western law. Indigenous Australian societies were explicitly placed at the opposite end of the scale, implicitly representing the earliest stage of legal evolution. Although Stone's attitude to Indigenous law and societies appeared to have changed in the latter years of his career, that was not reflected in his published works of legal theory.

In any case, the positivist way in which the High Court used Stone's theory, to require the existence of 'a society' as a logical precondition for the existence of law, was a misconstruction and a misuse of his jurisprudence. Stone emphatically denied that that style of theory — of law as a composite of logically connected *a priori* elements (including a 'society') — had any relation to the existence of actual law anywhere. His commitment to social justice, Aboriginal rights, and native title supports the conclusion that Stone himself may not have approved of the use of his work in the creation of a legal precedent limiting the capacity of Australian law to recognise Indigenous law and native title.

In the next chapter, I examine the other two texts relied upon by the Court, and investigate their conceptualisation of Indigenous Australian law and society.

CHAPTER EIGHT
LAW AND SOCIETY IN THE JURISPRUDENCE OF GEORGE PATON AND TONY HONORÉ

I. INTRODUCTION

In this second chapter of Part V, I examine the context of the clauses from George Paton's *A Text-book of Jurisprudence*,[1] and Tony Honoré's essay on 'Groups, Laws and Obedience',[2] quoted by the Court in *Yorta Yorta*. The chapter consists of two major divisions; the first is devoted to Paton's jurisprudence and the second to Honoré's. In each, I examine the positioning of Indigenous Australians in relation to the concept of 'law', and supplement analysis of the texts with research into the conditions in which they were produced — the biographical, historical and scholarly context. These research findings will then be used in the next chapter — the concluding chapter of Part V — to analyse the theoretical and material lineage of the interrelationship of 'law' and 'society' as disclosed in the *Yorta Yorta* judgment.

II. IN PATON'S JURISPRUDENCE …

When it was first published to much acclaim in 1946 (the same year as Stone's *The Province*), Paton's *A Text-book of Jurisprudence* was hailed as *the* textbook of jurisprudence.[3] Much more accessible than Stone's weighty tome, it quickly established itself as one of the leading textbooks in jurisprudence in the common law world.[4] Although later editions were published in 1951, '64 and '72 respectively,[5] it was the first edition that was cited by the High Court.

---

[1] George Whitecross Paton, *A Textbook of Jurisprudence* (Oxford, 1946) ('*A Textbook of Jurisprudence*').

[2] AM Honoré, 'Groups, Laws and Obedience' in AWB Simpson (ed) *Oxford Essays in Jurisprudence* (Second Series, Clarendon Press, Oxford, 1973) 1 (''Groups, Laws and Obedience' 1973').

[3] RH Graveson, 'A Text-Book of Jurisprudence; by GW Paton' (1947) 10 *Modern Law Review* 80, 80.

[4] See, eg, TEL, 'A Text-Book of Jurisprudence by George Whitecross Paton, Second Edition, 1951' 11 *Cambridge Law Journal* 314; TB Smith, 'A Text-Book of Jurisprudence, Second Edition, by GW Paton, 1951' (1952) 15 *Modern Law Review* 517; Hamish R Gray, 'A Text-Book of Jurisprudence by George Whitecross Paton; Third Edition by David Plumley Derham, 1964' (1965) 28 *Modern Law Review* 114. *A Textbook of Jurisprudence* was awarded the Swiney Prize for Jurisprudence in 1954, over Stone's *The Province*, which was also nominated: Leonie Starr, *Julius Stone: An Intellectual Life* (Oxford University Press, 1992) 95–6.

[5] George Whitecross Paton, *A Textbook of Jurisprudence* (Clarendon Press, 2nd ed, 1951) ('*A Textbook of Jurisprudence* 2nd ed'); George Whitecross Paton, *A Textbook of Jurisprudence* ed David P Derham (Clarendon Press, 3rd ed, 1964) ('*A Textbook of Jurisprudence* 3rd ed'); George Whitecross Paton, *A Textbook of Jurisprudence* ed GW Paton and David P Derham (Clarendon Press, 4th ed, 1972) ('*A Textbook of Jurisprudence* 4th ed'). The third edition was not revised by Paton himself, who was by then the Vice-Chancellor of Melbourne University, but was instead edited by David Derham. After his retirement, Paton edited the fourth edition together with Derham.

In this part of the chapter, I locate the clause cited by the High Court in its original position in Paton's work. I explore its situation in relation to the broader theory of which it forms part, and analyse the way Indigenous society and law are portrayed in that theory. I then consider Paton's text in the context of the Anglo-Australian legal academe of the time, in order to identify influences upon Paton's work, and to clarify inferences that can be drawn from it. First however, I briefly introduce the text and its author.

A Paton's Jurisprudence

At the time of writing the textbook, George Whitecross Paton was Professor of Jurisprudence at the Melbourne Law School.[6] Born near Geelong in Victoria, Australia, Paton had studied history and philosophy at the University of Melbourne, graduating with a Master of Arts in philosophy in 1926.[7] He was awarded a Rhodes scholarship, and attended Magdalen College, Oxford, where he majored in philosophy and jurisprudence. Like Julius Stone (who was in the same year, but attended Exeter College), Paton graduated with first class honours in 1928, and went on to graduate study, receiving a Bachelor of Civil Law (Hons) in 1929. He was appointed to the Chair of Jurisprudence at the University of Melbourne in 1931. Paton was to remain Professor of Jurisprudence there for twenty years, only leaving the position to take up an appointment as Vice-Chancellor of the same University. With his background in philosophy, history and political economy, he embraced the emerging sociological approach to the study of law and jurisprudence.

In a lecture at the University of London in the late 1930's, Paton had outlined his vision for the future direction and scope of English jurisprudence.[8] He argued that English jurisprudence needed to move beyond its preoccupation with narrow juristic science and embrace legal sociology and legal philosophy. He met this challenge in *A Textbook of Jurisprudence*, dividing the subject into pure science (analytical), functional (sociological) and teleological (philosophical inquiries into the purpose of law) jurisprudence.[9] Although Paton did not

[6] Unless otherwise indicated, the biographical details in this paragraph are drawn from JR Poynter, 'Paton, Sir George Whitecross (1902-1985)' *Australian Dictionary of Biography*, <http://adb.anu.edu.au/biography/paton-sir-george-whitecross-15033/text26230> 1; Colin R McDonald, 'Professor George Paton: Fifth Dean of the Faculty of Law 1946-1950' in Ruth Campbell, *A History of the Melbourne Law School 1857–1973* (Faculty of Law, University of Melbourne, 1977) 132–7.

[7] He had earlier graduated with a Bachelor of Arts (Hons) in history and philosophy in 1924: McDonald (n 6) 132; cf Poynter (n 6), who claimed that Paton had studied sociology and philosophy.

[8] GW Paton, 'Whither Jurisprudence?' (1939) 4 *Politica* 16.

[9] Paton, *A Textbook of Jurisprudence* (n 1) 3.

depreciate the value in each approach, he preferred the sociological approach, arguing that jurisprudence is 'a functional study of the concepts which legal systems develop, and of the social interests which law protects.'[10]

B The Quote in Context

The clause, 'law is but a result of all the forces that go to make society', quoted by the High Court in relation to Indigenous Australian law, is tellingly situated in Paton's textbook under the heading 'The Primitive Community', in a chapter entitled 'The Evolution of Law'. In that chapter, Paton charted legal evolution from its origins in 'primitive communities' through to 'mature' legal systems in three major stages (the primitive, middle and classical periods).[11] The object of this exercise was to better understand 'law today' by studying its origins and evolutionary development.[12]

Due to a paucity of known historical sources, Paton, like the evolutionary historians of the 19th century, turned to ethnographical information about contemporary Indigenous peoples in lieu of evidence of ancient European legal origins. This aspect of Paton's work was neo-evolutionary, in a similar vein to the work of Alan Diamond, which had been published a decade earlier. Paton rejected the notion of unilinear evolution, and like Stone, expressed caution about attempts to align the development of law with purely material or economic conditions.[13] Despite these reservations, he adopted the scale developed by Hobhouse, Wheeler and Ginsberg, in which societies of 'simpler peoples' were categorised according to mode of production.[14] The major categories were graded, comprising (from lower to higher) overlapping tiers of hunters, pastoralists and agriculturists.

Paton divided the primitive era into three main phases, namely 'before the era of courts', 'courts' and 'codes'.[15] According to Paton, courts first appear towards the end of the first

[10] Ibid 31–2.
[11] Ibid 36.
[12] Ibid.
[13] Ibid 33–5.
[14] LT Hobhouse, GC Wheeler and M Ginsberg, *The Material Culture and Social Institutions of the Simpler Peoples: An Essay in Correlation* (Chapman and Hall, 1915) cited in ibid 35. In adopting this categorisation, Paton followed Diamond's example; see AS Diamond, *Primitive Law* (Watts, 1935) 173–184.
[15] Paton, *A Textbook of Jurisprudence* (n 1) 36–45. This organisation is very similar to that adopted by Diamond; see Diamond (n 14) 185–218.

agricultural grade,[16] and codes sometime after the third agricultural grade.[17] The era preceding the development of courts is the earliest stage in the evolution of law, and covers communities in the lower hunter stage — predominantly characterised by Indigenous Australian peoples.[18] Paton's discussion of this stage is short, covering little more than two pages. He acknowledged the anthropologist Bronislaw Malinowski's challenge to the earlier view that 'the primitive native was automatically law-abiding' and did not therefore need a system of law.[19] Although he accepted Malinowski's theory that 'reciprocity, systematic incidence, publicity and ambition' would be 'the main factors in the binding machinery of primitive law',[20] Paton questioned whether this could 'strictly … be called law'.[21] Instead, he considered it as 'the material that is [later] fashioned into primitive law'.[22]

Paton followed Vinogradoff and Allen in rejecting Maine's theory that custom arose out of (and formed a later stage than) regal judgments, preferring the view that 'custom and embryonic law' preceded litigation.[23] He named this period 'pre-law',[24] arguing that 'the sphere of pre-law' was small:

> There are few rules concerning property but some concerning inheritance on death. There are rules of marriage (sometimes extraordinarily intricate as in the case of the Australian aborigines) which lay down the classes within which marriage may take place. Private wrongs are sometimes avenged by the victim, in other cases compensation is payable. There are a few offences which are regarded as an outrage on the community as a whole, such as incest, witchcraft, and general 'incompatibility of temperament'. A simple economic structure requires few rules for its regulation.[25]

[16] Paton, *A Textbook of Jurisprudence* (n 1) 38.
[17] Ibid 43.
[18] Hobhouse, Wheeler and Ginsberg (n 14) 30–32.
[19] Paton, *A Textbook of Jurisprudence* (n 1) 36.
[20] Bronislaw Malinowski, *Crime and Custom in Savage Society* (1926) 68, quoted in Paton, *A Textbook of Jurisprudence* (n 1) 37.
[21] Paton, *A Textbook of Jurisprudence* (n 1) 37.
[22] Ibid.
[23] Paton cited Allen (omitting reference to Vinogradoff), although Allen had derived this insight from Vinogradoff: Carleton Kemp Allen, *Law in the Making* (Oxford, 3rd ed, 1939) 65; Paton, *A Textbook of Jurisprudence* (n 1) 38.
[24] Paton, *A Textbook of Jurisprudence* (n 1) 38.
[25] Ibid.

The reference to Indigenous Australians in this passage is the only reference to a specific people in Paton's discussion of this period.

The 'pre-law' period was followed by the introduction of courts, typically about the end of the first agricultural grade. With the introduction of institutions of dispute resolution, 'the sphere of law [became] more definite' and the rules more precise.[26] The final stage in 'primitive law' was identified with the use of writing — the period of codes. In this period, the domain of law become even more definite and a new professional class developed.[27] The era of codes brought the period of 'primitive law' to an end.

The next stage described by Paton was the 'middle period', distinguished by excessive formality and technicality (and the rise of measures to circumvent the excessive rigidity of the law, such as the use of fictions and the beginnings of equity).[28] Finally, the 'classical period' was 'marked by a sudden flowering of legal genius'.[29] This most recent period was characterised by classification, analysis, and synthesis, such as the work performed by the 'English judges and writers of the nineteenth century'.[30]

Like Stone, Paton rejected the notion of a teleological 'end' for law — the idea that law evolves to fulfil a predestined purpose. He argued that '[n]o one social or economic force, no single logical idea, will explain to us the evolution of law; for law is a resultant of all the forces that go to make up the life of community'.[31] At the most, therefore, 'we can … lay down mere generalisations, not immutable laws of history'.[32] This clarifies Paton's objective in describing the evolution of law, which was 'not to set down universal laws of legal evolution, but rather

[26] Ibid 38–9.
[27] Ibid 45.
[28] Ibid 45–50.
[29] Ibid 50.
[30] Ibid 50–1. In the second edition, Paton added a further 'post-classical period' characterised by the rise of statutory law: Paton, *A Textbook of Jurisprudence* 2nd ed (n 5) 48–50.
[31] This rephrasing of the clause quoted by the High Court is positioned later in the book, in a chapter concerned with the question of whether law serves a higher purpose, predominantly covering natural law theories: Paton, *A Textbook of Jurisprudence* (n 1) 99.
[32] Paton described Pound's generalisations of the purpose of law changing over time, according to changes in social organisation and need, as an example of this type of theory. He went on to state that '[p]erhaps with further study it will be possible to show a greater measure of accuracy in the formulation of historical laws of legal development, but that day is as yet far distant. The happiest feature of modern thought is its tolerance and its scepticism; to realise the complexity of the problem is to be nearer a solution than to falsify reality by premature simplification': ibid 99.

to throw light on the nature of law today by a study of some of the stages through which it has passed'.[33]

C Society as a Precondition for Law

Paton rejected the Austinian idea that the existence of law necessarily required a politically organised society (a state).[34] However, he did stipulate, as an *a priori* precondition for law, a society which has reached 'a certain stage of development', namely the establishment of specific machinery for the creation, declaration and enforcement of its laws:

> The existence of law presupposes a community. Implicit in the notion of community is the acceptance of a set of values dealing with the fundamental issues on which the existence of that society depends … When it reaches a certain stage of development the community sets up a legal order which determines the methods by which law is to be created, declared, and enforced.[35]

Paton regarded the question of whether a definition of law should be broad enough to encompass Indigenous societies as a matter of mere academic convenience.[36] Conflating Indigenous socio-legal order with the origins of Western law, he stated that '[w]hat is more important is that jurisprudence should study primitive beginnings for the light they throw on mature law'.[37] Although he acknowledged the anthropological view that law should be defined by function rather than form,[38] Paton set a minimum condition for the existence of law: 'that law exists only if it has a certain degree of enforceability and if there is some specific mechanism for securing compliance'.[39] Ultimately, he defined law as:

> a legal order tacitly or formally accepted by a community, and it consists of the body of rules which that community considers essential to its welfare and which it is willing to enforce by the creation of a specific mechanism for securing compliance. A mature system

[33] Ibid 35–6.
[34] Ibid 83. See also the discussion at 62–4.
[35] Ibid 82–3.
[36] Ibid 63–4, 69. In contrast, he considered that the question of whether international law could be classed as law 'had important practical results' (concluding that it did not amount to law): at 68–71.
[37] Ibid 64.
[38] Ibid 63–4, citing Malinowski (n 20).
[39] Paton, *A Textbook of Jurisprudence* (n 1) 64; see also at 83.

> of law normally sets up that type of legal order known as the State, but we cannot say *a priori* that without the State no law can exist.[40]

He reiterated that law does not arise until a community 'reaches a certain stage of development'.[41]

D The Positioning of Indigenous Australia apropos 'Law'

Paton positioned Indigenous Australian communities as pre-legal in an analytical as well as in an evolutionary sense. By restricting the definition of 'law' to societies with Western-style legal infrastructure, he implicitly relegated Indigenous Australia outside the conceptual confines of law. Further — in theorising the establishment of a legal system as a stage of social development — he implicitly aligned Indigenous Australia with an analytically prior condition to law. In addition, Paton also overtly classified Indigenous Australian societies as 'pre-law' in an evolutionary sense.

Paton's exercise in evolutionary theory can thus be seen as an heuristic device. In order to demonstrate the nature of Western law, he contrasted it with an artificial construct — a primitive 'other' — explicitly constituted using Western perceptions of Indigenous Australian societies and law.

E Some Context on the 'Text-Book'

As demonstrated by his partiality for the sociological approach to the study of law, Paton was an avowed disciple of the influential American jurists, Oliver Wendell Holmes and Roscoe Pound.[42] Another strong influence on Paton's work was that of Carleton Kemp (CK) Allen. Like Stone, Paton had arrived at Oxford as a young graduate student just after the death of Vinogradoff and the peak of the historical and comparative school of jurisprudence. During the years that Paton and Stone were studying law and jurisprudence, CK Allen was an up-and-coming lecturer in those subjects,[43] and his book *Law in the Making* was essential reading for

[40] Ibid 83.

[41] See, eg, ibid 7, 31, 83.

[42] The influence of Pound and Holmes is evident throughout the book, and was acknowledged by Paton in the preface: Paton, 'Preface' in Paton, *A Textbook of Jurisprudence* (n 1) vi ('Preface').

[43] Allen was promoted to the chair of jurisprudence in 1929, the year Paton graduated: ET Williams, 'Allen, Sir Carleton Kemp (1887–1966)', rev Tony Honoré, *Oxford Dictionary of National Biography* (Oxford University Press, 2004); KC Wheare, 'Allen, Sir Carleton Kemp (1887–1966)' *Australian Dictionary of Biography* Volume 7 (MUP, 1979).

all students.[44] Allen was 'an admirable teacher and most lucid lecturer, who combined serious thought with a light touch'.[45] He had been Vinogradoff's protégé, and that influence can be seen in Allen's work, particularly in the earlier academic period of his career. Allen promoted the sociological approach which had been developing in the United States, although his own work remained more constrained by the limits of the legal discipline.[46]

Just as Allen had been a protégé of Vinogradoff, it appears that Paton became a protégé of Allen following his graduation from Oxford. It is not known whether Allen was aware of Paton during his student years (although it is likely that Paton and Stone attended Allen's lectures, and almost certain that they studied his work). Due to the system of teaching there — being primarily the responsibility of the tutors within the colleges — Allen had not personally taught Paton, who was a student at Magdalen College while Allen was a Fellow of University College.[47] It is possible that Allen had come across Paton as a Rhodes scholar, although it would be a couple of years before Allen took up his position with the Rhodes Trust.[48] An Australian, but not a Rhodes scholar himself,[49] Allen 'had always been interested in Rhodes Scholars and had had many pupils among them'.[50] What *is* known, however, is that Allen had examined Paton for his graduate law degree, and been glowing in his praise.[51] He supported Paton's application for the Chair of Jurisprudence at the University of Melbourne the following year. His reference was reproduced in the local Melbourne newspaper:

> I have much pleasure and no hesitation in supporting his candidature. Mr Paton was not actually a pupil of mine at Oxford but I examined him for the BCL degree, and formed a high opinion of his abilities. His paper in jurisprudence was, on the whole, the best that I have ever examined, and showed particular promise, in that it combined a thorough

[44] See the discussion in Chapter Three above.
[45] Williams (n 43).
[46] Like many works of English jurisprudence in the first half of the 20th century, Allen's work reads more like an introduction to the discipline of law, rather than legal theory: see the discussion in Neil Duxbury, 'English Jurisprudence between Austin and Hart' (2005) 91(1) *Virginia Law Review* 1.
[47] Paton's law tutor at Magdalen College was Robert Segar: 'Jurisprudence: Chair at University; Dr GW Paton Appointed', *The Argus* (Melbourne) 24 December 1930, 8.
[48] Allen became Oxford Secretary to the Rhodes Trust and Warden of Rhodes House in 1931: Williams (n 43); Wheare (n 43).
[49] Allen had applied for a Rhodes Scholarship in 1910, but was narrowly defeated. The experience appears to have made him highly critical of the selection process in New South Wales: John Poynter, 'Scholarships in Australia' in Anthony Kenny (ed) *The History of the Rhodes Trust 1902-1999* (Oxford University Press, 2001) 320, 337.
[50] AL Goodhart, 'Sir Carleton Kemp Allen 1887–1966' (1967) 53 *Proceedings of the British Academy* 391, 395.
[51] 'Jurisprudence: Chair at University; Dr GW Paton Appointed' (n 47).

> knowledge of substantive law with a thoughtful and philosophical outlook. In my opinion this combination is the best of all qualifications for the academic study of jurisprudence. Further, Mr Paton's training in history, classics, philosophy, and political economy, as preliminaries to the study of law, make up an extremely appropriate equipment for this chair, especially at a time when jurisprudence takes on an increasingly sociological colouring.[52]

Paton had assisted Allen with the third edition of *Law in the Making*, which was published in 1939, and Allen acknowledged his contribution with 'special gratitude'.[53] *Law in the Making* was a study of material sources of law in an evolutionary order of development, beginning with custom 'as the raw material of law'.[54] Negative perceptions of Indigenous Australians were presented as representing the earliest primitive origins of law.[55]

The influence of Allen on Paton's work in *A Textbook of Jurisprudence* is apparent throughout the entire book. Allen is one of, if not *the* most, cited author in the entire work. There are, in fact, more references to Allen throughout the book than to Holmes and slightly more than Pound. Although Paton recognised Allen for 'encouragement and the force of example', he may have aimed to move beyond Allen's limited legal theory.[56]

The third edition of *Law in the Making*, to which Paton had contributed, still retained the offensive analogy between Aboriginal Australian peoples and ants. It was that edition that had prompted the scathing critique by Harvard Professor Sidney Post Simpson, that recent developments in legal anthropology, particularly 'Malinowski's significant studies' had been ignored.[57] It is possible that this critique prompted Paton to incorporate developments in legal anthropology into his own work. For example, although Allen had referred to records of Indigenous communities providing evidence of the earliest forms of customary social order, he had not included information from anthropological studies.[58] In *A Textbook of Jurisprudence*,

---

[52] Ibid. The newspaper article also reproduced the testimonial written by Paton's law tutor at Magdalen College, Robert Segar. According to an article in *The Age*, Allen was also on the selection committee: 'University Council: New Professor of Jurisprudence' *The Age* (Melbourne, Victoria, 24 December 1930) 10.

[53] Carleton Kemp Allen, 'Preface to the Third Edition', in Allen (n 23).

[54] Allen (n 23) 61.

[55] See the discussion in Chapter Three above.

[56] It's also possible that this is an instance of what Paton himself described as '[f]requently the greatest debts are not consciously realised by the writer': Paton, 'Preface' (n 42) vi.

[57] Sidney Post Simpson, 'English Law in the Making' 4 (2) *Modern Law Review* 121, 123.

[58] Allen (n 23) 64.

Paton acknowledged the need to correct Allen's claims about 'custom' in Indigenous societies being followed automatically, and included a brief discussion of Malinowski's work.[59] In the second edition, Paton included a more detailed discussion of legal anthropology, including references to recent studies of Indigenous Australian peoples.[60] This discussion, however, was contained in a chapter on the origins of custom as a source of European law,[61] and couched in terms of 'the beginnings of the community'.[62] Like Allen, Paton continued to use a negative conceptualisation of Indigenous Australian societies to illustrate the earliest stage in social and legal evolution. Both regarded 'custom' as the raw material that would later develop into law, and designated Indigenous Australian societies as pre-legal.

Simpson's comments may also have drawn Paton's awareness to the difficulties of pursuing a jurisprudence that relied so heavily upon developments in other disciplines. Paton acknowledged that the sociological approach to legal theory was in its infancy. Because of its dependence on the social sciences, Paton cautioned that the benefits of that approach would only be gained in the future, as the social sciences developed.[63] Until the state of the social sciences had reached 'clearer conclusions', the jurist could 'only make tentative grasps at truth'.[64] With specific reference to reliance upon anthropological studies, Paton referred to the necessity of 'putting away our modern prejudices', noting '[i]t is as yet too early to pronounce dogmatic generalisations concerning the origin of custom and its relationship to law'.[65] It is tempting therefore to speculate that if Paton were to write today, his attitude to Indigenous law might be vastly different. Nevertheless, later editions of the textbook, including the fourth edition in 1972, continued to view anthropological studies as merely illuminating the

[59] Paton's discussion of anthropological research was limited to Malinowski (although he also included a footnote reference to Llewellyn and Hoebel's *The Cheyenne Way*) and consists of little more than one page: Paton, *A Textbook of Jurisprudence* (n 1) 36–7.

[60] In particular, Donald Thomson's study of Yolgnu and Ted Strehlow's work with Arrernte: DF Thomson, *Economic Structure and the Ceremonial Exchange Cycle in Arnhem* Land (MacMillan, 1949); TGH Strehlow, *Aranda Traditions* (Melbourne University Press, 1947); cited in Paton, *A Textbook of Jurisprudence* 2nd ed (n 5) 142.

[61] Paton, *A Textbook of Jurisprudence* 2nd ed (n 5) 142–6.

[62] Paton referred to *Law in the Making* as 'the classical study' of custom as a source of law, but noted that Allen's conjectures as to the earliest origins of custom were based upon speculation rather than 'field investigation of primitive communities': ibid 142.

[63] Paton, *A Textbook of Jurisprudence* (n 1) 28–9.

[64] Ibid 29.

[65] Paton, *A Textbook of Jurisprudence* 2nd ed (n 5) 142.

beginnings of legal evolution.[66] This selective use of material from the social sciences is another example of the way the sociological school of jurisprudence in that era privileged Western law.

In conclusion, as it was with the quote from Julius Stone, the reference by the High Court to Paton's jurisprudence in the context of Indigenous law was utterly inappropriate. The clause was taken from a theory of legal evolution, in which Western perceptions of Indigenous Australian peoples were used as evidence of the origins of European law and society. The object was to illuminate the nature of law in Western societies. Indigenous Australian communities were designated 'primitive communities' and their law located at the earliest stage of an evolutionary scale which culminated ultimately in Western law. Indeed, according to this scale, Indigenous Australian communities had not developed law. The explicit designation of their societies as 'pre-law' constitutes a denial of the very possibility of Indigenous law. That denial was reinforced by the prescription of a qualifying condition for the existence of law — a society at a 'certain stage of legal development' — one that according to Paton, Indigenous Australia could not meet.

I now turn to the third of the theoretical works cited in support of the link between law and society, Tony Honoré's essay.

III. AS PROFESSOR HONORÉ HAS POINTED OUT …

The clause quoted by the High Court, 'all laws are laws of a society or group', was taken from the introduction to Honoré's essay, 'Groups, Laws and Obedience'.[67] The essay is an exercise in descriptive legal theory, containing an analytic device — a fable of origin — similar to that used by HLA Hart. In it, Honoré constructed an imaginary primitive condition in order to demonstrate the necessary features of 'law' (epitomised, for him, by the legal system of a Western state). In this section of the chapter, I first sketch the career and jurisprudence of Tony Honoré, and outline the theory from which the quotation was derived. I then analyse the role of the analytic origin device, the central positioning of Western law, and the construction of a primitive 'Other'.

[66] The chapter on the origin of custom remained virtually unchanged in the 1972 edition: Paton, *A Textbook of Jurisprudence* 4th ed (n 5) 190–4. Of course, in the intervening period, Paton had been predominantly concerned with executive responsibilities, at the expense of continuing research in law. The fourth edition was produced in the years following Paton's retirement in 1968.

[67] Honoré, 'Groups, Laws and Obedience' 1973 (n 2) 2.

A The Legal Mind of Tony Honoré

Unlike the sociological approach preferred by Stone and Paton, Honoré's jurisprudence has the distinctive blend of linguistic philosophy and analytical theory characteristic of Oxford under the leadership of Herbert Hart. A career and (almost) lifelong Oxonian, Honoré had come to Oxford in 1946 as a Rhodes scholar.[68] Born in London but raised in South Africa,[69] he had postponed his scholarship due to the onset of World War II, serving in the British Army and surviving serious injury at the Battle of El Alamein.[70] As a Rhodes scholar in the immediate post-war period, Honoré came under the general aegis of CK Allen, who was the Oxford Secretary to the Rhodes Trust and Warden of Rhodes House at that time. While the primary responsibility for a Rhodes' scholar's education lay with their college (New College in Honoré's case), the Warden of Rhodes House retained 'a general unofficial supervision' over the scholars.[71] The records of the Trust indicate that due to the exigencies of the immediate post-war period, and the impacts of their war-time experiences upon the scholars themselves, the Rhodes scholars received more care and attention from the Warden than hitherto.[72] An outstanding student,[73] Honoré was appointed to the law faculty in 1948,[74] and was Regius Professor of Civil Law from 1971 to 1988.[75]

From his earliest years in the law faculty at Oxford, Honoré's interest in legal theory led to his involvement and collaboration with members of the philosophy department, then dominated by the ordinary-language linguistic philosophy popularised by Gilbert Ryle and JL Austin.[76]

---

[68] Jeremy Gauntlett, 'Laudatio for Tony Honoré' in Daniel Visser and Max Loubser (eds), *Thinking About Law: Essays for Tony Honoré* (SiberInk, 2011) 1.

[69] Ibid. Honoré died at Oxford on 26 February 2019 at age 97: John Gardner, 'Tony Honoré 1921–2019' <https://www.law.ox.ac.uk/news/2019-03-05-tony- honoré -1921-2019>.

[70] Geoffrey M Hodgson, 'Editorial Introduction to "Ownership" by A M Honoré (1961)' (2013) 9(2) *Journal of Institutional Economics* 223, 223.

[71] Carleton Kemp Allen, 'The Rhodes Scholars and Oxford 1931–52' in Elton (ed) *The First Fifty Years of the Rhodes Trust and the Rhodes Scholarships* (Oxford, 1956) 129, 151 ('The Rhodes Scholars and Oxford 1931–52').

[72] See Carleton Kemp Allen, *Forty Years of the Rhodes Scholarships* (Oxford, 1944); Allen, 'The Rhodes Scholars and Oxford 1931–52' (n 71); see also Dorothy Allen, *Sunlight and Shadow* (Oxford University Press, 1960).

