Indigenous Australia and the pre-legal society in HLA Hart’s *The Concept of Law*

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The continuing existence and operation of the traditional law of Aboriginal and Torres Strait Islander peoples has – relatively recently – been explicitly acknowledged in Australian law. In emerging case law on the subject, the High Court of Australia has confirmed the common law recognition of the survival of Indigenous Australian law. However, in determining what it is that is recognized by the common law – in interpreting Indigenous Australian ‘traditional laws and customs’ – the High Court has disregarded the knowledge reposed in those with authority or expertise in Indigenous Australian law, relying instead upon concepts and assumptions from the jurisprudence of English legal philosopher, HLA Hart. The influence of Hart’s theory in the Australian High Court’s 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. At the heart of The Concept of Law 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 article, I investigate how Indigenous Australians are positioned in relation to Hart’s pre-legal–legal dualism. I examine the ‘primitive’, pre-legal society in *The Concept of Law*, and its counterpart, the advanced legal system, to analyze the position of Indigenous Australian societies and law in Hart’s scheme. Finally, I analyze the construction of the dualism and consider its impact on the High Court’s interpretation of Indigenous Australian ‘traditional laws and customs’.

**Keywords:** HLA Hart, Indigenous recognition, First Nations’ law, native title, Yorta Yorta Case, pre-legal society

1 INTRODUCTION

The continuing existence and operation of the traditional law of Aboriginal and Torres Strait Islander peoples has – relatively recently – been explicitly acknowledged in Australian law.¹ In emerging case law on the subject, the High Court of Australia has confirmed the common law recognition of the survival of Indigenous Australian law.

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Australian law. However, in determining what it is that is recognized by the common law – in interpreting Indigenous Australian ‘traditional laws and customs’ – the High Court has disregarded the knowledge reposed in those with authority or expertise in Indigenous Australian law, relying instead upon concepts and assumptions from the jurisprudence of English legal philosopher, HLA Hart.

Hart is widely regarded as the preeminent English-speaking legal philosopher of the twentieth century. The legacy of his book, *The Concept of Law*, cannot be overstated; it is generally accepted as the ‘most successful work of analytical jurisprudence ever to appear in the common law world’. Writing at much the same time as the High Court was relying upon Hart’s work in its treatment of Indigenous law, Nicola Lacey commented that *The Concept of Law* ‘has been read by senior judges and has had a distinctive impact on the development of judicial culture in Britain and beyond’.

However, the influence of Hart’s theory in the Australian High Court’s interpretation of Indigenous Australian ‘传统 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 Thomas Hobbes and John 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* 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 article, I investigate how Indigenous Australians are positioned in relation to Hart’s pre-legal–legal dualism. I examine the ‘primitive’, pre-legal society in *The Concept of Law*, and its counterpart, the advanced legal system, to analyze the position of Indigenous Australian societies and law in Hart’s scheme. Finally, I analyze the construction of the dualism and consider its impact on the High Court’s interpretation of Indigenous Australian ‘traditional laws and customs’.

First, however, a preliminary content warning is necessary. The subject matter of this article is an investigation of a discourse of deficit that includes misrepresentations

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2. *Mabo* (n 1); *Yorta Yorta* (n 1); *Love* (n 1). In this article, I use the collective term, ‘Indigenous Australian’, to refer to the First Nations 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. Further, because it is the term used by Indigenous scholars, I refer to the traditional law of Indigenous Australian peoples as ‘law’.


7. I use the term ‘terra nullius’ (land belonging to no one) broadly to refer to the legal principles justifying the acquisition of sovereignty over Australia by the British. In short, the application of the doctrine of terra nullius to Australia involved the false assertion that its Indigenous peoples were without law: *Cooper v Stuart* (1889) AC 286; cf *Mabo* (n 1).
of Indigenous law and culture that are deeply offensive. Unfortunately, the persistence of these representations in contemporary Anglo-Australian law (particularly the legal doctrine concerning the recognition and interpretation of Indigenous Australian law) renders their exposure necessary.

2 CONCEPTS OF LAW

Indigenous ways of conceptualizing law are vastly different from their Anglo-Western counterparts. Indigenous Australian scholars have described their traditional law as a way of living that forms part of a rich relational and non-anthropocentric worldview. According to these accounts, law is conceptualized as immanent in the land, waters and natural world. Its basis is not merely the governance of humans, but the balance of the universe, including the earth and all natural and spirit beings. In contrast, Hart’s lectures at the University of Oxford that formed the basis for The Concept of Law were intended as a general descriptive analysis of an Anglo-Western legal system, directed to English law students and lawyers.

The incongruity of relying upon such a paradigmatic Anglo-Western theory of law in the interpretation of Indigenous law is exacerbated by the fact that Hart had actively questioned whether Indigenous law could count as ‘law’ at all. One of Hart’s stated objectives in The Concept of Law was to clarify the sense in which ‘borderline cases’, particularly ‘primitive law’ and international law, consist of ‘law’ or comprise ‘legal systems’. This was secondary only to his major objective, to analyze ‘the distinctive structure’ of a modern, municipal legal system.

Before turning to the idea of the ‘primitive’ in Hart’s work, it is worth briefly revisiting Hart’s juxtaposition of legal and pre-legal societies and clarifying some of the key concepts in his account of law.

9. Ibid.
10. Ibid.
11. Hart, The Concept of Law 3rd edn (n 4) 17. Hart later appeared to acknowledge that this descriptive approach could tend to reinforce a narrow, acontextual and apolitical view of law as an autonomous phenomenon. Nevertheless, he remained committed to the view that analytical positivism should retain a prominent role in jurisprudence because its rigorous conceptual analysis could provide essential tools for sociological (and other alternative) approaches to jurisprudential issues: David Sugarman and HLA Hart, ‘H. L. A. Hart in Conversation with David Sugarman’ (2005) 32(2) Journal of Law and Society 267, 291.
12. Sugarman and Hart (n 11) 291.
13. To some extent, I am pre-empting my own argument here: in this article, I will thoroughly interrogate whether by ‘primitive’ Hart was referring to Indigenous societies.
14. Hart, The Concept of Law 3rd edn (n 4) 17. 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.
15. Hart, The Concept of Law 3rd edn (n 4) 17. There was, of course, a second part to Hart’s primary objective – to provide ‘a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena’ – which was addressed in the latter half of the book, and which falls beyond the scope of this article.
2.1 The ‘Step from the Pre-Legal into the Legal World’

Throughout the introductory chapters of *The Concept of Law* – in which he introduced the reader to the idea of internal and external aspects of rules, and the difference between primary and secondary rules – Hart illustrated his arguments by drawing various imaginary societies with a range of recognizable, albeit usually simplified, systems of governance. Some of these imaginary societies take the political structure of an absolute monarchy, others are tribal chiefdoms. To demonstrate that it is the union of primary and secondary rules that forms the core of a modern legal system, 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’. Such societies would only have primary rules of obligation which are accepted by the majority of the people. 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. 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’. 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’.

