CHTHONIC LEGAL TRADITIONS TOWARDS EMIC UNDERSTANDINGS OF AUSTRALIAN FIRST NATIONS CONSTITUTIONALISM: 'ROOTED' CONSTITUTIONALISM AND A FOUNDATIONAL CONCEPTUAL APPARATUS FOR INQUIRIES INTO AUSTRALIAN FIRST NATIONS LEGAL ORDERS

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First Nations constitutionalism unfolds within a chthonic legal tradition which is incommensurable with most of the positivist theoretical and conceptual models deployed to investigate Westphalian constitutional systems. The irreducibility of analysis of chthonic constitutional traditions with such models of constitutionalism calls, on the one hand, for rethinking positivistic approaches to legal reasoning and rationalisation and, on the other hand, for identifying new conceptual grids in charting the normative and legal landscape of Indigenous constitutionalism. With specific reference to Australian First Nations constitutionalism, the purpose of this paper is to suggest the adoption of a conceptual apparatus for its investigation which reflects 'emic'[1] understandings of what Indigenous legal orders are and how they operate. In doing so, the paper subsumes Australian First Nations constitutionalism into Mills's theoretical elaboration of 'rooted constitutionalism'[2] and argues that such a 'rooted' kind of constitutionalism needs to be expounded through foundational concepts such as nomos*, myths, and legal traditions which are experientially and culturally grounded in the lifeworld that sustain Australian First Nations*

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1 'Emic' refers to one kind of research done, and viewpoints obtained, from within the social group (from the perspective of the subject): see Thomas N Headland, 'A Dialogue Between Kenneth Pike and Marvin Harris on Emics and Etics' in Thomas N Headland, Kenneth L Pike and Marvin Harris (eds), *Emics and Etics: The Insider/Outsider Debate* (Sage Publications, 1990) 6.

2 Aaron Mills is an Indigenous (Anishinaabe) scholar whose work on Indigenous constitutionalism is significantly assisting Indigenous constitutional revitalisation and, in turn, the multidimensional struggle for decolonisation, self-determination and nation building, as it is occurring on the site of education: see especially Aaron Mills, 'The Lifeworlds of Law: On Revitalising Indigenous Legal Orders Today' (2016) 61(4) *McGill Law Journal* 847 ('Lifeworlds of Law').

constitutional traditions. Such a conceptual apparatus draws mainly from the theoretical framework elaborated by legal pluralism and legal theory to deal with the contemporary normative complexities of stateless legal orders. It is a macro-level conceptual apparatus that would be foundational to 'etic'[3] understanding and theorisation of First Nations Australian constitutionalism.

INTRODUCTION

Law is part of a society's cultural totality as the Latin expression posits it: *ubi societas, ibi ius* (where there is a society, there is law).[4] This legal maxim revolves around the concept that law and society are indivisible. Each society, regardless of size, creates its own individual system of authority. As human communities are diverse all over the world, the legal orders, the laws and the respective doctrinal constructions of general concepts such as sovereignty, constitution, law, the rule of law, democracy, or specific institutions such as marriage, contract or tort, are diverse everywhere.[5]

By assuming the maxim *ubi societas, ibi ius*, as the foundational premise, this paper posits that Indigenous legal orders, including Australian First Nations legal orders, are legitimate sites of constitutionalism on their own terms, as they have been governed over time immemorial by their own chthonic constitutional traditions.[6] Given that Australian First Nations constitutionalism unfolds within a chthonic legal tradition which is incommensurable with most of the positivist theoretical and conceptual models deployed to investigate Westphalian constitutional systems, there is the need of rethinking or reassessing orthodox legal-theoretical conceptual and doctrinal assumptions and premises — bound to the nation-state perspective — considered insufficient for discussing Indigenous constitutionalism.

Likewise, the purpose of this paper is to suggest a conceptual apparatus that

3 'Etic' refers to one kind of research done, and viewpoints obtained, from outside (from the perspective of the observer): see Headland (n 1) 6.

4 This legal maxim is attributed to Baron Heinrich von Cocceji (1644–1719). It is derived from a philosophical argument, originally inspired by Aristotle's *Nicomachean Ethics,* and is usually summarised as '*Ubi homo, ibi societas. Ubi societas, ibi ius. Ergo: ubi homo, ibi ius*' (Where the human being is, there is a society. Where there is a society, there is law. Therefore: where the human being is, there is law): see Jonathan Barnes (ed), *The Complete Works of Aristotle, Volume 2: The Revised Oxford Translation* (Princeton University Press, 1984) 1833–9.

5 Jaakko Husa, *A New Introduction to Comparative Law* (Hart Publishing, 2015) 19.

6 The term 'chthonic' has been used by Goldsmith to describe people who live in close harmony with the earth. Goldsmith uses also the term 'vernacular' to describe chthonic people: see Edward Goldsmith, *The Way: An Ecological World-View* (University of Georgia Press, 1992) xvii, 409–15, 523. On 'chthonic legal traditions': see also H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, 4th ed, 2010) ch 3 ('*Legal Traditions of the World*').

might be deployed to advance understandings on Australian First Nations constitutionalism which would be consistent with their own constitutional traditions, and thus would reflect 'emic' understandings of what Indigenous legal orders are and how they operate.

As stated by White, one of the fundamental quests of human beings is to contextualise 'the world, and ourselves within it, in a coherent way, a way that will make possible meaningful speech and action'.[7] This quest for meaning is about collectively and individually locating ourselves[8] in an ontological, epistemological and axiological coherent *nomos* without which 'there can be no justice'.[9] The term *nomos*, plural *nomoi*, is the concept of law in ancient Greek philosophy.[10] In the context of this article, the term is used to refer to the normative universe within which all societal living unfolds. In First Nations societies, the *nomos* within which purposeful speech and action are generated, can be located, in part, in their Indigenous constitutional traditions.

By focusing principally on Indigenous societies within common law countries,

7 James Boyd White, *Living Speech: Resisting the Empire of Force* (Princeton University Press, 2006) 101.

8 Ibid 102.

9 Ibid.

10 For a definition of *nomo*s, see *Encyclopaedia Britannica* (online at 2 September 2020) Nomos.

such as those in North America,[11] Africa,[12] New Zealand,[13] and Australia,[14] scholarly analysis has been undertaken to explore those traditions from an analytical and normative perspective with the aim of seeking out and identifying the constitutional traditions that ultimately promote an understanding of how Indigenous societies, by adherence to those legal traditions, achieve fundamental social order. The theoretical framework deployed to expound aspects and levels of Indigenous constitutionalism in those societies resonate with emic understandings of how Indigenous constitutional traditions provide fundamental guidelines for a key aspect of governance; and how their traditions shape both individual and collective actions, the behaviour of leaders, decision-making, dispute resolution, and relationships with the human, material and spirit worlds.

This paper rides on the flow of that nascent 21st century legal literature and contributes to the growing body of comparative and social-legal science

11 John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, 2010); Sidney L Harring, *Crow Dog's Case*: *American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge University Press, 1994); Joseph P Kalt, 'The Role of Constitutions in Native Nation Building: Laying a Firm Foundation' in Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007) 78; Patricia A Monture-Angus, *Journeying Forward: Dreaming Aboriginal Peoples' Independence* (Pluto Press Australia, 2000); James (Sákéj) Youngblood Henderson, 'Postcolonial Indigenous Legal Consciousness' (2002) 1 *Indigenous Law Journal* 1; Christine Zuni Cruz, 'Law of the Land: Recognition and Resurgence in Indigenous Law and Justice Systems' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 315; Hadley Friedland, 'Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws' (2012) 11(1) *Indigenous Law Journal* 1, 38; Hadley Friedland and Val Napoleon, 'Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions' (2015–16) 1(1) *Lakehead Law Journal* 16; Darlene Johnston, 'First Nations and Canadian Citizenship' in William Kaplan (ed), *Belonging: The Meaning and Future of Canadian Citizenship* (McGill-Queen's University Press, 1993) 349; Wapshkaa Ma'iingan (Aaron Mills), 'Aki, Anishinaabek, kaye tahsh Crown' (2010) 9(1) *Indigenous Law Journal* 107.

12 Abdullahi Ahmed An-Na'im, *African Constitutionalism and the Role of Islam* (University of Pennsylvania Press, 2006); Francis M Deng, *Identity, Diversity, and Constitutionalism in Africa* (United States Institute of Peace, 2008); Francis M Deng, *Customary Law in the Modern World: The Crossfire of Sudan's War of Identities* (Routledge, 2013); Francis Mading Deng, *Tradition and Modernization: A Challenge for Law Among the Dinka of the Sudan* (Yale University Press, 1971) ('*Tradition and Modernization*'); John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press, 2004); Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins, *The Future of African Customary Law* (Cambridge University Press, 2011).

13 Carwyn Jones, 'Indigenous Law/Stories: An Approach to Working with Māori Law' in Jo-ann Archibald, Jenny Lee-Morgan and Jason De Santolo (eds), *Decolonizing Research: Indigenous Storywork as Methodology* (Zed Books, 2019) 120; Carwyn Jones, 'A Māori Constitutional Tradition' (2014) 12(1) *New Zealand Jounal of Public and International Law* 187; Matthew SR Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, 2008) 278; Ani Mikaere, 'Tikanga as the First Law of Aotearoa' (2007) 10 *Yearbook of New Zealand Jurisprudence* 24; Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (Huia Publishers, 2003); Alex Frame and Paul Meredith, 'Performance and Māori Customary Legal Process' (2005) 114(2) *Journal of the Polynesian Society* 135; Fiona Wright, 'Law, Religion and Tikanga Maori' (2007) 5(2) *New Zealand Journal of Public and International Law* 261.

14 CF Black, *The Land Is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011) ('*The Land Is the Source of the Law*'); CF Black, *A Mosaic of Indigenous Legal Thought: Legendary Tales and Other Writings* (Routledge, 2017); Christine Morris, 'A Full Law' (2000) 9(2) *Griffith Law Review* 209; Eddie Synot, 'Woven law' (The Re-(E)mergence of Nature in Culture II, The University of Sydney, 12 July 2019); James Gurrwanngu Gaykamangu, 'Ngarra Law: Aboriginal Customary Law from Arnhem Land' (2012) 2(4) *Northern Territory Law Journal* 236; George Pascoe Gaymarani, 'An Introduction to the Ngarra Law of Arnhem Land' (2011) 1(6) *Northern Territory Law Journal* 283; Danial Kelly, 'Foundational Sources and Purposes of Authority in Madayin' (2014) 4(1) *Victoria University Law and Justice Journal* 33.

scholarship that takes as its premise the inseparability of law and culture. Thereby, it fosters the understanding of law as a reflexive product of social action, and also cognisance of the dialects and content of Indigenous legal orders as a part of a larger totality of existential dimensions.