[73] Within two years, Honoré had graduated with firsts in Jurisprudence and the BCL, and had been awarded the Vinerian Prize: Gauntlett (n 68) 1.

[74] 'Tony Honoré: Emeritus Regius Professor of Civil Law at All Souls', *University of Oxford Faculty of Law* (Web Page) <https://www.law.ox.ac.uk/people/tony-honor%C3%A9>.

[75] Ibid. Honoré had been overlooked for the chair of jurisprudence upon Hart's vacating it, due to the recruitment of Ronald Dworkin by Hart himself. This led to a cooling of their relationship for some time: see Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004) 291.

[76] For an overview of Oxford philosophy in the post-war period, see Lacey (n 75) 136–42.

Honoré was the only law tutor who was included in JL Austin's Saturday morning group for philosophy tutors.[77] He first met HLA Hart by virtue of an interdisciplinary class in law and philosophy to which Hart, then a Philosophy Fellow, had been invited to give a paper.[78] The two worked closely together over the next couple of decades, during Hart's tenure of the Chair of Jurisprudence.[79] One of the results of their collaboration was the joint authorship of *Causation in the Law*.[80] A classic example of the application of Oxford linguistic philosophy to a legal concept, *Causation in the Law* is regarded by 'many philosophers … as representing the pinnacle of the Austin school's published achievements'.[81] Honoré also gave Hart 'detailed comments' on the draft of *The Concept of Law*.[82]

Honoré was a founding member of a law faculty discussion group convened by Hart to foster legal philosophy.[83] The group enabled Hart to 'build up the kind of prestige and aura around legal philosophy which Austin had so successfully constructed around linguistic philosophy',[84] and led to the publication of a series of collected essays.[85] The first volume of *Oxford Essays in Jurisprudence* was published in 1961,[86] and included Honoré's seminal essay on 'Ownership'.[87] The second series,[88] like the first, reflects the 'powerful influence' of Hart, and the style of analytical jurisprudence now associated with Oxford.[89] Published in 1973, it contains the essay cited by the High Court: 'Groups, Laws and Obedience'.

In it, Honoré argued that most descriptive legal theory, including that of Hart, suffers from two main shortcomings. The first is that the starting point for the analysis — that of the rule,

[77] AW Brian Simpson, *Reflections on* The Concept of Law (Oxford, 2011) 45. For a further discussion of the Saturday morning group, see also Lacey (n 75) 133–35.

[78] The innovative graduate class had been pioneered by Honoré jointly with the philosopher Tony Woozley in 1951–2, one of the first such interdisciplinary ventures at Oxford: Simpson (n 77) 40–1. See also Lacey (n 75) 149, 164.

[79] See Lacey (n 75) 164–5, 209–215; Simpson (n 77).

[80] HLA Hart & AM Honoré, *Causation in the Law* (Oxford University Press, 1959). The collaborative process and relationship between Honoré and Hart during that time is described in Lacey (n 75) 164–5, 209–215.

[81] See Lacey (n 75) 215.

[82] Ibid 214.

[83] Honoré was a continuing member of the group for many years: Lacey (n 75) 157. Brian Simpson was also a member of the group, and his description of the group is in Simpson (n 77) 4–5.

[84] Lacey (n 75) 158.

[85] Simpson (n 77) 5.

[86] AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford, 1961).

[87] AM Honoré, 'Ownership' in ibid 104.

[88] The second series was edited by Brian Simpson, who gave an account of the process in Simpson (n 77) 5.

[89] See the comments by John Swan, 'Review of Oxford Essays in Jurisprudence, Second Series by AWB Simpson' (1973) 23(4) *University of Toronto Law Journal* 479, 479.

command or norm — presupposes the existence of a group or society. The second is that the connection between law and 'the problem of securing obedience from members of a group' is misrepresented. Instead, on the basis of 'the axiom that all laws are laws of a society or group', Honoré argued that the group should be the starting point for an analysis of the nature of law. This should enable a more accurate analysis of the connections between the structures and laws of a group and the motivations of its members to obey.

Honoré later revised and refined 'Groups, Laws and Obedience' for publication as a chapter in his book *Making Law Bind*.[90] Although primarily a collection of previously published essays, *Making Law Bind* presents as a monograph. In the preface, Honoré commented that the revision of the original essays for the new volume was undertaken 'in order to improve the style, eliminate what in retrospect seems mistaken, and render the volume more coherent'.[91] The new volume reflects the central concern of Honoré's legal theory, the nature of obligation and obedience — that is, what it is that makes law binding. Honoré began *Making Law Bind* with a new chapter entitled 'How is Law Possible?' in which he foreshadowed the themes and central questions which recur throughout the book. This chapter leads into the revised version of 'Groups, Laws and Obedience'. Although the substance of the essay remained largely unchanged, the revision produced greater clarity.

In the following section, I set out the core lines of argument in the essay, before undertaking an analysis of it. References are to the 1973 version, since that is the one cited by the High Court. However, where the meaning has been substantially clarified by a change of wording in the later (1987) version — and where the meaning has not changed — it is substituted for the earlier version. Where more substantial changes have been made in the 1987 version, the extent of the change is explicitly indicated.

B Groups, Laws and Obedience

Honoré used the 'axiom that all laws are laws of a society or group' to set the 'outer framework' of his analysis of law.[92] The objective of the essay was clearly stated in the 1987 version: 'to

[90] Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, Oxford 1987) ('*Making Law Bind*').

[91] Tony Honoré, 'Preface' in ibid v.

[92] Honoré, 'Groups, Laws and Obedience' 1973 (n 2) 2. In the later version, the axiom is rephrased as 'the axiom that all laws are laws of a group or of a society which is itself a complex of groups': Tony Honoré, 'Groups, Laws and Obedience' in Honoré, *Making Law Bind* (n 90) 33 (''Groups, Laws and Obedience' 1987').

show how the structure of groups enables them to reinforce the motives for their members to obey the prescriptions by which the groups operate; and further, how the prescriptions adopted by certain groups which do this come to be called laws'.[93] The term 'prescription' includes a rule or norm (capable of general and multiple application), but could also refer to a directive relating to a particular instance.[94]

Honoré began with the premise that 'the existence of a group is … a necessary and almost a sufficient condition of the existence of laws or something comparable'.[95] He then elucidated certain necessary conditions for a group (and hence for law) to exist. First, there must be 'a known common purpose',[96] and secondly, 'shared understandings' as to the behaviour of one or more members in given circumstances (including how this behaviour is to be determined).[97] Thirdly, the prescriptions to which the understandings relate 'must restrict the freedom of at least some members of the group',[98] and fourthly, they 'must be broadly effective'.[99] In order for a prescription to be effective there must be 'a substantial measure of compliance',[100] which may be enforced by a range of possible measures. One of these measures may be 'the spontaneous directing of pressure against the violator'.[101] However, Honoré noted a risk associated with this type of enforcement: 'though often effective, especially in a small and coherent group, [it] is less efficient and less secure in a large or diverse group.'[102] This is because a group may be 'too loosely knit to run the risks connected with spontaneous enforcement'.[103] At this point, Honoré suggested two 'important social inventions' by which the group could mitigate the risk.[104] These inventions 'help to make possible the existence of

[93] Honoré, 'Groups, Laws and Obedience' 1987 (n 92) 33.
[94] Honoré, 'Groups, Laws and Obedience' 1973 (n 2) 4; Honoré, 'Groups, Laws and Obedience' 1987 (n 92) 32.
[95] Honoré, 'Groups, Laws and Obedience' 1973 (n 2) 3.
[96] Ibid 7.
[97] Ibid.
[98] Ibid. In this (original) version, an extra condition is included at this point, that 'the understanding must be communicated, not kept private'. It is omitted in the later version, probably because it is implicit in the second condition, that the understandings be shared.
[99] Ibid.
[100] Ibid 8.
[101] Ibid 9.
[102] Ibid.
[103] Ibid.
[104] Ibid.

laws'.[105] In the revised version of the essay, Honoré described this account as 'a species of *Just So* story'.[106]

Both inventions involved the 'interlocking of different types of prescription'.[107] The first was the interlocking of initial prescriptions with remedial prescriptions,[108] which need not necessarily involve a sanction.[109] The second involved a source prescription, which determined 'the way in which the content of a substantive prescription was to be settled.'[110] The notion of interlocking prescriptions however, while important, was not sufficient to explain the nature of laws.[111]

In order to count as laws, several further notions were required.[112] The first was the concept of a rule — a prescription having the form 'whenever … then …'.[113] But at this stage, rules were still 'too *informal* and *ad hoc* to count linguistically or functionally as laws.'[114] Therefore 'a further step [was] needed, namely that of institutionalizing the [source] and remedial rules.'[115] This step involved two stages: first, the 'jurisdictional stage' (the assignment of functions and the appointment of officials),[116] and second, the 'institutional stage' (the establishment of rules regarding such jurisdiction).[117] With the accomplishment of these steps, Honoré claimed that 'the reinforcement of social group understandings [had] now reached the stage at which it is

[105] Ibid.
[106] Honoré, 'Groups, Laws and Obedience' 1987 (n 92) 40. The term derives from Rudyard Kipling's *Just So Stories* (1902), a classic of colonial literature, and is of its nature a purely speculative account of origins. The designation of the account as a *Just So* story simply makes explicit what was already implicit in the original essay.
[107] Honoré, 'Groups, Laws, and Obedience' 1973 (n 2) 9.
[108] Ibid 9–10.
[109] Ibid 10.
[110] The advantage of this type of interlocking prescription was that 'violations of the derivative prescription need not involve a direct challenge to the source prescription on which they depended … and so need not endanger the existence of stability of the group'. The source prescription was referred to in the original essay as 'genetic prescription', and substantive prescription was referred to as 'derivative prescription': ibid; Honoré, 'Groups, Laws and Obedience' 1987 (n 92) 41–2.
[111] Honoré, 'Groups, Laws, and Obedience' 1973 (n 2) 14.
[112] Ibid.
[113] Ibid. The 1987 version refers to the 'invention of rules': Honoré, 'Groups, Laws and Obedience' 1987 (n 92) 45.
[114] Honoré, 'Groups, Laws, and Obedience' 1973 (n 2) 15 (emphasis added).
[115] Ibid.
[116] Ibid 16.
[117] Ibid 17.

linguistically and functionally justifiable to speak of laws'.[118] In the 1987 version, this was the end of the *Just So* story, but in neither version was it the end of the essay.

Honoré then argued that 'the laws of the sovereign territorial states such as the United Kingdom … and probably the laws of the international community … are often said to be the only laws in the full sense of the word'.[119] The reason for this 'lies once more in the intimate connection between law and obedience'.[120] It is that 'the state usually commands greater force than its rival groups', which '*entitles the laws of the state … to special status*' as the paradigm of law.[121]

The original essay concluded with a caveat to the effect that the analysis was not intended to be 'taken historically', but was simply an analytical device.[122] The caveat had been dispensed with in the later version, presumably because of the explicit use of the *Just So* story, the very nature of which is speculative.

C An Evolutionary Tale

'Groups, Laws and Obedience' has obvious similarities to Hart's account of the emergence of law.[123] As an analysis of the necessary conditions for the existence of law, it contains an admittedly fictitious account of how law might develop, arriving ultimately at the laws of the Western state, having 'special status' as '*the only* laws in the full sense of the word'.[124] In this section, I examine the impact of this positioning of Western law as the standard case, and the civil state–primitive condition dualism that results from Honoré's use of the analytic origin device.

Honoré claimed repeatedly and unequivocally that 'the paradigm of law is unquestionably state law'.[125] He did not specifically address the issue of Indigenous governance, other than to

[118] Ibid 18.
[119] Honoré, 'Groups, Laws and Obedience' 1987 (n 92) 49; see also Honoré, 'Groups, Laws, and Obedience' 1973 (n 2) 18.
[120] Honoré, 'Groups, Laws and Obedience' 1987 (n 92) 50; see also Honoré, 'Groups, Laws, and Obedience' 1973 (n 2) 19.
[121] Honoré, 'Groups, Laws, and Obedience' 1973 (n 2) 20 (emphasis added).
[122] Ibid 21.
[123] Honoré himself acknowledged as much: Honoré, 'Groups, Laws and Obedience' 1987 (n 92) 40.
[124] Honoré, 'Groups, Laws, and Obedience' 1973 (n 2) 18; Honoré, 'Groups, Laws and Obedience' 1987 (n 92) 49 (emphasis added).
[125] Tony Honoré, 'How is Law Possible?' in Honoré, *Making Law Bind* (n 90) 12. See also, Honoré, 'Groups, Laws, and Obedience' 1973 (n 2) 18–20.

acknowledge that it is *linguistically* correct to speak of the laws of tribes.[126] Honoré was more concerned with other alternative linguistic uses of the term 'laws' (such as the mores of religious groups, professions, and sporting associations), and with distinguishing them from state law. In so doing, he relied upon culturally specific linguistic usage, and 'common-sense intuitions' (the distinctive hallmarks of the 'ordinary language' philosophy of post-war Oxford) to make universal claims about the nature of law.[127] He universalised a particular form of legal arrangement (that of the Western state, and more specifically that of the United Kingdom) as the archetype of law itself.

Honoré did acknowledge that descriptive legal theory could have normative implications. However, his reason was that law is itself by nature normative: 'the notion of law is intimately linked with that of obedience'.[128] A descriptive theory of law is therefore, 'inter alia, a theory about the appropriate attitudes to obedience and disobedience to certain prescriptions and it would be less than candid to pretend that such a theory can be morally or politically neutral'.[129] Honoré's acknowledgement of the normativity of descriptive legal theory is therefore limited to the inherent normativity of its subject matter. It contains a minimal nod to the possibility that descriptive theory could validate state power, but does not extend to the normative connotations of the origin story, which was a mechanism strategically designed to highlight the value of state-type legal arrangements. Neither does it extend to the essentialism which is so marked in Honoré's work. In these respects, Honoré's legal theory demonstrates the same deficiencies as Hart's.

Honoré's use of the analytic device also results in a similar civilised–primitive dualism to that found in Hart's theory. The evolutionary nature of the device, contained in the speculative account of the emergence of Western law, is readily apparent. The original version of the essay is replete with evolutionary language. From the starting point of the concept of a group, Honoré referred continually to 'steps'[130] and 'stages'[131] toward the existence of laws. Phrases and

[126] See, eg, Honoré, 'Groups, Laws, and Obedience' 1973 (n 2) 2; Honoré, 'Groups, Laws and Obedience' 1987 (n 92) 33 (emphasis added).
[127] See Neil Duxbury, 'The Ties that Bind: Review of *Making Law Bind*' (1988) 51 *Modern Law Review* 790.
[128] Honoré, 'Groups, Laws, and Obedience' 1973 (n 2) 1.
[129] Ibid.
[130] See, eg, ibid 12, 15.
[131] See, eg, ibid 15, 16, 17, 18.

clauses such as 'social inventions',[132] 'a further step is needed',[133] 'stages on the path toward law',[134] 'a further stage is needed'[135] and ultimately, 'has now reached the stage at which it is … justifiable to speak of laws'[136] are used throughout. With the explicit use of the *Just So* story in the later edition, the evolutionary language is even more overt.

In both versions of the essay, Honoré constructed an imaginary primitive condition in order to explicate the features of Western state law. The primitive is putatively purely fictitious and represents an analytically, as opposed to an historically, prior condition. Yet it aligned with and reinforced a way of thinking about contemporary Indigenous societies who had been subject to British settler colonial rule. The technique is an analytical device similar to that used in the social contract theories (which speculated a 'state of nature' as the original state)[137] that were so influential in the application of terra nullius to Australia.

The imaginary primitive condition represents the *absence of*, and hence the *necessity for*, the features which are described as essential to Western law. The purportedly fictional nature of this primitive condition is a prime example of the construction of a primitive 'other', designed specifically to highlight features of Western law. Those features are explicated by the contrast with the imagined other in which they are markedly absent. The primitive other is therefore characterised by absence. The danger of using such a theory of law to identify necessary features of Indigenous law, is that any difference to the descriptive model can only be accounted for as an absence and a deficit.

The use of a theory of Western law, containing an analytical origin device similar to that used to deny the existence of Indigenous Australian law, to determine the nature and very existence of Indigenous law, is not merely inappropriate. It has the potential to result in an ongoing reiteration of the denial of Indigenous Australian law. At the very least, by obscuring and

[132] Ibid 9.
[133] Ibid 5.
[134] Ibid 16.
[135] Ibid 16–7.
[136] Ibid 18.
[137] Honoré himself was critical of social contract theories on the basis that contract 'is a device for securing, not social consensus, but individual advantage': Tony Honoré, 'The Social Contract Interpreted' in Honoré, *Making Law Bind* (n 90) 160.

marginalising Indigenous perspectives of the nature of their own law, its use hinders meaningful recognition.

IV. CONCLUSION

The High Court's choice of these theories to support an interpretation of Indigenous Australian law and set the conditions for its survival is extraordinary. That the clause from Paton's jurisprudence was entirely inappropriate should have been immediately obvious from its position under a heading referring to the 'primitive community' in a chapter devoted to (and entitled) the 'evolution of law'. Paton portrayed Indigenous Australian communities as 'pre-legal' and their law merely the 'raw material' from which 'law' could ultimately evolve. He used Western perceptions of Indigenous Australian peoples as 'evidence' of the origins of European law and society, representing the very earliest stage of legal evolution. By designating a society with a degree of Western-style legal infrastructure as a minimum qualification for 'law', Paton reinforced the conceptual impossibility of Indigenous law. The aim of Paton's project was to illuminate the nature of Western law, and to achieve this he contrasted it with an artificial construct expressly constituted from negative perceptions of Indigenous Australian societies and law. Similarly, the quote from Honoré's work referred to a Western paradigm of law, constructed in explicit contrast to its imaginary primitive origins. The theory contains a civilised–primitive dualism similar to that which characterised terra nullius and denied the very existence of Indigenous law. Why the majority justices made this choice of theory, and how it impacts upon the concepts of law and society as deployed in the judgment, is considered in the next chapter.

CHAPTER NINE
THE INEXTRICABLE LINK

I. INTRODUCTION

My focus in Part V of this thesis has been on the theory underpinning the 'society' requirement for the recognition of Indigenous Australian law. My object has been to uncover the genealogy of the conceptual connection between 'law' and 'society' utilised by the High Court to determine the conditions for recognition, and to understand the ways in which Indigenous Australian law has been treated throughout that heritage of Anglo-Australian legal thought.

Over the course of the previous two chapters, I explored the first 'generation' of the theoretical lineage of the interrelationship between law and society as described and used by the Court. I demonstrated that all of the theories cited by the Court in relation to the 'inextricable link between a society and its laws and customs' were British or Anglo-Australian theories about Western 'state' societies and law. All three theories represented Indigenous Australian law and society as 'primitive'. All three (two explicitly and one implicitly) positioned Indigenous Australian society and law at the earliest stage in legal evolution, and at least two designated that stage as pre-legal. I uncovered the threads tracing those ideas through previous 'generations', which I will explicate further a little later in this chapter.

I also began to unpack the material genealogy — the cultural and historical contingency — of those ideas of law and society. Through an analysis of biographical detail, I explored the scholarly influences on the texts, and uncovered the links connecting them. I established that the scholarship of each (Paton, Stone and Honoré) was grounded in Oxford jurisprudence (as, indeed, was Hart's). Paton and Stone had studied law at Oxford in the twilight of the era of historical jurisprudence, and their attitude to Indigenous Australian law and society was profoundly shaped by it. The influence of Vinogradoff and Allen is pronounced in their work, and in their preference for sociological jurisprudence. The fact that Herbert Hart, who studied philosophy there during the same period, did not study (much) jurisprudence at Oxford at that time accounts for his relative ignorance of alternative approaches to theorising about law, and for the difference in his own jurisprudence. Nevertheless, the distinct legacy of the historical school can still be seen in his assumptions about 'primitive communities'. Honoré, who studied at Oxford twenty years later, was connected to Allen through the Rhodes scholarship program (as Paton had been), and was strongly influenced by Hart, and the colonial legacy of legal primitivism is readily apparent in his work.

Although the links between each of these theories are now clear, the link between them and the subject matter of the judgment is not immediately apparent. Not one of the theories was a theory of Indigenous jurisprudence, nor written by an Indigenous author. Not a single one was an anthropological study of Indigenous Australian society or law. Nor were they theories of the (Western) legal academe that might have been more appropriate to a consideration of recognition, by the Anglo-Australian common law, of Indigenous laws and customs (such as legal pluralism, critical race theory, or post- or settler colonialism, for example). All three texts were dated by the turn of the 21st century — Paton and Stone's books had aged by over half a century, and by then even Honoré's essay, the most recent of the three, was thirty years old — and much had changed in legal theory in those couple of generations. To cap it off, not one of the cited works was even the latest edition or updated version of the text. Given the range of theoretical approaches available to the justices comprising the joint majority in 2002, the choice of these texts for a judgment concerning the nature of Indigenous Australian law and its recognition in Anglo-Australian legal doctrine seems extraordinary. The final, most recent, link in the genealogy is yet incomplete.

In this chapter, therefore, I question why the justices decided to rely upon these particular theories. I explore the potential influences upon their choice of theory — investigating the scholarly legal circles in which the justices, and the jurists they chose to rely upon, learnt and taught. I then draw Part V to a conclusion, consolidating the various insights from these three chapters to determine the theoretical pedigree of the way in which the Court deployed 'society' to limit 'law'.

II. LAWS AND CUSTOMS DO NOT EXIST IN A VACUUM — AND NEITHER DOES LEGAL THEORY

In the absence of evidence of their motivations, the answer to the question of *why* the justices chose to cite these specific theories of law can only ever be speculative. It may be possible however, to trace influences upon the justices' jurisprudential thought. A speech by Justice Michael Kirby at about the time of the judgment confirms this possibility, and offers a clue:

> Justices of the High Court who did not have the privilege of being Stone's pupils have told me that if you want to see the explanation of jurisprudence in our country and of the recent history of the High Court, you have only to ask how many of the leaders of that Court, and

> of the judiciary generally in Australia, were Stone's pupils. I can think of no other law teacher in Australia who had had a more profound and enduring impact on legal ideas.[1]

Given that all of the theorists cited by the Court were law teachers at major universities, I now investigate whether there are any connections between these jurists and the justices who cited their work.

I therefore examine the paths of the justices' law school educations and the university teaching of the jurists they cited — searching for correlations between law students, lecturers and prescribed texts. This section is divided according to university law schools, and covers (in order) Stone's teaching at Sydney University, Paton's at Melbourne and Honoré's at Oxford.

A 'Juliusprudence'

Julius Stone was Professor of Jurisprudence at Sydney University for thirty years, from 1942 to 1972. During that time, jurisprudence was a full year compulsory subject,[2] and Stone an engaging and effective teacher.[3] It has been argued that while his public commentary and service had considerable impact during his lifetime, and he left a legacy through his published books and papers, Stone's greatest monument was the continuing influence of his work on generations of law students.[4] He 'had a profound effect upon Australian legal culture … through the impact he had upon generations of law students, who went on to become the judges, politicians, scholars, diplomats and even merchant bankers of today.'[5] Many of those former students 'continue to express a profound debt' to him.[6]

---

[1] Justice Michael Kirby, 'Julius Stone — My Teacher' (Speech delivered at the launch of the Julius Stone Institute of Jurisprudence, The University of Sydney Faculty of Law, Sydney Law School Reports, 14 August 1999) ('Julius Stone — My Teacher').

[2] Anthony R Blackshield, 'The Legacy of Julius Stone' 20 (1) *University of New South Wales Law Journal* 215, 218.

[3] John M Ward, 'The Law School in World War II' in John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 97, 98; Justice Gordon Samuels, 'Julius Stone' (1986) 9 *University of New South Wales Law Journal* 9, 10; John Goldring, 'Julius Stone and the Study of Law and Society in Australia' (1985) 2(2) *Australian Journal of Law and Society* 4, 4–5; Kirby, 'Julius Stone — My Teacher' (n 1); IA Shearer, 'Professor Julius Stone, AO, OBE, QC' (1985) 8 *University of New South Wales Law Journal* 233, 234.

[4] Samuels (n 3) 9.

[5] Jeremy Webber, 'The Inauguration of the Julius Stone Institute of Jurisprudence' (2000) 25(2) *Australian Journal of Legal Philosophy* 123, 123.

[6] Ibid.

The impact of Stone's influence on the legal profession and academe in New South Wales has been widely recognised.[7] As Tony Blackshield has pointed out, during the thirty years that he was there, Sydney Law School was the only law school in the state. The result is that practically every university law graduate in New South Wales during that time had been taught by Stone.[8] Blackshield calculated that even if only a quarter of those students were 'fully receptive to his insights', that 'very modest estimate, when projected over a thirty-year period, suggests a remarkably far-reaching and pervasive influence on the legal profession of the State'.[9]

Of the seven High Court justices who decided the *Yorta Yorta* appeal, four had been taught by Stone — Chief Justice Gleeson, and Justices Gummow, Kirby, and Gaudron.[10] Two of the three joint majority justices therefore (Gleeson CJ and Gummow J), and both dissenting justices (Kirby and Gaudron JJ), had been Stone's students.

Murray Gleeson commenced his undergraduate studies in Arts/Law at Sydney University in 1956.[11] In a recent book chapter on Stone's influence on the legal profession, Gleeson wrote that the 'work and ideas of Julius Stone are still of great importance to the teaching and practice of law.'[12] Of Stone as a teacher, he recalled:

> We all knew that he was an internationally renowned scholar, and his comportment was scholarly … He was inquisitive and encouraged inquiry often on the part of undergraduates. In his dealings with undergraduates he was affable and good natured. Plainly, those who were most directly influenced by him were those who went on to become law teachers themselves. The judges and practitioners who were exposed to his ideas were individually influenced to varying degrees.[13]

Gleeson, however, appears to have been one of those who were not as greatly influenced as others, such as Michael Kirby (who had worked as a research assistant to Stone). Gleeson's biographer claims that, although he took the compulsory subjects taught by Stone —

[7] Goldring (n 3) 4–5; Blackshield (n 2) 218; Kirby, 'Julius Stone — My Teacher' (n 1).
[8] Blackshield (n 2) 218.
[9] Ibid.
[10] Kirby, 'Julius Stone — My Teacher' (n 1).
[11] Michael Pelly, *Murray Gleeson: The Smiler* (Federation Press, 2014) 21. Gleeson studied philosophy in the first year of his Arts degree: at 22.
[12] Murray Gleeson, 'Julius Stone and the Legal Profession' in Helen Irving, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press, 2010) 9, 12.
[13] Ibid 10.

Jurisprudence and International Law — Gleeson suggested that in fact he had had little to do with him.[14]

Gleeson was in the same year as Michael Kirby, and the two divided their subjects and shared their lecture notes, case notes and research.[15] Of this arrangement, Kirby said:

> We basically divided the world … He took the subjects that he was especially interested in, subjects as illuminating as Bankruptcy and Income Tax Law. And I took subjects that I was interested in, such as Constitutional Law, Jurisprudence and International Law.[16]

Since it was Kirby who attended the classes in Jurisprudence and International Law, it is not surprising that he was more influenced by Stone's teaching. Kirby has described Stone as 'a dynamo of the intellect and productivity',[17] who as a teacher, 'lifted our thoughts from mundane aspects of law. He opened our minds, as a great law teacher should'.[18]

Although Gleeson did not actually attend the classes, he nevertheless studied jurisprudence as it was taught by Stone, using the notes taken by Kirby, and of course, Stone's textbook. However, the question arises whether the misconstruction of Stone's work in Gleeson's judgment (as part of the joint majority) can be traced back to this division of subjects and the fact that Gleeson himself did not attend Stone's classes. Kirby's judgment (jointly with Gaudron) did not directly cite Stone, but their concept of society was more sympathetic to his work. Of the arrangement with Gleeson, Kirby presciently said:

> Future researchers of our judicial work will doubtless analyse our respective mastery of legal topics and trace it to our division of the spoils of study forty years ago.[19]

[14] Pelly (n 11) 25.

[15] Ibid 24; Justice Michael Kirby, '50 Years in the Law: A Critical Self-Assessment' (Speech to the legal profession of the Northern Territory in the Supreme Court, Darwin, 16 January 2009 and at the State Supreme Court and Federal Court Judges' Conference, Hobart, 26 January 2009); Justice Michael Kirby, 'Murray Gleeson — Law Student' (Speech delivered at The University of Sydney Faculty of Law Function to Honour the Appointment to the Office of Chief Justice of Australia of the Hon Murray Gleeson AC, Law School Assembly Hall, Sydney, 16 July 1998) ('Murray Gleeson — Law Student').

[16] Michael Kirby quoted in Pelly (n 11) 24.

[17] Justice Michael Kirby, 'Forty-Five Years On' (Speech delivered at the Reunion of the 1962 Graduating Class of the Faculty of Law, the University of Sydney, Australian Club, Sydney, 9th May 2007) ('Forty-Five Years On').

[18] Ibid.

[19] Kirby, 'Murray Gleeson — Law Student' (n 15).

The Province and Paton's *A Text-Book of Jurisprudence* were the prescribed text-books for the course studied by Gleeson and Kirby.[20] Apart from Stone's own course at Sydney, *The Province* was generally considered too difficult a textbook for undergraduate law students,[21] and was not as popular a prescribed text as Paton's book.[22] The updated versions of *The Province* (the trilogy) were not published until after that time, but Hart's *A Concept of Law* was published in 1961, Gleeson and Kirby's final year.[23]

Another member of the joint majority, Justice William Gummow, who studied Arts and Law at the University of Sydney during the early 1960s,[24] a couple of years after Gleeson and Kirby, was also taught by Stone.[25] Justice Mary Gaudron (who wrote the dissenting judgment jointly with Kirby J) had also been taught by Stone, and was reputed to have been inspired by his commitment to social justice.[26]

Ironically, notwithstanding the personal influence of Stone, the sociological emphasis in Stone's subjects had more in common with the law degree at Melbourne, than with the other teaching in the Sydney degree. While Stone's subjects were a departure from the otherwise

[20] Justice Michael Kirby, 'Harold Luntz: Doyen of the Australian Law of Torts' (2003) 27 *Melbourne University Law Review* 635, 638.