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’. Otherwise, ‘such a simple means of social control’ will be defective. As the society grows and develops, the simple system of primary rules will be insufficient to maintain social order due to three main deficiencies: uncertainty, inability to change and inefficiency.

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. Rules of change (empowering the introduction, amendment and repeal of other rules) remedy the defect of the static nature of primary rules, and rules of adjudication (empowering judicial function) remedy the defect of inefficiency. Remediing each defect constitutes a step ‘from the pre-legal into the legal world’ and remediing all

16. Such as that under the rule of ‘Rex I’: see, e.g., ibid 67–70.
17. See, e.g., ibid 60.
18. Ibid 91.
19. Ibid.
20. Ibid (emphasis added).
21. Ibid (emphasis added).
22. Ibid 92 (emphasis added).
23. Ibid.
24. Ibid.
25. Ibid 94.
27. Ibid 96–97.
three defects ‘convert[s] the regime of primary rules into what is indisputably a legal system’. 28 The combination of primary rules with secondary rules of recognition, change and adjudication constitutes the ‘heart of a legal system’. 29

2.2 Conceptual Issues

One of the reasons for its enduring popularity is that (unlike many other works of legal theory) The Concept of Law is eminently readable. Another contributing factor is that it is sufficiently flawed to have inspired both analytical jurists (to fill in the gaps and build upon Hart’s work) 30 and critics (to use it as a point of departure for alternative theories of law and legal scholarship). 31 Commentators have agreed that Hart’s explanations of many of the central concepts in the book are ambiguous and his use of them inconsistent. 32 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. 33

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 approach (according to which human action is understood from the perspective of the actor) 34 to analytical jurisprudence. 35 It has been argued however, that Hart’s treatment of the internal and external points of view is incomplete, 36 and neglects a

28. Ibid 94.
29. Ibid 98.
31. 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’).
32. This brief discussion will focus on those aspects of Hart’s theory that are relevant to this article. There are obviously many aspects of Hart’s jurisprudence that fall outside the scope of this article—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. There is also an extensive critical literature on other aspects of Hart’s theory which similarly falls outside the scope of this article.
34. 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 (OUP 2005).
36. MacCormick, H. L. A. Hart (n 35) 33–40; Martin (n 3) 20–27; Hacker (n 30) 12–16.
range of other internal aspects (such as volition),\(^3\)\(^7\) and perspectives (such as that of the legal theorist).\(^3\)\(^8\)

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).\(^3\)\(^9\) Within the origin story itself, the secondary rules are described alternately as rules and as institutional functions.\(^4\)\(^0\)

Similarly, the rule of recognition is referred to as a secondary rule, but is neither a power-conferring rule,\(^4\)\(^1\) nor just about primary rules but also about other secondary rules.\(^4\)\(^2\) It is also variously referred to as a rule and as a practice,\(^4\)\(^3\) and sometimes referred to in the singular and sometimes in the plural.\(^4\)\(^4\) It has also been observed that the relationship of the rule of recognition with rules of change and adjudication involves a degree of circularity.\(^4\)\(^5\)

Hart’s argument that the combination of primary and secondary rules forms the core of a legal system has also been criticized. It has been argued that law consists of more than just rules … it consists of principles,\(^4\)\(^6\) standards,\(^4\)\(^7\) orders and judgments.\(^4\)\(^8\) Further, a legal system consists of more than just law; it comprises physical and institutional, in addition to conceptual, elements.\(^4\)\(^9\)

3 THE PROBLEM OF THE ‘PRIMITIVE’ IN HART’S THE CONCEPT OF LAW

The contrast between ‘primitive’ societies and those with a ‘developed’ legal system is central to Hart’s thesis. The difference between them illuminates both the primary and secondary objectives of The Concept of Law. By a clear elucidation of the

41. 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 30) 197–200; MacCormick, H. L. A. Hart (n 35) 105. See also Martin (n 3) 35.
42. See Hacker (n 30) 22–25.
43. Lefkowitz (n 40) 264–67.
44. MDA Freeman, Lloyd’s Introduction to Jurisprudence (7th edn, Sweet & Maxwell 2001) 344.
45. MacCormick, H. L. A. Hart (n 35) 108–11; Martin (n 3) 35–38.
46. Dworkin, Law’s Empire (n 31).
47. MacCormick, H. L. A. Hart (n 35) 40–43.
49. 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 40) 260–64.
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. The answer to both is that although they may contain some semblance of law, neither amounts to a legal system. 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 (i.e., they are pre-legal) which comes back to his opening premise.

It has been pointed out that Hart’s upholding of a Western legal system as the standard case is clearly essentialist. 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. 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). The language of deficit – that is, ‘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, or at least the rule of law. For his critics, this is a problem in that it contradicts Hart’s own ‘separability thesis’. Hart was adamant that questions of what the law ought to be, are fundamentally different types of question from those about what the law is, although both were


52. Tamanaha (n 51) 151.


55. Or the related principle of legality. As to the rule of law, see Campbell (n 53) 31–35; as to the principle of legality, see Dworkin, *Law’s Empire* (n 31). See also the discussion in Nicola Lacey, ‘H. L. A. Hart’s Rule of Law: The Limits of Philosophy in Historical Perspective’ (2007) 36 Quaderni Fiorentini 36.

56. See, e.g., Guest (n 54); Gardner (n 53).

57. 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 H. L. A. Hart, ‘Positivism and the Separation of Law and Morals’ (1957–8) 71 Harvard Law Review 593; Hart,
important for him. The normative implications of Hart’s descriptive enterprise merge one into the other. Finally, the centrality of this juxtaposition between ‘primitive’ and ‘advanced’ to the work as a whole has led to it being described as reinforcing colonialist tropes of superiority over native peoples.

Hart’s fictional account of the emergence of a legal system, in particular, has been divisive. It has attracted strong criticism and apparently ‘caused a great deal of trouble’ for defenders of Hart’s jurisprudence, many of whom have nevertheless tended to minimize this ‘problematic’ aspect of Hart’s work. Comparatively little of what might be termed the extensive ‘mainstream’ analytical literature has engaged with it in any depth, and reactions have varied from brief but assured defences (often contained in footnote references) to relative silence. There is a reticence notable in scholars otherwise sympathetic to his work: language such as ‘unfortunate’, ‘a pity’, and even ‘the less said the better’. Critics have pointed to the paucity of – and incompatibility with – anthropological evidence, and suggested that the scheme implicitly justifies the imposition of western-style legal systems on colonized peoples.


58. 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. In his later work, inspired by his commitment to the values of liberalism, Hart’s jurisprudence contained arguments for law reform on issues such as abolition of the death penalty and decriminalisation of homosexuality (although I have made a general distinction between two periods in his career, Hart did publish in both areas simultaneously).

59. 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: Hart, The Concept of Law 3rd edn (n 4) 249–50. Hart did acknowledge that his descriptive enterprise was 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 11) 288.


61. Gardner (n 53) 81.

62. The term ‘problematic’ was used by Gardner, ibid, and although I have quoted from it in this regard, this article is, in fact, devoted to ‘Hart’s problematic fable’.