The paper substantiates its contribution in the specific context of Australian First Nations constitutionalism by suggesting a conceptual apparatus for analysis which resonates with the lifeworld which sustains Australian Indigenous legal orders and which is, at the same time, consistent with the epistemic approach adopted in contemporary comparative law for investigating stateless traditional systems of authority.[15]

Hence, the paper is about trying to contextualise the conceptualisation of Australian First Nations constitutionalism in the coherent ontological, epistemological and axiological normative universes envisaged by Indigenous people. While pursuing that aim, White reminds us that

> no text does this perfectly, just as none of us can do it perfectly. To be able to imagine the world and its inhabitants in a coherent and bearable way is a central desire of the human mind, yet it is perhaps never quite achieved. Even at the moments when we come closest to success there is often an element of pathos and failure.[16]

The paper unfolds in two parts and contains one fundamental premise — the maxim *ubi societas, ibi ius* — from which two main claims develop in a logical progression: the first claim posits that Indigenous legal orders, including Australian First Nations legal orders, are legitimate sites of constitutionalism on their own terms as they are governed over time immemorial by their own constitutional traditions. Then, the second claim — building on the inference that the existence of Indigenous constitutionalism in the legal universe calls for rethinking the positivistic mode of legal reasoning, rationalisation and systematisation — posits, with specific reference to Australian First Nations constitutionalism, that new conceptual grids are needed in charting its normative and legal complexity.

Part I situates those claims within the body of scholarship on constitutional and legal theory and engages firstly in a linear narrative with the relevant literature on the conceptualisation of constitutionalism, starting from the 18th and 19th Westphalian state-centred conceptions to the 20th and 21st centuries' fundamental shift in legal and social science, in the way constitutionalism is identified,

15 See generally Pierre Legrand, *Le Droit Comparé* (Presses Universitaires de France, 1st ed, 1999); Christian Atias, *Épistémologie du Droit* (Presses Universitaires de France, 1994); Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4(2) *Maastricht Journal of European and Comparative Law* 111; Béatrice Jaluzot, 'Méthodologie du Droit Comparé: Bilan et Prospective' (2005) 57(1) *Revue Internationale de Droit Comparé* 29; Glenn, *Legal Traditions of the World* (n 6); Mark Van Hoecke, *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004).

16 James Boyd White (n 7) 101.

understood, analysed and conceptualised.[17] Likewise, with specific reference to the decentralised Indigenous legal orders, Part I proceeds to expound Mills's concept of 'rooted constitutionalism' — in this paper considered as a concept that epitomises the vast body of Indigenous legal theory literature on Indigenous constitutionalism — and then subsumes Australian First Nations constitutionalism into Mills's theoretical elaboration.

Having identified and defined Australian First Nations constitutionalism as a 'rooted' kind of constitutionalism, then, in Part II, the paper suggests and expounds a conceptual apparatus that can assist its understanding. The key concepts suggested are: *nomos,* myth and law as tradition. Finally, the paper considers how such a conceptual apparatus is relevant to engage deeply with some of the most foundational aspects of Indigenous legal cultures and normative universes and can assist theorisations of Australian First Nations legal orders according to emic understandings of what a legal order is, where it comes from and what it is for.

This paper is the second of a series on Australian First Nations constitutionalism,[18] and it is multidisciplinary, interdisciplinary and transdisciplinary at the same time. '[I]t is multidisciplinary as it draws on knowledge from different disciplines, such as comparative law, legal theory, anthropology, [and] philosophy'.[19] At the same time, it is interdisciplinary and transdisciplinary as, respectively, 'it analyses, synthesizes and harmonizes links between those discipl[ine]s'[20] and then creates 'a new conceptual apparatus' to understand the 'complex normative and legal dimensions of Australian Indigenous legal orders, which could not occur if they were' handled with an orthodox mono-disciplinary positivist conceptual apparatus.[21]

Prominent in this paper are the concepts of 'constitutional tradition', 'First Nations constitutionalism', 'constitutional order' and 'constitutional system'. A note should be made here about the use of these concepts.

'Constitutional tradition', in the broadest sense, refers to 'a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal

17 It is beyond the scope of this paper to expound the history of constitutionalism. On the topic: see especially Scott Gordon, *Controlling the State*: *Constitutionalism from Ancient Athens to Today* (Harvard University Press, 1999); Francis D Wormuth, *The Origins of Modern Constitutionalism* (Harper & Brothers Publishers, 1949); Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press, rev ed, 1947). See also Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (Profile Books, 2011).

18 See Maria Salvatrice Randazzo, 'Chthonic Legal Traditions: A Standpoint Legal Research Paradigm for Comparative Analysis on Australian Indigenous Legal Orders' (2019) 3(1) *Udayana Journal of Law and Culture* 1.

19 Ibid 4.

20 Ibid.

21 Ibid.

system, and about the way law is or should be made, applied, studied, perfected, and taught'.[22]

'First Nations constitutionalism' refers to the process of self-imposed subjection of Indigenous people to a corpus of foundational principles, laws and rules — a constitution — to which they are accountable and that limits and shapes what they do.[23] The shared corpus of foundational principles, laws and rules is informed by the particular legal culture that each Indigenous society inhabits. The expression 'First Nations constitutionalism' is used interchangeably with 'chthonic constitutionalism' and 'Indigenous constitutionalism'.

'Constitutional order' or 'legal order'[24] refers to a stateless, decentralised system of authority and governance, like the Indigenous legal orders, whose legal traditions are embedded in social, political, economic and spiritual institutions.[25] A constitutional order reflects the basic attitude of a community towards the exercise of authority and is shaped by the more extensive normative construct of constitutional traditions. It comprises institutional elements, processes, procedures and foundational principles, through which authority is exercised, including the authority to interpret the law, resolve disputes and implement the law on behalf of the community.

'Constitutional system' or 'legal system'[26] is used to describe Westphalian state-centred legal systems of authority and governance whose law is adopted by government institutions and is implemented by legal professionals in legal institutions that are separate from other social and political institutions.[27]

PART I

1.1 The Conceptual Narrative of Constitutionalism: From Modern to Contemporary Conceptualisations

In classical writings on comparative law over the last two centuries, the notion deployed for categorising the constitutional legal systems of the world has been

22 John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press, 2nd ed, 1985) 2. See also Glenn, *Legal Traditions of the World* (n 6) 1–32.

23 See Beer Lawrence Ward, *Constitutional Systems in Late Twentieth Century Asia* (University of Washington Press, 1992).

24 The two expressions are used interchangeably in the context of this paper.

25 Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 49–50. The expression also includes contemporary post-Westphalian stateless systems of authority and governance, such as the European Union ('EU'), The World Trade Organisation ('WTO'), or the United Nations ('UN').

26 The two expressions are used interchangeably in the context of this paper.

27 See generally Husa (n 5) 59; see also Aalt Willem Heringa, *Constitutions Compared: An Introduction to Comparative Constitutional Law* (Intersentia, 4th ed, 2016) ch 1.

that of 'families' of laws, so that all of the legal systems could be categorised and understood as members of a limited number of legal families.[28] The legal system of Italy would belong to the civil law family, the legal system of England to the common law family, that of Saudi Arabia to the Islamic law family; the legal system of the ex-Soviet Union might fall within a socialist legal family.[29]

At a time of consolidation of radical nationalism,[30] in comparative law literature the deployment of the metaphorical notion of 'legal family' was justified to assert the idea that the legal systems of nation-states were endowed with sovereign autonomy over their national territory and their relations were defined by international law by virtue of their membership to legal families.[31] The core criticism towards the notion of 'legal families', and the taxonomic process it entails, focuses on the Eurocentric nature of the notion itself, as the scholarly analysis has been limited very largely to Westphalian legal systems. Non-Westaphlian, stateless legal orders were considered underdeveloped and pre-legal in essence and only relevant to the taxonomic process to the extent they received state recognition.[32] Accordingly, inquiry and analysis of stateless orders of authority was rare and unsystematic, falling outside the domain of legal taxonomy. They were seen as social mechanisms for organising and maintaining order in small-scale societies and as such, objects of scholarly analysis for social science disciplines, while their analysis and theorisation was excluded from the domain of legal science on the ground of manifest irrelevance.

The exclusionary drift in comparative law started to emerge in the 18th century and consolidated in the 19th and 20th centuries.[33] In particular, from the 18th century

28 K Zweigert and H Kötz, *An Introduction to Comparative Law*, tr Tony Weir (Clarendon Press, 3rd rev ed, 1998) 63–74; Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008) 38, 46. See also René David and John EC Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (Stevens & Sons, 3rd ed, 1985).

29 Reimann and Zimmermann (n 28) 46.

30 Radical nationalism, also known as revolutionary nationalism, is an intellectual synthesis of radical nationalism and dissident socialism which emerged in France and Italy at the beginning of the 20th century. It has been defined as an ideological theory that calls for a national community united by a shared sense of purpose and destiny. It was heavily promulgated by Benito Mussolini: see Daniele Conversi, 'Democracy, Nationalism and Culture: A Social Critique of Liberal Monoculturalism' (2008) 2(1) *Sociology Compass* 156, 169–70.

31 Reimann and Zimmermann (n 28) 46; the concept 'legal families' seems also implicitly deployed by Raz when he posits that 'every law necessarily belongs to a legal system (the English, or German, or Roman, or Canon Law, or some other legal system)': see generally Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Oxford University Press, 2nd ed, 1980) 1.

32 See generally Ugo Mattei, *Comparative Law and Economics* (University of Michigan Press, 1997). See also Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45(1) *American Journal of Comparative Law* 5.

33 The exclusionary drift is itself rooted in attitudes of Western legal education to teach and learn only one law, originally the *ius commune* derived from Roman law, in the universities of continental Europe and England; then the common law in the Inns of Courts; then the state law in universities: see Michael A Livingston, Pier Giuseppe Monateri and Francesco Parisi, *The Italian Legal System: An Introduction* (Stanford University Press, 2nd ed, 2015) 14, 16–17; Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1967) 15(3) *American Journal of Comparative Law* 419, 429.

on, a line of thought grounded in rationalism[34] of the modern era[35] consolidated in political, legal and philosophical discourses, which associated constitutionalism with the political theories of Locke,[36] and the founders of the American republic.[37] This line of thought emphasised that governments needed to be legally limited in their powers, their authority and legitimacy consequential to governments' compliance with those limitations, as spelled out in a written document.[38] As stated by Fioravanti, the American and French Revolutions represented

> a decisive moment in the history of constitutionalism, inaugurating the new concept of modern constitutionalism and its new associated practice: the constitutional written document which is established by a culturally homogenous and sovereign people through a process of dialectic negotiation.[39]

The 18th and 19th centuries' practice of a modern written constitution emerged in Europe, in opposition, from the one side, to the 'ancient constitutions' based on custom, tradition and irregularity and, on the other side, to the pre-constitutional societies, associated with a state of nature or a lower stage of development.[40] The 'modern constitution' was given theoretical justification and rationalisation in the writings of European political theorists — the fathers of modern political

34 'Rationalism' refers to the Western philosophical movement, which emerged in the 17th century and consolidated in the 18th century — during the Enlightenment, known also as the Age of Reason — through the speculative works of Malebranche, Descartes, Leibniz, Spinoza and Kant. The rationalism of the Age of Reason was aimed at harnessing and categorising the world. It is usually associated with the introduction of mathematical methods into philosophy and appeals to reason or the intellect as the primary source of knowledge and justification of all the existents in our universe. Rationalism has exerted a significant influence on social, political and legal theory and it is typically contrasted with empiricism, which appeals to sensory experience to apprehend the world and its social (including religious, political and legal) dimensions: see generally John Cottingham, *The Rationalists* (Oxford University Press, 1988); John Cottingham, *Western Philosophy: An Anthology* (Blackwell Publishing, 2nd ed, 2008); John H Garvey, T Alexander Aleinikoff and Daniel A Farber, *Modern Constitutional Theory: A Reader* (West Academic Publishing, 5th ed, 2004).