[21] WN Harrison, 'The Teaching of Jurisprudence: Reviews of A Text-book of Jurisprudence by George Paton and The Province and Function of Law by Julius Stone' (1948–1951) 1(1) *University of Queensland Law Journal* 63, 66; Hyman Tarlo, 'Law Schools and Law Teachers in Australia: 1946–1974' 9(1) *The University of Queensland Law Journal* 26, 28. See also W Friedmann, 'The Province and Function of Law: By Julius Stone' (1948) 11 *Modern Law Review* 235, 238.

[22] In a survey of jurisprudence teaching in Britain published in 1951, Paton's *Jurisprudence* was the second most prescribed text after Allen's *Law in the Making*; Stone's *Province* was not prescribed by any British law schools, but listed as further reading by a few. Paton's text was also on the list prescribed by HLA Hart at Oxford in the 1950s: in his 'typical list' of recommended reading, Hart listed Paton's text (along with Allen's *Law in the Making*) but omitted Stone's. In the 1970s Paton's text was still on the list of prescribed texts at law schools in Australia and Britain, but Stone's were not listed (except for his own courses), despite the relatively recent publication of the trilogy in the mid '60s. Both Stone's and Paton's texts were suggested by Lon Fuller as appropriate texts in American law schools. See RH Graveson, 'The Teaching of Jurisprudence in England and Wales' (1951) 4 *Journal of Legal Education* 127, 135–6; Simpson (n 79) 53; HLA Hart, 'Philosophy of Law and Jurisprudence in Britain (1945–1952)' (1953) 2(3) *The American Journal of Comparative Law* 355, 358; Alan Fogg, 'Content and objectives of Jurisprudential Teaching in Australasia' (1976–1979) 14 *Journal of the Society of Public Teachers of Law* 261, 276; RBM Cotterrell and JC Woodliffe, 'The Teaching of Jurisprudence in British Universities' (1974) 13 *Journal of the Society of Public Teachers of Law* 73, 87; Lon Fuller, 'The Place and Uses of Jurisprudence in the Law School Curriculum' (1948–1949) 1 *Journal of Legal Education* 495, 501.

[23] Gleeson and Kirby graduated in 1962.

[24] John Lehane, 'Gummow, William Montague Charles' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001; online version 2007). See also RP Meagher, 'Justice Gummow' (1995) 69 *The Australian Law Journal* 612.

[25] Kirby, 'Julius Stone — My Teacher' (n 1).

[26] See Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010).

heavy practical emphasis of the Sydney course,[27] the Melbourne degree, under the influence of George Paton, was more liberal and less vocational.

B George Paton and Jurisprudence at Melbourne Law School

Paton was Professor of Jurisprudence at the University of Melbourne for twenty years, from 1931 until his appointment as Vice-Chancellor in 1951.[28] It was his influence, as Dean of Law,[29] that determined the liberal nature of the law degree there.[30] Paton's approach to substantive law subjects, as well as jurisprudence, was sociological.[31] This was evidenced by his role in the introduction of the study of criminology in Australia.[32]

Paton's *A Textbook of Jurisprudence* was written for undergraduate law students, and was based upon his teaching at Melbourne Law School.[33] An insight into his teaching philosophy (and style) can be seen from a discussion of the Australian Universities Law Schools Association in 1949, where Paton said that 'ultimately it did not matter what one taught in Jurisprudence—the idea was to find out what stimulated the students, and teach them that'.[34]

On his appointment as Vice-Chancellor in 1951, Paton was succeeded as Professor of Jurisprudence by David Derham.[35] It was Derham who had edited the third edition of Paton's textbook (and the fourth edition together with Paton himself). Derham in turn was succeeded by Peter Brett, who occupied the chair from 1964 until 1975.[36] Both Derham and Brett continued Paton's broad, liberal approach to the study and teaching of law and jurisprudence.

---

[27] Gleeson (n 12) 10.

[28] Colin R McDonald, 'Professor George Paton: Fifth Dean of the Faculty of Law 1946-1950' in Ruth Campbell, *A History of the Melbourne Law School 1857–1973* (Faculty of Law, University of Melbourne, 1977) 132, 134; John Waugh, *First Principles: The Melbourne Law School 1857-2007* (The Myegunyah Press, 2007) 147.

[29] Paton was appointed Acting Dean of Law in 1943 and Dean of Law in 1946: McDonald (n 28) 136–7.

[30] See Waugh (n 28).

[31] Zelman Cowen, 'Professor Sir George Whitecross Paton' (1968) 24(2) *University of Melbourne Gazette* 1, 1; Waugh (n 28) 112.

[32] It was Paton who initiated discussions with John Barry, and ultimately established a department of criminology at the University of Melbourne, the first of its kind in Australia: Mark Finnane, 'The Origins of Criminology in Australia' 45(2) *Australian and New Zealand Journal of Criminology* 157; see also Waugh (n 28) 170-171.

[33] Paton, 'Preface' in George Whitecross Paton, *A Textbook of Jurisprudence* (Oxford, 1946) v.

[34] Tarlo (n 21) 28.

[35] Derham left in 1964 to become the foundation dean of law at Monash, later returning to the University of Melbourne as vice-chancellor, again succeeding George Paton: Cecily Close, 'Derham, Sir David Plumley (1920–1985)' 17 *Australian Dictionary of Biography* (MUP, 2007); Waugh (n 184) 156.

[36] Waugh (n 22) 158; Louis Waller, 'Brett, Peter (1918–1975)' 13 *Australian Dictionary of Biography* (MUP, 1993).

In 1953, Derham indicated that the boundaries of taught jurisprudence at Melbourne were set by the subject limits of Paton's text.[37] Derham argued forcefully for the broader approach to teaching jurisprudence, saying that '[i]f we do not at least make our students aware of the existence of other expanding branches of knowledge and of their impact on the law as it develops, our future lawyers will be less useful to the community than they should be'.[38] Brett was similarly adamant that law should be studied in light of knowledge from other disciplines in order to remain relevant to the life of the community.[39]

In the decades following Paton's accession to the University executive therefore, jurisprudence at the Melbourne Law School retained the broad outlook that had characterised Paton's time in the chair — in stark contrast to English jurisprudence, which had seen a revival of the analytical approach with Hart's appointment at Oxford.[40] Throughout the '50s, '60s and at least the first half of the '70s, Paton's successors ensured that his legacy of a broad sociological and contextual approach continued.

The third of the joint majority justices, Kenneth Hayne, began studying law at the University in Melbourne in 1964, the year the third edition of Paton's book was published. He studied there until 1968,[41] and was a student editor of the *Melbourne University Law Review*.[42] Without access to the archives at Melbourne Law School, there is a dearth of evidence about Hayne's

[37] Record of the meeting of the Society of Public Teachers of Law, held at Sheffield, England, 19th September 1953: See the record of the discussion following the President's Address in Denis Browne, 'Reflections on the Teaching of Jurisprudence' (1953) 2 *Journal of the Society of Public Teachers of Law* 79, 90.

[38] Browne (n 37) 90. Derham's openness to the sociological and realist schools of legal thought was reflected in his 'Australian Note of Appreciation' to Judge Jerome Frank: David Derham, 'Judge Jerome Frank: An Australian Note of Appreciation' (1957) 24(4) *University of Chicago Law Review* 643.

[39] Brett singled out advances in life and behavioural sciences as being particularly relevant: Peter Brett, *An Essay on A Contemporary Jurisprudence* (Butterworths, 1975) 87. His early scholarship demonstrated a scepticism of legal orthodoxy, and a 'preference for work with a distinctive Realist spirit': Susan Bartie, 'A Full Day's Work: A Study of Australia's First legal Scholarly Community' (2010) 29 *University of Queensland Law Journal* 67, 80. Brett's later 1975 essay, however, demonstrates a disillusionment with the American realists, whose work he describes as 'critical and destructive': Peter Brett, *An Essay on A Contemporary Jurisprudence* (Butterworths, 1975) 21–25. He expressed dissatisfaction with all the major schools of jurisprudential thought, including the realists, for failing to keep up with advances in the sciences: at 26.

[40] Indeed, Hart's appointment to the chair at Oxford coincided with Paton's resignation from the chair at Melbourne.

[41] Graeme Hill, 'Hayne, Kenneth Madison' in Coper et al (n 24).

[42] Justice KM Hayne, 'Foreword to the 50th Anniversary Edition of the Melbourne University Law Review', 31 *Melbourne University Law Review* 1.

time as student. However, some information about the nature of the jurisprudence subject as taught there at that time can be gleaned from the published literature.

Jurisprudence was a compulsory subject at Melbourne Law School throughout the first half of the 1960s,[43] when Hayne was a student. Sometime between 1967 and 1969, changes to the curriculum made it optional.[44] Given that the subject was compulsory for most of the time that he was a student, it is likely (but not certain) that Hayne studied jurisprudence in his undergraduate degree. The subject was probably taught by Peter Brett, who had just been promoted to the chair at the time. It is also probable, given that it was still a prescribed text in law schools across the country well into the 1970s,[45] that Brett retained Paton's book as the prescribed textbook. Derham had been working on the third edition immediately prior to his departure, and its publication coincided with Brett's appointment. As a student, Hayne was review editor of the issue of the *Melbourne University Law Review* containing a review of the third edition of Paton's textbook.[46]

If, as is likely, Hayne did study jurisprudence at Melbourne, it is unlikely to have been confined to the analytical approach that dominated Oxford Jurisprudence after Hart's accession to the chair in the early 1950s. However, his exposure to analytical jurisprudence would have been amplified when he went on to study for the BCL at Oxford, where he was taught by Tony Honoré.

[43] And had been compulsory for the preceding decades: Waugh (n 22) 173.
[44] Waugh notes that the new curriculum was introduced in stages between 1967 and 1969: ibid.
[45] Fogg (n 22) 276.
[46] EK Braybrooke, 'Paton: A Textbook of Jurisprudence (Derham, Ed)' (1965) 5(1) *Melbourne University Law Review* 103. Professor of Jurisprudence at University of Western Australia, Braybrooke said of Paton's textbook, that 'it is a book which should be in the hands of every law student, bought at an early stage in his career and kept by him for additional reading throughout his time at the Law School and beyond.'

C Tony Honoré, Oxford and another Rhodes Scholar

Tony Honoré began teaching in the law faculty at Oxford in 1948, and continued long after he had retired from the chair: a period of 70 years.[47] His teaching style is described as generous and kindly, focussing on key principles and explaining complex concepts in clear and lucid terms.[48]

Honoré taught Kenneth Hayne at the beginning of the 1970s. Hayne had been awarded a Rhodes scholarship in 1969, and arrived at Oxford not long after Hart's retirement from the chair of jurisprudence. Hayne was taught jurisprudence by both Honoré and Hart's successor, Ronald Dworkin, and this time at Oxford has been described as 'tremendously influential in [his] legal development'.[49] He graduated with first class honours in 1971.[50]

It is highly likely that Honoré had been finalising his essay on 'Groups, Laws and Obedience' during the time that Hayne was a student of his at Oxford in 1970 (certainly, the editing process for the volume in which it was published had taken place prior to 1972).[51] If Hayne was exposed to it then, it would explain why the Court cited the original 1973 publication, instead of the later refined version in *Making Law Bind.*

D The Final Link

At the height of their legal careers, therefore, the justices of the High Court of Australia were citing the works of their jurisprudence teachers that they had studied in their undergraduate or graduate law degrees.[52] In relation to the three texts, the justices were either taught by the author, studied the text as the prescribed text for the jurisprudence subject, or a combination of

[47] He continued to teach seminars in jurisprudence for the BCL (jointly with Dr John Gardner) until 2017, not long before his death on 26 February 2019 at age 97: John Gardner, 'Tony Honore 1921–2019' <https://www.law.ox.ac.uk/news/2019-03-05-tony-honore-1921-2019>.

[48] See John Gardner, 'Tony Honore as Teacher and Mentor: A Personal Memoir' in Boudewijn Sirks (ed) *Aspects of Law in Late Antiquity* (Oxford: privately published 2008); Jeremy Gauntlett, 'Laudatio for Tony Honoré' in Daniel Visser and Max Loubser (eds), *Thinking About Law: Essays for Tony Honoré* (SiberInk, 2011) 1.

[49] Graeme Hill, 'Hayne, Kenneth Madison' in Coper et al (n 24).

[50] Ibid.

[51] AW Brian Simpson, *Reflections on the Concept of Law* (Oxford, 2011) 5.

[52] This reliance upon their university lecturers, and texts dated by a generation or two, is extraordinary when one considers that, in their role on the bench of the highest court in the land, the justices of the High Court of Australia need to be up to date with every latest change in Australian law, regardless of the complexity or the minutiae. This makes it all the more surprising that when it comes to legal theory, those justices were citing the texts they studied at law school. Although a salient lesson on the importance of the teaching of legal theory, it casts a sobering picture of the place of legal theory in continuing legal and judicial education.

both. Gleeson and Gummow both studied jurisprudence at Sydney University under Julius Stone, with both Stone's and Paton's books as the set texts. Hayne studied his undergraduate degree at Melbourne Law School, where it is likely that Paton's book was still the prescribed textbook, and went on to Oxford as a Rhodes scholar, where he was taught legal theory by Tony Honoré at the very time Honoré was writing the essay.

Having filled in the final link, the genealogy of the conceptual connection between law and society as enunciated by the Court is now complete. The dominant theme (or gene, to continue the metaphor) is Oxford jurisprudence, whose historical links to Anglo-Australian legal scholarship through its imperial heritage have been preserved through the colonial mechanism of the Rhodes scholarship. The complementary information from the material and theoretical lineage (separated somewhat artificially for the purpose of the research) demonstrates the pedigree of the law-society connection, which is now summarised in the section below.

III. THE GENEALOGY OF THE LAW–SOCIETY CONNECTION

The idea of a society capable of law (for convenience I will refer to this idea as a 'legal society') has been used for centuries to limit the concept of 'law'. Iterations of the use of the 'legal society' as a determinant for the possibility of law can be found across the various schools of Anglo-Western legal thought over the past three or four centuries at least. The civil society–state of nature dualism of the Enlightenment thinkers denoted the capacity of certain societies — and the incapacity of other groups of people — to have law. Similarly, theorists of legal evolution employed the notion of societies needing to evolve to a certain stage before being capable of law. Analytical jurists such as John Austin limited the province of law by recourse to a legal society. Even the early sociological jurists graded the development of law by means of the capacity of the society.

Given this context, it is perhaps not surprising that the High Court listed the requirement of a 'society' as a pre-requisite for the existence of law. However, because of the views of Indigenous society and law concealed within it, the use of this notion of a legal society is deeply problematic when applied to determine the existence or otherwise of Indigenous Australian law. Inherent in the theoretical lineage of the concept of a legal society is the representation of Indigenous Australian societies as incapable of law.

As demonstrated in Chapter Three, since the time of first contact between British and Indigenous Australian peoples, Indigenous Australian societies have been depicted as the prime example of a pre-legal state or as 'evidence' of the very earliest forms of law. From the Scottish Enlightenment in the late 18th century, the historical school in the 19th, and the neo-evolutionists of the 20th century, evolutionary theorists such as John Millar, Paul Vinogradoff, and Alan Diamond used the notion of Aboriginal societies as primitive to position them prior to the evolution of law. The founder of analytical jurisprudence, John Austin, described Indigenous Australia as exemplifying a society incapable of law. And, to name just another example amongst many others, the pioneer of sociological jurisprudence, Roscoe Pound, expressly designated Indigenous Australian society as pre-legal. Those representations in turn informed the positing of a legal society, defined negatively by reference to Indigenous Australia, as a minimum qualification for the concept of 'law'. Indeed, the very idea of a society *incapable* of law was overtly constructed from negative perceptions of Indigenous Australian societies. Little wonder that the concept of a legal society as a pre-condition for law, manifest in the doctrine of terra nullius, was used continuously from the late 18th century, throughout the 19th and indeed for most of the 20th century, to deny the existence of Indigenous Australian law.

The reproduction of the legal society requirement in the current legal conditions for recognising the existence of Indigenous law is thus especially inappropriate. The theorists relied upon by the High Court in *Yorta Yorta* — Paton, Stone and Honoré (cited in relation to the interdependence of law and society), and HLA Hart (whose 'rule of recognition' was invoked to deny the recognition of law to a 'later' society observing traditional law) — all portrayed Indigenous Australian communities as representative of the primitive origins of Anglo-Western legal societies. In the case of Stone, Paton and Hart, that depiction was explicit; in Honoré's theory it was implicit. In every single one, Indigenous societies and law were positioned in ideational opposition to Anglo-Australian law. For all, with the possible exception of Stone, that positioning was outside the conceptual realm of law.

Hart, Paton and Honoré all prescribed, in an analytical sense, a society which has reached a certain stage of development as an *a priori* baseline qualification for the existence of law. For each, that stage involved the establishment of Western-style legal infrastructure — for Hart, the development of secondary rules of change, adjudication and recognition, for Paton machinery for creating, declaring and enforcing law, and for Honoré the functions and associated rules of

legal institutions. As Austin had done a century earlier, both Hart and Paton used negative perceptions of Indigenous Australian societies to inform the outer limits of that conceptual legal society.

While Stone denied the relevance of such positivist prescriptions to actual societies and law, he nevertheless privileged Western law and used Western legal concepts as a framework for viewing diverse communities. It was this aspect of his approach to jurisprudence that enabled it to be invoked — in apparent contradiction to its sociological roots — in support of the Court's positivist position. In Chapter Five, I indicated the seeming incongruity in the Court's use of sociological jurisprudence in support of a positivist agenda (setting criteria for the identification and differentiation of law from other normative phenomena). This contradiction is resolved by what Peter Fitzpatrick has called the 'myth of law's transcendence'.[53] As Fitzpatrick pointed out, despite the apparent opposition between positivist and sociological accounts of law, both end up positioning law above society. Legal positivism 'relied on social attributes of law, only then mysteriously to separate law from those attributes and set it above them'.[54] Sociological jurisprudence, '[n]o less mysteriously … persistently invoked and eventually succumbed to law's distinct identity'.[55] By centralising Western law and a Western legal framework, Stone reinforced and contributed to the image of Indigenous Australian societies at a nascent stage of legal development.

The seemingly innocuous statement about the connection between law and society in *Yorta Yorta* thus conceals a denial of the capacity of Indigenous Australian communities to have 'law'.

This in turn has implications for the capacity of Anglo-Australian legal doctrine to recognise the existence of Indigenous law at all. In the most recent High Court decision concerning the common law's acknowledgement of Indigenous Australian law, *Love v Commonwealth*, the paragraph containing the references to Stone, Paton and Honoré was reproduced.[56] Quoting the passage *in full*, Nettle J relied upon it to assert that 'more fundamental than the common law's recognition of rights and interests arising under traditional laws and customs is *the common*

[53] Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992) 9.
[54] Ibid.
[55] Ibid.
[56] *Love v Commonwealth* [2020] HCA 3 [269] (Nettle J) *(Love)*.

law's recognition of the Aboriginal societies from which those laws and customs organically emerged.'[57] Nettle J held that the historical connection between Aboriginal societies and the territory of Australia under their traditional law at the time the Crown acquired sovereignty over that territory gives rise to a special obligation of protection owed to Aboriginal societies and their members by the Crown in right of Australia.[58] That legal recognition of Aboriginal societies is limited however, by the concept of a legal society:

> So long as an Aboriginal society which enjoyed a spiritual connection to country before the Crown's acquisition of sovereignty *has, since that acquisition of sovereignty, remained continuously united in and by its acknowledgement and observance of laws and customs deriving from before the Crown's acquisition of sovereignty over the territory* … the unique obligation of protection owed by the Crown to the society and each of its members in his or her capacity as such will persist.[59]

Nettle J's judgment was overtly respectful of Indigenous Australian societies, their agency with respect to their own law and authority within that jurisdiction. Nevertheless, it was underpinned by the theoretical genealogy of the Court's conceptualisation of a legal society, which continues to limit the capacity of Anglo-Australian law to recognise Indigenous law. Latent within the ostensible recognition is a denial of its very existence.

IV. CONCLUSION

The genealogy of the conceptual connection between 'law' and 'society' exposes the contingency and cultural specificity of what was portrayed by the Court as a fundamental principle of the common law. Permeating that genealogy is Oxford Jurisprudence.

In a demonstration of the web of connections between Oxford and elite Australian law schools, the justices comprising the joint majority in *Yorta Yorta* cited the texts they had studied in their undergraduate or graduate law degrees, written by their jurisprudence lecturers — themselves all products of Oxford jurisprudence. The agency of the judiciary, in choosing (and

[57] Ibid (Nettle J).
[58] Ibid [272–284] (Nettle J).
[59] Ibid [278] (Nettle J). Nettle J added that there is a reciprocal obligation of a member of Aboriginal society to the Crown in right of Australia: at [279].

manipulating) legal principle, provides yet another manifestation of the contingency and cultural specificity of the principle itself.

The theoretical pedigree of the law–society connection, infused with the denial of the capacity of Indigenous Australian communities to have 'law', demonstrates how an apparently reasonable statement made in *Yorta Yorta* about the indispensable role of 'society' in connection with 'law' could have enabled the Court to deploy the concept of 'society' to limit the recognition of Indigenous Australian law.

PART VI

CONCLUSION

CHAPTER TEN
A DE-CONSTRUCTION OF 'TRADITIONAL LAWS AND CUSTOMS' IN CONTEMPORARY ANGLO-AUSTRALIAN LAW

I. INTRODUCTION

Throughout this thesis I have engaged in a careful and thorough deconstruction of the way Indigenous Australian law is conceptualised in the Anglo-Australian legal doctrine that contemplates its survival. I have unpacked the theoretical and conceptual constitution of the construct of 'traditional laws and customs' in contemporary Australian law, and in so doing, I have interrogated the jurisprudence that forms the basis of Anglo-Australian legal sovereignty.

The original methodological infrastructure of this thesis — with its network of diverse, complementary, interdisciplinary methods — has enabled a rigorous analysis of the legal recognition of Indigenous Australian law. The synthesis of intersecting and iterative modes of deconstruction has yielded a compound and complex analysis that could not have been achieved by the deployment of any of the methods individually or discretely.

In Part II (Chapters Two and Three), this framework of various styles of deconstruction was brought to bear in a survey of nearly two hundred years of Anglo-Australian jurisprudence — that heritage of legal thought forming the theoretical background to the classification of Australia as 'terra nullius'. The analysis resulted in the exposure of a binary opposition as the mechanism that historically enabled the disqualification of Indigenous law from 'law', leading to the justification of terra nullius. Further deconstruction of that dualism demonstrated the legacy of these thought patterns, providing a foundation for the analysis of the recognition of law in the substantive parts of the thesis.

The legal recognition of Indigenous Australian law and the construct of 'traditional laws and customs' were introduced in Part III. Legal research and analysis techniques were utilised in Chapter Four to identify the development and current state of legal doctrine relating to the common law recognition of 'traditional laws and customs', and to establish the legal authority of High Court decision in *Yorta Yorta*. Deconstruction of the doctrine commenced in Chapter Five, with the first stage of deconstruction (in the broad sense of dismantling component legal and philosophical materials) involving a close reading of the leading judgment in *Yorta Yorta*. The critical analysis of the legal reasoning in that chapter revealed both implicit and explicit

reliance upon legal theory. The theories implicitly relied upon by the Court became the subject matter of Part IV of the thesis, and those explicitly relied upon, the subject of Part V.

In subsequent chapters (Chapters Six, Seven and Eight), I scrutinised each of the theories that informed the Court's construction of 'traditional laws and customs' in turn. Using the broadest style of deconstruction, I examined the way 'law' was conceptualised in each one. I assessed the capacity of each of the theories to adequately encompass and/or account for Indigenous law, and appraised the way Indigenous law was treated. The second level of deconstruction (examining the limits and exclusions of those unpacked conceptual components) revealed the conceptual boundaries of 'law' in each of the theories, assessing them in relation to the relative positioning of Indigenous law — identifying what was centralised or included, and what was marginalised or excluded. On yet another level, using the genealogical style of deconstruction, I meticulously researched the academic context of each of the theories and their authors, revealing the sources of, and influences on, their attitudes to Indigenous Australian law. I examined primary and secondary juridical materials (including drafts, lecture notes, and speeches), historical and biographical material (including bibliographic records, newspaper articles, personal papers and correspondence), anthropological studies, and historical and academic commentaries. Connecting this information to that documented in Part II, I thereby charted the genealogy of the Anglo-Australian treatment of Indigenous Australian law, drawing this analysis together in Chapter Nine.

The integration of these intersecting and compounding modes of deconstruction into a cohesive framework has thus resulted in a robust interrogation of the theoretical background and conceptual composition of the legal construct of 'traditional laws and customs'. The deployment of these methods throughout the thesis has enabled me to draw the following conclusions.

II. THE CONSTRUCT OF 'TRADITIONAL LAWS AND CUSTOMS'

Far from a recognition of Indigenous Australian law, 'traditional laws and customs' is a construct of Anglo-Australian legal doctrine that reflects a deficit version of an Anglo-Western model of law.

Every theory relied upon by the High Court in *Yorta Yorta* to determine the recognition of Indigenous Australian law centralises Western 'state' law. All of the theories rely upon an

artificial construct — a primitive condition — to explain the nature of 'law'. This construction results in a civilised–primitive dualism. The dualism is most apparent in the analytical theories, where the 'primitive' is obviously an artificial construct. However, the evolutionary theories also give rise to the dualism, as there is a polarity between the civilised and primitive. The dualism is a simple, artificial measure of difference whereby the presence of a Western-style legal system on one side of a single axis is mirrored by its absence on the other. Both sides of the measure are constructed by reference to an Anglo-Western legal system. One is the positive manifestation, the other the negative of the same model. Indigenous perspectives have no place on either side of the dualism, and are thereby rendered invisible.

The inappropriateness of using this theoretical model to determine the nature and survival of Indigenous Australian law is compounded by the fact that in almost every single theory relied upon by the Court, the primitive 'other' was *explicitly* constructed using negative Western perceptions of Indigenous Australian law and society. With the exception of Tony Honoré's essay, each of the theories relied upon by the Court overtly portray Indigenous Australian law as representative of the 'primitive' pre-legal origins of Anglo-Western law, and position it at, or outside, the limits of the concept of 'law' itself. Honoré's work implicitly positioned Indigenous Australian society and law prior to legal evolution. In doing so, these theories incorporate and reproduce the legacy of the way Indigenous Australia has been portrayed in British legal thought from the time Indigenous Australians first became known to them.

The theoretical foundations of the doctrine of intersecting normative systems are therefore virtually identical to those of terra nullius. Indeed, they *consolidate* terra nullius by reaffirming the identification of Indigenous Australia as primitive. Deeply embedded in the Anglo-Western construct of 'traditional laws and customs' is the claim that Indigenous Australian social order does not and cannot amount to 'law'.

This legal understanding of Indigenous Australian law bears no resemblance to the law described by Indigenous scholars. Rather than being recognised as a source of authoritative information about Indigenous law, Indigenous knowledge holders have not been consulted at any level or at any stage — either in the Court's reasoning, or in the theories relied upon by the Court, or in the theoretical lineage of these ideas of Indigenous Australian law. Indigenous

knowledges, expertise, and authority with respect to their own law have been completely excluded.

Instead, the knowledge that is valued is the knowledge of jurisprudence at Oxford University, England in the 19th and 20th Centuries, passed down to elite law schools in Australia in the middle of the 20th century, via the Rhodes scholarships connecting the two. The respected knowledge holders are in fact these writers and teachers of jurisprudence, and it is their negative perspectives of Indigenous Australia that have informed the way Indigenous Australian law is conceptualised in the Anglo-Australian legal doctrine that recognises its survival.

Rather than Indigenous perspectives or worldviews, the conceptual basis for the construct of Indigenous Australian 'traditional laws and customs' in contemporary Australian law is rooted in the mythical evolutionary pre-history of English law. Its construction from notions of the relative capacity of 'civilised' and 'primitive' societies for 'law', as determined by British legal theorists in the enterprise of describing and justifying their own law, means that the concept is entirely constrained by the paradigm of Anglo-Western law. The heritage of 'traditional laws and customs' is English.

III. INDIGENOUS AUSTRALIANS AS PRIMITIVE 'OTHER'

A The Civilised–Primitive Binary

I now want to explore some of the further implications of the presence of the civilised–primitive dualism in the theories underpinning the recognition of Indigenous law in *Yorta Yorta*. As demonstrated by the deconstruction of the binary in Chapter Three, the primitive 'other' has three related senses. It represents the *absence* of an Anglo-Western style system of law, the *deficit* features of 'civilisation' and the *past* of Anglo-Western societies. These three senses are all manifested by the theories relied upon by the High Court in *Yorta Yorta.*

Each of these theories represented Anglo-Western legal systems as the epitome of 'law' and the height of legal evolution. Each portrayed the primitive 'other', conspicuous by the absence of an Anglo-Western style system of law, as non-legal and pre-legal (with the exception of Stone, who nevertheless portrayed it as the earliest stage of evolution). Every one described Anglo-Western legal systems as advanced, complex, rational, and systematised, and depicted the primitive as the corresponding negative image: rudimentary, superstitious, ad hoc, and arbitrary. All attributed the legal sophistication of Anglo-Western legal systems to advanced

evolution, and represented the primitive 'other' as the original state from whence that evolution began.

Despite its manifest inapplicability to Indigenous law, the theories relied upon by the Court repeated the tendency discernible throughout the recent history of Anglo-Western thought, of using negative perceptions of Indigenous Australian law as 'evidence' of the pre-history (ie, preceding the known history) of Anglo-European peoples. The primitive 'other' represents the lost history of ancient English customary law.