63. This is typified by one of the monographs devoted to Hart’s philosophy, that of Neil MacCormick, who devotes more than a few paragraphs out of a book of 200 pages to discussion of it: MacCormick, H. L. A. Hart (n 35) 108.

64. See, e.g., Waluchow (n 53) 89.

65. 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).


70. Anthony Skillen has argued that the step from pre-legal to legal presupposes a structure of power already in place to effect the transition and to authorize the new regime, a situation strikingly similar to the colonial experience: Skillen (n 60) 104.
On the other hand, 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 an analytic device. Even so, Peter Fitzpatrick has argued that Hart’s search for origins is a quest to find an ‘enduring essence’ (a task which is at odds with his linguistic philosophy and one he ostensibly eschewed) – a quest framed and consequently satisfied by a Western conception of law.

I begin my own inquiry, therefore, by closely examining Hart’s use of the term ‘primitive’ in The Concept of Law. I interrogate what he meant by the term ‘primitive communities’ and compare that with his figurative use of imaginary societies throughout the book.

### 3.1 ‘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. The word ‘primitive’ itself occurs almost 20 times throughout the book. 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 will 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. Other examples are his references to the ‘primitive simplicity of the theory’, and ‘primitive or rudimentary form of law’.

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. The term ‘primitive law’ was the contemporary equivalent, from the mid-nineteenth century until the late 1960s and

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71. See, e.g., Hacker (n 30) 11–12; Waluchow (n 53) 89; Green, ‘The Concept of Law Revisited’ (n 66) 1698.
72. Fitzpatrick (n 60) 192–97.
73. 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.
74. There are, in fact, 18 instances of the word.
75. Hart, The Concept of Law 3rd edn (n 4) 165 (emphasis added).
76. Referring to the theory of law as ‘the sovereign’s coercive orders’; ibid 80.
77. Referring to physical sanctions ‘left to the community at large’: ibid 86.

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early 70s, for the study of what is now termed ‘legal anthropology’.79 The Concept of Law, based on lectures given by Hart in the 1950s and written up into its final form in 1960,80 was first published at a time when many academic texts, including those in the disciplines of legal philosophy and legal anthropology, used that terminology.81

Almost certainly, Hart would not have intended the offensive connotations now associated with what was then considered a neutral academic term.82 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.83 His most emotive language was reserved for discriminatory practices.84 Indeed, although Hart contrasted ‘primitive’ societies with ‘developed’ or ‘modern’ states, he reserved the word ‘civilized’ to describe those nations whose legal systems do not allow formal discrimination on the basis of race.85

3.2 Actual or Imaginary, Primitive or Simple?

In his introduction to the third edition of The Concept of Law, 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’.86 Green argued:

79. 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”.
80. Lacey, The Nightmare and the Noble Dream (n 3) 222.
81. The second edition of Alan 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: A. S. Diamond, Primitive Law (2nd edn, Watts 1950); E Adamson Hoebel, The Law of Primitive Man: A Study in Comparative Legal Dynamics (Harvard University Press 1954); Dennis Lloyd, Introduction to Jurisprudence (Stevens & Sons 1959) 336–37; Carleton Kemp Allen, Law in the Making (7th edn, Clarendon Press 1964) 67; AS Diamond, The Comparative Study of Primitive Law (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).
82. Nevertheless, the term ‘primitive’ was ultimately rejected as an academic term precisely because it reflected the lingering assumptions of social evolutionist frameworks and colonial standpoints, which were no longer considered acceptable.
84. See, e.g., ibid 200–02; and the use of the terms ‘painful’ and ‘unpleasantly’ (at 200–01), and even ‘repellent’ (at 165).
85. Ibid 161.
86. Leslie Green, ‘Introduction’ in ibid xliv.
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 civilized to have invented it; it is that they do not need it.87

In examining this claim that by ‘primitive’ Hart meant simple, not uncivilized, 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 ‘many studies of primitive communities’.88 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’.89 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’.

Further, although Hart did describe his fictional primitive society as simple,90 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’,91 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.92

Unlike the imaginary absolute monarchy of ‘Rex I’, however, the fictional primitive society has not required much 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

87. Ibid 1 (emphasis in original).
89. Ibid 91–92.
90. See, e.g., ibid 93–94.
91. Hart did not shy away from using the term ‘customary law’, as he had from the term ‘custom’; see e.g. ibid 232.
92. Ibid 53.
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’.\(^{93}\) He also reiterated, throughout the course of the book, his claim that these societies not only have a simple type of governance, or ‘social organization’, but they are small, closely-knit and isolated.\(^{94}\)

### 3.3 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 just different type. ‘Primitive’, ‘pre-legal’ and ‘simple’ societies are contrasted with ‘developed’,\(^{95}\) ‘mature’\(^{96}\) and ‘modern’\(^{97}\) 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.\(^{98}\) 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’.\(^{99}\)

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’.\(^{100}\) Hart did not merely specify two main types, ‘pre-legal’ and ‘legal’, but an entire spectrum on a single continuum of evolution.

### 4 ‘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

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93. Ibid 232. Other examples occur at 227, 214.
94. Ibid 92, 198, 227.
95. Ibid 95, 169, 214.
96. Ibid 110, 142.
97. Ibid 20, 26, 45, 60.
98. 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.
100. Lefkowitz (n 40) 271.
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’, and recommended the reader to ‘read each chapter through before turning to these notes’, the endnotes (and their effect on the text) will be discussed separately below.

### 4.1 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. First, 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’. Second, 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’. Third, ‘the majority of the population live by the rules seen from the internal point of view’.

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’. In addition to these features, there are a couple of further assumptions which become apparent in Hart’s discussion of deficiencies. These are, first, that there is no procedure for authoritatively determining doubt over the content or scope of a rule. Second, the rules are static and only capable of changing slowly over time. Third, 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.

These features suggest that Hart’s ‘evidence’ is more closely aligned with the evolutionary legal primitivism of the late nineteenth century, than with the legal anthropology of the mid-twentieth century that was contemporary at the time Hart was writing.

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102. Ibid.
103. Ibid 91.
104. Ibid.
105. Ibid 92.
106. Ibid.
107. Ibid.
109. Ibid 93–94.
4.2 Legal Primitivism

Legal anthropology developed during the heyday of evolutionary theories – the period spanning the late nineteenth and early twentieth century. Legal and ethnological scholars seeking to identify and explain the origins of western law and society produced theories of legal and social evolution. In an era of rapid colonial expansion, ethnographic information about contemporary Indigenous societies (perceived to exist in a condition resembling the pre-history of Western society) was used to supplement scant historical sources. At the same time, scholars of historical and comparative jurisprudence sought an understanding of law through an exploration of its historical development, and drew upon these comparative studies from the social sciences to understand the nature of law and its role in society. Although it has now been largely forgotten, historical jurisprudence rivalled legal positivism in popularity in Britain during that period.

Peter Fitzpatrick has pointed out that although historical jurisprudence was 'not explicitly invoked' by Hart, it 'pervades [his] account'. Certainly many of Hart’s assumptions – legal evolution, the equivalence of Indigenous socio-legal organization 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 all characteristic of historical and comparative jurisprudence.