35 The modern period, foreshadowed by the Enlightenment, began in the West in the 17th and 18th centuries with the end of the religious wars and is characterised by a set of philosophical presumptions about the formal, rational structure of ideas that began to transform assumptions about the natural world and the ability to access and understand these structures: see generally Louis Dupré, *The Enlightenment and the Intellectual Foundations of Modern Culture* (Yale University Press, 2004); Paul Hazard, *The Crisis of the European Mind: 1680–1715*, tr J Lewis May (New York Review Books, 2013).

36 See generally John Locke, *Two Treatises of Government: In the Former, the False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown. The Latter Is an Essay Concerning the True Original, Extent, and End of Civil-Government* (Lawbook Exchange, 2010).

37 See Bernard Bailyn (ed), *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification* (Library of America, 1993) pts 1–2; Daniel Farber, *Lincoln's Constitution* (University of Chicago Press, 2003); Daniel A Farber and Suzanna Sherry, *A History of the American Constitution* (West Academic Publishing, 3rd rev ed, 2013); Max Farrand (ed), *The Records of the Federal Convention of 1787* (Yale University Press, 1911) vols 1–3.

38 See generally Gordon (n 17); Garvey, Aleinikoff and Farber (n 34).

39 Maurizio Fioravanti, *Costituzione* (Il Mulino, 1999) 102 [tr Maria Salvatrice Randazzo].

40 Charles Borgeaud, 'The Origin and Development of Written Constitutions' (1892) 7(4) *Political Science Quarterly* 613.

and constitutional theory — from Locke,[41] to Stuart Mill,[42] Paine,[43] Rousseau,[44] Smith,[45] Kant,[46] and Hegel.[47] In particular, in the age of the American and French Revolution, Thomas Paine articulated a theoretical construct for modern constitutionalism,[48] whose defining element was a single document — a constitution — with a preamble establishing an independent and self-governing nation-state with a set of uniform legal and representative political institutions — the legislative, executive and judiciary branches of government — in which all citizens are treated equally.[49] Thus, from the 19th century on, constitutionalism has been associated with the Westphalian centralised nation-state legal system, and designates organisation, exercise and limitation of governmental power established by a written constitutional law. Since then, a large scholarly literature has grown up on the state-centred conceptualisation of constitutionalism.[50]

1.2 Constitutionalism and Legal Pluralism

Scholars of constitutional theory and constitutional lawyers, who elaborate on constitutionalism from a Westphalian state-centred perspective and work within the legal positivist paradigm, have opposed the deployment of the modern notion of constitutionalism to stateless political contexts of authority and governance.[51] The argument runs that issues of de facto inadmissibility and theoretical inconsistency would emerge by including those systems into the conceptual purview of modern constitutionalism.[52] The core argument for such an exclusionary trend is that, as a legal phenomenon, constitutionalism finds its legitimate substantiation in a written and entrenched constitutional document.[53]

41 Locke (n 36).

42 David O Brink, *Mill's Progressive Principles* (Oxford University Press, 2013); John Stuart Mill, *The Collected Works of John Stuart Mill*, ed John M Robson (University of Toronto Press, 1963–91) vols 1–33.

43 Thomas Paine, *Rights of Man* (Chump Change, 2017).

44 Rousseau, *The Social Contract and Other Later Political Writing*, ed Victor Gourevitch, tr Victor Gourevitch (Cambridge University Press, 1997).

45 Adam Smith, *Lectures on Jurisprudence*, ed RL Meek, DD Raphael and PG Stein (Oxford University Press, 1978).

46 Immanuel Kant, *The Cambridge Edition of the Works of Immanuel Kant*, ed Paul Guyer and Allen W Wood (Cambridge University Press, 1992–2012) bks 1–15.

47 Georg Wilhelm Friedrich Hegel, *Lectures on the Philosophy of World History*, tr HB Nisbet (Cambridge University Press, 1975) 1–4.

48 Paine (n 43) 72–3.

49 NW Barber, *The Constitutional State* (Oxford University Press, 2010) 75. So identified and defined, modern constitutionalism seems to be the basic premise upon which Bobbit has developed his general theory of constitutional decision: see Phillip Bobbitt, *Constitutional Fate*: *Theory of the Constitution* (Oxford University Press, 1982). Further, on the role of written constitutions as constraints on institutional governance, see Cass R Sunstein, 'Constitutions and Democracies: An Epilogue' in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (Cambridge University Press, 1988) 327, 327–8; Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998) 99, 153.

50 See McIlwain (n 17); David and Brierley (n 28).

51 Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65(3) *Modern Law Review* 317.

52 Ibid 322–3.

53 Ibid; see also Ward (n 23).

In such political, theoretical, philosophical and legal contexts, Indigenous constitutional orders — many of which precede modern constitutionalism by thousands of years — are considered as pre-normative/legal expressions of a primitive stage of human development, rather than as legal phenomenon, and thus outside the province of legal science.

However, the 20th century has seen a fundamental shift, both in legal and social science, in the ways constitutionalism is identified, understood, analysed, and conceptualised.[54] In particular, with regard to decentralised Indigenous societies, it has been posited that constitutionalism should be understood as a dynamic set of ideas and thereby conceptualised as the process of the 'self-imposed subjection of Indigenous government, leadership and citizens to an overarching set of laws, rules, or principles — a constitution — to which they are accountable and that limits and shapes what they do'.[55] Likewise, an emergent body of scholarship in comparative law and legal theory has been expanding the analytical horizon of constitutionalism, in the awareness that the positivist theoretical construction of (national) 'legal system' is becoming less adequate to be taken as either a descriptive or normative model in comparative studies on the legal orders of the world.[56] A major criticism to the positivist mode of inquiry and conceptual elaboration holds that constitutionalism so conceived is unable to explain the contemporary flows of political, economic and social power that are beyond the reach of the state.[57]

In literature, the association of constitutionalism with non-Westphalian legal orders has emerged under the ensign of 'legal pluralism', which, as stated by McKee, has carved out a space for itself by positioning against, respectively:[58]

- Legal monism — 'an account of law as unitary, forming a systemic whole'.[59]
- Legal centralism — 'the identification of law with the normative output of

54 See generally Jack M Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Harvard University Press, 2011); Keith G Banting and Richard Simeon (eds), *The Politics of Constitutional Change in Industrial Nations: Redesigning the State* (Palgrave Macmillan, 1985); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007); Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, 2008); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).

55 Stephen Cornell, '"Wolves Have A Constitution": Continuities in Indigenous Self-Government' (2015) 6(1) *International Indigenous Policy Journal* 1, 9.

56 H Patrick Glenn, 'The Capture, Reconstruction and Marginalization of "Custom"' (1997) 45(3) *American Journal of Comparative Law* 613, 620.

57 David Held et al, *Global Transformations: Politics, Economics and Culture* (Stanford University Press, 1999) 1–31; Donald S Lutz, 'Thinking About Constitutionalism at the Start of the Twenty-First Century' (2000) 30(4) *Publius* 115, 117–30.

58 Derek McKee, 'Review Essay — Emmanuel Melissaris's Ubiquitous Law: Legal Theory and the Space for Legal Pluralism' (2010) 11(5) *German Law Journal* 573, 577–8.

59 Ibid 577.

state institutions'.[60]

- Legal positivism — 'the idea that there can be neutral criteria for identifying law'.[61]
- Prescriptivism — 'the idea that law exists apart from the subjects who create it and maintain it'.[62]

As Tully posits, the core of legal pluralism is 'that post-colonial societies are constituted by a wide variety of legal and customary systems of authority that cannot be accurately represented in the language of modern constitutionalism'.[63]

The legal pluralism theoretical framework, complemented by empirical pluralism insights, is substantiated by investigations revealing that there is not a single authoritative source of law associated with centralised normative orders; rather, there can be multiple sites of legal, or more broadly, normative production. Zumbansen notes that legal pluralists have 'increased awareness of different levels and sites of norm creation'.[64] Very recently, within this pluralistic framework, comparative law studies have started to go beyond the focus on the nation-state in analysing systems of law, thus, standing in sharp opposition to the analytical and empirical insistence on associating law with the notion of the nation-state legal system.[65]

Within the pluralist theoretical framework, Hahm maintains that the essence of constitutionalism is to be found in the cultural and political tradition of any given legal order.[66] He redefines constitutionalism as the practice of disciplining political power and includes in its conceptual purview the non-despotic political arrangement in non-Westphalian systems of governance.[67] Hahm's redefinition has without a doubt widened the conceptual reach of constitutionalism beyond its standard referent of 'legal limitations on government powers through judicial review and other mechanisms codified in a written constitution'.[68] He has done so by including 'political institutions, practices, and discourses that do not … operate in terms of principles like the separation of powers, representative

60 Ibid.

61 Ibid 578.

62 Ibid.

63 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995) 101.

64 Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1(2) *Transnational Legal Theory* 141, 146.

65 Ibid. See also Anna Christensen, 'Polycentricity and Normative Patterns' in Hanne Petersen and Henrik Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth, 1995) 235; Andrei Marmor, *Law in the Age of Pluralism* (Oxford University Press, 2007) chs 4, 8.

66 Chaihark Hahm, 'Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?' (2001) 1(2) *Journal of Korean Law* 151, 151.

67 Ibid 161–2.

68 Ibid 162.

democracy, or even the rule of law'.[69] Significantly, this redefinition has determined a fundamental shift in the ways in which constitutionalism — and constitutions — is understood and defined. One of the main implications is that constitutionalism should not be confused with legalism and that in order to have a deeper and clearer understanding of what constitutionalism means and implies theoretically and pragmatically in a given legal order, there is the need to resort to that order's pre-political foundational principles. The place to begin to foster this understanding is to identify and define the connection between constitutionalism and legal traditions.[70] In this context, scholarly analysis shows that the praxis of constitutionalism in a stateless setting of authority does not seem to imply a comprehensive or overriding commitment to individual rights or to a particular way of distributing powers and functions among structures of governance;[71] rather, it would embody the values, often non-explicitly stated, which underpin all constitutional systems or orders.[72] As Cornell propounds, constitutionalism can be found in, and legitimated by, the constitutional tradition of any given legal order:

> These rules or guidelines may be written or unwritten; they may be taught in school or taught by elders, parents, and medicine people; they may be recorded in honored books and documents or deeply embedded in the often unspoken but shared understandings that make up a people's culture; they may be drawn from hard-won experience, given to the people by spirit beings, or invented in response to new needs or conditions that compel new ideas or forms of action. And they may change overtime. … This is the heart of constitutionalism …[73]

1.3 Indigenous Constitutionalism: A 'Rooted' Kind of Constitutionalism

So conceptualised, constitutionalism surely departs from the orthodox tradition in political thought that defines and qualifies constitutionalism with reference to those forms of government contemplated in a written constitution. The concept pragmatically embraces a broad range of legal orders, including time immemorial Indigenous constitutional orders based on tradition, the presence of which in the legal universe seems to undermine the solid foundations of our inherited positivist legal worldview, thereby calling legal theory to a quest for conceptual tools able to come to terms with Indigenous constitutionalism. For this search to be effective, contemporary Indigenous legal scholarship propounds the need

69 Ibid.

70 Lutz (n 57) 117–18.

71 Ibid 125.

72 Compton, for example, shows how evangelical morals have influenced the most important American constitutional developments of the 20th century: see John W Compton, *The Evangelical Origins of the Living Constitution* (Harvard University Press, 2014).