The identification of Indigenous Australia with the pre-historic origins of Anglo-Western civilisation carries serious implications for the capacity of Anglo-Australian legal thought to ever meaningfully recognise Indigenous law. It brings into question the very possibility of contemporaneous co-existence of Indigenous law alongside Anglo-Australian law. On a linear-time scale, the past cannot co-exist with the present except as its history. In that sense it has contributed to the present but ceases to exist in its own right. The contemporaneous full existence of the two within a linear-time paradigm is conceptually impossible. Where they do coexist, therefore, there is an implication that one has already overtaken (and effectively replaced) the other. The civilised has superseded its archaic past, the primitive, which ceases to have any relevant meaning or function other than as an historic artefact or museum piece.

Recognition of Indigenous law on this conceptual basis limits its role to that of a relic of the past rather than having an ongoing, meaningful function into the future. It makes its displacement by, and replacement with, Anglo-Western law appear natural and inevitable. There are strong echoes here of the social Darwinist notion of entire peoples dying out as a consequence of 'natural selection'. Contemporary Indigenous law is perceived as an anachronism — the last vestiges of an archaic customary law regime, marking time until its natural demise. The sense of inevitability, which is directly attributable to the impact of the civilised–primitive binary, finds clear expression in Brennan J's euphemism of the tide of history washing away any real acknowledgment and observance of Indigenous law. What this deconstruction demonstrates however, is that it is only adherence to the dualism that leads to this perception.

As outlined previously, this deconstruction does not destroy the binary opposition. By revealing the conceptual mechanism within it, however, deconstruction can disturb the apparent naturalness of its conceptual categories, exposing their artificiality and their limitations. This intervention has demonstrated how the operation of the dualism has effected the violent exclusion of Indigenous knowledges about their law, and resulted in a fabricated view of Indigenous law as a fragile relic from an archaic past that cannot conceivably coexist with the common law in any other, more meaningful, way. In light of the insights generated by this deconstruction, I now analyse the effect of the dualism upon the common law recognition of Indigenous law in the Anglo-Australian legal doctrine of intersecting normative systems.

B The Impact of the Dualism upon the Recognition of Indigenous Australian Law

The conceptual consequences of the civilised–primitive binary can be seen clearly in both the broad themes and the technical detail of the *Yorta Yorta* decision.

One of the most obvious impacts of the dualism on the judgment is the exclusion of Indigenous understandings of their own law. The joint majority in *Yorta Yorta* completely omitted any consideration of knowledge or theory emanating from those with authority or expertise in Indigenous Australian law. As a result, Indigenous concepts of law are conspicuously absent from the reasoning.

Another effect of the dualism, the conceptualisation of Indigenous law as a museum piece, is seen in two of the signature moves of the judgment — the impairment of the Indigenous normative system upon intersection with the common law and the requirement of continuity of the pre-sovereignty normative system. The loss of Indigenous law-making power as an immediate consequence of the intersection of normative systems was posited in *Yorta Yorta* as a ‘natural’ or inevitable consequence of the change in sovereignty. The blatant lack of equality afforded the intersecting normative systems is normalised in the judgment by the absence of any rationale or supporting reasoning as to why, or even how, the change in sovereignty had this drastic effect (this is so regardless of whether or not one accepts the validity of the proposition that the change in sovereignty mandated this loss of law-making power). This gives an appearance of inevitability to the disempowerment of the Indigenous normative system, a fatalism reminiscent of social Darwinism which is directly attributable to the impact of the dualism.

The requirement of continuity of the pre-sovereignty normative system also reflects the pervasiveness of the view of Indigenous law as historic artefact. It enabled the denial of recognition to an Indigenous law that was portrayed in the native title claimants' submissions as rejuvenated and dynamic. A revitalised contemporary law, even one based upon ancient tradition, doesn't accord with the notion of a relic from archaic times because it holds out a vision and a relevance for the future. This sheds light upon why the majority had difficulty accepting it as 'traditional law and custom'. Instead, the Court upheld the decision of the trial judge who had relied upon the 'tide of history' metaphor. The conceptual effects of the dualism thus account for two of the areas of the judgment that have attracted sustained criticism.

In a similar way, the alignment of Indigenous law with the primitive legal 'other' (in the dual senses of the deficit of features of 'civilisation' and of representing the past of Anglo-Western societies) accounts for many of the problematic aspects of the reasoning. It is encapsulated in the comparison drawn in the judgment between the 'traditional laws and customs of societies having no well-developed written language' and a 'developed European body of written laws'. In Part III, I listed some of the major areas of criticism of the *Yorta Yorta* decision: the failure to accommodate the impacts of colonisation, or to allow for corresponding change in Aboriginal society and law, and the introduction of an additional criterion (proof of a continuing society). I also listed a range of anomalies in the judgment: the majority's reliance upon the trial judge's findings despite those findings failing to satisfy the test in their reasoning (logical inconsistency); requiring proof of the continued existence and vitality of Indigenous law while simultaneously denying its law-making capacity (internal contradiction); and inferences that Indigenous law is merely a set of customs, or even protocols. Each of these is explained by the impact of the dualism.

One of the features that has been consistently allocated to the 'primitive as deficit' involves the absence of machinery to create or deliberately alter law, resulting in the characterisation of primitive law as static and capable only of very gradual evolution. As such, the primitive legal 'other' is capable of continued, albeit rudimentary, existence and vitality without having a 'law-making' capacity. The alignment of Indigenous with 'primitive' thus accounts for the Court's assumption that an Indigenous normative system could have continued existence and vitality despite denying its law-making capacity, resulting in one of the major logical contradictions in the judgment. It also accounts for the Court's failure to allow for corresponding change in

Aboriginal society and law to accommodate the impacts of colonisation. The primitive legal 'other' is incapable of responding dynamically to anything other than gradual social change, let alone the type of catastrophic change faced by Indigenous societies as a result of colonisation. The notion of the primitive representing the Anglo-Western past also accounts for why the justices had difficulty accepting that Indigenous law can validly change or develop into the future. The only conceivable development for the primitive as Anglo-Western past would align with the historic development of Anglo-Western law, not a different trajectory — and the conceptual implication of the dualism is that that has already happened, resulting in its 'natural' supersession by Anglo-Western law.

Another feature of the primitive legal 'other' is the absence of a system. 'Primitive law' has been construed as constituting unsystematised sets of customs and social norms, the only reason for their continued observation being long-standing use. This also corresponds with the idea of the primitive representing the past of common law in the ancient customs of the realm (resulting in Indigenous law being styled 'customary law'). It accounts for the Court's assumptions throughout the judgment of Indigenous law as a set of customs or protocols despite the rhetoric of Indigenous law as a body of normative rules, and the corresponding rejection of the notion that Indigenous law may not amount to a 'system'.

Finally, assumptions about 'primitive law' and 'primitive society' as surviving remnants of an archaic past explain the majority's difficulty in *Yorta Yorta* in associating traditional law with urban peoples. The dualism pairs 'civilised' society with Anglo-Western law and 'primitive' society with 'primitive law'. Traditional law is associated with traditional lifestyles, and the assumption of natural progression implies that adoption of Western lifestyles requires Western law.

Instead of effecting a recognition of the survival of Indigenous law, the doctrine of intersecting normative systems reiterates the assumptions of terra nullius. The violence inherent in the doctrine of intersection thus repeats and iterates the violence of invasion and dispossession.

IV. THE CONCEPT OF 'LAW'

Having charted the treatment of Indigenous Australian law in Anglo-Australian juristic thought, probing its relation to concepts of 'law', I now tease out the intricacies of that relative positioning. I interrogate the boundaries drawn around the concept of 'law' and explore the

liminal space between it and Indigenous Australian law. In doing so, I turn the inquiry around. Having addressed the issue of how Indigenous Australian law has been conceptualised apropos 'law', I now confront the converse question. I ask whether that relative positioning of Indigenous Australian law has influenced the Anglo-Western concept of 'law' itself.

Since the first known contact with Indigenous Australian peoples, British jurisprudence has used Indigenous Australia to mark the outermost limits of 'law'. In common with this tradition, each of the theories underpinning the concept of law in the doctrine of intersecting normative systems in *Yorta Yorta* deliberately placed Indigenous Australian law beyond or at the outermost boundaries of what could be considered 'law'. The limits of 'law' were thus drawn to exclude, or marginalise, Indigenous Australian peoples' law. Indeed, perceptions of Indigenous Australian law have been instrumental in the drawing up of and the placement of those limits.

Time and again, theory after theory used the notion of Indigenous Australian societies as the archetype of a society without law, or as the epitome of the earliest beginnings of legal evolution. Each specified Indigenous Australia as the outer frontier of the concept of 'law' itself. Indigenous Australia was the reference point according to which the conceptual boundary of law was positioned. This positioning transcends the accepted distinctions between the various schools of thought within Anglo-Western jurisprudence.

In her deconstruction of the limits of 'law', Margaret Davies has demonstrated that 'what the notion of a limited law represses is that each law, and the entirety of the legal system, *is marked by the otherness which it excludes*'.[1] The non-legal 'other', excluded or denied by the limits placed around the concept of 'law', nevertheless intrudes into — and is essential to — the concept of 'law'.[2]

As the explicit delineation of what counts as law and what doesn't, the denial of Indigenous Australian law is therefore essential to the Anglo-Western construct of 'law' itself. It forms the

[1] Margaret Davies, 'Derrida and Law: Legitimate Fictions' in Pierre Legrand (ed), *Derrida and Law* (Ashgate, 2009) 71, 79 (emphasis in original). See also Margaret Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (Pluto Press, 1996) ('*Delimiting the Law*').

[2] Margaret Davies, *Delimiting the Law* (n 1).

conceptual boundaries of the construct, and as such, the modernist Anglo-Western construct of law *depends upon* the denial of law to Indigenous Australians.

V. CONCLUSION

I started this thesis with the question of how Indigenous Australian law has been portrayed in Anglo-Australian legal thought. In answering that question, I have demonstrated how Anglo-Australian law has been perceived within its own tradition. The modernist Anglo-Western concept of law has been constructed in such a way that embeds the denial of Indigenous Australian law within it. The denial of Indigenous Australian law has actually been integrated as an essential part of the modernist Anglo-Western construct of 'law' itself. That makes the recognition of Indigenous law as 'law' conceptually unachievable.

Nevertheless, what this thesis has shown is that these ways of conceptualising law are historically and culturally contingent. The theoretical foundations of the decision in *Yorta Yorta* were not inevitable. The High Court had a choice of legal theory, including a wide range of contemporary jurisprudence and a body of expertise about Indigenous understandings and exercise of law. It is only the *choice* of theoretical framework in that judgment that has rendered the meaningful recognition of Indigenous law practically impossible. As a case study, this offers a salient lesson on the role of legal educators and the importance of continuing judicial education.

The research in this thesis creates an opportunity for critical reflection upon the Anglo-Australian discipline of law, and the way lawyers and legal scholars conceptualise 'law'. Once we understand how these concepts have been constructed, we can rethink or reimagine the way we in the Anglo-Australian academe conceptualise 'law'. This will create a space for renegotiating the respectful coexistence of Indigenous and Anglo-Australian law.

BIBLIOGRAPHY

A Articles/Books/Reports

Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 1999* (Report No 1/2000, 7 April 2000)

Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2002* (19 March 2003)

Alford, Katrina, 'White-washing Away Native title Rights: The Yorta Yorta Land Claim and the "Tide of History"' (1999) 13 *Arena* 67

Allen, Carleton Kemp, *Forty Years of the Rhodes Scholarships* (Oxford, 1944)

Allen, Carleton Kemp, 'Jurisprudence: What and Why?' in Carleton Kemp Allen, *Legal Duties and Other Essays in Jurisprudence* (Oxford, Clarendon Press, 1931) 1

Allen, Carleton Kemp, *Law in the Making* (Oxford University Press, 1927)

Allen, Carleton Kemp, *Law in the Making* (Oxford University Press, 2nd ed, 1930)

Allen, Carleton Kemp, *Law in the Making* (Oxford University Press, 3rd ed, 1939)

Allen, Carleton Kemp, *Law in the Making* (Oxford University Press, 4th ed, 1946)

Allen, Carleton Kemp, *Law in the Making* (Oxford University Press, 5th ed, 1951)

Allen, Carleton Kemp, *Law in the Making* (Oxford University Press, 6th ed, 1958)

Allen, Carleton Kemp, *Law in the Making* (Oxford University Press, 7th ed, 1964)

Allen, Carleton Kemp, *Legal Duties and Other Essays in Jurisprudence* (Oxford Clarendon Press, 1931)

Allen, Carleton Kemp, 'The Rhodes Scholars and Oxford 1931–52' in Godfrey Elton (ed) *The First Fifty Years of the Rhodes Trust and the Rhodes Scholarships* (Oxford, 1956)

Allen, Dorothy, *Sunlight and Shadow* (Oxford University Press, 1960)

Almeida, Luis Duarte de, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's* The Concept of Law (Hart Publishing, 2013)

Amankwah, HA, 'Post-*Mabo*: The Prospect of the Recognition of a Regime of Customary (Indigenous) Law in Australia' (1994) 18(1) *University of Queensland Law Journal* 15

Anaya, S James, *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, 2004)

Angie, Antony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004)

Anker, Kirsten, *Declarations of Interdependence: A Pluralist Approach to Indigenous Rights* (Routledge, 2014)

Anker, Kirsten, 'Law in the Present Tense: Tradition and Cultural Continuity in *Members of the Yorta Yorta Aboriginal Community v Victoria*' (2004) 28(1) *Melbourne University Law Review* 1

Anker, Kirsten, 'Postcolonial Jurisprudence and the Pluralist Turn: From Making Space to Being in Place' in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press, 2017) 261

Aristotle, *The Nichomachean Ethics* tr David Ross (Oxford University Press, 1990)

Arneil, Barbara, *John Locke and America: The Defence of English Colonialism* (Oxford: Clarendon Press, 1996)

Aroney, Nicholas, 'Julius Stone and the End of Sociological Jurisprudence' (2008) 31 *University of New South Wales Law Journal* 107

Aroney, Nicholas and Jennifer Corrin, 'Endemic Revolution: HLA Hart, Custom and the Constitution of the Fiji Islands' (2013) 45(3) *Journal of Legal Pluralism and Unofficial Law* 314

Atkinson, Henry, 'Yorta Yorta Cooperative Land Management Agreement: Impact on the Yorta Yorta Nation' (2004) 6(5) *Indigenous Law Bulletin* 23

Atkinson, Wayne, 'Mediating the Mindset of Opposition: The *Yorta Yorta* Case' (2002) 5(15) *Indigenous Law Bulletin* 8

Attwood, Bain, 'The Articulation of "Land Rights" in Australia: The Case of Wave Hill' (2000) 44(1) *Social Analysis: The International Journal of Social and Cultural Practice* 3

Attwood, Bain, *Rights for Aborigines* (Allen & Unwin, 2003)

Attwood, Bain and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007)

Austin, John, *The Province of Jurisprudence Determined*, ed David Campbell and Philip Thomas (Ashgate, first published 1832, 1998 ed)

Australian Human Rights Commission, *Bringing Them Home* (Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 1997)

Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Australian Indigenous Studies* 2011

Australian Law Reform Commission, *Connection to Country: Review of the* Native Title Act 1993 *(C'th)* (Report No 126, April 2015)

Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, June 1986)

Baier, Kurt, *The Moral Point of View: A Rational Basis of Ethics* (Cornell University Press, 1958)

Balkin, JM, 'Deconstructive Practice and Legal Theory' (1987) 96(4) *Yale Law Journal* 743

Balkin, JM, 'Being Just with Deconstruction' (1994) 3 *Social and Legal Studies* 393

Balkin, JM, 'Nested Oppositions' (1990) 99(7) *Yale Law Journal* 1669

Balkin, JM, 'Tradition, Betrayal and the Politics of Deconstruction' (1989–1990) 11 *Cardozo Law Review* 1613

Balkin, Jack M, 'Deconstruction' in Dennis Patterson (ed) *A Companion to the Philosophy of Law and Legal Theory* (2010, 2nd ed, Blackwell) 361

Bammer, Gabriele, *Strengthening Interdisciplinary Research: What it is, What It Does, How it Does it and How it is Supported* (Report for the Australian Council of Learned Academies, 2012)

Banner, Stuart, *Possessing the Pacific* (Harvard, 2007)

Banner, Stuart, 'Why Terra Nullius? Anthropology and Property Law in Early Australia' (2005) 23(1) *Law and History Review* 95

Barkun, M, *Law Without Sanctions: Order in Primitive Societies and the World Community* (Yale University Press, 1968)

Barnes, HE, 'Hartland, *Primitive Law*' (1925) 4(1) *Social Forces* 196

Bartie, Susan, 'A Full Day's Work: A Study of Australia's First Legal Scholarly Community' (2010) 29 *University of Queensland Law Journal* 67

Bartlett, Richard, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015)

Bartlett, Richard H, 'Aboriginal Land Claims at Common Law' (1983) 15 *University of Western Australia Law Review* 293

Bayles, Michael D, *Hart's Legal Philosophy: An Examination* (Kluwer Academic Publishers, 1992)

Bederman, David J, *Custom as a Source of Law* (Cambridge University Press, 2012)

Behrendt, Larissa, *Aboriginal Dispute Resolution: A Step Towards Self-Determination and Community Autonomy* (Federation Press, 1995)

Behrendt, Larissa, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003)

Behrendt, Larissa, 'Asserting the Doctrine of Discovery in Australia' in Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracy Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010) 187

Behrendt, Larissa, 'The Doctrine of Discovery in Australia' in Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracy Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010) 177

Bell, Duncan (ed), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge University Press, 2007)

Benton, Lauren and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Harvard University Press, 2016)

Benton, Lauren and Richard J Ross (eds), *Legal Pluralism and Empires, 1500-1850* (Cambridge University Press, 2002)

Bhabha, Homi K, 'The Commitment to Theory' (1988) 5(1) *New Formations* 5

Bhabha, Homi K, 'The Other Question — The Stereotype and Colonial Discourse' (1983) 24(6) *Screen* 18

Bhabha, Homi, 'Of Mimicry and Man: The Ambivalence of Colonial Discourse' (1984) 28 *October* 125

Bix, Brian 'HLA Hart and the Hermeneutic Turn in Legal Theory' (1999) 52 *SMU Law Review* 171

Black, CF, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011)

Blackshield, Anthony R, 'The Legacy of Julius Stone' 20(1) *University of New South Wales Law Journal* 215

Blackshield, Anthony, 'Stone, Julius (1907-1985)' *Australian Dictionary of Biography*, <http://adb.anu.edu.au/biography/stone-julius-15728/text26916>

Blackstone, William, *Commentaries on the Laws of England* (1765–1769)

Boucher, David, 'Hobbes' Contribution to International Thought, and the Contribution of International Thought to Hobbes' (2015) 41(1) *History of European Ideas* 29

Bowden, Brett, 'Civilisation and Savagery' in George Kassimeris and John Buckley (eds), *The Ashgate Research Companion to Modern Warfare* (Ashgate 2010) 271

Bowden, Brett, 'Civilisation: "It Means Just What I Choose it to Mean" (2017) 54(2) *Society* 126

Bowden, Brett, 'The Colonial Origins of International Law, European Expansion and the Classical Standard of Civilisation' (2005) 7 *Journal of the History of International Law* 1

Bowden, Brett, *The Empire of Civilisation: The Evolution of an Imperial Idea* (University of Chicago Press, 2009)

Bowden, Brett, 'In the Name of Progress and Peace: The "Standard of Civilisation" and the Universalising Project' (2004) 29(1) *Alternatives: Global, Local, Political* 43

Braybrooke, EK, 'Paton: A Textbook of Jurisprudence (Derham, Ed)' (1965) 5(1) *Melbourne University Law Review* 103

Brecht, Arnold, '*The Quest for Law* by William Seagle' (1942) 42(3) *Columbia Law Review* 500

Brennan, Frank, *No Small Change: The Road to Recognition for Indigenous Australia* (UQ Press, 2015)

Brennan, Sean, 'Native Title in the High Court of Australia a Decade after *Mabo*' (2003) 14 *Public Law Review* 209

Brennan, Sean, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from* Mabo *to* Akiba*: A Vehicle for Change and Empowerment?* (Federation Press, 2015)

Brett, Peter, *An Essay on a Contemporary Jurisprudence* (Butterworths, 1975)

Brett, Peter, 'Oxford Essays in Jurisprudence' (1961–2) 3 *Melbourne University Law Review* 402

Browne, Denis, 'Reflections on the Teaching of Jurisprudence' (1953) 2 *Journal of the Society of Public Teachers of Law* 79

Buchan, Bruce, 'The "Tides of History": The Yorta Yorta, Native Title and Colonial Attitudes to Indigenous Sovereignty' (2004) 7(2) *Journal of Australian Indigenous Studies* 3

Buckle, Stephen, 'Tully, Locke and America' (2001) 9(2) *British Journal for the History of Philosophy* 245

Burke, Paul, *Law's Anthropology: From Ethnography to Expert Testimony in Native Title* (ANU E Press, 2011)

Burrow, John W, 'Henry Maine and Mid-Victorian Ideas of Progress' in Alan Diamond (ed), *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Cambridge University Press, 1991) 55

Burton, Pamela, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010)

C, CT, 'Law in the Making by Carleton Kemp Allen Third Edition' (1940) 22(1) *Journal of Comparative Legislation and International Law* 125

Caenegem, RC Van, *The Birth of the English Common Law* (Cambridge University Press, 1988)

Cahn, Edmond N, '*A Text-Book of Jurisprudence* by George Whitecross Paton' (1957) 47(3) *Columbia Law Review* 521

Calma, Tom, 'The Integration of Customary Law into the Australian Legal System' (Speech, National Indigenous Legal Conference, October 2006)

Calma, Tom, 'The Integration of Customary Law into the Australian Legal System' (2007) 25 *Law in Context: A Socio-Legal Journal* 74

Campbell, AH, '*Law in the Making* by Carleton Kemp Allen Third Edition' (1940) 56 *Law Quarterly Review* 123

Campbell, Ruth, *A History of the Melbourne Law School 1857–1973* (Faculty of Law, University of Melbourne, 1977)

Campbell, Tom, 'Rewriting Hart's Postscript: Thoughts on the Development of Legal Positivism' 5 *Problema: Anuario de Filosofia y Teoria del Derecho* 23

Case, Natasha, 'Tide of History or Tsunami? *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors* (1998)' (1999) 4(17) Indigenous Law Bulletin 20

Cassidy, Julie, 'The Impact of the Conquered/Settled Distinction regarding the Acquisition of Sovereignty in Australia' (2004) 8 *Southern Cross University Law Review* 1

Castle, TD and Bruce Kercher, *The Dowling Legacy: Foundations of an Australian Legal Culture 1828 to 1844* (Francis Forbes Society for Australian Legal History, 2005)

Castles, Alex C, *An Australian Legal History* (Law Book, 1982)

Cavallar, Georg, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' (2008) 10 *Journal of the History of International Law* 181

Chalmers, Gordon, 'Indigenous as "Non-Indigenous" as "Us"? A Dissident Insider's Views on Pushing the Bounds for What Constitutes "Our Mob"' (2013–4) 17(2) *Australian Indigenous Law Reporter* 47

Chiassoni, Pierluigi, 'The Simple and Sweet Virtues of Analysis: A Plea for Hart's Metaphilosophy of Law' (2011) 5 *Problema: Anuario de Filosofia y Teoria del Derecho* 53

Chilisa, Bagele, *Indigenous Research Methodologies* (SAGE, 2012)

Cicero, Marcus Tullius, *On the Commonwealth* tr GH Sabine and SJ Smith (Bobbs-Merrill, 1960)

Close, Cecily, 'Derham, Sir David Plumley (1920–1985)' 17 *Australian Dictionary of Biography* (MUP, 2007)

Cockayne, James, '*Members of the Yorta Yorta Aboriginal Community v Victoria*: Indigenous and Colonial Traditions in Native Title' (2001) 25 *University of Melbourne Law Review* 786

Cohen, L Jonathan, '*The Concept of Law* by HLA Hart: Book Review' (1962) 71(283) *Mind* 395

Coke, Edward, *The First Part of the Institutes of The Laws of England* (first published 1823, Legal Classics Library 1985) vol I

Coke, Edward, *The First Part of the Institutes of The Laws of England* (first published 1823, Legal Classics Library 1985) vol II

Conley, John M and William M O'Barr, 'Back to the Tobriands: The Enduring Influence of Malinowski's *Crime and Custom in Savage Society*' (2002) 27(4) *Law and Social Inquiry* 847

Conklin, William E, 'Derrida's Territorial Knowledge of Justice' in Ruth Buchanan et al (ed) *Reading Modern Law: Critical Methodologies and Sovereign Formations* (Taylor & Francis, 2012)

Cook, Walter Wheeler, '*Law in the Making* by Carleton Kemp Allen; *A General View of European Legal History* by Munroe Smith; *Some Lessons from our Legal History* by William Searle Holdsworth' (1928) 22 *American Political Science Review* 989

Cooper, David E, 'Verstehen' in Ted Honderich (ed) *The Oxford Companion to Philosophy* (Oxford University Press, 2005)

Coper, Michael, 'Julius Stone: A Personal Reflection on his Influence Today' (1997) 20(1) *University of New South Wales Law Journal* 253

Coper, Michael, 'Geoffrey Sawer and the Art of the Academic Commentor' (2014) 42 *Federal Law Review* 389

Coper, Michael, Tony Blackshield and George Williams, *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001)

Coper, Michael, Tony Blackshield and George Williams, *The Oxford Companion to the High Court of Australia* (Oxford University Press, online version, 2007)

Corbett, PE, '*Law in the Making*' (1931) 9 *Canadian Bar Review* 57

Corbin, Arthur, '*Law in the Making* by Carleton Kemp Allen' (1928) 38 *Yale Law Journal* 270

Cornell, Drucilla, *The Philosophy of the Limit* (Routledge, 1992)

Cornell, Drucilla, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992)

Cosgrove, Richard A, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (New York University Press, 1996)

Cosgrove, Richard A, 'Pollock, Sir Frederick, Third Baronet (1845–1937)' *Oxford Dictionary of National Biography*

Cotterrell, RBM and JC Woodliffe, 'The Teaching of Jurisprudence in British Universities' (1974) 13 *Journal of the Society of Public Teachers of Law* 73

Cotterrell, Roger, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (LexisNexis, 2nd ed, 2003)

Cowen, Zelman, 'Professor Sir George Whitecross Paton' (1968) 24(2) *University of Melbourne Gazette* 1

Craven, Matthew, 'Colonialism and Domination' in Bardo Fassbender and Anne Peters (eds) *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 862

Cromartie, Alan, 'The Idea of Common Law as Custom' in Amanda Perreau-Saussine and James B Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press, 2007) 203

Croucher, Rosalind, 'Jack Goldring: A Man for All Seasons' (Jack Goldring Memorial Lecture, University of Wollongong, 9 October 2015)

Curran, John W, '*The Quest for Law* by William Seagle' (1942) 32(6) *Journal of Criminal Law and Criminology* 660

Currey, CH, 'Forbes, Sir Francis' (1784–1841) 1 *Australian Dictionary of Biography* (first published 1966) <http://adb.anu.edu.au/biography/forbes-sir-francis-2052>

Currey, CH, 'Stephen, John (1771–1833)' 2 *Australian Dictionary of Biography* (first published 1967) <http://adb.anu.edu.au/biography/stephen-john-1292>

Curthoys, Ann, *Freedom Ride: A Freedom Rider Remembers* (Allen & Unwin, 2002)

D, JP, '*Law in the Making* by Carleton Kemp Alen' (1929) 27 *Michigan Law Review* 361

Dalrymple, John, *An Essay towards a General Theory of Feudal Property in Great Britain* (1757)

Davies, Margaret, *Asking the Law Question* (4th ed, Thomson Reuters, 2017)

Davies, Margaret, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (Pluto Press, 1996)

Davies, Margaret, 'Derrida and Law: Legitimate Fictions' in Pierre Legrand (ed), *Derrida and Law* (Ashgate, 2009) 71

Davies, Margaret, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87

Davies, Margaret, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge, 2017)

Davies, Margaret, 'Pluralism and Legal Philosophy' (2006) 57 *Northern Ireland Legal Quarterly* 577

Derham, David, 'Judge Jerome Frank: An Australian Note of Appreciation' (1957) 24(4) *University of Chicago Law Review* 643

Derham, David P, 'The Concept of Law by HLA Hart' (1961–2) 3 *Melbourne University Law Review* 398

Derrida, Jacques, 'Force of Law: The Mystical Foundation of Authority' in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992) 3

Derrida, Jacques, 'Letter to a Japanese Friend' in Wood and Bernasconi (eds), *Derrida and Difference* (Northwestern University Press, Evanston, 1988)

Derrida, Jacques, *Limited Inc*, tr S Weber et al (Northwestern University Press, 1988)

Derrida, Jacques, *Of Grammatology*, tr Gayatri Chakravorty Spivak (Johns Hopkins University Press, 1976)

Derrida, Jacques, *Positions*, tr Alan Bass (Continuum, 2nd ed, 2004)

Dewey, John, '*Law in the Making* by Carleton Kemp Allen' (1928) 28(6) *Columbia Law Review* 832

Diamond, Alan (ed), *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Cambridge University Press, 1991)

Diamond, AS, *The Comparative Study of Primitive Law* (University of London, Athlone Press, 1965)

Diamond, AS, *Primitive Law* (Watts, 1935)

Diamond, AS, *Primitive Law* (Watts, 2nd ed, 1950)

Diamond, AS, *The Evolution of Law and Order* (Watts, 1951)

Diamond, AS, *Primitive Law: Past and Present* (Methuen, 1971)

Dias, RWM, 'Oxford Essays in Jurisprudence (Second Series)' (1973) 32(2) *Cambridge Law Journal* 342