The assumption that 'customary law' is stationary and capable only of gradual change, reflects the assertion made by Sir Henry Maine in Ancient Law, the inaugural work of the English school of historical jurisprudence, and, incidentally, one of the foundational texts of legal anthropology. Maine traced the evolution of law through the history of Indo-European societies. He argued that in its early stages of development, law cannot be explicitly changed by a deliberate act; it is

110. The content warning needs to be repeated here. The discourse of deficit and disparagement that characterises many of these (mis)representations of Indigenous law and society is deeply offensive.
111. See Norbert Rouland, Legal Anthropology (Athlone Press 1994); Roberts (n 69); Tuori (n 79).
112. The ethnographic data gathered from colonial sources was interpreted and presented in ways that conformed to pre-existing ideas of the origins of Western law, and is now regarded as methodologically and theoretically unsound: see Tuori (n 79); Roberts (n 69).
113. In this sense, historical and comparative jurisprudence was the precursor of sociological jurisprudence; see Brian Z Tamanaha, ‘The Third Pillar of Jurisprudence: Social Legal Theory’ (2015) 56 William and Mary Law Review 2235.
115. Fitzpatrick (n 60) 195.
116. Later studies would demonstrate many of these assumptions to be inaccurate or incorrect: see generally, Rouland (n 111); Roberts (n 69).
118. He relied upon Ancient Greek, Roman, biblical and European sources.
119. Maine (n 117) 21.
stationary and capable of only gradual evolution. 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; only ‘progressive societies’ (which Maine argued were extremely rare) developed the means of enabling change in the law as a response to social change.

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 considered that the earliest forms of law were regal judgments. ‘Customary law’ occurred at a later stage – the age of oligarchies – which succeeded that of kings. Knowledge of customary law was exclusive to aristocracies, who were the administrators and repositories of the law. 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.

Hart’s claims have more in common with the pre-legal stage of legal evolution proposed by Maine’s successor, Sir Paul Vinogradoff. Like Maine, Vinogradoff had developed a scheme of various types of law at different developmental stages. Unlike Maine, however, Vinogradoff used ethnographical studies of contemporary Indigenous peoples from around the globe as evidence of the earliest stages in legal evolution. The earliest developmental stage proposed by Vinogradoff, a study of the ‘origins’ of law in totemistic society, was based predominantly on

120. Ibid 23–24.
121. Ibid 22–24. 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 generally the discussion in Alan Diamond (ed), The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal (CUP 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 (CUP 1980) 88.
122. 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 117) 4–9.
123. Ibid 10–14.
124. Ibid 11–12.
125. Paul Vinogradoff, Outlines of Historical Jurisprudence (OUP 1920–22). Only the first two volumes (covering the first three of the six legal types) were published before Vinogradoff’s death. Vinogradoff’s aim was to study ‘ideological types’ occurring throughout history – that is, historical types treated in ideological rather than chronological order: Paul Vinogradoff, Outlines of Historical Jurisprudence: Volume I Introduction – Tribal Law (OUP 1920) 158–160 (‘Outlines of Historical Jurisprudence: Volume I’).
126. Despite acknowledging that his scheme was ‘restricted in the main to the evolution of juridical ideas within the circle of European civilisation’, Vinogradoff justified his use of anthropological studies 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’: Vinogradoff, Outlines of Historical Jurisprudence: Volume I (n 125) 138.
ethnographic studies of Australian Aboriginal societies. This stage preceded legal development.

Unlike Maine, Vinogradoff considered that custom developed not from resolution of disputes, but as an everyday practice. He assumed that the ‘customs and inherited instincts’ of Indigenous cultures were so deeply ingrained that they were capable of only gradual adaptation. However, much of Vinogradoff’s discussion of this pre-legal stage 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.

Another work of historical and comparative jurisprudence that remained an influential text during the time Hart produced The Concept of Law was CK Allen’s Law in the Making. Allen had been Professor of Jurisprudence at Oxford during Hart’s brief time there as a student of jurisprudence, and was still a member of the Faculty at the time Hart took up the chair. 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’. Negative perceptions of Indigenous Australians were presented as representing the earliest primitive origins of law. 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.

Hart’s language is evocative of the wording used by Allen in Law in the Making. For example, whereas Allen had said, ‘it is not difficult … to imagine’ societies without legislation, Hart claimed that ‘it is possible to imagine’ a society without

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127. The studies cited by Vinogradoff include: NW Thomas, Kinship Organization and Group Marriage in Australia (1906); Howitt, ‘The Dieri and Other Kindred Tribes of Central Australia’ (1890) XX(1) Journal of the Anthropological Institute; Spencer and Gillen, The Northern Tribes of Central Australia; Spencer and Gillen Across Australia (1912); Ling Roth, The Aborigines of Tasmania (1890); RH Matthews, Notes of Some Native Tribes of Australia (1906).
128. The second type, ‘tribal law’, was the earliest form of law, and involved decisions of chiefs. These earliest historical types were followed by civic law, medieval law, individualistic jurisprudence, and beginnings of socialistic jurisprudence respectively: Vinogradoff, Outlines of Historical Jurisprudence: Volume I (n 125) 158.
129. Ibid 368.
130. 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.
131. Carleton Kemp Allen, Law in the Making (OUP 1927). As Hart cited the 6th edition of Law in the Making in The Concept of Law (at 294), all pinpoint references in this article will be to that edition; Carleton Kemp Allen, Law in the Making (6th edn, OUP 1958) (‘Law in the Making 6th edn’).
132. 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) 150–51.
133. Allen, Law in the Making (n 131) 61.
136. Allen, Law in the Making (n 131) 66.
legislature, courts or officials.137 While Allen described ‘societies of which we have evidence’ governed only by customary rules which are not yet distinctly legal,138 Hart depicted ‘societies of which we have knowledge’, which only 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.139 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.140 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.141

One work that is consistent with all Hart’s claims is Sidney Hartland’s *Primitive Law*.142 Hartland’s is a work of comparative legal ethnology, written from an explicitly evolutionist perspective, and one of the few works of this ilk to have been written in English.143 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 13 different ethnographies of Indigenous Australians alone,144 to which numerous references are made and from which details and examples are described.