73 Cornell (n 55) 2.

to situate First Nations constitutional orders within their respective lifeworlds and thus to engage simultaneously both with their structural expressions and with the lifeworlds beneath them. In that regard, Garroutte's 'radical indigenism' calls for an overall approach to research that stems from Indigenous peoples' roots and principles and that is based on Indigenous worldviews.[74] They assist conceptualisation of Indigenous constitutionalism and are used as 'tools for the discovery and generation of knowledge'.[75] On this flow of thought, a growing body of scholarship is exploring the landscape of Indigenous constitutionalism and illustrating ways in which conceptual and theoretical models grounded in the culture and experiences of Indigenous communities can be elaborated and applied.[76] The common denominator of all these conceptualisations and theorisations is their situatedness within an Indigenous worldview.

With respect to conceptualisations of Indigenous constitutionalism, that vast body of scholarship is epitomised by Mills's formulation of 'rooted constitutionalism'.[77] He argues that understandings of Indigenous constitutionalism are situated within the respective lifeworlds of each Indigenous society and are grounded in a kind of 'rooted constitutionalism', which stems from those lifeworlds.[78] Mills defines 'lifeworld' as the set of ontological, epistemological, axiological and cosmological understandings that situate Indigenous community in creation.[79]

A lifeworld, in other words, is the worldview, the context that creates and sustains any legal order and its law, and which allows Indigenous people to orient themselves in all their normative/legal relations.[80] Such positioning is foundational to understanding Indigenous constitutionalism. As Boisselle posits, to understand a legal order and its law, one must appreciate the background of tacit understandings that define a political community's culture and history and upon which the foundational laws of societal living are grounded:[81]

> [The] law is not captured by pointing solely to the moment of its articulation, or to the articulation itself, as standing apart from an underlying cultural background, for law is the articulation of some of what is already there in the background.

74 Eva Marie Garroutte, *Real Indians: Identity and the Survival of Native America* (University of California Press, 2003) chs 5–6.

75 Ibid 113.

76 See above nn 9–12. See also Irene Watson, 'Re-Centring First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10(5) *AlterNative* 508; Christine Black, 'A Timely Jurisprudence for a Changing World' (2009) 22(2) *International Journal for the Semiotics of Law* 197; CF Black, 'On Lives Lived with Law: Land as Healer' (2016) 20 *Law Text Culture* 164 ('On Lives Lived with Law').

77 Mills, 'Lifeworlds of Law' (n 2) 850–4.

78 Ibid 854.

79 Ibid 852.

80 See Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (1999) 3(2) *Worldviews: Global Religions, Culture, and Ecology* 105.

81 Andrée Boisselle, 'Beyond Consent and Disagreement: Why Law's Authority Is Not Just about Will' in Jeremy Webber and Colin M Macleod (eds), *Between Consenting Peoples: Political Community and the Meaning of Consent* (UBC Press, 2010) 207, 208–9.

> The formulation of law, be it orally, in writing, or directly through action, cannot mean anything if it is cut out from this implicit background. Conceptualizing this background is thus essential to uncover the complex nature of law as an activity consisting at once in the creation and discovery, not of our consensuses but of something more amorphous, which we might term our shared understandings.[82]

On the same line of thought, Black posits that the complex nature of an Indigenous legal order can be drawn from what Boisselle calls the background, those basic premises that form the core of an Indigenous worldview and from which reciprocal obligations and privileges between human and non-human life forms flow within a dynamic and enduring partnership.[83] Then, with reference to Australian Indigenous constitutionalism, Black asserts that specific inquiries must be contextualised within Indigenous peoples' cosmologies, otherwise the whole endeavour is constrained at a very superficial level: 'This is because a people's cosmological Creation story and events define their principles, ideals, values and philosophies, which, in turn, inform the legal regime'.[84] Likewise, with reference to North American Indigenous constitutionalism, Henderson opines that the legal dimension of Indigenous constitutionalism is inhabited by legal orders whose traditions and philosophies are inextricably connected to the lifeworld of Indigenous communities. He posits Indigenous legal orders are embedded in relationships and experiences with families and the ecology. Therefore,

> [law] is more than the underlying conceptions or values or customs expressed in text. It is more than a set of interpretations and justification of the text; more than its manifestations or reflections. Justice is a normative vision of the human spirit unfolding, a product of shared thoughts and consciousness. It is a product of a community's beliefs and imagination. It is the shared consciousness that makes a person feel as if they belong to a community. It is the frontier line between power and imagination. Like all visions, it is subject to the evaluation of the community and to transformation.[85]

> Thus, as a matter of coherence, a legal scholar cannot simply analyse Indigenous legal orders in a vacuum and assume they retain integrity and functionality without a preliminary understanding of their foundational sources of

82 Ibid 208 (emphasis omitted).

83 Black, *The Land Is the Source of the Law* (n 14) 15. See also Graham (n 80).

84 Black, *The Land Is the Source of the Law* (n 14) 15.

85 Henderson, 'Postcolonial Indigenous Legal Consciousness' (n 11) 26.

origination.[86]

Further, Mills observes that

> some of us openly engage the relationship between lifeworld and law while others of us prefer to work implicitly, even through indirection. We differ even in how we conceptualize the relationship: some of us draw out the kind of distinction between lifeworld (and hence constitutional order) and law that I have here, while others … collapse lifeworld and law, saying that for Indigenous peoples, lifeworld is law. But in our respective ways of organizing and expressing our understandings, each of us is disclosing the same powerful insight that every system of law — Indigenous or not — has a home.[87]

Hence Mills, in order to expound the concept of 'rooted constitutionalism', uses the metaphor of a tree as a visual representation of how Indigenous constitutional orders are related to their respective lifeworld:

> The roots [of the tree] push deep into the earth. They grow solid and powerful, holding the tree in place. They draw life from the earth up into a stout trunk — strong enough to support the entire canopy about it. The rough lines marking the trunk's outer bark eventually give way to full curves as branches reach forth, all around, for *giizis*, the sun. As the branches reach farther from the trunk, they produce magnificent leaves, leaves which sing in the wind, which explode into colour in fall, and finally which carpet the earth before *biboon*, winter, settles in, helping to renew earth once again.[88]

Mills uses this image to map the relationship between lifeworld and legal orders and thus to express visually what rooted constitutionalism means and how it operates:

> The roots of a society are its lifeworld: the story it tells of creation, which reveals what there is in the world and how we can know. Creation stories disclose what a person is, what a community is, and what freedom looks like. The trunk is a constitutional order: the structure generated by the roots, which organizes and

86 See also John Borrows (Kegedonce), *Drawing Out Law: A Spirit's Guide* (University of Toronto Press, 2010); Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press, 2018); James Tully, 'A View of Transformative Reconciliation: Strange Multiplicity & the Spirit of Haida Gwaii at 20' (Lecture, Yale University, 1 October 2015); James Tully, 'On Gaia Citizenship' (Mastermind Lecture, University of Victoria, 20 April 2016); Jerry H Gill, *Native American Worldviews: An Introduction* (Humanity Books, 2002); Anne Mead, *Working with Aboriginal Worldviews: Tracks to Two-Way Learning* (West One Service, 2012).

87 Mills, 'Lifeworlds of Law' (n 2) 857–8 (emphasis and citations omitted). See generally Basil Johnston, *Ojibway Heritage* (McClelland and Stewart, 1976); Joëlle Pastora Sala and Katrine Dilay, *Written Brief of the Assembly of Manitoba Chiefs Submitted to the Standing Committee on Fisheries and Oceans for the Review of the Fisheries Act* (30 November 2016) 9–10; Oshoshko Bineshiikwe et al, 'Ogichi Tibakonigaywin, Kihche Othasowewin, Tako Wakan: The Great Binding Law', *Manitoba Elders Share a Message with National Energy Board and the Public at Turtle Lodge* (Blog Post, 28 November 2015) <http://www.turtlelodge.org/2015/11/manitoba-elders-share-a-message-with-national-energy-board-and-the-public/>.

88 Mills, 'Lifeworlds of Law' (n 2) 862.

> manifests these understandings as political community. The branches are our legal traditions, the set of processes and institutions we engage to create, sustain, and unmake law. … No two trees are the same even if they're white birch, the same age, and growing right next to one another.[89]

Correspondingly, this paper posits that while the various Australian Indigenous societies may have nearly identical constitutional structures, they will have laws that differ. Each stratum of legality within the lifeworld-law relationship is both empowered and constrained by the strata below. Lifeworld relationships within each of the communities are different, as there are diverse narratives of constitutional *genesis* that define the legal orders they create. For Australian Indigenous societies, it is a constitutional order so created that will shape and define legal processes and institutions, and thus ultimately what each society qualifies as law. Unlike the constitutional image of a freestanding 'living tree',[90] the roots of Australian First Nations constitutional trees are 'buried in and wrapped tightly against earth',[91] firmly rooted 'in something beyond itself'.[92]

The universe of Australian Indigenous 'rooted' constitutionalism is inhabited by legal orders defined by what Synot calls the jurisprudence (and practise) of 'woven law'.[93] To expound the concept of woven law, Synot resorts to the practice of weaving, which is foundational in many Indigenous cultures to preserve and generate societal life and order and to define the relational situatedness of Indigenous peoples within their environments. The process of weaving, as it unfolds in collecting the different grasses and combining them into a connected whole, creates a web of relationships among Indigenous peoples and communities that defines rights and obligations between, respectively, individuals, communities, the individual and the communities; past, present, and future generations; the communities and the natural world. The weave is the *fons et origo* of the law of relationship, and to live within the parameters of Indigenous legality, is to oblige to the law of relationship, with its rights, duties and responsibilities stemming by a web of relationships that intertwine the natural, spiritual and social (including political and legal) dimensions of living into a coherent whole.[94]

Mills's conceptualisation of constitutionalism and Synot's analysis of woven law contain both descriptive and normative prescriptive assertions. In a descriptive respect, they point to time immemorial forms of legality that dismiss

89 Ibid 862–3.

90 See generally Leslie Zines, 'Dead Hands or Living Tree? Stability and Change in Constitutional Law' (2004) 25(1) *Adelaide Law Review* 3. See also Vicki C Jackson, 'Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors' (2006) 75(2) *Fordham Law Review* 921, 926.

91 Mills, 'Lifeworlds of Law' (n 2) 863.

92 Ibid.

93 Synot (n 14).

94 Ibid.

all versions of 'black box'[95] model of theorising and, implicitly, show these to be, at most, biased generalisations. In a normative respect, they propound that Indigenous constitutionalism enhances our awareness to the multifaceted spatial and temporal conditions of the law, which mainstream legal theory of the 20th century, with its universalistic claims, tended to ignore or rationalise in narrow, positivist terms. At issue is not only the temporal and spatial situatedness of law, but also the conception of time and space, implicit in Indigenous law, as well as the continuances, boundaries and cross-boundaries connections, emblematic of Indigenous law.

Within such rooted constitutional and woven law perspectives, Australian First Nations constitutionalism defines legal orders that are values-based, as opposed to rules-based systems.[96] In values-based systems, law, at its very foundation, is conceived and derived from values. These foundational values inform and underpin a rational and fair expectation of how power should be organised, exercised and controlled at a private and public level. Despite local diversity, it is possible to identify a core of similar values into which the diverse Australian Indigenous constitutional orders are embedded: respect and solidarity of the human world with the spiritual and natural world, through an ethic of guardianship and stewardship; reciprocity and balance in restoring relationship, through prioritising of community harmony and a holistic approach to conflict. The values find their expression in constitutional *principles* of Ancestral Laws and also in societal expectations, behaviour and actions.[97]

95 The 'black box' model refers to the mapping of our legal universe in light of a *state-sovereigntist* view of modern constitutionalism: see especially William Twining, *Globalisation and Legal Theory* (Butterworths, 2000) 8, 36.