Dodson, Mick, 'From 'Lore' to 'Law': Indigenous Rights and Australian Legal Systems (1995) 20 (1) *Alternative Law Journal* 2

Dodson, Mick, 'Power and Cultural Differences in Native Title Mediation' (1996) 3(4) *Aboriginal Law Bulletin* 8

Dodson, Mick, 'Land Rights and Social Justice' in Galarrwuy Yunupingu (ed) *Our Land is Our Life: Land Rights — Past, Present and Future* University of Queensland Press, 1997) 39

Dominello, Francesca, 'Beyond Symbolism: Aboriginal Sovereignty and Native Title' (2008) 13 *Journal of the Australasian law Teachers Association*

Dorsett, Shaunnagh, 'Civilisation and Cultivation: Colonial Policy and Indigenous Peoples in Canada and Australia' (1995) 4(2) *Griffith Law Review* 214

Dorsett, Shaunnagh, 'From Time Immemorial: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry' (2002) 26 *Melbourne University Law Review* 32

Dorsett, Shaunnagh, and John McLaren (eds), *Legal Histories of the British Empire: Laws, Engagements and Legacies* (Routledge, 2014)

Dorsett, Shaunnagh and Shaun McVeigh, 'An Essay on Jurisdiction, Jurisprudence, and Authority: The High Court of Australia in *Yorta Yorta* (2001)' (2005) 56 *Northern Ireland Legal Quarterly* 1

Dorsett, Shaunnagh and Shaun McVeigh, 'Just So: "The Law Which Governs Australia is Australian Law"' (2002) 13 *Law and Critique* 289

Dorsett, Shaunnagh and Shaun McVeigh, 'Conduct of Laws: Native Title, Responsibility and Some Limits of Jurisdictional Thinking' (2012) 36 *Melbourne University Law Review* 470

Dorsett, Shaunnagh and Shaun McVeigh, 'Section 223 and the Shape of Native Title: The Limits of Jurisdictional Thinking' in Lisa Ford and Tim Rowse, *Between Indigenous and Settler Governance* (Routledge, 2013)

Douzinas, Costas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart, 2005)

Duxbury, Neil, 'Custom as Law in English Law' (2017) 76(2) *Cambridge Law Journal* 337

Duxbury, Neil, 'English Jurisprudence between Austin and Hart' (2005) 91(1) *Virginia Law Review* 1

Duxbury, Neil, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004)

Duxbury, Neil, 'The Ties that Bind: Review of *Making Law Bind*' (1988) 51 *Modern Law Review* 790

Dworkin, Ronald, *Law's Empire* (Harvard University Press, 1986)

Dworkin, Ronald, *Taking Rights Seriously* (Harvard University Press, 1977)

Edlin, Douglas E (ed), *Common Law Theory* (Cambridge University Press, 2007)

Egerton, JE, 'Stephen, Sir James (1789–1859)' *Australian Dictionary of Biography* <http://adb.anu.edu.au/biography/stephen-sir-james-2694>

Eggerking, Kitty, 'Landmarks: Reading the Gove Peninsula' (PhD Thesis, The Australian National University, 2013)

Elias, TO, *The Nature of African Customary Law* (Manchester University Press, 1956)

Elton, Godfrey (ed), *The First Fifty Years of the Rhodes Trust and the Rhodes Scholarships* (Oxford, 1956)

Epstein, AL, *Juridical Techniques and the Judicial Process: A Study in African Customary Law* (Manchester University Press, 1954)

Evans-Pritchard, EE, *The Nuer: A Description of the Modes of Livelihood and Political Institutions of a Nilotic People* (Oxford, Clarendon Press, 1940)

F, GL, 'The Distinction between the Normative and Formal Functions of Law in HLA Hart's The Concept of Law' (1979) 65(7) *Virginia Law Review* 1359

Fassbender, Bardo and Anne Peters (eds) *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012)

Finch, JD, '*Oxford Essays in Jurisprudence* (Second Series)' (1974) 37 *Modern Law Review* 110

Finkelman, J, '*Law in the Making* by Carleton Kemp Allen Third Edition' (1941) 4(1) *University of Toronto Law Journal* 223

Finnane, Mark, 'The Origins of Criminology in Australia' 45(2) *Australian and New Zealand Journal of Criminology* 157

Finnis, John, 'How Persistent are Hart's "Persistent Questions"?' in Luis Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's* The Concept of Law (Hart Publishing, 2013) 227

Finnis, John, 'On Hart's Ways: Law as Reason and as Fact' in Matthew Kramer et al (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford University Press, 2008) 3

Finnis, John, *Natural Law and Natural Rights* (Oxford University Press, 1980)

Firth, Raymond (ed), *Man and Culture: An Evaluation of the Work of Bronislaw Malinowski* (Routledge, 1957)

Fisher, HAL, 'Paul Vinogradoff: A Memoir' in *The Collected Papers of Paul Vinogradoff* (Oxford at the Clarendon Press, 1928) vol 1, 3

Fitzmaurice, Andrew, 'Discovery, Conquest, and Occupation of Territory' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 840

Fitzmaurice, Andrew, 'The Genealogy of Terra Nullius' (2007) 38(129) *Australian Historical Studies* 1

Fitzpatrick, Peter, '"Enacted in the Destiny of Sedentary Peoples": Racism, Discovery and the Grounds of Law' (2000) 1(1) *Balayi: Culture, Law and Colonialism* 11

Fitzpatrick, Peter, *Modernism and the Grounds of* Law (Cambridge University Press, 2001)

Fitzpatrick, Peter, *The Mythology of Modern Law* (Routledge, 1992)

Fitzpatrick, Peter, 'No Higher Duty: *Mabo* and the Failure of Legal Foundation' (2002) 13 *Law and Critique* 239

Fogg, Alan, 'Content and objectives of Jurisprudential Teaching in Australasia' (1976–1979) 14 *Journal of the Society of Public Teachers of Law* 261

Ford, HAJ, 'The Centenary of the Faculty of Law 1873–1973' (1973) 9 *Melbourne University Law Review* 171

Ford, Lisa, 'Indigenous Policy and its Historical Occlusions: The North American and Global Contexts of Australian Settlement' (2008) 12(1) *Australian Indigenous Law Reporter* 69

Ford, Lisa, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Harvard University Press, 2010)

Ford, Lisa and Tim Rowse (ed), *Between Indigenous and Settler Governance* (Routledge, 2013)

Franklin, Mitchell, '*The Quest for Law* by William Seagle' (1942) 6(2) *Science and Society* 190

Freeman, MDA, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 7th ed, 2001)

Freeman, MDA, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 9th ed, 2014)

French, Robert, 'Lifting the Burden of Native Title: Some Modest Proposals for Improvement' (2009) 93 *Reform* 10

Friedman, W, '*Law in the Making* by Carleton Kemp Allen Third Edition' (1940) 3 *Modern Law Review* 244

Friedman, W, '*Law in the Making* by Carleton Kemp Allen Fifth Edition' (1952) 15 *Modern Law Review* 386

Friedman, W, 'Legal Theory and the Practical Lawyer' (1941) 5(2) *Modern Law Review* 103

Friedmann, W, '*The Province and Function of Law*; by Julius Stone' (1948) 11 *Modern Law Review* 235

Fuller, Chris, ''Legal Anthropology, Legal Pluralism and Legal Thought' (1994) 10(3) *Anthropology Today* 9

Fuller, Lon, 'The Place and Uses of Jurisprudence in the Law School Curriculum' (1948–1949) 1 *Journal of Legal Education* 495

Fuller, Lon L, 'Positivism and Fidelity to Law A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630

Furphy, Samuel, '"Our Civilisation has Rolled over Thee": Edward M Curr and the Yorta Yorta Native Title Case' (2010) 7(3) *History Australia* 54

Gammage, Bill, *The Biggest Estate on Earth: How Aborigines Made Australia* (Allen & Unwin, 2012)

Gardner, John, 'Some Types of Law' in Edlin, Douglas E (ed), *Common Law Theory* (Cambridge University Press, 2007) 51

Gardner, John, 'Tony Honoré 1921–2019' <https://www.law.ox.ac.uk/news/2019-03-05-tony-honore-1921-2019>

Gardner, John, 'Tony Honoré as Teacher and Mentor: A Personal Memoir' in Boudewijn Sirks (ed), *Aspects of Law in Late Antiquity* (Oxford: privately published 2008)

Gardner, John, 'Why Law Might Emerge: Hart's Problematic Fable' in Luis Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's* The Concept of Law (Hart Publishing, 2013) 81

Gaudron, Justice Mary, 'Equality Before the Law with Particular Reference to Aborigines' (1993) 1(2) *Judicial Review* 81

Gaudron, Justice Mary, 'Part Time and Partisan' in John Mackinolty and Judy Mackinolty (eds) *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 141

Gauntlett, Jeremy, 'Laudatio for Tony Honoré' in Daniel Visser and Max Loubser (eds), *Thinking About Law: Essays for Tony Honoré* (SiberInk, 2011) 1

Gert, Bernard, 'Baier, Kurt (1917–)' *Encyclopedia of Philosophy* <https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/baier-kurt-1917>

Gleeson, JT, JA Watson, RCA Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) 194

Gleeson, Murray, 'Julius Stone and the Legal Profession' in Helen Irving, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press, 2010) 9

Glenn, H Patrick, 'A Concept of Legal Tradition' (2008–9) 34 *Queen's Law Journal* 427

Glenn, H Patrick, 'Continuity and Discontinuity of Aboriginal Entitlement' (2007) 7 *Oxford University Commonwealth Law Journal* 23

Glenn, H Patrick, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, 5th ed, 2014

Gluckman, M, *The Judicial Process among the Barotse of Northern Rhodesia* (Manchester University Press, 1955)

Goldie, LFE, 'In Memoriam: Professor Julius Stone (1907–1985)' (1986) 80(1) *American Journal of International Law* 144

Goldie, LFE, 'Julius Stone and the Adventure of the Idea of Justice' (1975) 3 *Syracuse Journal of International Law and Commerce* 93

Goldring, John, 'Remarks at the Julius Stone Symposium' (1997) 20 *University of New South Wales Law Journal* 247

Goldring, John, 'Julius Stone and the Study of Law and Society in Australia' (1985) 2 (2) *Australian Journal of Law and Society* 4

Gong, Gerrit, *The Standard of 'Civilization' in International Society* (Clarendon Press Oxford, 1984)

Goodhart, AL, 'Sir Carleton Kemp Allen 1887–1966' (1967) 53 *Proceedings of the British Academy* 391

Gordon, Robert 'Law and Ideology' (1988) 3(1) *Tikkun* 14

Graham, Mary, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Australian Humanities Review* 181

Graveson, RH, 'Review: *The Province and Function of Law* by Julius Stone' (1948) 30 (3/4) Journal of Comparative Legislation and International Law 113

Graveson, RH, 'The Teaching of Jurisprudence in England and Wales' (1951) 4 *Journal of Legal Education* 127

Graveson, RH, '*A Text-Book of Jurisprudence*; by GW Paton' (1947) 10 Modern Law Review 80

Gray, Hamish R, '*A Text-Book of Jurisprudence* by George Whitecross Paton; Third Edition by David Plumley Derham, 1964' (1965) 28 *Modern Law Review* 114

Green, Leslie, '*The Concept of Law* Revisited' (1996) 94(6) *Michigan Law Review* 1687

Green, Leslie, 'Introduction' in HLA Hart, *The Concept of Law* (Oxford Clarendon Press, 3rd ed, 2012)

Grewe, Wilhelm G, *The Epochs of International Law* (Walter de Gruyter, 2013)

Grey, George, 'Report upon the Best Means of Promoting the Civilisation of the Aboriginal Inhabitants of Australia', enclosed in Captain Grey to Lord John Russell (4th June 1840) in Frederick Watson (ed) *Historical Records of Australia* (1922) Series 1, Vol 21, 33

Griffith, Gavan, 'A Commonwealth Perspective' in Michael Coper and George Williams (eds), *How Many Cheers for* Engineers*?* (Federation Press, 1997) 118

Guest, AG (ed), *Oxford Essays in Jurisprudence* (Oxford, 1961)

Guest, Stephen, 'Two Strands in Hart's Concept of Law' in Stephen Guest (ed), *Positivism Today* (Dartmouth 1996) 29

Guilfoyle, Kate, 'McHugh, Michael Hudson' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 464

Gummow, Justice WMC, 'Legal Education' (1988) 11(3) *Sydney Law Review* 439

H, HA, '*Law in the Making* By Carleton Kemp Allen' 44 *Law Quarterly Review* 236

H, HA, 'Law in the Making' (1947) 29 (3/4) *Journal of Comparative Legislation and International Law* 84

Hacker, PMS, 'Hart's Philosophy of Law' in PMS Hacker and J Raz, *Law, Morality and Society: Essays in Honour of HLA Hart* (Oxford University Press, 1977) 1

Hacker, PMS and J Raz, *Law, Morality and Society: Essays in Honour of HLA Hart* (Oxford University Press, 1977)

Haddon, AC, 'In Memoriam: Edwin Sidney Hartland (1848–1927)' (1926) 37(2) *Folklore* 178

Hagen, Rod, 'Ethnographic Information and Anthropological Interpretation in a Native Title Claim: The Yorta Yorta Experience' (2001) 25 *Aboriginal History* 216

Hale, Matthew, *The History of the Common Law of England and an Analysis of the Civil Part of the Law* (1713)

Hamburger, Lotte and Joseph Hamburger, *Troubled Lives: John and Sarah Austin* (University of Toronto Press, 1985)

Hanks, Peter and Bryan Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (Allen & Unwin, 1984)

Hargraves, Neil, 'Enterprise, adventure and industry: the formation of 'commercial character' in William Robertson's *History of America*' (2003) 29 *History of European Ideas* 33

Harris, Robert J, 'Paton, George Whitecross, *A Text-Book of Jurisprudence*' (1947) 252(1) *Annals of the American Academy* 110

Harrison, WN, 'The Teaching of Jurisprudence: Reviews of *A Text-book of Jurisprudence* by George Paton and *The Province and Function of Law* by Julius Stone' (1948–51) 1(1) *University of Queensland Law Journal* 63

Hart, HLA, 'Analytic Jurisprudence in Mid-twentieth Century: A Reply to Professor Bodenheimer' (1957) *University of Pennsylvania Law Review* 105

Hart, HLA, *The Concept of Law* (Oxford Clarendon Press, 1961)

Hart, HLA, *The Concept of Law* (Oxford Clarendon Press, 2nd ed, 1994)

Hart, HLA, *The Concept of Law* (Oxford Clarendon Press, 3rd ed, 2012)

Hart, HLA, 'Definition and Theory in Jurisprudence' (1954) 70 *Law Quarterly Review* 37

Hart, HLA, 'Dias and Hughes on Jurisprudence' (1958) 4 *Journal of the Society of Public Teachers of Law* 143

Hart, HLA, 'Introduction' in John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence*, ed HLA Hart (Weidenfeld and Nicolson, first published 1832, 1954 ed)

Hart, HLA, 'Kelsen Revisited' (1962–3) 10 *UCLA Law Review* 709

Hart, HLA, *Law, Liberty and Morality* (Oxford University Press, 1963)

Hart, HLA, 'Philosophy of Law and Jurisprudence in Britain (1945–1952)' (1953) 2(3) *The American Journal of Comparative Law* 355

Hart, HLA, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593

Hart, HLA, *Punishment and Responsibility* ((Oxford: Clarendon Press, 1968)

Hart, HLA, & AM Honoré, *Causation in the Law* (Oxford University Press, 1959)

Hartland, Edwin Sidney, *Primitive Law* (Methuen, 1924)

Hasluck, Nicholas, 'Callinan, Ian David Francis' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001; online version 2007)

Hathaway, Barbara Drexler, *Julius Stone* (Legal Bibliography Series #20, Tarlton Law Library, School of Law, University of Texas, March 1980)

Hawke, RLJ, 'Julius Stone: Humanist, Jurist and Internationalist; Inaugural Julius and Reca Stone Memorial Lecture' (1986) 9 *University of New South Wales Law Journal* 1

Hayne, Justice KM, 'Foreword to the 50th Anniversary Edition of the Melbourne University Law Review' 31 *Melbourne University Law Review* 1

Hazeltine, HA, '*Law in the Making* by Carleton Kemp Allen' (1928) 44 *Law Quarterly Review* 236

Hazlehurst, Kayleen M (ed), *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia, and New Zealand* (Avebury, 1995)

Henriss-Anderssen, Diana, 'Members of the Yorta Yorta Community v Victoria [2002] HCA 58 (12 December 2002)' (2002–3) 9 *James Cook University Law Review* 331

Henry, John et al, 'Indigenous Research Reform Agenda: Rethinking Research Methodologies' (Cooperative Research Centre for Aboriginal and Tropical Health, Links Monograph Series 2, 2002)

Hibben, Jennifer, 'Andrews, Shirley Aldythea (1915–2001)', *Obituaries Australia*, <http://oa.anu.edu.au/obituary/andrews-shirley-aldythea-14936/text26125>

Highland, Howard L, 'The Mote in the Common Law's Eye: Dislodging Eurocentric Barriers to Just Recognition of Native Title in the Wake of *Yorta Yorta*' (2007) 13(2) *Washington and Lee Journal of Civil Rights and Social Justice* 349

Hill, Graeme, 'Hayne, Kenneth Madison' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001; online version 2007)

Hinkson, John, Paul James, Lorenzo Veracini (eds), *Stolen Lands, Broken Cultures: The Settler-Colonial Present* (Arena, 2012)

Hinton, Martin, Elliot Johnston, Daryle Rigney (eds), *Indigenous Australians and the Law* (Cavendish, 1996)

Hobbes, Thomas, *Leviathan* (Penguin, first published 1651)

Hobhouse, LT, GC Wheeler and M Ginsberg, *The Material Culture and Social Institutions of the Simpler Peoples: An Essay in Correlation* (Chapman and Hall, 1915)

Hobhouse, LT, GC Wheeler and M Ginsberg, *The Material Culture and Social Institutions of the Simpler Peoples; An Essay in Correlation* (Chapman & Hall, 1930)

Hodgson, Geoffrey M, 'Editorial Introduction to "Ownership" by AM Honoré (1961)' (2013) 9(2) *Journal of Institutional Economics* 223

Hoebel, E Adamson, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge: Harvard University Press, 1954)

Hoebel, E Adamson, '*The Quest for Law*: William Seagle' (1942) 44(1) *American Anthropologist* 141

Hokari, Minoru, 'From Wattie Creek to Wattie Creek: An Oral Historical Approach to the Gurindji Walk-Off' (2000) 24 *Aboriginal History* 98

Holdsworth, WS, *A History of English Law* (Methuen, 1903)

Holdsworth, WS, 'Professor Sir Paul Vinogradoff 1854–1925' (1924-5) 11 *Proceedings of the British Academy* 487

Holdsworth, WS, 'Sir Paul Vinogradoff: The Scholar' (1926) 4 (12) *The Slavonic Review* 529

Holland, Ben, 'The Moral Person of the State: Emer de Vattel and the Foundations of International Legal Order' (2011) 37(4) *History of European Ideas* 438

Honoré, AM, 'Groups, Laws and Obedience' in AWB Simpson (ed), *Oxford Essays in Jurisprudence* (Second Series, Clarendon Press, Oxford, 1973) 1

Honoré, AM, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford, 1961) 104

Honoré, Tony, *About Law: An Introduction* (Clarendon Press, Oxford, 1995)

Honoré, Tony, 'Groups, Laws and Obedience' in Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, Oxford 1987) 33

Honoré, Tony, 'Herbert Lionel Adolphus Hart (1907–1992): Legal Philosopher' *Oxford Dictionary of National Biography* (Oxford University Press, 2008–14)

Honoré, Tony, 'How is Law Possible?' in Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, Oxford 1987) 1

Honoré, Tony, 'The Human Community and the Principle of Majority Rule' (1976) 8(3) *Sydney Law Review* 599

Honoré, Tony, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, Oxford 1987)

Honoré, Tony, 'The Necessary Connection between Law and Morality' (2002) 22(3) *Oxford Journal of Legal Studies* 489

Honoré, Tony, 'What is a Group?' in Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, Oxford 1987) 52

Hookey, John, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia' (1972–3) 5(1) *Federal Law Review* 85

Howe, Anthony, 'Free Trade and Global Order: The Rise and Fall of a Victorian Vision' in Duncan Bell (ed), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge University Press, 2007) 26

Howell, PP, *A Manual of Nuer Law: Being an Account of Customary Law, its Evolution and Development in the Courts Established by the Sudan Government* (OUP, 1954)

Howitt, AW, 'The Dieri and Other Kindred Tribes of Central Australia' (1891) 20(1) *Journal of the Anthropological Institute of Great Britain and Ireland* 30

Hunter, Ian, 'Vattel in Revolutionary America: From the Rules of War to the Rule of Law' in Lisa Ford and Tim Rowse (ed), *Between Indigenous and Settler Governance* (Routledge, 2012)

Hutchinson, Allan C 'A Postmodern's Hart: Taking Rules Sceptically' (1995) 58(6) *Modern Law Review* 788

Irving, Helen, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press, 2010)

Johnson, Walter S, '*The Province and Function of Law: Law as Logic, Justice and Social Control*: A Study in Jurisprudence; by Julius Stone' 24 Canadian Bar Review 837

Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018)

Just, Peter, 'History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law' (1992) 26(2) *Law and Society Review* 373

K, AKR, '*Law in the Making*. By Sir Carleton Kemp Allen. Sixth Edition. Oxford University Press. 1958' 7 *International and Comparative Law Quarterly* 770

Kalowski, Henrik, 'Gaudron, Mary Genevieve' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 293

Kames, *Historical Law Tracts* (Edinburgh, 1758)

Keal, Paul, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press, 2003)

Kelsen, Hans, *Pure Theory of Law*, tr Max Knight (University of California Press, 1967)

Kelsen, Hans and Albert A Ehrenzweig, 'Professor Stone and the Pure Theory of Law' (1965) 17(6) *Stanford Law Review* 1128

'Kenneth Madison Hayne AC' *High Court of Australia* (Web Page) <http://www.hcourt.gov.u/justices/former-justices/justice-hayne>

Kenny, Anthony (ed), *The History of the Rhodes Trust 1902-1999* (Oxford University Press, 2001)

Kenny, Anthony, 'The Rhodes Trust and its Administration' in Anthony Kenny (ed) *The History of the Rhodes Trust 1902-1999* (Oxford, 2001) 1

Kenny, S, 'Colonies to Dominion, Dominion to Nation' in JT Gleeson, JA Watson, RCA Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) 245

Keon-Cohen, BA, 'John Walpole Willis: First Resident Judge in Victoria' (1972) 8 *Melbourne University Law Review* 703

Kercher, Bruce, 'Alex Castles on the Reception of English Law' (2003) 7(1) *Australian Journal of Legal History* 37

Kercher, Bruce, 'Many Laws, Many Legalities' (2003) 21(3) *Law and History Review* 621

Kercher, Bruce, *Outsiders: Tales from the Supreme Court of NSW, 1824–1836* (Australian Scholarly, 2006)

Kercher, Bruce, 'R v Ballard, R v Murrell and R v Bonjon' (1998) 3(3) *Australian Indigenous Law Reporter* 410

Kercher, Bruce, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4(13) *Indigenous Law Bulletin* 7

Kercher, Bruce, 'Recovering and Reporting Australia's Early Colonial Case Law: The Macquarie Project' (2000) 18(3) *Law and History Review* 659

Kercher, Bruce, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995)

Kercher, Bruce, 'Why the History of Australian Law is not English: Second Alex Castles Lecture in Legal History, October 2000' (2004) 7 *Flinders Journal of Law Reform* 177

Kerruish, V and C Perrin, 'Awash in Colonialism: A Critical Analysis of the Federal Court Decision in the Matter of *Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors*' (1999) 24 *Alternative Law Journal* 3

Kirby, Justice Michael, 'Forty-Five Years On' (Speech delivered at the Reunion of the 1962 Graduating Class of the Faculty of Law, University of Sydney, 9 May 2007)

Kirby, Michael, 'HLA Hart, Julius Stone and the Struggle for the Soul of Law' 27 *Sydney Law Review* 323

Kirby, Justice Michael, 'Harold Luntz: Doyen of the Australian Law of Torts' (2003) 27 *Melbourne University Law Review* 635

Kirby, Michael, 'JL Goldring, Legal Education and a Most Unusual Occupation' (2014) 38 *Australian Bar Review* 226

Kirby, Justice Michael, 'Julius Stone and the High Court of Australia' (1997) 20(1) *University of New South Wales Law Journal* 239

Kirby, Justice Michael, 'Julius Stone — My Teacher' (Speech delivered at the launch of the Julius Stone Institute of Jurisprudence, The University of Sydney Faculty of Law, Sydney Law School Reports, 14 August 1999)

Kirby, Justice Michael, 'Murray Gleeson — Law Student' (Speech delivered at The University of Sydney Faculty of Law Function to Honour the Appointment to the Office of Chief Justice of Australia of the Hon Murray Gleeson AC, University of Sydney Law School, 16 July 1998)

Kirby, Justice Michael, '50 Years in the Law: A Critical Self-Assessment' (Speech to the Legal Profession of the Northern Territory in the Supreme Court, Darwin, 16 January 2009 and at the State Supreme Court and Federal Court Judges' Conference, Hobart, 26 January 2009)

Kipling, Rudyard, *Just So Stories* (1902)

Kleinhans, Martha-Marie and Roderick A Macdonald, 'What is a Critical Legal Pluralism' (1997) 12(2) *Canadian Journal of Law and Society* 25

Knoll, David D, 'In Memoriam: Professor Julius Stone (1907–1985)' (1986) 80(1) *American Journal of International Law* 143

Kovach, Margaret, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (University of Toronto Press, 2009)

Kramer, Matt, 'HLA Hart' (2011) 5 *Problema: Anuario de Filosofia y Teoria del Derecho* 11

Kramer, Matthew H and Claire Grant, 'Introduction' in Matthew Kramer et al (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford University Press, 2008)

Kramer, Matthew et al (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford University Press, 2008)

Kraynak, Robert P, 'Hobbes on Barbarism and Civilisation' (1983) 45(1) *Journal of Politics* 86

Kronick, Bernard Lewis, 'Willian Seagle, *The Quest for Law*' (1941) 30 *California Law Review* 115

Krygier, Martin, '"*The Concept of Law*" and Social Theory' (1982) 2(2) *Oxford Journal of Legal Studies* 155

'Kurt Baier' <http://www.otago.ac.nz/philosophy/Baier.pdf>

Kwaymullina, Ambellin, 'Aboriginal Nations, the Australian Nation-State and Indigenous International Legal Relations' in Irene Watson (ed) *Indigenous Peoples as Subjects of International Law* (Taylor & Francis, 2017) 5

Kwaymullina, Ambellin 'Seeing the Light: Aboriginal Law, Learning and Sustainable Living in Country' (2005) 6(11) *Indigenous Law Bulletin* 12

Kwaymullina, Ambellin and Blaze Kwaymullina, 'Learning to Read the Signs: Law in an Indigenous Reality' (2010) 34(2) *Journal of Australian Studies* 195

L, TE, '*Law in the Making* by Carleton Kemp Allen Fifth Edition' (1952) 11(2) *Cambridge Law Journal* 315

L, TE, '*A Text-Book of Jurisprudence* by George Whitecross Paton, Second Edition, 1951' (1952) 11(2) *Cambridge Law Journal* 314

L, TE, 'The Evolution of Law and Order by AS Diamond' (1952) 11(2) *Cambridge Law Journal* 313

Lacey, Nicola, 'Do the "Persistent Questions" Persist? Revisiting Chapter I of *The Concept of Law*' in Luis Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds) *Reading HLA Hart's* The Concept of Law (Hart Publishing, 2013) 269

Lacey, Nicola, 'HLA Hart's Rule of Law: The Limits of Philosophy in Historical Perspective' (2007) 36 *Quaderni Fiorentini* 36

Lacey, Nicola, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004)

Lacey, Nicola, 'Obligations, Sanctions, and Obedience' in Neil MacCormick and Peter Birks (eds) *The Legal Mind: Essays for Tony Honoré* (Clarendon Press, Oxford, 1986) 219

Lacey, Nicola, 'Philosophy, Political Morality and History: Explaining the Enduring Resonance of the Hart–Fuller Debate' 83 *NYU Law Review* 109

Laidlaw, Zoe, 'Rhodes House and the Rhodes House Library: An Historical Survey of the Intentions of the Rhodes Trust, 1925–1929' (2001) 100(401) *African Affairs* 641

Lane, Patricia, 'Warming Up Cold Porridge: Amending the *Native Title Act*' (Legal Studies Research Paper No 10/13, Sydney Law School, University of Sydney, January 2010)

Langmore, Diane, 'Salmond, Sir John William (1862–1924)' (1988) 11 *Australian Dictionary of Biography*

Langton, Marcia, 'Grandmothers' Law, Company Business and Succession in Changing Aboriginal Land Tenure Systems' in Galarrwuy Yunupingu (ed) *Our Land is Our Life: Land Rights — Past, Present and Future* University of Queensland Press, 1997) 84

Lanham, DJ, '*Law in the Making*. Seventh Edition By Sir Carleton Kemp Allen' (1965) 8 *Journal of the Society of Public Teachers of Law* 222

Lavery, Daniel, 'The British Acquisition of New Holland: a Residuum of Allodial Sovereignties' (PhD Thesis, James Cook University, 2015)

Lavery, Daniel, 'No Decorous Veil: The Continuing Reliance on an Enlarged Terra Nullius Notion in Mabo [2]' (2019) 43(1) *Melbourne University Law Review* 233

Lavery, Daniel, 'A Greater Sense of Tradition: The Implications of the Normative System Principles in *Yorta Yorta* for Native Title Applications' [2003] *Murdoch University Electronic Journal of Law* 41

'*Law in the Making* By Carleton Kemp Allen Second edition. Oxford: Clarendon Press 1930' 31 (4) *Columbia Law Review* 736