139. Ibid 66, 143.
140. See ibid 64–147.
141. Ibid 64, 144–45.
143. Most works of comparative legal ethnology, such as the vast studies produced by Kohler and Post, had been published in Europe, and Hartland’s *Primitive Law* thus filled ‘a long existent gap in the literature of the subject in English’: HE Barnes, ‘Hartland, Primitive Law’ (1925) 4(1) Social Forces 196, 198. See also Tuori (n 79) 94.
144. The studies of Australian Aboriginal and Torres Strait Islander peoples cited by Hartland include: Alfred William Howitt, *The Native Tribes of South East Australia* (1904); WB Spencer and FJ 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 Australia* (1880); Walter Edmund Roth, *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,\textsuperscript{145} and theft,\textsuperscript{146} as well as others imposing ‘positive duties to perform services or make contributions to the common life’.\textsuperscript{147} 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’,\textsuperscript{148} it is not merely habit,\textsuperscript{149} but community pressure and the fear of often superstitious repercussions,\textsuperscript{150} that enforces the general obedience. Hartland also notes that there are occasional breaches, for which sanctions are provided.\textsuperscript{151} Generally, law is enforced by sensitivity to community ridicule and contempt.\textsuperscript{152} 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.\textsuperscript{153}

Further, Hart’s assumption 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,\textsuperscript{154} is also consistent with Hartland’s view that:

[T]he laws of peoples in the lower culture ... 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.\textsuperscript{155}

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’;\textsuperscript{156} ‘[f]rom generation to generation they follow the customs of the fathers’.\textsuperscript{157} Change happens over time as circumstances change, but so slowly that it is almost imperceptible.\textsuperscript{158}

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,

\textsuperscript{145} Hartland (n 142) 145–48, 154–55.
\textsuperscript{146} Ibid 159, 173, 183.
\textsuperscript{147} 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.
\textsuperscript{148} Ibid 138.
\textsuperscript{149} Ibid 202.
\textsuperscript{150} Ibid 8.
\textsuperscript{151} Ibid ch VI ‘Sanction’.
\textsuperscript{152} Ibid 161–65.
\textsuperscript{153} Ibid ch VI ‘Sanction’.
\textsuperscript{154} Hart, The Concept of Law 3rd edn (n 4) 92.
\textsuperscript{155} Hartland (n 142) 203.
\textsuperscript{156} Ibid 200.
\textsuperscript{157} Ibid 201.
\textsuperscript{158} Ibid 202. The one exception is caused by contact with Europeans: at 200.
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.159

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.160 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.161 However, a number of other books cited by Hart and unquestionably influential on his thoughts, were also not in the collection.162

Another work that correlates closely with Hart’s claims is Alan Diamond’s Primitive Law.163 Diamond’s work was neo-evolutionary, associating legal evolution with social and economic development, and grading societies according to mode of production (with Indigenous Australians dominating the ‘lowest’ grade).164 The chapter describing a stage of legal evolution ‘before the evolution of courts’165 encompasses primarily Indigenous Australian and American peoples.166 Like Hart, Diamond assessed these ‘communities standing at the lowest grades of progress’ as pre-legal.167

This chapter supports most of Hart’s empirical claims.168 It describes societies without legislature, courts or officials,169 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.170 Diamond described an array of ‘rules of conduct’, religious and secular, ranging from non-compulsory to compulsory.171

159. Ibid 20–21.
160. 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).
161. Hart bequeathed his library to the Hebrew University of Jerusalem. I conducted bibliographic research into that collection as part of my research for this project.
162. 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.
165. Ibid ch 18.
166. The peoples assessed by Diamond as ‘before the evolution of courts’ were those classed 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.
167. Ibid 185–93.
168. This particular chapter was also cited by Hart in his endnotes to this section of the book, as to which see below.
169. 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 163) 187.
171. Ibid 188–93.
His depiction of a ‘class of rule of conduct … which are invariably observed, and which in the opinion of all must be observed’,\textsuperscript{172} although the rules ‘are sometimes broken’,\textsuperscript{173} 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.\textsuperscript{174} He therefore preferred the term ‘rules of conduct’ to ‘custom’ as a general descriptor for the maintenance of order in such societies.\textsuperscript{175} 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 to Hart’s basic rules restricting violence, theft and deception (although it is a broader category than Hart’s primary rules of obligation and he describes rules relating to incest and witchcraft as more common than wrongs such as homicide and theft).\textsuperscript{176} His discussion of reciprocity accords more closely with Hart’s account, describing obligations to perform services and make contributions to the community.\textsuperscript{177}

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’,\textsuperscript{178} or other organs for ‘laying down or enforcing any rules’.\textsuperscript{179} Further, Diamond’s description of wrongs being avenged by friends or family,\textsuperscript{180} where ‘punishment is inflicted by the community or part’,\textsuperscript{181} 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 \textit{Primitive Law} was in Hart’s collection,\textsuperscript{182} and was cited by him in the endnotes to \textit{The Concept of Law}.\textsuperscript{183}

4.3 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. Of the three endnotes in this section of the book, two refer to empirical studies.

\textsuperscript{172} Ibid 188.
\textsuperscript{173} Ibid 190.
\textsuperscript{174} He did, however, suggest that for some of the rules that term would be appropriate: ibid 191.
\textsuperscript{175} Ibid 188.
\textsuperscript{176} Ibid 192–93. 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).
\textsuperscript{177} Ibid 189–91.
\textsuperscript{178} Ibid 191.
\textsuperscript{179} Ibid 187.
\textsuperscript{180} Ibid 192–93.
\textsuperscript{181} Ibid 193.
\textsuperscript{182} It was one of the titles bequeathed by Hart to the Hebrew University of Jerusalem.
\textsuperscript{183} Hart, \textit{The Concept of Law} 3rd edn (n 4) 291.
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’.\footnote{Ibid.} This latter statement reflects the rule-centred approach to legal anthropology,\footnote{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.} 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.\footnote{See Rouland (n 111) 37–38; Roberts (n 69) 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, 373–75.} Underpinning this approach was a notion of formal racial equality,\footnote{See Moore (n 186).} 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.\footnote{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 60) 194.} 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.\footnote{Hart, The Concept of Law 3rd edn (n 4) 291, citing Bronislaw Malinowski, Crime and Custom in Savage Society (Harcourt, Brace and Co, 1926); Diamond (n 163) ch 18; KN Llewellyn and EA Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence (University of Oklahoma Press 1941).} These references are a curious and eclectic collection of disparate approaches. Crime and Custom in Savage Society is an anthropological study of the Trobriand Islands (an archipelago off the coast of Papua New Guinea).\footnote{Malinowski (n 189).} With its publication in 1926, Bronislaw Malinowski is generally credited with revolutionizing both the methodology of field work and the theoretical analysis of the maintenance of order in the discipline of legal anthropology.\footnote{See Roberts (n 69) 190–91.} Malinowski argued that law ought to be defined not by form, but by function, and it may consist in a whole range of social phenomena.
beyond those recognized by Western legal systems. The Cheyenne Way, a study of the law and dispute resolution of the Cheyenne people in North America, was another ground-breaking work of legal anthropology, first published in 1941. While both Crime and Custom in Savage Society and The Cheyenne Way were highly influential at that time, and are now classics of anthropological literature, 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 Hart made in the note either, with the possible exception of The Cheyenne Way which combined elements of the rule-centred approach with a broader dispute resolution approach.

In the second note, which refers to adjudication without organized 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. Gluckman’s work is another classic of legal anthropology which epitomizes the rule-centred approach. Gluckman analyzed the application of legal rules in Indigenous African dispute resolution, to demonstrate the comparability of African and Western legal thought. In his discussion of the excerpt quoted from Evans-Pritchard’s The Nuer, Gluckman emphasized 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’. In this note, Hart also made a detailed comment on the history of adjudication in Roman law. 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 organized sanctions. However, 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.