96 A rules-based system relies on a model of deductive reasoning by applying a rule of law to a given problem to obtain an answer 'A'. The system declares 'A' is the answer based on the principle of law articulated by the governing authorities that mandate it. This process of determining which rules should be applied and how they should be interpreted is often referred to as legal reasoning which is deployed for decision-making purposes in various approaches. See, eg, Robert S Summers, 'The Formal Character of Law' (1992) 51(2) *Cambridge Law Journal* 242. See also Richard E Susskind, 'Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning' (1986) 49(2) *Modern Law Review* 168; L Thorne McCarty, 'Reflections on Taxman: An Experiment in Artificial Intelligence and Legal Reasoning' (1977) 90(5) *Harvard Law Review* 837; Anne von der Lieth Gardner, *An Artificial Intelligence Approach to Legal Reasoning* (MIT Press, 1987).

97 Although foundational *values* and constitutional *principles* are often used interchangeably in the legal literature, this paper proceeded on the basis of a distinction in their meanings. Constitutional *principles* would represent the general consensus on basic societal *values* and are rules of behaviour that cannot be changed by just an ad hoc decision of any state or stateless body, but solely through a generally taken decision that would not be against the values they express. Foundational *values* are distinguishable from constitutional principles by their association with the local environment and the traditions and histories that give definition to the constitutional identity of a given polity: see especially Chief Justice James Leslie Bain Allsop, 'Values in Law: How Principles, Norms and Ideals Influence and Shape the Rules and Conduct of Law' (Hochelaga Lecture, University of Hong Kong, 20 October 2016); Gary Jeffrey Jacobsohn, 'Constitutional Values and Principles' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 777; Joaquín R-Toubes Muñiz, 'Legal Principles and Legal Theory' (1997) 10(3) *Ratio Juris* 267, 267; Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' in Hans Kelsen (ed), *What is Justice: Justice, Law, and Politics in the Mirror of Science* (University of California Press, 1957) 266; Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 19.

PART II

2.1 Conceptual Apparatus for Inquiries into Australian First Nations Constitutionalism: Rationale

Capturing the essence of Australian First Nations rooted and values-based constitutionalism requires, first of all, the identification, elaboration and articulation of a conceptual apparatus able to facilitate approaches to research that make visible the strata of 'bindings and layers' of Indigenous 'woven law'[98] and thereby, able to reveal the interconnectedness of the spiritual, political and legal dimensions of living. The Indigenous legal tradition reveals normative universes and legal meanings of what a First Nations legal order is and what it is for, which are parallel to the universe of the civil and common legal traditions. Indigenous legal traditions cannot be separated from life and compartmentalised in the way Australian law or German law, for example, can be separated from the social, political and religious spheres of existence. Accordingly, the difficulties legal theory faces in conceptually accommodating Australian Indigenous constitutionalism within an orthodox Western legal paradigm demonstrate how deeply linked to nation-state constitutionalism many of the supposedly universal concepts of our legal language are.[99] Hence, the main challenge faced by scholars, educated and trained in the parallel legal universe of the civil law and common law legal traditions, consists of undoing the Western legal research theoretical framework grounded in positivism and elaborating new paradigmatic frames to investigate and 'understand … legal traditions which are learnt, transmitted and implemented orally'.[100] For our purpose, the act of capturing the core of Australians' First Nations constitutionalism requires cognisance from the outset that we are not only dealing with practices of law that are antithetical to the civil and common legal traditions, but we are also investigating antithetical ontological, epistemological, axiological and philosophical underpinnings, intellectual standards, ethics and legal understandings.[101]

Thereby, this paper suggests that the field is open for new conceptual innovations

98 Synot (n 14).

99 However, there are some aspects of Western legal theory (Raz's systematic nature of law and Hart's primary and secondary rules, for example) that may have a useful and explicative value for understanding some aspects of Indigenous legal orders and thus support/assist the theorisation of some aspects of Australian Indigenous constitutionalism. Likewise, the literature shows that there is scope for the application of non-indigenous theoretical tools within indigenous legal theory. Indigenous legal scholars, such as Borrows and Val Napoleon, demonstrate the ways non-indigenous theoretical tools may be put to use safely and fruitfully; those scholars have been, however, careful to identify the cultural boundedness of those theories which render inappropriate their uncritical application. See generally Borrows, *Canada's Indigenous Constitution* (n 11); Valerie Ruth Napoleon, 'Ayook: Gitksan Legal Order, Law, and Legal Theory' (PhD Thesis, University of Victoria, 2009).

100 Randazzo (n 18) 2–3.

101 Ibid 2. See, eg, Christine Black, 'Maturing Australia through Australian Aboriginal Narrative Law' (2011) 110(2) *South Atlantic Quarterly* 347 ('Maturing Australia'); Graham (n 80); Irene Watson (n 76).

and that the aspects and levels of such a 'rooted' kind of Australian Indigenous constitutionalism might be expounded via a foundational conceptual apparatus which includes the following:

- *nomos*;
- myth; and
- law as tradition.

The concepts suggested relate to each other in terms of clusters and networks, rather than forming conceptual pyramids. They serve epistemic and heuristic purposes: they are frameworks to understand the *modus essendi et operandi* of Australian Indigenous legal orders from the author's own etic perspective, which reflects emic understandings of what an Indigenous legal order is and how it operates; they also have an heuristic function, as they are necessary for identifying, defining and organising legal issues.

The conceptual apparatus draws from the theoretical framework elaborated by legal pluralism and legal theory to deal with the contemporary normative complexities of decentralised, stateless legal orders, including Indigenous ones, and is consistent with the approach developed by contemporary comparative law scholars to analyse stateless legal orders.[102] It is justified by the necessity of devising new epistemological and conceptual models to guide understandings — and theoretical elaboration — *about* and *of* Australian First Nations legal orders consistently and coherently with their ontological, epistemological and axiological *universe*.[103] For many years a 'legal' ethnocentric analytical approach to Indigenous traditional legal orders has moulded the research theoretical framework. A 'legal' ethnocentric approach means the evaluation of stateless, non-Westphalian legal systems according to preconceptions originating within the Western doctrinal and jurisprudential framework of analysis, in the absence of criteria to identify and diversify Indigenous foundational normative *corpora* of

102 There is extensive literature on this subject. For the most recent reviews: see Zumbansen (n 64); John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002); Mattias Ahrén, 'Indigenous Peoples' Culture, Customs, and Traditions and Customary Law: The Saami People's Perspective' (2004) 21(1) *Arizona Journal of International and Comparative Law* 63; John Bennett and Susan Rowley (eds), *Uqalurait: An Oral History of Nunavut* (McGill-Queen's University Press, 2004); James Anaya, 'Indigenous Law and Its Contribution to Global Pluralism' (2007) 6(1) *Indigenous Law Journal* 3; Øyvind Ravna, 'Sámi Legal Culture: And Its Place in Norwegian Law' in Jørn Øyrehagen Sunde and Knut Einar Skodvin (eds), *Rendezvous of European Legal Cultures* (Fagbokforlaget, 2010) 149. On customary law in general: see, eg, Jeremy Webber, 'The Grammar of Customary Law' (2009) 54(4) *McGill Law Journal* 579.

103 See generally Webber, 'The Grammar of Customary Law' (n 102).

values and principles, and in disregard of Indigenous epistemology.[104]

When analysing legal traditions either across cultures or within a minority culture, such as the Indigenous ones, scholars should be aware of the power dynamic intrinsic in the relationship with the subject researched, above all when they investigate Indigenous constitutionalism, as First Nations Peoples still confront a base experience of subjection.[105] Scholars have the potential of expanding the horizon of knowledge or, rather, continuing to sustain and perpetuate the horizon of preconception and ignorance. Certainly, such a conceptual apparatus has a minimal impact on the co-operative effort to balance power relationships. However, it does assist in forging a novel legal conceptual research perspective that will contribute towards changing the existing power imbalance of an influential strand of contemporary legal theory that reinforces the dominance of Western positivist rhetoric in law research. It does so by complementing the pragmatism evident in the proposal for reframing legal research paradigms to engage with Indigenous legal orders propounded by an increasingly broad spectrum of non-Indigenous and Indigenous academics. They are committed to move beyond the state-centred legal paradigm of what defines and identifies a legal system, and give attention to 'the practice of law as it unfolds in socially and politically structured fields of engagement, so that conceptual and theoretical rationalisation of Indigenous legal orders can be reframed and understood in … terms … of holistic systems of moral, political and legal authority operating as a binding code for living, commensurable in terms of legal theory'.[106] From this perspective, the concepts suggested form a macro-level conceptual apparatus that serves much broader epistemic purposes than just those of Australian Indigenous constitutional orders. They can be instrumental in identifying the

104 Martin Nakata, 'Anthropological Texts and Indigenous Standpoints' [1998] (2) *Australian Aboriginal Studies* 3, 4; Lester-Irabinna Rigney, 'Internationalization of an Indigenous Anticolonial Cultural Critique of Research Methodologies: A Guide to Indigenist Research Methodology and Its Principles' (1999) 14(2) *Wicazo Sa Review* 109; James (Sa'ke'j) Youngblood Henderson, 'Challenges of Respecting Indigenous World Views in Eurocentric Education' in Roger Neil (ed), *Voice of the Drum: Indigenous Education and Culture* (Kingfisher Publications, 2000) 59; Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2nd ed, 2012); Bagele Chilisa, *Indigenous Research Methodologies* (SAGE Publications, 2012); Jo-ann Archibald, Jenny Lee-Morgan and Jason De Santolo (eds), *Decolonizing Research: Indigenous Storywork as Methodology* (Zed Books, 2019); Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Fernwood Publishing, 2008); Willie Ermine, 'Aboriginal Epistemology' in Marie Battiste and Jean Barman (eds), *First Nations Education in Canada: The Circle Unfolds* (UBC Press, 1995) 101; Manulani Aluli Meyer, 'Indigenous and Authentic: Hawaiian Epistemology and the Triangulation of Meaning' in Norman K Denzin, Yvonna S Lincoln and Linda Tuhiwai Smith (eds), *Handbook of Critical and Indigenous Methodologies* (SAGE Publications, 2008) 217; Dennis Foley, 'An Indigenous Standpoint Theory' (2002) 5(3) *Journal of Australian Indigenous Issues* 3; Dennis Foley, 'A Dichotomy: Indigenous Epistemological Views' (2003) 6(3) *Journal of Australian Indigenous Issue*s 13; Dennis Foley, 'Indigenous Epistemology and Indigenous Standpoint Theory' (2003) 22(1) *Social Alternatives* 44; Michael Anthony Hart, 'Indigenous Worldviews, Knowledge, and Research: The Development of an Indigenous Research Paradigm' (2010) 1(1) *Journal of Indigenous Voices in Social Work* 1; Aileen Moreton-Robinson, 'Towards an Australian Indigenous Women's Standpoint Theory: A Methodological Tool' (2013) 28(78) *Australian Feminist Studies* 331; Randazzo (n 18) 22.