Lawlor, Leonard, 'Jacques Derrida' *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/spr2021/entries/derrida/>

Lawson, FH, *The Oxford Law School: 1850–1965* (Oxford Clarendon Press, 1968)

Leach, ER, 'The Epistemological Background to Malinowski's Empiricism' in Raymond Firth (ed), *Man and Culture: An Evaluation of the Work of Bronislaw Malinowski* (Routledge, 1957) 119

Lefkowitz, David, 'What Makes a Social Order Primitive? In Defence of Hart's Take on International Law' (2017) 23 *Legal Theory* 258

Lehane, John, 'Gummow, William Montague Charles' in Michael Coper, Tony Blackshield and George Williams, *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001; online version 2007)

Lehmann, William C, *John Millar of Glasgow 1735–1801: His Life and Thought and his Contributions to Sociological Analysis* (Cambridge, 1960)

Lester, Geoffrey and Graham Parker, 'Land Rights: The Australian Aborigines Have Lost a Legal Battle, But …' (1973) 11 *Alberta Law Review* 189

Letwin, Shirley Robin, *On the History of the Idea of Law*, ed Noel B Reynolds (Cambridge University Press, 2005)

Llewellyn, KN, and EA Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, University of Oklahoma Press, 1941)

Lloyd of Hampstead, 'An Essay on a Contemporary Jurisprudence by Peter Brett' (1976) 39(6) *Modern Law Review* 742

Lloyd, Dennis, *Introduction to Jurisprudence* (Stevens & Sons, 1959)

Locke, John, *Two Treatises of Government and A Letter Concerning Toleration* (Digireads, first published 1689, 2005 ed)

Lunney, Mark, 'Legal Émigrés and the Development of Australian Tort Law' (2012) 36 *Melbourne University Law Review* 494

Lyall, Andrew, 'Early German Legal Anthropology: Albert Hermann Post and his Questionnaire' (2008) 52(1) *Journal of African Law* 114

Lyons, David, '*HLA Hart* by Neil MacCormick' (1984) 93(1) *Philosophical Review* 112

MacAdam, Alastair and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (Butterworths, 1998)

MacCormack, Geoffrey, 'On the Problem of Law in Primitive Societies' in Werner Krawietz, Theo Mayer-Maly, Ota Weinberger (eds) *Objektivierung des Rechtsdenkens: Gedächtnisschrift für Ilmar Tammelo* (Duncker & Humblot, 1984)

McCormick, John P, 'Derrida on Law: or, Poststructuralism Gets Serious' (2001) 29(3) *Political Theory* 395

MacCormick, Neil, 'Book Review: *A Life of HLA Hart: The Nightmare and the Noble Dream*' (2005) 14 *Social and Legal Studies* 433

MacCormick, Neil, *HLA Hart* (Stanford University Press, 1981)

MacCormick, Neil, 'HLA Hart: A Biographical Sketch' in *HLA Hart* (Stanford University Press, 1981)

MacCormick, Neil and Peter Birks (eds) *The Legal Mind: Essays for Tony Honoré* (Clarendon Press, Oxford, 1986)

McCrudden, Christopher, 'Brian Simpson's *Reflections on "*The Concept of Law*"*: An Introduction to the Symposium' (2012) 3(2) *Transnational Legal Theory* 101

McCulloch, Samuel Clyde, 'James Stephen and the Problems of New South Wales, 1838–1846' 26(4) *Pacific Historical Review* 353

McDonald, Colin R, 'Professor George Paton: Fifth Dean of the Faculty of Law 1946-1950' in Ruth Campbell, *A History of the Melbourne Law School 1857–1973* (Faculty of Law, University of Melbourne, 1977) 132

McHugh, PG, *Aboriginal Societies and the Common Law; A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004)

Mackinolty, John and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991)

McLean, Edward B, *Law and Civilisation: The Legal Thought of Roscoe Pound* (University Press of America, 1992)

McNeil, Kent, 'The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison' in Knafla and Westra (eds) *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* (UBC Press, 2010) 146

Macoun, Alissa, 'Colonising White Innocence: Complicity and Critical Encounters' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage* (Springer, 2016) 85

Macpherson, CB, 'Introduction' in Thomas Hobbes, *Leviathan* (Penguin, first published 1651, 1968 ed)

McQuillan, Martin (ed), *The Politics of Deconstruction: Jacques Derrida and the Other of Philosophy* (Pluto Press, 2007)

McRae, Heather, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues: Commentary and Materials* (2nd ed, LBC, 1997)

McWhinney, Edward, 'Julius Stone and the Sociological Approach to International Law' (1986) 9 *University of New South Wales Law Journal* 14

McWhinney, Edward, 'New Frontiers in Jurisprudence in Canada' (1957–8) 10 *Journal of Legal Education* 331

Maher, FKH, '*Law in the Making*. By Sir Carleton Kemp Allen. Oxford at the Clarendon Press, 1964' 5 *Melbourne University Law Review* 110

Maine, Henry Sumner, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (first published 1861, 1996 reprint of 1861 edition, Thoemmes Press, 1996)

Malbon, Justin, 'The Extinguishment of Native title: The Australian Aborigines as Slaves and Citizens' (2003) 12(2) *Griffith Law Review* 310

Malcolm, Noel, 'A Summary Biography of Hobbes' in Tom Sorrell (ed), *The Cambridge Companion to Hobbes* (Cambridge University Press, 1996) 13

Malinowski, Bronislaw, *Crime and Custom in Savage Society* (1926)

Maloney, Pat, 'Hobbes, Savagery and International Anarchy' (2011) 105(1) *American Political Science Review* 189

Manderson, Desmond, 'Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory' (1996) 20 *Melbourne University Law Review* 1048

Marett, RR, 'Edwin Sidney Hartland' (1927) 38(1) *Folklore* 83

Markwell, Donald, 'Sir Zelman Cohen; Educational Leader and Healing Governor-General' (2012) 101(1) *Round Table* 23

Martin, Michael, *The Legal Philosophy of HLA Hart: A Critical Appraisal* (Temple University Press, 1987)

Martinez, George, 'Foreword: A Symposium on the Jurisprudence of HLA Hart' (1999) 52 *SMU Law Review* 25

Mason, Anthony, 'Emeritus Professor William Morison' *Academy of the Social Sciences in Australia* (Web Page) <http://www.assa.edu.au/fellowship/fellow/deceased/388>

Matthews, RH, *Notes of Some Native Tribes of Australia* (Royal Society of New South Wales, 1906)

Meagher, RP, 'Justice Gummow' (1995) 69 *The Australian Law Journal* 612

Meek, Ronald L, *Social Science and the Ignoble Savage* (Cambridge University Press, 1976)

Melissaris, Emmanuel, 'The More the Merrier: A New Take on Legal Pluralism' (2004) 13(1) *Social and Legal Studies* 57

Mendelson, Wallace, 'Paton, George Whitecross and David P Derham (eds) *A Textbook of Jurisprudence*, Fourth Edition' (1973) 2(6) *Perspective* 122

Merry, Sally Engle, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869

'Messrs Shepherd and Gifford to Earl Bathurst' (15 February 1819) in Frederick Watson (ed) *Historical Records of Australia* (1922) Series 4, Vol 1, 330

Mikhail, John, 'Plucking the Mask of Mystery from its Face': Jurisprudence and HLA Hart' (2007) 95 *Georgetown Law Journal* 733

Mikics, David, *Who Was Jacques Derrida? An Intellectual Biography* (Yale University Press, 2009)

Mill, John Stuart, 'Austin on Jurisprudence' (1863) 118 *Edinburgh Review* 438

Miller, Robert J, 'The Doctrine of Discovery in American Indian Law' (2005) 42 *Idaho Law Review* 1

Miller, Robert J and Jacinta Ruru, 'An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand' (2008–9) 111 *West Virginia Law Review* 849

Millar, John, *The Origin of the Distinction of Ranks: Or an Inquiry into the Circumstances Which Give Rise to Influence and Authority in the Different Members of Society* (Basil, first published 1771, 1791 ed)

Milton, Philip, 'HLA Hart: Jurisprudence and Linguistic Philosophy' (1984) 47(6) *Modern Law Review* 751

Moore, Sally Falk, 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology' (2001) 7(1) *Journal of the Royal Anthropological Institute* 95

More, Thomas, *Utopia* tr Dominic Baker-Smith (Penguin, 2012)

Moreton-Robinson, Aileen (ed), *Critical Indigenous Studies: Engagements in First World Locations* (University of Arizona Press, 2016)

Moreton-Robinson, Aileen, 'The House that Jack Built: Britishness and White Possession' (2005) 1 *Australian Critical Race and Whiteness Studies Association Journal* 21

Moreton-Robinson, Aileen, 'Introduction: Locations of Engagement in the First World' in Moreton-Robinson, Aileen (ed), *Critical Indigenous Studies: Engagements in First World Locations* (University of Arizona Press, 2016) 3

Moreton-Robinson, Aileen, 'The Possessive Logic of Patriarchal White Sovereignty: The High Court and the *Yorta Yorta* Decision' (2004) 3(2) *Borderlands e-journal*

Moreton-Robinson, Aileen, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (University of Queensland Press, 2000)

Moreton-Robinson, Aileen, and Maggie Walter, 'Editorial' (2008) 1(1) *International Journal of Critical Indigenous Studies* 1

Morison, WL, 'Introduction' in John Austin, *The Province of Jurisprudence Determined*, ed David Campbell and Philip Thomas (Ashgate, first published 1832, 1998 ed)

Morison, WL, *John Austin* (Edward Arnold, 1982)

Morison, WL, 'Law School People 1941–1973' in John Mackinolty and Judy Mackinolty (eds) *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 105

Morison, WL, 'Some Myth about Positivism' (1958) 68(2) *The Yale Law Journal* 212

Morphy, Howard, 'Title to their Land' (1978) 22(9) *Quadrant* 36

Mulvaney, DJ, 'Stanner, William Edward (Bill) (1905–1981)', *Australian Dictionary of Biography* <http://adb.anu.edu.au/biography/stanner-william-edward-bill-15541/text26753>

Murphy, Sean D, 'The Concept of International Law' (2009) 103 *Proceedings of the Annual Meeting (American Society of International Law)*165

Myres, JL, 'Edwin Sidney Hartland' (1927) 27 *Man* 143

Nettheim, Garth, '*Mabo* and Legal Pluralism: The Australian Aboriginal Justice Experience' in Kayleen M Hazlehurst (ed), *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia, and New Zealand* (Avebury, 1995)

Nielsen, Jennifer M, 'The Problem with Research' in Dorota Gozdecka and Anne Macduff (eds), *Feminism, Postfeminism, and Legal Theory: Beyond the Gendered Subject* (Routledge, 2019) 117

O, DT, '*Law in the Making*. By Carleton Kemp Allen' (1928) 3(2) *Cambridge Law Journal* 324

O, DT, '*Law in the Making* by Carleton Kemp Allen Third Edition' (1941) 7(2) *Cambridge Law Journal* 297

Obregon, Liliana, 'The Civilized and the Uncivilized' in Bardo Fassbender and Anne Peters (eds) *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 917

Oliver, Peter C, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, 2005)

Palmer, Kingsley, 'Societies, Communities and Native Title', in Lisa Strelein (ed), *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010)

Parkin, George R, *The Rhodes Scholarships* (Constable, 1912)

Paton, GW, 'Whither Jurisprudence?' (1939) 4 *Politica* 16

Paton, GW and G Sawer, 'Ratio Decidendi and Obiter Dictum in Appellate Courts' (1947) 68 *Law Quarterly Review* 461

Paton, George Whitecross, *A Textbook of Jurisprudence* (Oxford, 1946)

Paton, George Whitecross, *A Textbook of Jurisprudence* (Clarendon Press, 2nd ed, 1951)

Paton, George Whitecross, *A Textbook of Jurisprudence*, ed David P Derham (Clarendon Press, 3rd ed, 1964)

Paton, George Whitecross, *A Textbook of Jurisprudence*, ed GW Paton and David P Derham (Clarendon Press, 4th ed, 1972)

Payandeh, Mehrdad, 'The Concept of International Law in the Jurisprudence of HLA Hart' (2011) 21(4) *European Journal of International Law* 967

Pearson, Noel, 'The Concept of Native Title at Common Law' in Galarrwuy Yunupingu (ed) *Our Land is Our Life: Land Rights — Past, Present and Future* (University of Queensland Press, 1997) 150

Pearson, Noel, 'The High Court's Abandonment of the "The Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*' (2003) 7 *Newcastle Law Review* 1

Pelly, Michael, *Murray Gleeson: The Smiler* (Federation Press, 2014)

Perkins, Charles, '"Student Action for Aborigines" Report' in Federal Council for Advancement of Aborigines and Torres Strait Islanders, *Reports and Resolutions of the 8th Annual Conference on Aboriginal Affairs*, 16-18 April 1965, 47

Phillips, O Hood, '*Law in the Making*. By Sir Carleton Kemp Allen. Sixth Edition. Oxford University Press. 1958' (1958) 21 *Modern Law Review* 685

Phillips, O Hood, '*Law in the Making*. By Sir Carleton Kemp Allen. Seventh Edition' (1965) 28 *Modern Law Review* 617

Pitts, Jennifer, 'Boundaries of Victorian International Law' in Duncan Bell (ed), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge University Press, 2007) 67

Pitty, Roderic, 'A Poverty of Evidence: Abusing Law and History in *Yorta Yorta v Victoria* (1998)' (1999) 5 *Australian Journal of Legal History* 41

Plato, *The Republic* tr Trevor J Saunders, HDP Lee (Penguin, 1982)

Plato, *The Laws* tr HDP Lee (Penguin, 1971)

Pocock, JGA, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth* Century (Cambridge, 1957)

Pollock, Frederick, 'Sir Paul Vinogradoff' (1926) 42 *Law Quarterly Review* 1

Pollock, Frederick, 'Introduction and Notes to Sir Henry Maine's "*Ancient Law*" in Henry Sumner Maine, *Ancient Law* (John Murray, 1925)

Porsanger, Jelena, 'An Essay About Indigenous Methodology' <http://septentrio.uit.no/index.php/nordlit/article/viewFile/1910/1776> 109)

Posner, Richard A, 'A Theory of Primitive Society, with Special Reference to Law' (1980) 23(1) *Journal of Law and Economics* 1

Post, Albert Hermann, 'Ethnological Jurisprudence' (1891) 2(1) *Jurist* 31

Postema, Gerald J, *Bentham and the Common Law Tradition* (Oxford University Press, 2019)

Postema, Gerald J, 'Classical Common Law Jurisprudence (Part I) (2002) 2(2) *Oxford University Commonwealth Law Journal* 155

Postema, Gerald J, 'Classical Common Law Jurisprudence (Part II) (2003) 3(1) *Oxford University Commonwealth Law Journal* 1

Postema, Gerald J, 'Coordination and Convention at the Foundations of Law' (1982) 11(1) *Journal of Legal Studies* 165

Pound, Roscoe, 'The End of Law as Developed in Legal Rules and Doctrines' (1914) 27 *Harvard Law Review* 195

Pound, Roscoe, *Jurisprudence* (West Publishing Co, 1959) vol I

Pound, Roscoe, *Outlines of Lectures on Jurisprudence* (Cambridge Harvard University Press, 5th ed, 1943)

Pound, Roscoe, *Social Control Through Law* (Archon Books, 1968)

Poynter, JR, 'Paton, Sir George Whitecross (1902-1985)' *Australian Dictionary of Biography*, <http://adb.anu.edu.au/biography/paton-sir-george-whitecross-15033/text26230>

Poynter, John, 'Scholarships in Australia' in Anthony Kenny (ed) *The History of the Rhodes Trust 1902-1999* (Oxford University Press, 2001) 320

Prest, Wilfred, 'Antipodean Blackstone: The *Commentaries* "Down Under"' (2003) 6 *Flinders Journal of Law Reform* 151

Priestley, LJ, 'Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case' (1974) 6 *Federal Law Review* 150

Pufendorf, Samuel, *De Iure Naturae et Gentium* (first published 1672)

Radcliffe-Brown, AR, 'Primitive Law' in Edwin RA Seligman (ed), (1933) 9 *Encyclopaedia of the Social Sciences* 202

Radi, Heather, 'Street, Lady Jessie Mary (1889–1970)', *Australian Dictionary of Biography* <http://adb.anu.edu.au/biography/street-lady-jessie-mary-11789/text21089>

Radin, Max, '*The Quest for Law* by William Seagle' (1942) 55(5) *Harvard Law Review* 901

Rawls, John, *A Theory of Justice* (Oxford University Press, 1972)

Raz, Joseph, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009)

Raz, Joseph, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Clarendon Press, 1980)

Raz, Joseph, 'HLA Hart (1907–1992)' (1993) 5(2) *Utilitas* 145

Read, Peter, *Charles Perkins: A Biography* (Viking, 1990)

Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution (Report of the Expert Panel, January 2012)

Record of the Meeting of the Society of Public Teachers of Law, held at Sheffield, England, 19th September 1953 in Denis Browne, 'Reflections on the Teaching of Jurisprudence' (1953) 2 *Journal of the Society of Public Teachers of Law* 79, 90

Redmond, Anthony, 'Identifying the Relevant Level of a Society in Australian Native Title Claims (2011) 21(3) *Anthropological Forum: A Journal of Social Anthropology and Comparative Sociology* 287

Referendum Council, *Final Report of the Referendum* Council (30 June 2017)

Report of the UK Parliamentary Select Committee on Aboriginal Tribes (British Settlements) (Aborigines Protection Society, 1837)

'Review of *Ancient Law* by Henry Sumner Maine' (1961) 8(4) *Crayon* 77

Henry Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Allen & Unwin, 1996)

Reynolds, Henry, *The Law of the Land* (Penguin, 1987)

Reynolds, Henry, 'The *Mabo* Judgment in the Light of Imperial Land Policy' (1993) 16(1) *University of New South Wales Law Journal* 27

Rheinstein, Max, 'Stone: *The Province and Function of Law*' (1948) 16 *University of Chicago Law Review* 754

Riddett, Lyn A, 'The Strike that Became a Land Rights Movement: A Southern "Do-Gooder" Reflects on Wattie Creek 1966–74' (1997) 72 *Labour History* 50

Rigney, Lester-Irabinna, 'Internationalization of an Indigenous Anticolonial Critique of Research Methodologies: A Guide to Indigenist Research Methodology and its Principles' (1999) 14(2) *Wicazo Sa Review* 109

Rigney, Lester-Irabinna, 'Indigenous Research Epistemologies: A Historical Journey of Conviction, Contradiction and Transformation' (PhD Thesis, Flinders University, 2007)

Rigney, Lester-Irabinna, 'Indigenous Australian Views on Knowledge Production and Indigenist Research' in Julian E Kunnie, Nomalungelo I Goduka (eds), *Indigenous Peoples' Wisdom and Power: Affirming Our Knowledge Through Narratives* (Routledge, 2006) 32

Rigsby, Bruce, 'Custom and Tradition: Innovation and Invention' [2006] *Macquarie Law Journal* 8

Rigsby, Bruce, 'Social Theory, Expert Evidence, and the *Yorta Yorta* Rights Appeal Decision' in Louis Knafla & Haijo Westra (eds), *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* (UBC Press, 2010) 53

Ritter, David, 'The Judgement of the World: The *Yorta Yorta* Case and the "Tide of History"' (2004) 35(123) *Australian Historical Studies* 106

Ritter, David, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18(1) *Sydney Law Review* 5

Rizetti, Janine, 'From Foundational Case to Footnote: Judge Willis' Opening Address in the Case of *R v Bonjon*' (2017) 88(1) *Victorian Historical Journal* 69

Rizetti, Janine, 'Judge Willis, Bonjon and the Recognition of Aboriginal Law' (2010) *ANZLH e-journal*

Roberts, Simon, *Order and Dispute: An Introduction to Legal Anthropology* (Penguin, 1979)

Rodes, Robert E, 'On the Historical School of Jurisprudence' (2004) 49 *American Journal of Jurisprudence* 165

Rose, Stanley D, '*Law in the Making* by Carleton Kemp Allen Sixth Edition' 43 *Minnesota Law Review* (1958) 43 *Minnesota Law Review* 173

Roth, H Ling, *The Aborigines of Tasmania* (1890)

Rottschaefer, Henry, '*Law in the Making* by Carleton Kemp Allen' (1929) 2 *Southern California Law Review* 504

Roughan, Nicole and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press, 2017)

Rouland, Norbert, *Legal Anthropology* (Athlone Press, 1994)

Rowse, Tim, *Nugget Coombs: A Reforming Life* (Cambridge, 2002)

Rowse, Tim, *Obliged to be Difficult: Nugget Coombs' Legacy in Indigenous Affairs* (Cambridge, 2000)

Royal Commission into Aboriginal Deaths in Custody (National Report, April 1991) vol 2

Rumble, Wilfred E, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in Nineteenth-Century England* (Continuum, 2005)

Ryan, Alan, 'Hobbes' Political Philosophy' in Tom Sorrell (ed), *The Cambridge Companion to Hobbes* (Cambridge University Press, 1996) 208

Saint Germain, Christopher, *Doctor and Student: Or Dialogues between a Doctor of Divinity and a Student in the Laws of England* (1543)

Sampford, Charles, 'Legal Systems and their Place in Legal Theory' in DJ Galligan (ed) *Essays in Legal Theory* (Melbourne University Press, 1984)

Samuels, Justice Gordon, 'Julius Stone' (Oration at the Funeral of Julius Stone, 5 September 1985) (1986) 9 *University of New South Wales Law Review* 9

Schapera, I, 'Malinowski's Theories of Law' in Raymond Firth (ed), *Man and Culture: An Evaluation of the Work of Bronislaw Malinowski* (Routledge, 1957) 139

Schlag, Pierre, 'A Brief Survey of Deconstruction' (2005–6) 27 *Cardozo Law Review* 741

Schott, Rüdiger, 'Main Trends in German Ethnological Jurisprudence and Legal Ethnology' (1982) 20 *Journal of Legal Pluralism* 37

Schultz, Fritz, *Classical Roman Law* (Clarendon Press, Oxford, 1951)

Seagle, William, *The Quest for Law* (Alfred Knopf, 1941)

Sears, Charles B, '*Law in the Making* by Carleton Kemp Allen' (1927–8) 13 *Cornell Law Quarterly* 484

Sears, Charles B, '*Law in the Making* by Carleton Kemp Allen Second Edition' (1930–1) 16 *Cornell Law Quarterly* 146

Secher, Ulla, 'The *Mabo* Decision: Preserving the Distinction between "Settled" and "Conquered or Ceded" Territories' (2005) 24 *University of Queensland Law Review* 35

Secher, Ulla, 'The Reception of Land Law into the Australian Colonies Post-*Mabo*: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of Continuity Pro-Tempore' (2004) 27(3) *UNSW Law Journal* 1

Seidel, Peter, 'Native Title: The Struggle for Justice for the Yorta Yorta Nation' (2004) 29(2) *Alternative Law Journal* 10

Sharp, Malcolm, '*The Quest for Law* by William Seagle' (1941) 9(1) *University of Chicago Law Review* 202

Shartel, Burke '*Law in the Making*. By Carleton Kemp Allen. Second edition revised and enlarged. Oxford: Clarendon Press 1930' 29 *Michigan Law Review* 542

Shearer, IA, 'Professor Julius Stone, AO, OBE, QC' (1985) 8 *University of New South Wales Law Journal* 233

Sheleff, Leon, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (Frank Cass, 1999)

Sheller, Simon 'Kirby, Michael Donald' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 394

Simpson, AWB, 'The Common Law and Legal Theory' in AWB Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, 1987) 359

Simpson, AWB, '*Making Law Bind: Essays Legal and Philosophical* by Tony Honoré' (1988) 47(2) *Cambridge Law Journal* 299

Simpson, AWB (ed), *Oxford Essays in Jurisprudence* (Oxford Clarendon Press, Second Series, 1973)

Simpson, AW Brian, *Leading Cases in the Common Law* (Oxford University Press, 1995)

Simpson, Brian, *Reflections on* The Concept of Law (Oxford University Press, 2011)

Simpson, SP and J Stone, *Cases and Readings on Law and Society* (West Publishing, 1948–49)

Simpson, Sidney Post, 'English Law in the Making' 4 (2) *Modern Law Review* 121

Simpson, Sidney Post and Julius Stone, *Law and Society in Evolution* (West Publishing, 1948)

Skillen, Anthony, *Ruling Illusions: Philosophy and the Social Order* (Harvester Press, 1977)

Smith, Adam, *Lectures on Jurisprudence*, ed Ronald L Meek, David Raphael and Peter Stein (Oxford University Press, 1976)

Smith, Adam, *Wealth of Nations* (first published 1776)

Smith, Linda Tuhiwai, *Decolonizing Methodologies: Research and Indigenous Peoples* (Otago University Press, 2nd ed, 2012)

Smith, TB, '*A Text-Book of Jurisprudence*, Second Edition, by GW Paton, 1951' (1952) 15 *Modern Law Review* 517

Sorrell, Tom (ed), *The Cambridge Companion to Hobbes* (Cambridge University Press, 1996)

Spencer, Baldwin and Francis Gillen, *Across Australia* (1912)

Spencer, Baldwin and Francis Gillen, *The Northern Tribes of Central Australia* (1904)

Spivak, Gayatri Chakravorty, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press, 1988) 271

Starr, Leonie, *Julius Stone: An Intellectual Life* (Oxford University Press, 1992)

Stein, Peter, *Legal Evolution: The Story of an Idea* (Cambridge University Press, 1980)

Stein, Peter, 'The Four-Stage Theory of the Development of Societies' in Peter Stein, *The Character and Influence of the Roman Civil Law: Historical Essays* (Bloomsbury, 2003)

Stein, Peter, 'The Tasks of Historical Jurisprudence' in Peter Birks and Neil MacCormick (eds), *The Legal Mind: Essays for Tony Honoré* (Clarendon Press, 1986)

Stein, Peter, 'Vinogradoff, Sir Paul Gavrilovitch [Pavel Gavriilovich Vinogradov] (1854 – 1925)' *Oxford Dictionary of National Biography* (23 September 2004) <https://doi.org/10.1093/ref:odnb/36664>

Stephen, Leslie, 'Stephen, James (1789–1859)' 54 *Dictionary of National Biography, 1885–1900* 163, <https://en.wikisource.org/wiki/Stephen,_James_(1789-1859)_(DNB00)>

Stephen, J, 'Validity of Statute, 20 George II, c 19 in the Colony' (1822) in Frederick Watson (ed), *Historical Records of Australia* (1922) Series 4, Vol 1, 412

Stephens, Mamari, 'Maori Law and Hart: A Brief Analysis' (2001) 32 *Victoria University of Wellington Law Review* 853

Steven, Wilf, 'The Invention of Legal Primitivism' (2009) 10 *Theoretical Inquiries in Law* 485

Stoljar, J, 'Invisible Cargo: The Introduction of English Law into Australia' in JT Gleeson, JA Watson, RCA Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) 194

Stone, Julius, 'A Critique of Pound's Theory of Justice' (1934–5) 20 *Iowa Law Review* 531

Stone, Julius, *Human Law and Human Justice* (Maitland Publications, 1965)

Stone, Julius, 'Law and Society in the Age of Roscoe Pound' (1966) 1 *Israel Law Review* 173

Stone, Julius, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1964)

Stone, Julius, *The Province and Function of Law: Law as Logic Justice and Social Control* (Associated General Publications, Sydney, 1946)

Stone, Julius, 'The Province of Jurisprudence Redetermined' (1944) 7(3) *Modern Law Review* 97

Stone, Julius, 'Roscoe Pound and Sociological Jurisprudence' (1965) 78(8) *Harvard Law Review* 1578

Stone, Julius, *Social Dimensions of Law and Justice* (Maitland Publications, 1966)

Stone, Julius, 'Trends in Jurisprudence in the Second Half Century' (Speech, University of Texas Law School, 24 March 1967) reprinted in Barbara Drexler Hathaway, *Julius Stone* (Legal Bibliography Series #20, Tarlton Law Library, School of Law, University of Texas, March 1980).