193. KN Llewellyn and EA Hoebel, The Cheyenne Way: Conflict and Case Law inPrimitive Jurisprudence (University of Oklahoma Press 1941). For a discussion of its significance in legal anthropology, see Roberts (n 69) 197; Rouland (n 111) 38.
194. Roberts (n 69) 197; Schapera (n 192) 139, 150.
195. Rouland (n 111) 38.
197. Roberts (n 69) 197.
198. See the discussion of Gluckman’s work in Moore (n 186).
199. Gluckman (n 196) 263. This application of a Western legal framework was not entirely consistent with Evans-Pritchard’s own position.
Apart from Diamond’s work, the anthropological studies cited by Hart in these two notes are fundamentally dissimilar to the nature of the claims Hart made in his text.\textsuperscript{202} Hart’s junior colleague at Oxford, Brian Simpson, claimed that ‘Hart’s knowledge of the anthropological literature was … scanty’.\textsuperscript{203} 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 \textit{Law in the Making}.\textsuperscript{204} However, these sources were practically ignored by Allen, who continued to adhere to the automaton theory.\textsuperscript{205} 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, however, none contained references to the curious combination cited by Hart.\textsuperscript{206} 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.\textsuperscript{207} 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-twentieth century, with expertise in linguistic philosophy, should demonstrate such a tentative grasp of the range of approaches to ‘primitive law’ (characterized by diverse methodological, epistemological and theoretical frameworks) in the anthropological

\textsuperscript{202} 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 60) 194.

\textsuperscript{203} Simpson (n 5) 173.

\textsuperscript{204} Ibid.

\textsuperscript{205} In the 3rd edn (1939), Allen cited Savigny, Maine and Vinogradoff, but in a footnote, which first appeared in the 5th edn in 1951, Allen cited Diamond’s \textit{Primitive Law} as a contra opinion: Carleton Kemp Allen, \textit{Law in the Making} (5th edn, OUP 1951) 63. By the 6th edn, 1958, there is in the same footnote, a further reference to Gluckman: Allen, \textit{Law in the Making} 6th edn (n 131) 66.

\textsuperscript{206} If Hart did obtain them from a textbook, it could have been Dennis Lloyd’s \textit{Introduction to Jurisprudence}, which was first published in 1959, just as Hart was completing \textit{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 twentieth 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 86) 335–39. One of the only other jurisprudence texts that contain references to some of the anthropological works cited by Hart is George Paton’s \textit{A Textbook of Jurisprudence} (OUP 1946), which refers to Malinowski, Diamond’s \textit{Primitive Law} and \textit{The Cheyenne Way}.

\textsuperscript{207} 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’, \textit{The Concept of Law} 1st edn (n 4). See also Lacey, \textit{The Nightmare and the Noble Dream} (n 3) 214; Simpson (n 5) 51, 173.
literature of the time. What is interesting then, is the fact that Hart relied upon ethno-
graphic studies at all, or allowed empirical data to obscure what was essentially a
purely analytical exercise.208 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, sug-
gests that he had a single source (or two or more complementary 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 jurispru-
dence, 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.

4.4 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 con-
templation as the subjects of the studies to which he referred. The studies included in the
endnotes encompassed Indigenous peoples of Africa, America and Oceania (including
Australia). The major works of historical jurisprudence, with the exception of Maine, all
explicitly portrayed Indigenous Australians as epitomizing the earliest stage in legal evolu-
tion. 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,209
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.210 At the ‘lowest grade’ on Diamond’s evolutionary scale were
‘the Australian aboriginal communities of the Stone Age’.211

It is quite probable that Hart envisaged Indigenous peoples from anywhere in the
world, particularly those colonized 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.

5 THE PRE-LEGAL–LEGAL DUALISM

Before exploring the implications of this classification of Indigenous Australia as pre-
legal, it is necessary to consider the general impact of the central role played by Hart’s
distinction between pre-legal and legal worlds.

208. As to Hart’s attitude to the utility of empirical evidence in the social sciences (in the con-
text of the Hart–Devlin debate), see Lacey, The Nightmare and the Noble Dream (n 3) 261.
209. The Australian Aboriginal peoples referred to 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.
211. Ibid 185.
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.212

5.1 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 seventeenth-century theory.213 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’.214 Progression to civil society, via the social contract, cures these defects by means of ‘a common established law and judicature to appeal to, with authority to decide controversies … and punish offenders’.215

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.216 In a cryptic note referring to ‘[t]he step from the pre-legal into the legal world’, Hart cited Kurt Baier on ‘Law and Custom’ in The Moral Point of View.217 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.218

212. Fitzpatrick (n 60) 195.
213. Fitzpatrick (n 60) 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, H. L. A. Hart (n 35) 98.
215. Ibid 97.
216. 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 there 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’ <www.otago.ac.nz/philosophy/Baier.pdf>. See also, Bernard Gert, ‘Baier, Kurt (1917–)’ Encyclopedia of Philosophy <www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/baier-kurt-1917>. All links accessed 1 August 2020.
217. Hart, The Concept of Law 3rd edn (n 4) 292, citing Baier (n 162) 129–33. This is one of three references to Baier’s The Moral Point of View in the endnotes.
218. 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.
Baier preceded his account, as did Hart, with a description of social rules.\textsuperscript{219} Like Hart, instead of attempting a definition of law, he defined a legal system.\textsuperscript{220} Baier described societies ‘which have not reached this stage of development’ as ‘prelegal’, without ‘a system even of primitive law’.\textsuperscript{221} 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 the function of authorized adjudication,\textsuperscript{222} which resembles Hart’s rule of adjudication. The other is legislation, which serves two functions.\textsuperscript{223} 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’).\textsuperscript{224} 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”’.\textsuperscript{225} 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’,\textsuperscript{226} and observed that in a ‘very small group this type of social pressure [to support social rules of custom] will be very effective’.\textsuperscript{227} Elsewhere, Baier drew a general distinction between primary and secondary moral rules,\textsuperscript{228} 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 claims by reference to ethnographical evidence that societies

\textsuperscript{219} Baier (n 162) 125–27.
\textsuperscript{220} Baier was prepared to define ‘a law’ as a certain part of a legal system: ibid 127.
\textsuperscript{221} Ibid 128.
\textsuperscript{222} The function of adjudication consists of specialization in determining breaches of the rules and administering the appropriate consequences: ibid 127–28.
\textsuperscript{223} Baier himself did not specify that there were two separate functions of legislation, but the distinction is apparent from his discussion. See ibid 127–29.
\textsuperscript{224} Ibid 129.
\textsuperscript{225} Ibid 127.
\textsuperscript{226} Ibid 131.
\textsuperscript{227} Ibid 128.
\textsuperscript{228} 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 204–05.
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.

5.2 ‘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 centralized 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 fea-
tures 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 author-
itative and valid, and so on. It was by means of just such a conceptual mechanism that
Indigenous societies with diverse social, economic and legal organization, were per-
ceived 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 evolution-
ary anthropological studies relied upon by Hart were engaged in a similar quest for
the origins of Western law. 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’ commu-
nities, therefore, were informed from the same condition of absence. This is a crucial
point. It demonstrates that 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.229
Its appearance in the legal doctrine concerning the recognition and interpretation of
Indigenous Australian law is deeply problematic.