105 Jeremy Webber, 'Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples' (1995) 33(4) *Osgoode Hall Law Journal* 623, 628–9.

106 Randazzo (n 18) 23.

relevant context for understandings of First Nations constitutionalism, pointing out how inquiries can be carried out meaningfully, at the deeper level of the underlying lifeworlds of the legal orders investigated. Hence, investigations into First Nations constitutionalism become hermeneutical in essence: the scholars are not only analysing rules, seen by Legrand as nothing more than 'string[s] of words',[107] the surface appearance of law; rather, they are reaching below the rules' surface to discover the 'deep structures of legal rationality' these rules convey.[108] The expression 'deep structures of legal rationality' evokes a vertical relationship between the surface rules (the signifier *A*) and a set of deep structures (the signified *B*), that lies beneath the surface rules, with the hermeneutical mode of investigation revealing the terms of the vertical relationship between the signifier *A* and the signified *B*.[109] When it reaches the required depth, the vertical hermeneutical analysis comes across the structural intelligible scheme — the properties and relations of which '"become signs", or [components], of a system operating as a code'.[110] It is in relation to these deep structures that the concepts suggested can be functional in devising a theory of relevant context within which to carry out the deep level investigations into Indigenous constitutionalism.[111] And perhaps, in due course, such conceptual apparatus might establish itself in the vocabulary deployed to investigate Indigenous constitutionalism and become part of the lexis of a new alternative legal language. That being said, such an apparatus does not necessarily render orthodox positivist conceptualisations completely obsolete. These may still be instrumental for specific purpose, but has certainly lost its exclusive validity, so that alternative, mutually non-exclusive ways exist to conceptualise and systematise legal phenomena and to address and define Indigenous constitutionalism.

The next sections explicate the concepts of *nomos*, myths and law, conveying the sense of how they could be used as specific epistemological tools to analyse Australian Indigenous legal orders.

2.2 *Nomos*

The concept of *nomos* — the normative universe — is central to understanding the *genesis iuris, modus essendi et operandi* of Australian Indigenous legal

107 Legrand, 'The Impossibility of "Legal Transplants"' (n 15) 121.

108 Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45(1) *International and Comparative Law Quarterly* 52, 61.

109 Jean-Michel Berthelot, *L'Intelligence du Social* (Presses Universitaires de France, 1996) 71–2 [tr Maria Salvatrice Randazzo].

110 Ibid 72 [tr Maria Salvatrice Randazzo]. See also Randazzo (n 18) 11.

111 Foley, 'Indigenous Epistemology and Indigenous Standpoint Theory' (n 104). With reference to a deep-level model of analysis, as it can be applied in comparative legal researches on state constitutionalism, and also on Indigenous constitutionalism: see Geoffrey Samuel, 'Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 35, 73–7.

orders. These legal orders, as well as the nation-state legal systems, inhabit a *nomos,* which, as Cover asserts, is 'a world of right and wrong, of lawful and unlawful, of valid and void'.[112]

Legal scholars may come to identify the Westphalian normative world with the rules and principles of justice foundational to any legal system and the institutional elements through which the law is conceived and adopted, which are, indeed, constitutive elements to that world. However, rules, principles and legal institutions are a small part of the normative universe that ought to assert scholarly speculation. As Cover asserts: 'No [legal systems or legal orders, with their] set of legal institutions or prescriptions exis[t] apart from the narratives that locate it and give it meaning. For every constitution[al] [order] there is an epic, for each decalogue a scripture'.[113]

For Australian First Nations legal orders, the 'epic' or 'scripture' recounts of a time immemorial, originating from eternity within which is located the *genesis* of their legal orders with their Ancestral Laws. Once understood in the context of the narratives that give it meaning, any constitutional order, be it a centralised Westphalian legal system or a decentralised legal order, becomes not merely a system of rules to be observed, but a *nomos* in which the community lives. In this normative world, legal order, law and narrative are intertwined: 'Every [legal order] is insistent in its demand to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral'.[114] Thus, any kind of constitutional order is positioned in a normative universe, while any prescription, 'even when embodied in a legal text, [cannot] escape its origin and its end in experience', which, by the passage of the time, becomes the foundational *iuris* narrative of that legal order.[115]

The First Nations normative universes are inhabited by norms that ultimately define individuals' actions: 'norms are rules of behaviour or definite patterns of behaviour, departure from which renders the person liable to some kind

112 Robert M Cover, 'Foreword: *Nomos* and Narrative' (1983) 97(1) *Harvard Law Review* 4, 4. It is beyond the scope of this paper to consider and engage the debate on Cover's piece. The engagement with Cover's article is being targeted to apply Cover's insight on *nomos* to the analysis on the *modus essendi* of Australian First Nations constitutionalism.

113 Ibid.

114 Ibid 5 (citations omitted). See also Lon L Fuller, *The Law in Quest of Itself* (Foundation Press, 1940).

115 Cover (n 112) 5. See also Hayden White, 'The Value of Narrativity in the Representation of Reality' (1980) 7(1) *Critical Inquiry* 5; Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973); Clifford Geertz, *Negara: The Theatre State in Nineteenth-Century Bali* (Princeton University Press, 1980); Owen M Fiss, 'Objectivity and Interpretation' (1982) 34(4) *Stanford Law Review* 739; John T Bannon, 'Persons and Masks of the Law: By John T Noonan, J Farrar Straus and Giroux, 1976' (1977) 22(1) *American Journal of Jurisprudence* 199, 199–202; Black, 'Maturing Australia' (n 101).

of censure'.[116] Thereby, norms are also codes of communication between individuals.[117]

The codes-narratives that inhabit the Australian Indigenous normative systems vary in genres. The various genres of narratives — sacred, secret or public — are influenced by a 'normative force field', which is inhabited by the heterarchical normative domains of 'is', 'ought' and 'what might be'.[118] Those domains coexist and relate in a dialogical and dialectic dynamic of knowledge and practice and are foundational to a legal order. As Cover observes:

> [T]he narratives that create and reveal the patterns of commitment, resistance, and understanding — patterns that constitute the dynamic between precept and material universe — are … subject to no formal hierarchical ordering, no centralized, authoritative provenance, no necessary pattern of acquiescence. … The narratives that any particular group associates with the law bespeak the range of the group's commitments. Those narratives also provide resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law. … Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common 'script' renders it 'sane' — a warrant that we share a nomos.[119]

The Australian First Nations *nomoi* live in a stateless dimension; indeed, this paper argues, that their *genesis iuris* takes place always through an ultimate 'cultural medium', as Cover eloquently states.[120] The normative domains that affect these legal orders are the products of powerful forces: 'culture-specific designs of particularist meaning'.[121] The powerful forces can be identified in the observance of Ancestral Laws, worship through the medium of ceremonies, and reciprocity. These forces create the normative worlds in which the legal orders are preponderantly defined as systems of meaning rather than regulatory and prescriptive systems of norms and rules.

116 *A Dictionary of Sociology* (3rd rev ed, 2009) 'norm'. In sociology, 'a norm is a shared expectation of behaviour that connotes what is considered culturally desirable and appropriate'. Most definitions of the term indicate the nature of the concept as a synonym for social rule, emphasising its application to social patterns of behaviour that are expected, or, 'normal', in any given social arena. In this sense, the phrase normative relations, used here to define both society and culture is adopted to describe the whole system of social rules of behaviour (ie, of all repeating patterns, descriptive as well as prescriptive) that define any specific society and culture. See also *The Oxford Dictionary of Philosophy* (2nd rev ed, 2008) 'norm'.

117 Law's expressive range is profound: see Moshe Greenberg, 'Some Postulates of Biblical Criminal Law' in Judah Goldin (ed), *The Jewish Expression* (Yale University Press, 1976) 18, 26.

118 Cover (n 112) 10.

119 Ibid 10–46.

120 Ibid 11.

121 Ibid 12.

Following Cover, these normative worlds could be called 'paideic'[122] as they are defined by a corpus *commune* of precepts and *genesis iuris* narratives, transmitted from one generation to another since time immemorial and thereby having become an authoritative way of living in the world. The Australian Indigenous *paideic* legal orders originate in their respective ultimate sources of authority, referred to in anthropological studies, as the 'Dreamtime' or 'Dreaming'. Different meanings and expressions have been associated with those two terms. Spencer and Gillen offered the expression 'Dreamtime' to underline the notion of eternity that comes to a Western (and Judeo-Christian) mind whenever the Indigenous people talk about the ancestral past.[123] However, as the expression 'Dreamtime' seemed to neglect the spatial dimension of this ultimate source of authority, Stanner deployed and promoted 'The Dreaming' expression,[124] which today is the most used in ethnological social and legal writings and also in general usage. This expression evokes an action and implies the dynamic and immanent character of 'The Dreaming' as embracing the creative past and the ordering of the world and having great relevance to the present and future Indigenous existence. For First Nations People in Australia, 'The Dreaming' still exists as a living reality that is at the same time 'out there', the first constituent principle of their normative and legal orders and an integral part of their legal culture and way of being; it is, as Stanner remarked, the 'everywhen'.[125]

Thereby, 'The Dreaming' takes to the original source of the Australian First Nations constitutional orders: the first cause of all that exists. It is the transcendental, ultimate, coherent, multidimensional source of origination and legitimacy of Australian Indigenous legal orders, whose knowledge and understanding cannot be accessed apart from knowledge of their *genesis iuris*. In other words, it is not possible to separate or understand Australian Indigenous legal orders from the metaphysical background against which they are located, as 'The Dreaming' provides the theoretical and epistemological referent that embeds complex networks of knowledge and ritual binding together all aspect of life, from ordinary daily, religious, political and legal activity to philosophical and metaphysical speculations. As a normative and legal concept, 'The Dreaming' is the *nomos* which encapsulates the integrated nature of the Australian Indigenous legal ontologies that comprise human society, the plant and animal world, the physical environment and the spiritual realm.

122 Ibid. *Paideic* is the adjectival form of '*paideia*', which means 'education' or 'learning' in ancient Greek. *Paideia* was a system of broad education with a holistic approach to learning. The term was combined with *enkyklios* ('complete system' or 'circle') to identify a large compendium of general education: see Werner Jaeger, *Paideia: The Ideals of Greek Culture*, tr Gilbert Highet (Oxford University Press, 2nd ed, 1945).

123 Baldwin Spencer and FJ Gillen, *The Native Tribes of Central Australia* (Dover Publications, 1968) 592. See also TGH Strehlow, *Aranda Traditions* (Melbourne University Press, 1947); Géza Róheim, *The Eternal Ones of the Dream: A Psychoanalytic Interpretation of Australian Myth and Ritual* (International Universities Press, 1945); WEH Stanner, *On Aboriginal Religion* (University of Sydney, 1966).