Strehlow, TGH, *Aranda Traditions* (Melbourne University Press, 1947)

Strelein, Lisa, 'A Captive of Statute' (2009) 93 *Australian Law Reform Commission Reform Journal* 48

Strelein, Lisa, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2009)

Strelein, Lisa, 'From *Mabo* to *Yorta*: Native Title Law in Australia' (2005) 19 *Washington University Journal of Law and Policy* 225

Strelein, Lisa (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010)

Sugarman, David, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William L Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) 26

Sugarman, David and HLA Hart, 'HLA Hart in Conversation with David Sugarman' (2005) 32(2) *Journal of Law and Society* 267

Sullivan, Patrick, *Belonging Together: Dealing with the Politics of Disenchantment in Australian Indigenous Affairs Policy* (Aboriginal Studies Press, 2011)

Summers, Robert S, 'HLA Hart's *The Concept of Law*: Estimations, Reflections, and a Personal Memoir' (1995) 45 *Journal of Legal Education* 587

Summers, Robert S, 'Professor HLA Hart's Concept of Law' (1963) *Duke Law Journal* 629

Summers, Robert S, 'Professor MacCormick on HLA Hart's Legal Theory' (1983) 31(3) *American Journal of Comparative Law* 481

Swan, John, 'Review of *Oxford Essays in Jurisprudence*, Second Series by AWB Simpson' (1973) 23(4) *University of Toronto Law Journal* 479

Sylvest, Casper, 'The Foundations of Victorian International Law' in Duncan Bell (ed), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge University Press, 2007) 47

Taffe, Sue, 'Shirley Andrews: an Architect of the National Aboriginal Civil Rights Movement, 1952–1968' (2011) 8(2) *History Australia* 153

Tamanaha, Brian, 'The Folly of the "Social Scientific" Concept of Legal Pluralism' (1993) 20 *Journal of Law and Society* 192

Tamanaha, Brian, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001)

Tamanaha, Brian, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27(2) *Journal of Law and Society* 296

Tamanaha, Brian 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375

Tamanaha, Brian Z, 'Sociological Jurisprudence Past and Present' (2020) 45(2) *Law & Social Inquiry* 493

Tamanaha, Brian Z, 'The Third Pillar of Jurisprudence: Social Legal Theory' (2015) 56 *William and Mary Law Review* 2235

Tarlo, Hyman, 'Law Schools and Law Teachers in Australia: 1946–1974' 9(1) *The University of Queensland Law Journal* 26

Tehan, Maureen, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27(2) *Melbourne University Law Review* 523

Thomas, NW, *Kinship Organization and Group Marriage in Australia* (1906)

Thomson, DF, *Economic Structure and the Ceremonial Exchange Cycle in Arnhem Land* (MacMillan, 1949)

Tobin, Brendan, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters* (Routledge, 2016)

'Tony Honoré: Emeritus Regius Professor of Civil Law at All Souls', *University of Oxford Faculty of Law* (Web Page) <https://www.law.ox.ac.uk/people/tony-honor%C3%A9>

Torre, Massimo La, 'The Hierarchical Model and HLA Hart's Concept of Law' (2013) 21 *Revus Journal for Constitutional Theory and Philosophy of Law* 141

Treiman, Israel, 'Review of "*The Quest for Law*" by William Seagle' (1942) 27(4) *Washington University Law Review* 608

Tuck, Richard, *Hobbes* (Oxford University Press, 1989)

Tuck, Richard, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, 1999)

Tully, James, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge University Press, 1993)

Tuori, Kaius, *Lawyers and Savages: Ancient History and Legal Realism in the Making of Legal Anthropology* (Routledge, 2015)

Twining, William, 'Academic Law and Legal Philosophy: The Significance of Herbert Hart' (1979) 95 *Law Quarterly Review* 557

Twining, William L, *Globalisation and Legal Theory* (Northwestern University Press, 2000)

Twining, William L (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986)

Twining, William, 'Normative and Legal Pluralism: A Global Perspective' (2009–2010) 20 *Duke Journal of Comparative and International Law* 473

Twining, William, 'The Province of Jurisprudence Re-Examined' in Catherine Dauvergne, *Jurisprudence for an Interconnected Globe* (Ashgate, 2003)

Uluru Statement from the Heart (National Constitutional Convention, 26 May 2017)

Utz, Stephen G, 'Maine's "*Ancient Law*" and Legal Theory' (1983–4) 16 *Connecticut Law Review* 821

Vattel, Emer de, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (first published 1758)

Veracini, Lorenzo, 'Introducing Settler Colonial Studies' (2011) 1 *Settler Colonial Studies* 1

Veracini, Lorenzo, 'Settler Colonialism and Decolonisation' (2007) 6(2) *Borderlands*

Veracini, Lorenzo, '"Settler Colonialism": Career of a Concept' (2013) 41(2) *Journal of Imperial and Commonwealth History* 313

Ville, Jacques de, *Jacques Derrida: Law as Absolute Hospitality* (Routledge, 2011)

Vinogradoff, Paul, *The Collected Papers of Paul Vinogradoff Volume II* ed HAL Fisher (Oxford at the Clarendon Press, 1928)

Vinogradoff, Paul, 'The Teaching of Sir Henry Maine' in Paul Vinogradoff, *The Collected Papers of Paul Vinogradoff*, ed HAL Fisher (Oxford at the Clarendon Press, 1928) vol 2, 173

Vinogradoff, Paul, *Outlines of Historical Jurisprudence* (Oxford University Press, 1920–22)

Vinogradoff, Paul, *Outlines of Historical Jurisprudence: Volume I Introduction — Tribal Law* (Oxford University Press, 1920)

Visser, Daniel and Max Loubser (eds), *Thinking About Law: Essays for Tony Honoré* (SiberInk, 2011)

W, PH '*Law in the Making* by Carleton Kemp Allen Second Edition' (1930) 46 *Law Quarterly Review* 523

Waldron, Jeremy, 'All We Like Sheep' (1999) 12 *Canadian Journal of Law and Jurisprudence* 169

Waldron, Jeremy, 'Hart and the Principles of Legality' in Matthew Kramer et al (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford University Press, 2008) 67

Waldron, Jeremy, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?' in Luis Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's* The Concept of Law (Hart Publishing, 2013)

Walker, Brett, 'Gleeson, (Anthony) Murray' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001; online version 2007)

Waller, Louis, 'Brett, Peter (1918–1975)' 13 *Australian Dictionary of Biography* (MUP, 1993)

Waluchow, WJ, 'HLA Hart: Supervisor, Mentor, Friend, Inspiration' 5 *Problema: Anuario de Filosofia y Teoria del Derecho* 3

Waluchow, WJ, 'Legality, Morality, and the Guiding Function of Law' in Matthew Kramer et al (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford University Press, 2008) 85

Ward, Charlie, 'Following the Leaders: The Role of Non-Indigenous Activism in the Development and Legitimation of Daguragu Community (Wattie Creek), 1969–73' (2014) 100(1) *Journal of the Royal Australian Historical Society* 69

Ward, John M, 'The Law School in World War II' in John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 97

Watson, Blake A, 'John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal Recognition" of the Doctrine of Discovery' (2011) 36(2) *Seton Hall Law Review* 481

Watson, Blake, 'The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand' (2011) 34 *Seattle University Law Review* 507

Watson, Frederick (ed), *Historical Records of Australia* (1922) Series 1, Vol 21

Watson, Frederick (ed), *Historical Records of Australia* (1922) Series 4, Vol 1

Watson, Irene, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015)

Watson, Irene 'Buried Alive' (2002) 13 *Law and Critique* 253

Watson, Irene, 'Illusionists and Hunters: Being Aboriginal in the Occupied Space' (2005) 22(1) *Feminist Law Journal* 15

Watson, Irene, 'Indigenous People's Law-Ways: Survival Against the Colonial State' (1997) 8(1) *Australian Feminist Law Journal* 39

Watson, Irene, 'Naked Peoples: Rules and Regulations' (1998) 4 *Law, Text, Culture* 1

Watson, Irene, 'Power of the Muldarbi: The Road to its Demise' (1998) 11(1) *Australian Feminist Law Journal* 28

Watson, Irene, 'Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal Peoples' (2009) 108(1) *South Atlantic Quarterly* 27

Watson, Irene, 'Re-Centring First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10(5) *AlterNative: An International Journal of Indigenous Peoples* 508

Waugh, John, *First Principles: The Melbourne Law School 1857-2007* (Myegunyah Press, 2007)

Webber, Jeremy, 'The Inauguration of the Julius Stone Institute of Jurisprudence' (2000) 25(2) *Australian Journal of Legal Philosophy* 123

Weiner, James F, 'Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta' (2002) 18 *Land, Rights, Laws: Issues of Native Title* 1

Weiner, James F and Katie Glaskin, 'Introduction: The (Re-)Invention of Indigenous Laws and Customs' (2006) 7(1) *Asia Pacific Journal of Anthropology* 1

Wensing, Edward, 'Land Justice for Indigenous Australians: How Can Two Systems of Land Ownership, Use and Tenure Coexist with Mutual Respect Based on Parity and Justice?' (PhD Thesis, The Australian National University, 2019)

Wentworth, WC, 'Will You Please Help to Get this Bill Passed by Parliament?' (Vaughan Douglas Print, Brookvale)

Wheare, KC, 'Allen, Sir Carleton Kemp (1887 – 1966)' *Australian Dictionary of Biography* Vol 7 (MUP, 1979)

Whitman, James Q, 'Western Legal Imperialism: Thinking About the Deep Historical Roots' (2009) 10(2) *Theoretical Inquiries in Law* 305

Whitmore, EF, '*Law in the Making* by Carleton Kemp Allen Fifth Edition' (1953) 31 *Canadian Bar Review* 211

Wigdor, David, *Roscoe Pound: Philosopher of Law* (Greenwood Press, 1974)

'William Montague Charles Gummow AC', *High Court of Australia* (Web Page) <http://www.hcourt.gov.u/justices/former-justices/justice-gummow>

Williams, ET, 'Allen, Sir Carleton Kemp (1887-1966)', rev Tony Honoré, *Oxford Dictionary of National Biography* (Oxford University Press, 2004)

Williams, Robert A Jr, 'The Algebra of Federal Indian Law: The Hard Trail of Decolonising and Americanising the White Man's Indian Jurisprudence' (1986) *Wisconsin Law Review* 219

Williams, Robert A Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, 1990)

Williams, Robert A Jr, 'Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination' (1991) 8(2) *Arizona Journal of International and Comparative Law* 51

Williams, Robert A Jr, 'Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's "Learning to Live with the Plenary Power of Congress Over the Indian Nations"' (1988) 30 *Arizona Law Review* 440

Williams, Robert A Jr, 'The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought' (1983–4) 57(1) *Southern California Law Review* 1

Williams, Robert A Jr, *Savage Anxieties: The Invention of Western Civilization* (Palgrave Macmillan, 2012)

Wolff, Patrick, 'The Limits of Native Title' (2000) 3 *Meanjin* 129

Wolff, Patrick, 'Nation and Miscegenation: Discursive Continuity in the Post-*Mabo* Era' (1994) 36 *Social Analysis* 93

Wolff, Patrick, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387

Woodward, Edward, *One Brief Interval: A Memoir* (Miegunyah Press, 2005)

Wortley, BA, 'Review: *Legal Duties and Other Essays in Jurisprudence* by Carleton Kemp Allen' (1932) 38 *Economica* 497

Wright, Cecil A, 'Stone on Jurisprudence' (1947) 7(1) *The University of Toronto Law Journal* 227

Wylie, FJ, 'The Social Side of Oxford Life' in George R Parkin, *The Rhodes Scholarships* (Constable, 1912) 181

Wylie, FJ, 'The University System' in George R Parkin, *The Rhodes Scholarships* (Constable, 1912) 138

Wylie, Francis, 'The Rhodes Scholars and Oxford 1902-31' in Godfrey Elton (ed), *The First Fifty Years of the Rhodes Trust and the Rhodes Scholarships* (Oxford, 1956)

Yntema, Hessel E, '*Quest for Law* by William Seagle' (1942) 220 *Annals of the American Academy f Political and Social Science* 271

Yntema, Hessel E, 'Recent Literature on Jurisprudence' (1954) 3 *American Journal of Comparative Law* 257

Yntema, Hessel E, 'Review: *Legal Duties and Other Essays in Jurisprudence* by Carleton Kemp Allen' (1933) 33(5) *Columbia Law Review* 933

'Yorta Yorta Nation Aboriginal Corporation' (Website) <https://yynac.com.au/>

Young, Simon, 'Cultural Timelessness and Colonial Tethers: Australian Native Title in Historical and Comparative Perspective' (2008) 12(1) *Australian Indigenous Law Reporter* 60

Young, Simon, 'Tides of History and Jurisprudential Gulfs: Native Title Proof and the Noongar Western Australia Claim' (2010) 8(1) *Indigenous Law Journal* 95

Young, Simon, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008)

Yunupingu, Galarrwuy, 'From Bark Petition to Native Title' in Galarrwuy Yunupingu (ed), *Our Land is Our Life: Land Rights — Past, Present and Future* (University of Queensland Press, 1997) 1

Yunupingu, Galarrwuy, 'Tradition, Truth and Tomorrow' (Dec 2008 – Jan 2009) *Monthly* 32-40

Yunupingu, Galarrwuy (ed), *Our Land is Our Life: Land Rights — Past, Present and Future* (University of Queensland Press, 1997)

Yunupingu, Mandaway, 'Yothu Yindi: Finding Balance' (1994) 35(4) *Race and Class* 4

Zulueta, F de, 'Paul Vinogradoff, 1854–1925' (1926) 42 *Law Quarterly Review* 202

Zulueta, F de, '*Primitive Law* by AS Diamond' (1936) 50(2) *Classical Review* 78

B *Cases*

Advisory Opinion on the Western Sahara (Spain v Morocco) [1975] ICJ Reports 12

Bodney v Bennell (2008) 167 FCR 84

Calder v Attorney-General of British Columbia [1973] SCR. 313

Case No 15, Anonymous (1722) 2 Peere Williams 75

Coe v Commonwealth (1979) 24 ALR 118

Cooper v Stuart (1889) AC 286

Fejo v Northern Territory (1998) 195 CLR 96

In re Southern Rhodesia (1919) AC 211

Jones v Bartlett (2000) 205 CLR 166

Love v Commonwealth (2020) 375 ALR 597; [2020] HCA 3

Mabo v Queensland [No 1] (1988) 166 CLR 186

Mabo v Queensland [No 2] (1992) 175 CLR 1

MacDonald v Levy (1833) 1 Legge 39; [1833] NSWSupC 47

Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606

Members of the Yorta Yorta Aboriginal Community v Victoria (2001) 180 ALR 655

Members of the Yorta Yorta Community v Victoria (2002) 214 CLR 422

Milirrpum v Nabalco (1971) 17 FLR 141

New South Wales v Commonwealth (1975) 135 CLR 337

Northern Territory v Griffiths (2019) 93 ALJR 327

Queensland v Congoo (2015) 256 CLR 239

R v Murrell and Bummaree (1836) 1 Legge 72; [1836] NSWSupC 35

R v Ballard or Barrett [1829] NSWSupC 26

Risk v Northern Territory (2007) 240 ALR 75

Walker v New South Wales (1994) 182 CLR 45

Western Australia v Ward (2002) 191 ALR 1

C *Legislation*

Commonwealth Constitution

Constitution Alteration (Aborigines) Bill 1965

Constitution Alteration (Aborigines) Bill 1966

Constitution Alteration (Repeal of Section 127) Bill 1965 ('New clauses to be proposed by Mr Wentworth') (Bills Digest [210] – 920/16.11.1965 F4351/65)

Constitution Alteration (Aboriginals) 1967

Judiciary Act 1903 (C'th)

Native Title Act 1993 (C'th)

Racial Discrimination Act 1975 (C'th)

D *Treaties*

United Nations *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007)

E Newspaper Articles

'Called to Bar' *Brisbane Courier* (Queensland, 20 November 1929) 21

'Jurisprudence: Chair at University; Dr GW Paton Appointed', *The Argus* (Melbourne, 24 December 1930) 8

'Sir Carleton Kemp Allen' (Obituary), *The Guardian* (12 December 1966) 2

'University Council: New Professor of Jurisprudence' *The Age* (Melbourne, Victoria, 24 December 1930) 10

'William Seagle, NLRB Lawyer, Was Author of Books on the Law' *New York Times* (New York, 2 January 1978) 24

Wentworth, WC, 'Does the Referendum Go Far Enough?' *Sydney Morning Herald* (Sydney, 17 November 1965)

'Won Own Education', *News* (Adelaide, 29 December 1930) 4

F *Other*

Commonwealth, *Gazette: Special*, No S 402, 30 December 1993

Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1966, 1 (William Wentworth)

Hardy, Frank, 'Save the Gurindji' (newspaper advertisement) 1970

Letter from Margaret Bello to Julius Stone, 23 June 1959, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Charles Perkins, John Powles, Gary Williams and Paul Cohen, 18 November 1964, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Alex Mills 25 April 1965, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Alex Mills to Julius Stone, 13 April 1967, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Norman Paling (Aboriginal Children's Advancement Society) to Julius Stone, 10 November 1966, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Julius Stone to Norman Paling, 6 December 1966, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Norman Paling (Aboriginal Children's Advancement Society) to Julius Stone, 2 January 1967, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Stan Davey (Federal Council for Aboriginal Advancement), 28 August 1963, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Julius Stone to Colin Tatz, 6 August 1964, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Julius Stone to Shirley Andrews, 15 July 1963, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Alex Mills, 25 April 1965, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Alex Mills to Julius Stone, 25 August 1965, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Alex Mills, 25 August 1965

Letter from Alex Mills to EA Willis (Chief Secretary of NSW) 23 October 1965

Letter from Julius Stone to JB Renshaw, 27 April 1965, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Alex Mills to EA Willis (Chief Secretary of NSW), 23 October 1965, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Alex Mills to Julius Stone, 21 November 1965

Letter from Julius Stone, 22 November 1965, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Alex Mills to Julius Stone 3rd January 1966

Letter from Alex Mill to the Editor, Sydney Morning Herald, 26th December 1965

Letter from Julius Stone to Robert Menzies, 6 January 1966, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Julius Stone to Alex Mills, 6 January 1966, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Alex Mills to Harold Holt, 3 February 1966, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from Julius Stone to Robert Menzies, 3 February 1966, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

Letter from FW Jennings (Private Secretary to the Prime Minister) to Alex Mills, 23rd February 1966

Letter from Julius Stone to HC Coombs, 9 January 1969, WEH Stanner Collection, AIATSIS, MS 3752, Series 15 Item 2

Letter from HC Coombs to Julius Stone, 13 January 1969, WEH Stanner Collection, AIATSIS, MS 3752, Series 15 Item 2

Letter from WEH Stanner to Frank Purcell, 5 March 1969, WEH Stanner Collection, AIATSIS, MS 3752, Series 15 Item 2

Letter from AE Gotlieb to Julius Stone, 3 April 1969, Papers of Julius Stone, National Library of Australia, MS 5166, Series 14, Box 165

Letter from Julius Stone to Allan Gotlieb, 20 February 1969, Papers of Julius Stone, National Library of Australia, MS 5166, Series 14, Box 165

Letter from Julius Stone to WEH Stanner, 26 February 1969, Papers of Julius Stone, National Library of Australia, MS 5166, Series 14, Box 165

Letter from WEH Stanner to Frank Purcell, 5 March 1969, WEH Stanner Collection, AIATSIS, MS 3752, Series 15 Item 2

Memo from Julius Stone to Full Time Colleagues in the Faculty of Law, undated, Papers of Julius Stone, National Library of Australia, MS 5166, Series 14, Box 165

Memo from AR Blackshield 'Canadian Cases', 27 February 1969, WEH Stanner Collection, AIATSIS, MS 3752, Series 15 Item 2

Memorandum from RA Woodman to Julius Stone, 21 February 1969, Papers of Julius Stone, National Library of Australia, MS 5166, Series 14, Box 165

'New Aboriginal Affairs Bill Proposed' (1968) 17(7) *Dawn* (Magazine for the Aboriginal People of New South Wales, July 1968) 1

Northern Territory Council for Aboriginal Rights, Newsletter, 5 December 1968

SAFA, 'Submissions to the Joint Parliamentary Committee on Aboriginal Welfare', 6 April 1967, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

SAFA, 'Suggested Immediate Measures Requiring Little Money' (copy of material supplied to Mr Willis, Chief Secretary of NSW)

Stanner, WEH, 'The Yirrkala Case', Papers of Julius Stone, National Library of Australia, MS 5166, Series 14, Box 165

Stone, Julius, and Tony Blackshield, 'Legal Questions Affecting Yirrkala Land Claim', Papers of Julius Stone, National Library of Australia, MS 5166, Series 14, Box 165

Stone, Julius and Alex Mills, 'Statement on Proposed Changes in the Constitution Concerning Aborigines', Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

'Summary of Observations' (SAFA to Mr Willis, Chief Secretary of NSW)

Tatz, Colin, 'Bureau of Aboriginal Affairs' (proposal), 17 June 1964, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

'Yinjilli' (Bulletin of the Federal Council for Aboriginal Advancement) (Issue 1), June 1963, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166)

'Yirrkala Land Case: Summary of Discussion at Seminar held at 10.30am on Friday 28th February 1969, Seminar Room 3, RSPacS, ANU', WEH Stanner Collection, AIATSIS, MS 3752, Series 15 Item 2

APPENDIX
JULIUS STONE, ABORIGINAL RIGHTS AND NATIVE TITLE

I. INTRODUCTION

Julius Stone's commitment to social justice and minority rights is well known and has been well-documented. Less well known and virtually undocumented is Stone's commitment to, support of, and involvement in, Aboriginal rights and native title in Australia. The purpose of the research set out in this appendix is to place Stone's jurisprudence firmly within the context of his commitment to social justice and the rights of minorities. This appendix documents Stone's support of the Aboriginal rights movement during the 1960s, including his personal involvement in the preparation of the first native title case to be put before an Australian court.

The research methods for this appendix comprise archival research into Stone's personal papers, archived in the National Library of Australia, and the papers of Professor WEH (Bill) Stanner, archived in the collections of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). The archival material is supplemented by literature relating to the Aboriginal civil rights and land rights movements, which provides the political and historical context for understanding the import and significance of the papers.

The appendix begins with an introduction to the commitment to social justice and minority rights that characterised the work of Julius Stone. I then explore and document the extent to which this commitment extended to support of, and involvement in, Aboriginal rights and native title in Australia. Finally, I analyse the language used by Stone in his personal papers to discern the basis for his support of Indigenous rights.

II. SOCIAL JUSTICE AND MINORITY RIGHTS

Stone's commitment to social justice and minority rights was founded in his experience of the extreme anti-Semitism of the early 20th century. His parents had been part of the Jewish exodus from Eastern Europe at the start of the century, migrating to England shortly before Stone's birth, as refugees from Tsarist persecution.[1] His personal experience of anti-Semitism and consciousness of Jewish history prompted Stone's concern with the law's capacity for justice

[1] Leonie Starr, *Julius Stone: An Intellectual Life* (Oxford University Press, 1992) 1.

and the protection of minorities.[2] His earliest published works related to the protection of the rights of minorities against member states at international law (in an era before the United Nations focus on human rights).[3]

Stone became a fierce defender of human rights,[4] and was hostile 'to any form of prejudice and discrimination'.[5] He was concerned that 'positive law often was an instrument of oppression which did not measure up to concepts of justice available to him'.[6] The concept of justice, and its relation to positive law, interested him almost to the point of obsession.[7] His primary concern 'was always with distributive and substantive justice', and with positive law only 'to the extent that it aided or impeded the quest for such justice.'[8] He was, however, 'acutely conscious that the concept of justice was a social and cultural construct.'[9] It is perhaps hardly surprising therefore that Stone was supportive of the movement for Aboriginal rights in Australia that achieved national consciousness during the 1960s.

Nevertheless, Stone's commitment to social justice and minority rights was constrained by his personal positioning as a middle-class, highly educated man of his time. His commitment to social justice did not extend to an understanding of the impact of patriarchy or heteronormativity, for example. Stone did not challenge the criminalisation of homosexuality,[10] and his work formed part of the patriarchal legal tradition. Not only did Stone's scholarship completely 'overlook the silencing or omission of women from most discussions of the law',[11] but he benefited from women's unpaid, or poorly paid, labour.[12] He certainly benefited from

[2] Ibid 19-20, 24; Anthony Blackshield, 'Stone, Julius (1907-1985)' *Australian Dictionary of Biography* <http://adb.anu.edu.au/biography/stone-julius-15728/text26916>; RLJ Hawke, 'Julius Stone—Humanist, Jurist and Internationalist Inaugural Julius and Reca Stone Memorial Lecture' (1986) 9 *University of New South Wales Law Journal* 1, 2–5; Justice Gordon Samuels, 'Julius Stone' (Oration at the funeral of Julius Stone, 5 September 1985) (1986) 9 *University of New South Wales Law Review* 9, 12.

[3] Starr (n 1) 19-20, 26.

[4] Hawke (n 2) 4.

[5] Ibid.

[6] John Goldring, 'Julius Stone and the Study of Law and Society in Australia' (1985) 2 (2) *Australian Journal of Law and Society* 4, 9 ('Tribute to Julius Stone').

[7] Ibid 6-7.

[8] Ibid 9.

[9] Ibid 6-7.

[10] Michael Kirby, 'HLA Hart, Julius Stone and the Struggle for the Soul of Law' 27 *Sydney Law Review* 323, 329.

[11] John Goldring, 'Remarks at the Julius Stone Symposium' (1997) 20 *University of New South Wales Law Journal* 247, 249 ('Remarks').

[12] Mary Gaudron, for example, 'was expressly critical of Stone on feminist grounds and…thought that Stone's relationship with Zena Sachs, his research assistant, was exploitative': Pamela Burton, *From Moree to Mabo:*

the unpaid labour of his wife, Reca, who had been a practising dentist for a number of years prior to marriage, and studied law in addition to her degrees in science and dentistry.[13] Reca 'participated fully in her husband's work',[14] and supported his career in many ways including discussing the content of his projected writings,[15] typing up numerous drafts of his very lengthy manuscripts,[16] and 'generally providing the strong intellectual, moral and emotional support he needed'.[17] Nevertheless, Stone's openness to change his views is illustrated by his changing views on the Vietnam war,[18] and Goldring noted that had he lived longer, his attitude to women's work and feminist jurisprudence might have become more accommodating.[19]

It was towards the latter part of his career that Stone became involved in the movement for Aboriginal rights in Australia. In the next section I document his support of the civil rights movement and increasing involvement in various aspects of Indigenous rights activism throughout the latter half of the 1960s. Although peripheral to its achievements, Stone's support of the movement demonstrates his commitment to Indigenous rights in substance as well as discourse.

III. JULIUS STONE AND THE INDIGENOUS RIGHTS MOVEMENT

Stone's personal papers, archived in the National Library of Australia, indicate that his involvement in Indigenous affairs was initially sporadic and only gradually became more substantial. At first, his contribution consisted merely of ad hoc communications indicating his concern for civil rights issues and support of work being done in that area.[20] From 1965, he

The Mary Gaudron Story (UWA Publishing, 2010) 52. On the other hand, Burton pointed out that 'it was because of Stone's encouragement that Sachs studied law, although due to family commitments she did not pursue a professional career': at 52.

[13] Starr wrote that Reca 'had already been a sounding board for many of Stone's ideas which had later been published and hoped that knowledge of the law would help her become even more involved. This is a further illustration of her lifelong dedication to Stone's career and writings and the subjugation of her own intellectual interests': Starr (n 1) 44. See also Hawke (n 2) 4.

[14] Hawke (n 2) 4.

[15] Ibid.

[16] See Starr (n 1).

[17] Hawke (n 2) 4.

[18] Anthony R Blackshield, 'The Legacy of Julius Stone' 20(1) *University of New South Wales Law Journal* 215, 216.

[19] Goldring argued that '[t]here is little in feminist writing about law that he would have disapproved of, had he thought about it': Goldring, 'Remarks' (n 11) 249.

[20] He communicated with various individuals and organizations in the early 1960s, including Indigenous rights activists, Lady Jessie Street and Shirley Andrews, and the recently formed Federal Council for Aboriginal Advancement (FCAA). For the work of Lady Jessie Street and Shirley Andrews in Indigenous affairs, including

became more involved, partly due to his position at Sydney University, where student activists were becoming concerned with Aboriginal Rights. In April 1965, Stone supported the student freedom riders' campaign for an inquiry into segregation, inequality and disadvantage at a state level, and in November of that year, he petitioned for federal constitutional reform. Ultimately, in 1969, he contributed to the legal battle for native title for the Yirrkala people, which led to the 1971 decision of Blackburn J in *Milirrpum v Nabalco*.[21]

A Sydney University and Student Action for Aborigines

Stone's support of the Sydney University student organisation, Student Action for Aborigines (SAFA), began after the success of the 'freedom ride' in 1965. SAFA had been formed in 1964 by students at Sydney University, with Charles Perkins elected president.[22] Their objectives were to raise public awareness health, education and housing issues faced by Aboriginal people, to break down social discriminatory barriers and to 'stimulate the interest of the Aborigines themselves in resisting discrimination'.[23]

SAFA's major project was a 'freedom ride', a bus trip in February 1965, to various towns in country New South Wales to highlight racism and segregation.[24] The freedom riders met with local Aboriginal and non-Aboriginal people, conducting a survey of living conditions,[25] and confronting local businesses and enterprises that refused to serve or admit Aboriginal people.[26] The freedom ride, particularly the demonstrations, attracted much media attention,[27] and 'exposed racial discrimination to a degree no previous protest in Australia had ever done.'[28]

---

the formation of FCAA, see Heather Radi, 'Street, Lady Jessie Mary (1889–1970)', *Australian Dictionary of Biography* <http://adb.anu.edu.au/biography/street-lady-jessie-mary-11789/text21089>; Jennifer Hibben, 'Andrews, Shirley Aldythea (1915–2001)', *Obituaries Australia*, <http://oa.anu.edu.au/obituary/andrews-shirley-aldythea-14936/text26125>; Sue Taffe 'Shirley Andrews: an Architect of the National Aboriginal Civil Rights Movement, 1952–1968' (2011) 8(2) *History Australia* 153.

[21] (1971) 17 FLR 141 ('*Milirrpum*').

[22] Peter Read, *Charles Perkins: A Biography* (Viking, 1990) 98; Ann Curthoys, *Freedom Ride: A Freedom Rider Remembers* (Allen & Unwin, 2002) 32.

[23] Charles Perkins, '"Student Action for Aborigines" Report' in Federal Council for Advancement of Aborigines and Torres Strait Islanders, *Reports and Resolutions of the 8th Annual Conference on Aboriginal Affairs*, 16-18 April 1965, 47.

[24] See generally, Curthoys (n 22).

[25] Such as attitudes, health, education and housing: Perkins (n 23) 48.

[26] Curthoys (n 22).

[27] Ibid 240.

[28] Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007) 35.