6 FROM REPUDIATION TO RECOGNITION: THE FRAUGHT
LEGAL RELATIONSHIP BETWEEN INDIGENOUS AND
ANGLO-AUSTRALIAN LAW

In invoking empirical evidence in support of his analytic device, Hart followed in the
tradition of the social contract theorists of the Enlightenment era. Thomas Hobbes,

229. 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 60) 102.
John Locke and, later, John 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 colonization of Australia, identified Native American peoples, whereas Austin, writing in the decades following the establishment of the first British colony on the lands of the Gadigal people (in what is now Sydney), named Indigenous Australians as exemplifying the state of nature.

The effect of identifying Indigenous Australia with the state of nature – a state characterized by an absence of law – was to mandate that difference be overlooked in favour of absence. As a result, Aboriginal socio-political and legal organization (not to mention economy, land use, knowledge, arts and culture) was able to be disregarded and effectively dismissed. The perceived absence of law (together with these other negatively interpreted indicia of ‘civilization’) was used to justify the application of the doctrine of terra nullius to the Australian continent, providing the basis for the British assertion of sovereignty over the territory.

For over two hundred years, the denial of Indigenous law persisted as the foundation of Anglo-Australian legal sovereignty. It was finally corrected in 1992, when the High Court of Australia handed down its landmark decision in *Mabo v Queensland [No 2]* (‘Mabo’). The rejection of terra nullius in that case provoked an effective rethinking of the orthodox explanation of the reception of English law in Australia following the acquisition of sovereignty by the British.

### 6.1 ‘Traditional Laws and Customs’

The designation of Indigenous Australian law as ‘traditional laws and customs’ derives from the leading judgment in *Mabo*. The term was subsequently included in the Native Title Act 1993 (C’th), which provides that native title rights and interests have their source in the traditional laws and customs of the claimant people.


232. *Cooper v Stuart* (n 7); cf *Mabo* (n 1).

233. *Mabo* (n 1).


235. *Native Title Act 1993* (C’th) s223(1)(a); *Western Australia v Ward* (2002) 191 ALR 1, 17.
The interpretation of ‘traditional laws and customs’ under the Native Title Act was authoritatively determined by the High Court of Australia in Members of the Yorta Yorta Community v Victoria (‘Yorta Yorta’). So too, the relationship between the received common law and Indigenous law following the acquisition of sovereignty was finally addressed – some ten years after Mabo – in the Yorta Yorta decision.

The Yorta Yorta case involved an appeal by the Yorta Yorta people (whose traditional lands lie on either side of the Murray River, in part of southern New South Wales and northern Victoria) against a negative native title determination. In rejecting their claim, the trial judge had found that the Yorta Yorta claimants had not continued to observe and acknowledge the traditional laws and customs of their forebears. He reached this conclusion by comparing contemporary activities of the claimant group to those described by the early colonists. Because these were different, he concluded that the contemporary activities were of recent origin, and did not owe their origin to traditional laws and customs. Following an unsuccessful appeal to the Full Court of the Federal Court, the Yorta Yorta appellants were granted special leave to appeal to the High Court.

The leading judgment of the majority of the High Court in the Yorta Yorta case was unusually philosophical, overtly citing legal theories as legal authority. In considering the meaning of ‘traditional laws and customs’, and the impact of their meeting with the common law, the justices of the High Court reverted to first principles, invoking theoretical considerations of concepts of ‘law’.

As the remainder of this article comprises an analysis of the use of Hart’s theory in the High Court’s judgment – and the impact of this on the Court’s construction of Indigenous law – it is worth briefly setting out the Court’s reasoning.

The majority held that because native title rights and interests owe their existence not to the common law, but to traditional laws and customs (under the Native Title Act), this infers the existence of a normative system other than the common law. Thus, they held that an intersection of two normative systems, traditional laws and customs and the common law, occurred at the time of acquisition of sovereignty over the

236. Yorta Yorta (n 1).
239. Yorta Yorta Trial (n 237) [128].
240. Yorta Yorta (n 1) 439 [31], 441 [37] (Gleeson CJ, Gummow and Hayne JJ).
The consequence for the Indigenous normative system was the loss of its law-making capacity and hence its capacity to validly create new rights, duties or interests. As a result, 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. Therefore, the ‘traditional laws and customs’ presently possessed must have their origin in the normative Aboriginal and Torres Strait Islander rules existing prior to sovereignty, and the normative system under which the rights and interests are possessed must have had a continuous existence and vitality since sovereignty. 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.

The majority 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. 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. They held that the appeal by the Yorta Yorta people must be dismissed.

6.2 Some Anomalies in the Reasoning

There are a number of irregularities that are immediately apparent from the reasoning in this judgment. First, there is an element of circularity. The wording of the statutory definition was used to identify and point to fundamental principles, which were in turn used to interpret the wording of the definition. Second, the judgment contains an internal contradiction in relation to the paradox of requiring the continued existence and vitality of Indigenous law whilst simultaneously denying its law-making capacity. Third, the conclusion does not follow from the reasoning. The majority relied upon the trial judge’s findings, which did not actually satisfy their own test. The findings had been made in relation to the content of the rules and customs, and not – as required by the High Court – their role in the normative system.
A number of questions regarding the construct of Indigenous law also arise from the judgment. One is whether the impairment of its law-making capacity effectively reduces it from a system of law to custom.251 Another concerns the terminology used. Indigenous law was most frequently described as a ‘normative system’, but was also variously referred to as comprising ‘rules’,252 ‘normative rules’ or ‘bodies of normative rules’,253 ‘bodies of norms’254 and ‘sets of norms’.255 The question arises whether the use of these descriptors has the effect of downgrading it to a set of protocols. Last (but certainly not least) is the question of the extent to which this construct of Indigenous law reflects Indigenous Australian understandings of their own law.

6.3 An Absence of Indigenous Knowledge and Expertise

The interpretation of Indigenous Australian law in *Yorta Yorta* bears little resemblance to 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,256 access to a well-established body of knowledge within the Western academy on the nature of Indigenous Australian law257 and an extraordinary level of access to first-hand testimony from Indigenous law men and women258 – the majority left unconsidered any theory emanating from those with authority or expertise in Indigenous Australian law.

Fundamental concepts of Indigenous law described 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...

252. *Yorta Yorta* (n 1) 443 [42], [44], 444 [46].
253. Ibid 442 [40], 444 [46].
254. Ibid 441 [38], 442 [39], 445 [48].
255. Ibid 441–42 [38], [39].
256. The majority cautioned that there was a danger in importing theoretical analyses and terminology derived from Eurocentric concepts of law and applying them to societies with quite different concepts of law. Despite this awareness of the intercultural difficulties, however, the majority’s language was one of deficit. The ‘traditional laws and customs of societies having no well-developed written language’ were compared to ‘a developed European body of written laws’: *Yorta Yorta* (n 1) 442 [39]; 447 [55] (emphasis added).
257. 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.
258. 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.
is immanent. Concepts of being, thinking and actualizing 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 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 natural world, and limited to the governance of human behaviour. 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 unrecognizable as an Indigenous Australian concept of law.