124 WEH Stanner, *The Dreaming & Other Essays* (Black, 2nd ed, 2011) 57.

125 Ibid 58.

Observed from this angle, *nomos* is a flexible, macro-level concept that embraces socio-legal studies, history and anthropology,[126] and when deployed in the context of inquiries into Australian Indigenous constitutionalism, refers to foundational normative and legal dimensions of Indigenous legal orders, which are difficult to incorporate into the text-oriented practice of positivist law research.[127] The understanding of *nomos* is broad and contains most of the components we need to escape from an approach that would rather conceive Australian Indigenous legal orders and their law in isolation from other dimensions of life, such as the spiritual and political ones.[128] This includes the interconnectedness of the natural, spiritual and normative worlds, from which an ecocratic decentralised system of governance derives. That is, a system of authority and governance that recognises the power of nature and of life itself, whose laws source to a time immemorial, grounded in the principle of reverence for the planet, and is thereby functional in creating and maintaining ecologically sustainable systems.[129]

As such, it is no surprise that the concept itself will be disputed.[130] Yet, it actually seems to set analysis of Australian First Nations constitutionalism free from the paradigmatic limitations of a 'black-letter law' approach, particularly in regard to studying systems of authority comparatively, as it becomes apparent that the scholars 'cannot limit themselves to simply comparing rules'.[131] From this perspective, the epistemic rationale of using such an open concept as *nomos* is that it seems to contain a certain methodological promise to bring into the spectrum of legal analysis 'larger aspects of culture and social structure', which would in turn 'reveal the place of law in society'.[132]

2.3 Myth

The legal narratives that recount the *genesis iuris* of the Indigenous legal orders

126 See, eg, Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge University Press, 1989).

127 When we deal with concepts like 'legal tradition', we are dealing with macro comparative law. Inside this sub-field of comparative law, 'legal tradition' is considered a novel instrumental concept: see especially Jaluzot (n 15) 47.

128 Obviously, one might argue that this definition is analytically poor. However, it can be counter-argued that the definition itself reflects the pluralistic nature of law: see especially F Reyntjens, 'Note sur l'Utilité d'Introduire un Systéme Juridique "Pluraliste" ans la Macro-Comparaison des Droits' (1991) 68 *Revue Internationale de Droit Comparé* 41, 43–4 [tr Maria Salvatrice Randazzo].

129 Black, 'On Lives Lived with Law' (n 76); Graham (n 80). On the ecological function of law: see especially Fritjof Capra and Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler Publishers, 2015).

130 See, eg, Efstathios K Banakas, 'The Method of Comparative Law and the Question of Legal Culture Today' (1994) 3(2) *Tilburg Foreign Law Review* 113, 115.

131 Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47(3) *International and Comparative Law Quarterly* 495, 495.

132 David Nelken, 'Legal Culture' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, 2006) 372, 375.

are known in the Australian anthropological literature as myths.[133] The definition of 'myth' adopted in this paper has been elaborated by drawing on some of Strehlow's ideas concerning the content of myth,[134] Roland and Catherine Berndt's early conceptualisation of myth,[135] and Malinowski's functional approach to myth.[136]

Strehlow framed the conceptual analysis of myth within Eurocentric models of fairytale investigation, which conflict with legal-anthropological perspectives starting to emerge in the second half of the 20th century. With this caveat in mind, Kenny still underlines the importance of Strehlow's analysis in order to capture the essence of Australian First Nations lifeworlds. In her words, his study has 'realised a Boasian ideal: to pursue the *Geist* or logic of a people's culture through attention to their myth'.[137]

Strehlow's taxonomy of (sacred and secular) myths (*Mythen*), legends (*Sagen*) and fairytales (*Märchen*) was drawn upon the classification elaborated by the Grimm brothers.[138] They defined myth as a s*ui generis* expression of storytelling, a channel for transmission of knowledge in traditional societies and concerned with matters of 'collective, usually sacred, importance'.[139] *Sagen* are defined as 'a genre of stories that … [derive from] true events; typically used for Nordic myths'.[140] *Märchen* are 'narratives that are not bound to a specific landscape, place

133 Alan Rumsey, 'Introduction' in Alan Rumsey and James Weiner (eds), *Emplaced Myth: Space, Narrative, and Knowledge in Aboriginal Australia and Papua New Guinea* (University of Hawai'i Press, 2001) 1; Stanner, *The Dreaming & Other Essays* (n 124); Ronald M Berndt and Catherine H Berndt, *Man, Land & Myth in North Australia: The Gunwinggu People* (Ure Smith, 1970) ('*Man, Land & Myth*'); Alec H Chisholm (ed), *The Australian Encyclopaedia: In Ten Volumes* (Michigan State University Press, 1958) vol 1, 53–5; Roland M Berndt and Catherine H Berndt, *The Speaking Land: Myth and Story in Aboriginal Australia* (Inner Traditions International, 1994) ('*The Speaking Land*'); TGH Strehlow, 'Geography and the Totemic Landscape in Central Australia: A Functional Study' in Roland M Berndt (ed), *Australian Aboriginal Anthropology: Modern Studies in the Social Anthropology of the Australian Aborigines* (University of Western Australia Press, 1970) 92 ('Geography and the Totemic Landscape').

134 Strehlow, 'Geography and the Totemic Landscape' (n 133) 93; TGH Strehlow, *Songs of Central Australia* (Book Service, 1972).

135 Berndt and Berndt, '*The Speaking Land*' (n 133).

136 Bronislaw Malinowski, *The Ethnography of Malinowski*: *The Trobriand Islands 1915–18*, ed Michael W Young (Routledge & Kegan Paul, 1979) ('*The Ethnography of Malinowski*').

137 Anna Kenny, *The Aranda's Pepa: An Introduction to Carl Strehlow's Masterpiece* (Australian National University Press, 2013) 136.

138 'The Grimm brothers developed their triple distinction over a generation. A brief sketch of its generic criteria appears in Jacob Grimm's preface to the 1844 edition of *Deutsche Mythologie* [(Gesammelt auf dem Ober, 1844) xvi]: "Looser, less fettered than legend, the Fairy-tale lacks that local habitation, which hampers legend, but makes it more home-like. The Fairy-tale flies, the legend walks; the one can draw freely out of the fullness of poetry, the other has almost the authority of history. … The ancient mythus, however, combines to some extent the qualities of fairy-tale and legend; untrammelled in its flight, it can yet settle down to a local home"': Ibid 141, quoting Jacob Grimm, *Teutonic Mythology*, tr James Steven Stallybrass (George Bell & Sons, 1883) vol 3, xv. See Elizabeth Wanning Harries, 'Literary Fairy Tale' in Donald Haase (ed), *The Greenwood Encyclopedia of Folktales and Fairy Tales* (Greenwood Press, 2008) vol 2, 578; Maria Tatar, *The Hard Facts of the Grimms' Fairy Tales* (Princeton University Press, 1987); Maria Tatar, 'Why Fairy Tales Matter: The Performative and the Transformative' (2010) 69(1) *Western Folklore* 55.

139 Andrew Von Hendy, *The Modern Construction of Myth* (Indiana University Press, 2001) xiii.

140 Kenny (n 137) 142.

or true events. Their content can draw from fiction and imagination'.[141] Grimms considered *Mythen* as sacred narratives that may include 'features of both *Sagen* and *Märchen*'.[142] As stated by Kenny, these *corpora* of sacred narratives 'unfold in a well-defined realm in which the protagonists interact and events intertwine. These myth collections start usually with setting the general scene and describing what was at the beginning of time and where the protagonists dwelt'.[143]

Strehlow unified the Grimms' threefold classification under the term 'traditions' to describe the different types of stories he collected.[144] The mythical narratives recount of the creation of the world, of Ancestral Beings, their *modus vivendi* and how they moulded the formless world. Strehlow propounded that those myths represented the Indigenous understanding of the world: in a word, their worldview. Likewise, in the first sections of his myth collections he referred to some of the Ancestral Beings as lawgivers and '"teachers" ("*Lehrer*") who establish and pass on "laws" ("*Gesetze*")'.[145]

Similarly, Ronald and Catherine Berndt asserted the normative nature of Indigenous Australian myth, which they conceptualised as a normative and prescriptive code for living.[146] Through a contextual analysis, they could observe that in the myth, narrative behaviour transgressing ancestral law is penalised by an audience in the process of performance.[147] The later functionalist perspective asserting that the narratives constitute a conservative, socialising force and a *corpora* of normative prescriptions for the community, can be sourced to the

141 Ibid.

142 Ibid 141. See also Tatar, *The Hard Facts of the Grimms' Fairy Tales* (n 138).

143 Kenny (n 137) 144. For the Greek and Roman myths, some of the dwelling places are 'Olympia and Hades, Asgard, Midgart and Jötenheim, or Heaven and Earth': at 141–4.

144 Ibid 142. Kenny further specifies that

> [t]he two main categories of Aranda myths were 'The oldest traditions of the Aranda' and 'The specific traditions of the Aranda'. The second category was split into four sub-categories: 'Traditions about celestial bodies and natural phenomena', 'Traditions about the most ancient time', 'Traditions about totem-gods, who travelled in animal shape' and 'Traditions about totem-gods who travelled usually in human shape'. [Strehlow] also used the word 'traditions' to describe Loritja myths, trying new categories and headings like 'The highest being (Tukura)', 'The Tukutita, the first people' and so forth.

See also Carl Strehlow, *The Aranda and Loritja Tribes in Central Australia*, tr Charles Chewings (unpublished) 17–19.

145 Kenny (137) 146.

146 Berndt and Berndt, *The Speaking Land* (n 133) 1–14; Berndt and Berndt, *Man, Land & Myth* (n 133) 219. See also Catherine H Berndt, 'Sickness and Health in Western Arnhem Land: A Traditional Perspective' in Janice Reid (ed), *Body, Land and Spirit: Health and Healing in Aboriginal Society* (University of Queensland Press, 1982) 121–3.

147 Berndt and Berndt, *The Speaking Land* (n 133) 3.

Berndts' conceptualisation of myth as a code for living.[148] Accordingly, the *modus vivendi* of the Ancestor Beings may be seen as normative and pedagogical in essence, as 'they contain "ought" statements that can be singled out as guidelines for behaviour'.[149]

Malinowski consolidated a functional approach to analysing myths conceived a normative and prescriptive code for living, regulating ritual and social life.[150] With reference to the rituals and myths of the Kula,[151] he propounds that 'myth possesses the normative power' to fix custom, to sanction modes of behaviour and to give 'dignity and importance to an institution'.[152] He notes further:

> The Kula receives from these ancient stories its stamp of extreme importance and value. The rules of commercial honour, of generosity and punctiliousness in all its operations, acquire through this their binding force. This is what we could call the normative influence of myth on custom.[153]

Thus, according to Malinowski, myth is foundational to the preservation and maintenance of societal order, as it includes, often in idealised or metaphorical form, a normative structure developed by distinct traditional societies to regulate relations among themselves and with the surrounding environments.

Drawing on the above analysis, elaboration and conceptualisation, myth is considered as having a legal meaning in this paper, as being a non-textual primary and explicit source of law of the Australian Indigenous legal orders. Accordingly, myths include the Ancestral *Corpora Iura* for living. Conceptually, the *Corpora Iura* can be conceived as the moral, political and legal norms through which Australian First Nations people govern themselves, define their position in society, maintain order in society, and are guided through life. Separate Western formal constructs, such as social, cosmological, religious, moral, political and

148 See LR Hiatt (ed), *Australian Aboriginal Mythology: Essays in Honour of WEH Stanner* (Australian Institute of Aboriginal Studies, 1975); Malinowski, *The Ethnography of Malinowski* (n 136) 237; AR Radcliffe-Brown, *The Social Organization of Australian Tribes* (Franklin Classics Trade Press, 2018); AR Radcliffe-Brown, *Structure and Function in Primitive Society: Essays and Addresses* (Franklin Classics Trade Press, 2018); EE Evans-Pritchard, *The Nuer: A Description of the Modes of Livelihood and Political Institutions of a Nilotic People* (Oxford University Press, 1969); EE Evans-Pritchard, *Social Anthropology and Other Essays: An Investigation of the Aims and Methods of Modern Anthropology by One of Its Major Figures* (Free Press, 1962).