Following the initial success of the freedom ride, SAFA continued to activate for change at a state level in New South Wales. In addition to conducting further freedom rides, SAFA prepared reports into conditions, made recommendations, and raised awareness.[29] They pressured the major political parties, particularly in the lead up to the 1965 New South Wales state election, to radically change their assimilationist policies, and lobbied for the establishment of a state Parliamentary Select Committee to 'study the plight of Aborigines'.[30]

Stone became involved with SAFA during the New South Wales election campaign in April 1965, when SAFA were lobbying all parties for promises to establish a Parliamentary Select Committee. SAFA had managed to secure election promises from the leaders of the Country and Liberal Parties but not the Labor Party.[31] In response to a letter from Alex Mills of SAFA,[32] Stone wrote to the leader of the Labor Party, JB Renshaw, along the lines suggested by Mills. Mills had noted that the leaders of the conservative parties had supported the idea of a select committee and suggested asking Renshaw 'if his party would support the formation of a Parliamentary Select Committee to study the plight of Aborigines'.[33] Stone took issue with the term 'the plight', suggesting instead that the committee inquire into 'the special difficulties obstructing the educational, economic and civic improvement of Aborigine people in this State, and to recommend short-term and long-term programmes for reducing these difficulties.'[34]

Stone wrote of a sense of responsibilities:

> All of us I think are nagged by a sense of responsibilities unfulfilled. As individuals we feel powerless to act; and a Government lead taken with due deliberation would give a sense of widespread relief. Personally, I do not think there is any easy solution. I do believe, however, that the establishment of a Parliamentary Select Committee would be an important step forward.[35]

[29] Curthoys (n 22) 226–232.
[30] Ibid 229–235.
[31] Curthoys (n 22).
[32] Letter from Alex Mills, 25 April 1965, Papers of Julius Stone, National Library of Australia, MS 5166, Series 15, File 1 (Box 166) ('Papers of Julius Stone (Box 166)'). It appears that the letter had been sent to all academic staff at the University; although not clear from Stone's copy of Mills' letter of 25 April, it is implied in Mills' letter to Stone of 25 August 1965, acknowledging Stone's letter to Renshaw and adding that 'very few academics notified me if they wrote to him': Letter from Alex Mills to Julius Stone, 25 August 1965, Papers of Julius Stone (Box 166).
[33] Letter from Alex Mills, 25 April 1965, Papers of Julius Stone (Box 166) (n 32).
[34] Letter from Julius Stone to JB Renshaw, 27 April 1965, Papers of Julius Stone (Box 166) (n 32).
[35] Ibid.

Stone's insistence on changing the term 'plight' reveals an awareness of structural inequality combined with an assimilationist discourse. The use of the term 'improvement' in connection with 'Aborigine people' is at best integrationist if not assimilationist, and reflects the dominant discourse of the time. However, Stone's use of language recognising obstructions to educational, economic and civic conditions and opportunities demonstrates an emphasis on removing structural disadvantage, rather than the deficit discourse implied by the term 'plight'. Stone's use of the term 'responsibility', however, is more ambiguous, since there is no indication of the source of the responsibility. It is unclear from this letter whether Stone understood the responsibility as springing from respect of rights, or to make reparations for past wrongs, or from a more paternalistic sense of responsibility.

As a result of the 1 May election, the Liberal-Country Party coalition came to power, and announced a Joint Parliamentary Committee 'to inquire into the conditions of Aboriginal people in New South Wales, and to recommend on "the legislative or other proposals necessary to assist Aborigines to attain an improved standard of living"'.[36] A letter from Alex Mills to Eric Willis, the new Chief Secretary of New South Wales, anticipating preparing material for the proposed Inquiry, lists Stone as one of the academics 'deeply interested in the enquiry into Aboriginal conditions' and 'prepared to be consulted on the matter in the preliminary stages'.[37] In fact, Mills wrote, 'Professor Julius Stone suggested that I enclose a copy of the letter which he sent to Mr Renshaw in April'.[38] There is nothing in Stone's papers that indicates that he had any further involvement with the Select Committee's Inquiry. But this was the beginning of a longer association with Mills, who became the Aboriginal Affairs Officer for the National Union of Australian University Students (NUAUS).

As a postscript to Stone's involvement, the Joint Parliamentary Committee's final report was tabled on 13 September 1967.[39] It included recommendations to provide more housing and education, and to abolish the Aborigines Welfare Board (integrating Aboriginal welfare services into existing Welfare agencies) in favour of a Director of Aboriginal Affairs advised by an elected board of Aboriginal people.[40] However the tone of the report was 'strongly

[36] Curthoys (n 22) 261.
[37] Letter from Alex Mills to EA Willis, 23 October 1965, Papers of Julius Stone (Box 166) (n 32).
[38] Ibid.
[39] Curthoys (n 22) 272.
[40] Ibid.

assimilationist',[41] and it did not recommend anti-discrimination legislation.[42] Legislation finally passed in February 1969 and came into effect in June 1969: '[a] new era in policy and administration had begun. By this time, however, SAFA had disappeared from the political scene and the Freedom Rides were finally over.'[43] In the meantime, Stone had continued his involvement in Indigenous legal issues by supporting the move towards constitutional reform.

B Constitutional Reform

Prior to 1967, the Australian federal government did not have constitutional power to legislate with respect to Indigenous Australians. That power was vested in the state governments. Under the Commonwealth Constitution, the federal government did have power to legislate with respect to 'the people of any race for whom it is deemed necessary to make special laws' (the race power), but that provision had expressly excluded 'the aboriginal race'.[44] The Constitution had also excluded Indigenous Australians from being counted in reckoning population statistics.[45] A groundswell of public opinion in favour of constitutional reform led to a successful referendum in 1967.

The effect of the referendum was to alter the Commonwealth Constitution, to include Indigenous Australians in the Census and to give the Commonwealth the power to legislate with respect to Indigenous Australians. This was achieved by repealing s 127 (which had excluded Indigenous Australians from population statistics), and by amending the existing race power (51(xxvi) to remove the exclusion of Indigenous Australians.[46]

In the lead-up to the referendum, Julius Stone actively petitioned for a much stronger version of constitutional reform. In 1965, the Menzies government had proposed a referendum to repeal s 127 (but not amend s 51(xxvi)), in addition to a proposal to alter s 24 to change the nexus between the numbers of members of the two houses of Parliament.[47] The proposal to abolish s 127 was only included because the government believed that the popular support for that

[41] Ibid.
[42] Ibid.
[43] Ibid 273.
[44] *Commonwealth of Australia Constitution Act*, s 51(xxvi) ('*Commonwealth Constitution*').
[45] *Commonwealth Constitution* (n 44) s 127.
[46] *Constitution Alteration (Aboriginals) 1967*.
[47] Section 24 provides, inter alia, that the number of members in the House of Representatives 'shall be, as nearly as practicable, twice the number' of the Senate: *Commonwealth Constitution* (n 44) s 24.

proposal would help get the other proposed amendment through.[48] When the bill was introduced into Parliament on 11 November 1965, it contained proposals to amend s 24 and repeal s 127.[49] Government backbencher, WC (Bill) Wentworth,[50] was critical of the limited nature of the government's proposal, which he attributed to the 'quite understandable' anxiety on the part of the prime minister to keep the referendum questions relatively minimal to ensure the greatest chance of success.[51] Wentworth proposed removing the race power altogether, since he argued that altering s 51 (xxvi) by removing the exemption of Aboriginal people from the race power would expose them to discrimination.[52] Wentworth acknowledged that removing the explicit power on the part of the Commonwealth to make laws on the basis of race would not prevent the States from so doing, and he argued that 'it would be desirable to guard against this by inserting into the Constitution a positive prohibition against racial discrimination'.[53] He proposed the insertion of a new section, s 117A which would prohibit racial discrimination but would not 'preclude the making of laws for the special benefit' of Aboriginal people.[54] He also proposed that 'the gap left in Section 51 … could be appropriately filled with a new paragraph xxvi, giving the Commonwealth power to make laws for "The advancement of the Aboriginal natives of the Commonwealth of Australia".[55]

Wentworth's proposal was encapsulated in a proposed private member's bill, which was supported by members of the Federal Council for Aboriginal Advancement.[56] In fact, Wentworth's private members bill was not introduced into Parliament until the following year, and in the meantime, the proposed changes were simply tabled as added clauses to the Government's bill on 16 November 1965.[57]

[48] Attwood and Markus (n 28) 35.
[49] C*onstitution Alteration (Aborigines) Bill 1965*.
[50] Incidentally a close friend of HLA Hart (a friendship formed at Oxford where Wentworth was a Rhodes scholar) and with whom Hart stayed during his only trip to Australia: see Nicola Lacey, *A Life of HLA. Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004) 25–6; 304–6.
[51] WC Wentworth, 'Does the referendum Go Far Enough?' *Sydney Morning Herald,* 17 November 1965 ('Does the Referendum Go Far Enough?')
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Attwood and Markus (n 28) 37.
[57] Constitution Alteration (Repeal of Section 127) Bill 1965 ('New clauses to be proposed by Mr Wentworth') (*Bills Digest* [210] – 920/16.11.1965 F4351/65).

Wentworth urged the public to support 'specific measures to outlaw racial discrimination inside Australia and to give the Commonwealth some direct responsibility for Aboriginal advancement'.[58] Sufficient indication of popular support, he argued, would persuade the Government to amplify its current proposal for a referendum.[59] There is a strong sense of urgency in his expression, since 'there is no prospect of getting the extra proposals even submitted to a referendum unless there is an indication of popular support, sufficient to impress both Government and Opposition, before the matter is crystallised in Parliament and the necessary legislation is finalised'.[60]

Amongst Stone's papers is a copy of a leaflet distributed by Wentworth. It claims that the Constitution 'does not let the Federal Government help the States in their efforts to raise the standards of their Aboriginal People' and 'still embodies the principle of racial discrimination inside Australia'.[61] The leaflet contains a copy of Wentworth's proposed private members bill, the C*onstitution Alteration (Aborigines) Bill 1965*, which it states, 'is directed towards curing these defects'. The leaflet urges the public to support the Bill 'by contacting your own Members of Parliament … and letting them know you support this Bill; by getting your friends to support it in the same way; by working for the Bill in any organisations to which you belong'.[62]

Stone's papers indicate that he worked with Alex Mills, now the Aboriginal Affairs Officer for NUAUS, to promote Wentworth's proposal. With Mills, Stone drafted a statement of petition in support of Wentworth's bill. The statement reads:

> As we the undersigned understand it, the purpose of the proposed changes to the Constitution (listed below) put forward by Mr W.C Wentworth, M.H.R., is to establish beyond doubt the competence of the Commonwealth Government of Australia, subject to the Constitution, to deal with all matters effecting [sic] Aborigines just as it possesses the power to legislate for the citizenry generally.
>
> We take this opportunity to record our emphatic view (shared, we believe, by most thoughtful voters) that the Commonwealth's competence in this regard should be thus

[58] Wentworth, 'Does the Referendum Go Far Enough?' (n 51).
[59] Ibid.
[60] Ibid.
[61] WC Wentworth, 'Will You Please Help to Get this Bill Passed by Parliament?' (Vaughan Douglas Print, Brookvale) ('Will You Please Help to Get this Bill Passed by Parliament?')
[62] Ibid.

> established. We believe that this is an essential step in the Commonwealth's assumption of its clear moral and social responsibilities, made urgent by the need of State Governments for assistance and aid in these matters. The constitutional changes involved would also enable the Commonwealth to face other nations with dignity and a clear conscience concerning the advancement of the Aborigines who are committed to our care.

Stone circulated the statement to gather signatures primarily from academics, as well as Church, Jewish, and civic leaders. His letter reads:

> This is an opportunity for the many of us who are concerned with Aboriginal advancement to bring greater efficiency and rationality into Commonwealth and States responsibility towards the Aboriginal population.[63]

Stone's wording again refers to 'responsibilities' in conjunction with an assimilationist/integrationist paternalism that was common for that time. 'Advancement' is the main wording used in both documents, together with economic imperatives, such as 'efficiency and rationality' and the states' urgent need of financial assistance. Although Stone is clearer about the type of responsibilities (moral and social), he is not clear about the source of those responsibilities. From the paternalistic ('the Aborigines who are committed to our care') tone in the statement, the responsibility appears more akin to a duty to look after those who are less able to look after themselves, such as the young and infirm (and, at that time, female), rather than a responsibility to respect rights, or to make reparations for past wrongs.

On 6th January 1966, Stone wrote to Prime Minister Menzies, enclosing the statement together with a list of approximately 250 signatories (the majority being from University of Sydney and University of New South Wales).[64] Stone was aware of Menzies' imminent retirement (announced on 20 January 1966) and, as he was departing for Jerusalem, organised for Mills to send a copy of the letter to Holt upon his succession to the prime ministership.[65] Mills did so

[63] Julius Stone, letter, 22 November 1965, Papers of Julius Stone (Box 166) (n 32).

[64] Letter from Julius Stone to Robert Menzies, 6 January 1966, Papers of Julius Stone (Box 166) (n 32). Some of those signatories withheld their support from the anti-discrimination clause.

[65] Ibid; Stone wrote: 'I suggest that there will be less indelicacy if you hold the enclosed carbon of my despatch to the P.M. until the mooted change of personnel takes place. You can then send it to Holt with a covering letter saying that I requested you to do this in view of my absence overseas.'

on 3rd February.[66] Although Stone received a letter from Menzies,[67] setting out the Commonwealth's position, the letter was not in the file amongst Stone's papers.

By February 1966, the Government, under new prime minister Harold Holt (who had succeeded Menzies after the latter's retirement) decided not to proceed with the referendum.[68] It was not until after the postponement of the referendum, that Wentworth's private members Bill was presented to Parliament.[69] Hence by the time of the second reading speech of Wentworth's bill, 10 March 1966, the referendum originally set down for May 1966 had been postponed. In his second reading speech,[70] Wentworth referred both to a sense of responsibility to Aboriginal people but also 'some sense of failure in relation to the way in which we have dealt with our Aborigines in the past'.[71] He also pointed out that '[w]e must look first and foremost to what the Aborigines want, and they want the Commonwealth to accept a greater degree of responsibility towards them.'[72] It was not until February 1967 that the Holt government 'decided to proceed with a referendum that now included the proposal to amend section 51(xxvi).[73]

Stone supported a far more progressive constitutional reform than was achieved in 1967. Indeed, the reforms supported by Stone in 1965 — constitutional entrenchment of a prohibition against racial discrimination, a 'special measures' power for the Commonwealth to make special laws for the advancement of Aboriginal people, and the repeal of the discriminatory race power from the Constitution — represent a much stronger constitutional protection for Indigenous rights than is currently the case, and are similar in significant respects to some of the suggestions made by the Expert Panel on Constitutional Recognition of Indigenous

[66] Letter from Alex Mills to Harold Holt, 3 February 1966, Papers of Julius Stone (Box 166) (n 32).
[67] Receipt of the letter was acknowledged by Stone in his subsequent letter to Menzies on 3rd February 1966: Letter from Julius Stone to Robert Menzies, 3 February 1966, Papers of Julius Stone (Box 166) (n 32).
[68] Attwood and Markus point out that this decision was probably influenced by the publicity attracted by Wentworth's [proposed] private member's bill, as well as pressure to amend section 51 (xxvi) from 'churchmen and lawyers': Attwood and Markus (n 28) 40–41.
[69] The Constitution Alteration (Aborigines) Bill 1966 was presented and read a first time on 10 March 1966.
[70] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1966, 1–4 (William Wentworth).
[71] Ibid 1.
[72] Ibid 1.
[73] Attwood and Markus (n 28) 41.

Australians in 2012.[74] Also significant is the fact that the statutory equivalent (but much weaker) anti-discrimination legislation, the Racial Discrimination Act — an ordinary Act of Federal Parliament, which was not enacted until ten years after Stone's support for a constitutionally entrenched provision — was critical to the ultimate success of the *Mabo* litigation nearly thirty years later.[75] Stone's commitment to Aboriginal rights was evidenced again by his support of land rights and native title in the late 1960s.

C Julius Stone and Native Title in Australia

Stone's papers indicate support for two campaigns widely considered to be 'the signifiers of land rights':[76] the Gurindji people's wages claim and land rights cause,[77] and the Yirrkala people's native title case. Although Stone had no real involvement in the Gurindji cause,[78] he played a small but significant role in the initial stages of the preparation of the Yirrkala claim.

Shortly after the Yirrkala people had instructed their solicitor, Frank Purcell, to take legal action for land rights,[79] Stone became involved in discussions of the potential legal issues at the invitation of HC (Nugget) Coombs and Bill Stanner.[80] Stone had offered his assistance in a

[74] *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (Report of the Expert Panel, January 2012). Since then, the focus of the movement for constitutional reform has shifted to a proposal for a representative body giving a 'First Nations Voice' to Parliament: see *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017); Referendum Council, *Final Report of the Referendum Council* (30 June 2017); Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018).

[75] In *Mabo v Queensland [No 1],* the High Court held that a Queensland statute which purported to retrospectively extinguish native title (including Mabo's claim) was invalid for contravening the *Racial Discrimination Act 1975* (C'th): *Mabo v Queensland [No 1]* (1988) 166 CLR 186.

[76] Bain Attwood, 'The Articulation of "Land Rights" in Australia: The Case of Wave Hill' (2000) 44(1) *Social Analysis: The International Journal of Social and Cultural Practice* 3, 26.

[77] Beginning as a strike by Gurindji stock workers on Wave Hill cattle station in the Northern Territory, and subsequently a claim for the return of their traditional land, the Gurindji action lasted over nine years, and resulted in the return of some of their land in a highly symbolic handover ceremony by the Whitlam government in 1975, the precursor of land rights legislation in the Northern Territory. See generally, ibid; Bain Attwood, *Rights for Aborigines* (Allen & Unwin, 2003) ch 11, 257–306.

[78] Stone's papers indicate small financial donations to support the Gurindji people's cause in 1968 and 1970.

[79] This had occurred by December 1968: Frank Brennan, *No Small Change: The Road to Recognition for Indigenous Australia* (UQ Press, 2015) 70.

[80] Coombs (recently retired Governor of the Reserve Bank of Australia), was chairman and Stanner (Professor of Anthropology at the Australian National University) a member of the Council for Aboriginal Affairs. Stanner provided expert advice to the Yirrkala people during the course of the litigation: see DJ Mulvaney, 'Stanner, William Edward (Bill) (1905–1981)', *Australian Dictionary of Biography* <http://adb.anu.edu.au/biography/stanner-william-edward-bill-15541/text26753>; see Tim Rowse, *Obliged to be Difficult: Nugget Coombs' Legacy in Indigenous Affairs* (Cambridge, 2000); Tim Rowse, *Nugget Coombs: A Reforming Life* (Cambridge, 2002).

letter to Coombs in January 1969, congratulating him on his 'Guest of Honour' Address on the ABC:

> Your Guest of Honour address on the rights of the Yirrkala of the Gove region, and the fate which threatens them, will surely figure as one of the notable manifestoes of this generation…. Bill Stanner's Boyer Lectures were an admirable background for what you had to say. I think his final lecture raised abstractly the point you made so concrete and poignant.
>
> I hope you will remember my deep interest in this side of your "retirement", and call on me if I can help.'[81]

Coombs took Stone up on his offer of help and invited him to a seminar at the Australian National University (ANU) to canvass the legal issues faced by the Yirrkala. In his response to Stone's letter, Coombs wrote:

> Bill Stanner and I talked over your offer of help and I think you could be of great value to us. We are trying to arrange a kind of unofficial seminar at the A.N.U. to look soberly and academically at the issues raised by the Yirrkala case both from the social and the legal point of view. Bill is working on an introductory paper for such a seminar. If it is to be of real value it must be arranged very promptly and both Bill and I would be very grateful if you could participate. He will be in touch with you about it.[82]

A copy of Stanner's introductory paper (marked 'for private seminar at ANU; not for circulation or quotation') is in the papers of Julius Stone, heavily underlined and annotated in hand.[83]

In his preliminary paper, Stanner raised a number of legal issues for consideration. In addition to the question of whether the common law of Australia recognised native title, other legal issues included whether the Yirrkala people's uninterrupted possession of the subject land amounted to title by adverse possession, and whether the creation of 'a reserve for the use and benefit of aborigines' might be interpreted as transfer of beneficial ownership or creation of a trust in favour of the Aboriginal inhabitants.[84] Having set out the legal issues for discussion and

[81] Letter from Julius Stone to HC Coombs, 9 January 1969, WEH Stanner Collection, AIATSIS, MS 3752, Series 15 Item 2 ('Stanner Collection').
[82] Letter from HC Coombs to Julius Stone, 13 January 1969, Stanner Collection (n 81).
[83] WEH Stanner, 'The Yirrkala Case', Papers of Julius Stone, National Library of Australia, MS 5166, Series 14, Box 165 ('Papers of Julius Stone, Box 165').
[84] Ibid.

clarification, Stanner then spent the rest of the paper (approximately ten pages) describing Aboriginal customs in land and the relationship with land in terms of principles and concepts of property.[85] He was later concerned that he had overly emphasised the spiritual aspect of the relationship to land,[86] in the sense that it may be misconstrued.[87]

In response to the invitation, and to Stanner's paper, Stone recruited information from his contacts in Canada, as well as in Sydney. In a letter to Allan Gotlieb, later Canadian ambassador to the United States, Stone asked for literature on Indigenous land rights in Canada.[88] Stone's letter indicates that he saw Indigenous rights to land as an issue of justice:

> May I invoke your assistance on another matter which is occupying some of our attention. This concerns the problematical basis under Australian former Imperial law for land claims of our Aborigines here in Australia. This matter has become a rather urgent one in view of the snow-balling of explorations and grant of concessions in our Northern Territory as we become aware of our natural resources potential. A group of us is very much concerned to do what we can to see that justice is done to the Aborigines.[89]

The reference to justice, and the corollary absence of references to responsibilities or to advancement, seems to represent a shift in Stone's rationale or basis for supporting Indigenous rights. The shift from 'responsibility' or 'responsibilities' in 1965 to 'justice' in 1969 accords with Goldring's assessment in his obituary tribute,[90] in which he commented that Stone's primary concern was with the concept of justice, and the capacity of positive law to deliver distributive and substantive justice.

Stone then circulated a memo to his colleagues in the Faculty of Law at the University of Sydney, saying that he (and Tony Blackshield)[91] had been asked to join the seminar group at

---

[85] Ibid.

[86] 'Yirrkala Land Case: Summary of Discussion at Seminar held at 10.30am on Friday 28th February 1969, Seminar Room 3, RSPacS, ANU', Stanner Collection (n 81) 10 ('Yirrkala Land Case: Summary of Discussion').

[87] Letter from WEH Stanner to Frank Purcell, 5 March 1969, Stanner Collection (n 81).

[88] Letter from Julius Stone to Allan Gotlieb, 20 February 1969, Papers of Julius Stone, Box 165 (n 83). Gotlieb's response was dated 3 April 1969 and referred Stone to the *Hawthorn Report* and a couple of published articles by Professor Kenneth Lysyk: Letter from AE Gotlieb to Julius Stone, 3 April 1969, Papers of Julius Stone, Box 165 (n 83).

[89] Letter from Julius Stone to Allan Gotlieb, 20 February 1969, Papers of Julius Stone, Box 165 (n 83).

[90] Goldring, 'Tribute to Julius Stone' (n 8), 9.

[91] A lecturer in law at Sydney University during the 1960s, Blackshield worked closely with Stone and had assisted him in the revision of *The Province* for publication as a trilogy: see Starr (n 1) 163–5.

ANU 'to explore the basis of the Yirrkala aborigine land claims in the Northern Territory.'[92] Stone went on to state that he was particularly interested in the question of whether the spiritual nature of aboriginal relation to land could fit within legal categories of possessory title:

> We are both directing our minds to questions within our special interest, such as whether the "spiritual" relation of a clan to "its" land can be brought within legal categories of possessory title, how far such title is aborted by the "walkabout" patterns of clan life, and the non-exclusiveness and non-continuity of the relation of any particular clan or individual user to "its" or "his" land.[93]

The use of quotation marks around the possessive pronouns indicates that Stone may have had reservations about the possessory nature of Indigenous relations to land.

Stone attached to the memo a list of 'more technical and less amorphous' legal questions, requesting assistance with the answers.[94] The list of questions includes questions of sovereignty and legal status, as well as legal bases for Aboriginal claims of title. The first five questions relate to the acquisition of sovereignty, legal status (both at international law and the British common law) of Aboriginal people at that time, and common law recognition of Aboriginal land tenure.[95] The other questions reflect the issues raised by Stanner, and relate to the possibility of the Indigenous people acquiring title by adverse possession, old common law customary rights, and whether by creating reserves, the Crown could be said to have created a trust in favour of the Aborigines (and whether the Crown could so bind itself).[96]

From a letter to Stanner enclosing the list of questions, it is apparent that Stone's attention was directed not toward common law recognition of native title, but to a much older doctrine of

[92] Memorandum from Julius Stone to Full Time Colleagues in the Faculty of Law, undated, Papers of Julius Stone, Box 165 (n 83).
[93] Ibid.
[94] Although not apparent from Stone's memo, the list of thirteen questions was probably drawn up by Tony Blackshield, who in his memorandum of 27 February 1969 on Canadian Cases refers to 'my list of thirteen questions': Memorandum from AR Blackshield 'Canadian Cases', 27 February 1969, Stanner Collection (n 81).
[95] Julius Stone and Tony Blackshield, 'Legal Questions Affecting Yirrkala Land Claim', Papers of Julius Stone, Box 165 (n 83).
[96] Ibid. There is no evidence of any answers forthcoming to the questions. Only one response is on the file, and that is a reference to other experts (on the New Guinea Legal Research Council): RA Woodman, Memorandum to Julius Stone, 21 February 1969, Papers of Julius Stone, Box 165 (n 83).

common law recognition of customary rights (such as those deriving from English customary law):

> I have directed my mind mainly to the more diffuse questions of how (if at all) we can bring the "spiritual" basis of the aborigine clan's relation to its home tract under the mantle of common law recognition of customary title. The nearest to a starting-point on this is the doctrine of customary rights in the nature of easements…
>
> In this connection, pp75-139 of Max Gluckman's *Ideas of Barotse Jurisprudence* seem close to our concerns, but on one condition. This is that you can provide data on the Yirrkala which does not leave the clan's relation to the land wholly independent of overt elements such as occupation, use, assertion of exclusive enjoyment, hierarchical grant by chiefs or elders, characterising the African situation which Max is discussing. I do hope you can guide us in this aspect on Friday.[97]

Stone's reference to Gluckman's work was a search for approximations, within Indigenous laws and customs, to western legal norms and institutions. The caveat expressed here by Stone was that, in order for the action to succeed, external manifestations of occupation, use and exclusive possession similar to the common law must be found in the Indigenous relation to land. The need for such external manifestations was reiterated by Stone in the seminar itself, which covered broadly the issues raised in Stanner's discussion paper.[98]

Stone's contributions to the seminar demonstrate a lack of familiarity with the doctrine of native title as it had developed in other common law countries. He struggled to find some way of translating Aboriginal relationships to land (as explained by Stanner) into concepts of land ownership that would be recognised by the common law. Although he raised the issue of customary title rights under old common law, he found it difficult to reconcile Stanner's explanation of Aboriginal connection to land with concepts akin to common law.

In response to Stanner's concern that he may have overdone the spiritual aspect of the relationship and that it 'had become a kind of gimmick in the mind of the government' and might undermine the weight of the Yirrkala case, Stone agreed that the spiritual connection should be underplayed for the lack of analogy in the common law.[99] In response to a suggestion

[97] Letter from Julius Stone to WEH Stanner, 26 February 1969, Papers of Julius Stone, Box 165 (n 83).
[98] 'Yirrkala Land Case: Summary of Discussion' (n 86).
[99] Ibid 10.

that the acephalous nature of Indigenous society would not be a legal hindrance to the recognition of rights, Stone said:

> The difference it makes is that when you have hierarchy in the pre-existing native society and allegiances and such like, that is some kind of adjudicating machinery such as you have in the peoples Gluckmann deals with — when you have this you are very near in analogy to what you will find in the common law and therefore your job becomes very much easier.[100]

Stone's comments throughout the seminar indicate that he was very conscious of the difficulties of arguing for land title rights under the common law where there were few analogies between the Indigenous relation to land and the common law concepts of land ownership.

In the end, Stone was unable to provide legal authority in support of the land claim, and his involvement in the case seems to have been limited.[101] In fact, the value of his contribution may have been to alert Stanner to the difficulties of arguing this claim under the common law at that time. This seems to be confirmed in a letter written by Stanner after the seminar to the Yirrkala lawyer, Frank Purcell, in which Stanner reflected:

> A large number of possible arguments and authorities were examined without, to me, anything truly definite resulting…
>
> The discussion, while extremely informative and helpful to me, left me perturbed on one matter. The historical aspects of applicable law, including the law of real property, as it may touch the case, are so far from being really clear that the Commonwealth and the Company have open to them many possibilities to which ready answers may not suggest themselves during the hearing.[102]

The case was heard in the Northern Territory Supreme Court in 1970. The plaintiffs' central contention was that the common law respected rights to land under Aboriginal traditional law and custom, under a doctrine of communal native title … a novel argument for an Australian

[100] Ibid 28.

[101] It appears from Stanner's papers that Tony Blackshield (who provided research assistance to Stone) continued to be involved.

[102] Letter from WEH Stanner to Frank Purcell, 5 March 1969, Stanner Collection (n 81).

court at that time.[103] Other arguments that had been canvassed at the seminar — regarding rights arising from adverse possession and the creation of reserves — were included in the pleadings, but formally abandoned prior to trial.[104] The argument that had interested Stone, recognition of customary title under old common law, was not included in the pleadings. The decision was handed down in April 1971. Dismissing the claim, Blackburn J held that the doctrine of communal native title did not form part of Australian law, and that although they had a recognisable system of law, the plaintiffs had not established a proprietary interest in the land.[105]

IV. CONCLUSION

In terms of the achievements of the Indigenous rights movement in Australia of the 1960s, Stone's involvement was minor. It is significant, however, in that it demonstrates Stone's commitment (in substance as well as in discourse) to Indigenous rights, including native title, as a matter of equality and justice. The papers reveal a gradual shift in Stone's discourse around the basis for Indigenous rights, from assimilation, integration, and paternalism to justice. His discourse in the mid-1960s reflected an awareness of structural inequalities, combined with a sense of social and moral responsibility. By the close of the decade, Stone's language reveals that he saw Indigenous rights, and land rights in particular, as a matter of justice.

[103] *Milirrpum* (n 21) 149–51.
[104] Ibid 151.
[105] See the discussion in Chapter Four above.