6.4 The Influence of HLA Hart

Instead of defining traditional laws and customs in a way that reflected Indigenous Australian peoples’ understandings of their own law, the leading judgment in Yorta Yorta was replete with references to British and Anglo-Australian legal theories. Although the majority entered a caveat about the utility of questions of analytical jurisprudence, effectively eschewing a ‘jurisprudential debate’ over whether Indigenous law can properly be conceived of as ‘law’, the judgment relied extensively upon it. The pervasive influence of Hart’s theory throughout the majority judgment has been widely recognized. The reasoning employs the lexicon of Hart’s analytical jurisprudence and draws upon key aspects of it.

259. In addition to Hart, the jurisprudence of Tony Honoré, Julius Stone, George Paton and Charles Sampford was cited by the Court. It is Hart’s theory, however, that dominates the reasoning. For a comprehensive examination of the use of all these theories in the Yorta Yorta decision, see Diana Anderssen, The Construct of Indigenous Australian ‘Traditional Laws and Customs’ in Contemporary Australian Law: A Conceptual Analysis (PhD Thesis, The Australian National University, 2021).

260. Yorta Yorta (n 1) 447 [55].

261. Each of the jurisprudential questions raised concerned the difference between law and other phenomena, an issue which was treated as unhelpful: ibid 442–43 [41].

262. 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. Having issued the disclaimer, the justices proceeded with an analysis based upon fundamental principles which draw upon concepts with a derivation in nineteenth- and twentieth-century analytical jurisprudence. ‘Jurisprudential analysis’, essentially analytical jurisprudence, was drawn upon periodically to support, or assist in explaining, the reasoning, thus demonstrating the synergies between the two.

263. See, e.g., Kirsten Anker, Declarations of Interdependence: A Pluralist Approach to Indigenous Rights (Routledge 2014); Dorsett and McVeigh (n 251); H Patrick Glenn, ‘Continuity and Discontinuity of Aboriginal Entitlement’ (2007) 7 Oxford University Commonwealth Law Journal 23; Bruce Rigsby, ‘Social Theory, Expert Evidence, and the Yorta Yorta Rights Appeal
The concept of a rule of recognition, for example, is central to the majority’s reasoning. It is used to explain 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. However, as Kirsten Anker has noted, 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’.

Another aspect of Hart’s jurisprudence that appears in the judgment is his analysis of the normativity that distinguishes rules from patterns of behaviour. The majority explicitly invoked Hart’s distinction between rules and observable patterns of behaviour to conclude that traditional law and customs must comprise rules having a normative quality. And yet, as Anker has observed, the internal aspect was ‘decidedly missing from [the trial judge’s] analysis in the Yorta Yorta trial’. Even the theory cited in the ‘caveat’ is almost exclusively drawn from The Concept of Law. The fact that each of the specific jurisprudential questions identified in the


264. See, generally, the discussion in Anker (n 263) 76–77; and Dorsett and McVeigh (n 251) 8–10.

265. The majority explained that ‘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 [the change in] sovereignty’: Yorta Yorta (n 1) 446 [54].

266. Having stated this principle, the majority went on ‘[t]o explain why this is so’, explicitly justifying it with reference to their analysis of a normative system, including the critical role played by the rule of recognition: Yorta Yorta (n 1) 444–46 [47]–[54].

267. The question, according to the majority, is not one of the content of the laws and customs, but whether they form part of the normative system in accordance with its rule of recognition: ibid 446 [53]–[54].

268. Having stated that the relevant rule of recognition is to be found in the social structures of the society as those structures existed at sovereignty, the majority continued, ‘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’: ibid 446 [54].

269. Anker (n 263) 77.

270. Bruce Rigsby has suggested that Hart’s perspective on normativity differs from that conventionally held by social anthropologists: Rigsby, ‘Social Theory’ (n 263) 53, 69.

271. Yorta Yorta (n 1) 443 [42]. This is an example of the Court’s reliance upon Hart’s jurisprudence despite their explicit caution: 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.

272. Anker (n 263) 78.

273. The only other reference is to Austin’s Province of Jurisprudence Determined, and that also includes a reference to Hart’s discussion in The Concept of Law.
caveat was derived from Hart’s work is yet another indication of its influence throughout the judgment.

7 THE IMPACT OF THE DEPLOYMENT OF HART’S THEORY IN 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 way Indigenous Australian law has been interpreted in the Anglo-Australian legal doctrine that recognizes its existence.

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 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 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’.274 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’.275 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.

275. Ibid.
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 recognizes 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. 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 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 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’. 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. The majority held that since the findings of the trial judge ‘were findings about interruption in observance of traditional law and custom’, the appellants had not proven continuity of a society united in its acknowledgement and observance of the laws and customs.

276. This point was made in Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Native Title Report 2002 (19 March 2003).
277. Ibid 457.
278. Ibid 446.
279. Ibid 458 (emphasis omitted).
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 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 colonization, 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’. As pointed out above, 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 ‘settlement’. Hart himself had addressed the issue of the rule of recognition in former colonies of the British Empire such as Australia.280 According to Hart, as a former colony gains independence, ‘the ultimate rule of recognition has shifted’; there is a ‘new rule’.281 This illuminates a theme in the majority judgment in *Yorta Yorta*, which made little allowance for the disrupting impact of...

colonization 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. However, 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.282 The ultimate irony is that the legal system of the Australian nation would fail the test set for Indigenous Australian societies.

8 CONCLUSION

In creating a hypothetical pre-legal society, HLA Hart drew upon assumptions from evolutionary ethnological theories that were outdated and largely discredited even at the time he was writing. The studies of ‘primitive’ communities relied upon by Hart routinely portrayed Indigenous Australian societies in a condition prior to the evolution of law. Not only did Hart categorize Indigenous Australian societies and law as ‘pre-legal’, therefore, but that very category was overtly constructed from negative perceptions of Indigenous Australian societies as being symbolic of the deep origins of Anglo-Australian common law.

The influence of Hart’s jurisprudence in the High Court’s decision in Members of the Yorta Yorta Community v Victoria has thereby re-introduced theoretical aspects of terra nullius into the very legal doctrine that replaced it. It has resulted in a construction of Indigenous law that bears no resemblance to Indigenous accounts, amounting instead to a deficit version of an Anglo-Western model of law. The chronic inability to recognize Indigenous law as ‘law’ thus continues to underpin the legal recognition and understanding of Indigenous law in Australia.

The question that arises is whether the justices of the High Court of Australia would so readily have invoked Hart’s jurisprudence if the full implications of this aspect of it had been appreciated. The difficult question must therefore be asked – could this outcome have been avoided if the uncomfortable problem of the ‘primitive’ had been consistently, directly and rigorously confronted in the mainstream analytical literature on the jurisprudence of HLA Hart?

282. See Oliver (n 281) 292–94.