149 Berndt and Berndt, *Man, Land & Myth* (n 133) 154.

150 Malinowski, *The Ethnography of Malinowski* (n 136) 237.

151 Kula, also known as the Kula exchange or Kula ring, is a ritual practised by the people of the Trobriand Islands of southeast Melanesia, in the course of which contractual partners merchandise traditional commodities following a well-established ceremonial performance. From the partnership flow reciprocal rights, duties and obligations which pass on from generation to generation. The Kula exchange system is expounded by the anthropologist Bronislaw Malinowski: see Bronislaw Malinowski, *Argonauts of the Western Pacific: An Account of Native Enterprise and Adventure in the Archipelagoes of Melanesian New Guinea* (George Routledge & Sons, 1922). See also the seminal work of Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies,* tr WD Halls (Routledge, 1990).

152 Malinowski, *The Ethnography of Malinowski* (n 136) 237.

153 Ibid.

legal codes (which are largely based on the general acceptance of dichotomies between natural and cultural, material and spiritual, past and present, secular and sacred, subject and objects) are, in Australian First Nations worlds, interwoven into a coherent whole, where there are no ontological dichotomies between dimensions. In other words, the Western trichotomy between moral, normative and legal does not exist in Australian First Nations constitutional orders.

This elaboration and conceptualisation of myth does not fit well with a purely positivist conception of legality; however, it fits with pluralist concepts of legality, as orally expressed in First Nations societies. Rouland analyses the pre-eminence of the spoken word in oral cultures, noting that '[o]ur own legal culture has assumed a predominantly written form for several centuries'.[154] Yet, most Indigenous societies communicate through the 'spoken word'.[155] The 'spoken word' conveys a multiplicity of contextual and emotional meanings that often cannot be expressed in written form. Reference to the oral word includes all modes of communications that are not written.[156] In the case of the Australian Indigenous legal orders, the myth, in its legal meaning, encodes the rights, duties and reciprocal obligations usually articulated through knowledge of particular Dreaming stories, segments of Dreaming tracks, songs, ceremonies and sacred designs that describe the country and places created by the ancestors of a landholding group.[157] The transmission of (legal) knowledge through myths is generally progressive, as the entire corpus of information about a particular site or story is passed on through time. Ancestral law mythological narratives are structured in layers of knowledge that may be transmitted over several decades. As Morton posits with reference to male initiation, which generally takes place between 10 and 30 years of age, '[t]hroughout the cycle of initiation, perhaps lasting as long as twenty years, a youth constantly absorbs knowledge and ancestral powers into his body'.[158]

Hence, the myths are part of a complex normative/legal universe. They amount to *Corpora Iura* in the language of narratives, which is to be ultimately sourced in time immemorial, and is foundational in ordering the dialectical relations

154 Norbert Rouland, *Legal Anthropology*, tr Philippe G Planel (Athlone Press, 1994) 139 [trans of: *Anthropologie Juridique* (1988)].

155 Ibid.

156 Ibid 140, 171; John Borrows, for example, has begun a lecture by holding a rock from near his home community of Neyaashiinigming, describing how the law is inscribed in that rock: Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (n 102) 29–30. See also John Borrows, 'Living Law on a Living Earth: Aboriginal Religion, Law, and the Constitution' in Richard Moon (ed), *Law and Religious Pluralism in Canada* (UBC Press, 2008) 161.

157 See Howard Morphy, 'Death, Exchange and the Reproduction of Yolngu Society' in Francesca Merlan, John Morton and Alan Rumsey (eds), *Scholar and Sceptic: Australian Aboriginal Studies in Honour of LR Hiatt* (Aboriginal Studies Press, 1997) 123; Anthony Redmond, 'Places that Move' in Alan Rumsey and James Weiner (eds), *Emplaced Myth: Space, Narrative, and Knowledge in Aboriginal Australia and Papua New Guinea* (University of Hawai'i Press, 2001) 120; MJ Meggitt, *Gadjari Among the Walbiri Aborigines of Central Australia* (University of Sydney, 1966).

158 John Morton, 'Singing Subjects and Sacred Objects: More on Munn's "Transformation of Subjects into Objects" in Central Australian Myth' (1987) 58(2) *Oceania* 100, 110 (citations omitted).

between the normative/legal dimensions of the law *as it ought to be* and the law *as it is*.

2.4 *From Law to 'Legal Tradition'*

The concept of law is foundational for an investigation of Australian First Nations legal orders, as it is to investigations into Westphalian legal systems. Because Indigenous legal orders inhabit a *nomos* whose legal knowledge is transmitted through myths via the spoken word, it is necessary to think about law in a theoretical framework or mental scaffolding that can be inclusive of stateless forms of law governing decentralised, Indigenous societies in its conceptual purview.[159] In other words, a more inclusive concept of law needs to be elaborated beyond the orthodox legal positivistic paradigm that asserts only positive laws exist and that these laws are made, or chosen, by legislators and lawmakers (including judges in the common law tradition).[160]

In John Austin's version of legal positivism, laws are simply the commands of a sovereign, which 'are established by political superiors' and 'oblige generally the members of the political community, or oblige generally persons of a class'.[161] A more complex version of legal positivism is offered by Hart in *The Concept of Law*. Hart characterises law as a *system of rules*, 'where a secondary rule of recognition is accepted and used for the identification of primary rules of obligation'.[162] The most basic types of rules are primary rules which impose rights and obligations and which include the criminal law. Secondary rules define the formation, recognition, modification and extinguishment of primary rules.[163]

A rule of recognition is, in effect, a definition of what Austin called a 'sovereign command'.[164] Legal positivism and legal centralism posit that only the positive law of the state legitimately exists. Imposing the modern Western state-centric concept of law on stateless societies without considering other existing, alternative normative structures that fulfil, to a degree, the role of state law in Western societies leaves jurists with a limited model of analysis. The results are likely to fundamentally misrepresent the complex normative *modus essendi et operandi* of stateless societies. The lack of state law might appear to be an absence of meaningful, effective normativity. Yet, an Indigenous constitutional perspective requires another conceptual framework open to the context-specificity of the

159 Stephen Laurence and Eric Margolis, 'Concepts and Cognitive Science' in Eric Margolis and Stephen Laurence (eds), *Concepts: Core Readings* (MIT Press, 1999) 3.

160 See generally JM Kelly, *A Short History of Western Legal Theory* (Clarendon Press, 1992).

161 John Austin, *The Province of Jurisprudence Determined*, ed Wilfred E Rumble (Cambridge University Press, 1995) 17. See also Austin's categorisation of 'commands': at 12–30.

162 HLA Hart, *The Concept of Law* (Oxford University Press, 1961) 100.

163 On the variety of 'primary rule' see ibid 26–41; on the rule of recognition see ibid 100–9.

164 Austin (n 161) 286. See also *The Concise Oxford Dictionary of Politics* (3rd ed, 2009) 'law'.

concept of law.

Dissatisfaction with positivistic conception of law can be traced to early 20th century legal scholarship. Ehrlich laments 'the tragic fate of juristic science' being devoted exclusively to 'state law', and goes on to identify law with associations in the social world at all levels, including the factory and the family.[165]

In the quest for universal concepts of law, legal philosophers have appeared to overlook legal universes parallel to their own in time and space, especially those where the *modus essendi et perandi* of law would hinder pursuing the objective of total coherence of normative information — an essentially chimerical objective, as total coherence presupposes a continuously static conceptual taxonomy of all legal phenomena. Legal philosophers, by avoiding comparative analysis across either time or space, have generated standards and idealised concepts of the legal and institutional structures with which they are most familiar and, in so doing, they have been pursuing the objective of total coherence by resorting to a very limited model of analysis. However, for the Western past and present legal traditions, such a benchmark is irrelevant. Nation-state law is a relatively normative *novus genum* even in the West, albeit 'one particularly successful at colonising and dominating its rivals'.[166] As Del Mar points out:

> '[M]ore than 99 percent of human's two- to three- million year sojourn on Earth has been spent in small bands — flexible, egalitarian, nomadic groups comprised of several extended families'. The remaining one percent needs to be further divided into periods when persons lived, inter alia, in chiefdoms, villages, towns, cities, kingdoms, guilds, and empires. Only a fraction of that one percent would involve persons living in what we have to come to characterise as sovereign states. Taking a step back, then, one begins to wonder whether the association of the concept of law with the concept of the sovereign state is not a little disproportionate.[167]

Similarly, Roberts suggests 'that law is "always" somewhere in the picture'.[168] He argues that law has always existed 'in the social world before men aspired to be "kings", at a time when … no institutions of domination' had been developed.[169] Further, Sacco claims that the origin of law can be sourced from 'beyond the

165 Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, tr Walter L Moll (Harvard University Press, 1936) 13.

166 Seán Patrick Donlan, 'Things Being Various: Normativity, Legality, State Legality' in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart Publishing, 2014) 161, 161.

167 Maksymilian Del Mar, 'Beyond the State in and of Legal Theory' in Seán Patrick Donlan and Lukas Heckendorn Urscheler (eds), *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Routledge, 2016) 19, 19, quoting Ted C Lewellen, *Political Anthropology: An Introduction* (Praeger, 3rd ed, 2003) 44 (citations omitted).

168 Simon Roberts, 'After Government? On Representing Law Without the State' (2005) 68(1) *Modern Law Review* 1, 5.

169 Ibid.

recent past covered by conventional legal history'.[170] He proceeds to identify and deconstruct the most relevant phases in history associated with elements that are (falsely, he explains) considered foundational to the Western contemporary concept of law, and whose absence would make the task of elaboration and conceptualisation of the law of the world impossible to undertake.[171]

First, Sacco challenges the idea that to exist, law needs a legislator or lawmaker. He points to the origin of the common law legal tradition rooted in a series of judicial processes that did not require the intervention of any institutional legislative figure or process. Second, he deconstructs the idea that law intrinsically requires any jurist; that is, any professional or institutional figure of legal practitioners (lawyers or judges). Sacco's examples involve both the Chinese empire and the classical Roman tradition. Further, he provides examples of historical documents that refer to legal traditions where writing was not present, showing that law can exist, and has indeed been formulated expressly as law, even in the absence of writing.[172]

Following from this point, Sacco compares decentralised-power societies and centralised-power societies,[173] identifying the existence of law within both categories, and supporting his argument with the example of European international law (operating well before the creation of the League of Nations in 1919 and the United Nations in 1945). Sacco's analysis shows that law, as an expressly defined historical phenomenon (ie, one that has been expressly acknowledged by specific societies within their cultural boundaries), has existed in the absence of a few elements often identified as essential to the idea of law: a centralised form of lawmaking power (whether a legislative body making laws or judiciary identifying the law), specialised and specifically institutionalised legal roles and, finally, writing.[174] Sacco then asserts that the existence of law can be posited in the absence of institutions (ie, specific roles to exercise legal functions, as shown by the Roman example) and even of language (ie, an expressly verbalised form of communication).[175]

The significance of Sacco's analysis is not only, as Roberts suggests, that it 'involves an enormous claim: that there never was a pre-legal social world'[176] preceding the Westphalian nation-state legal system. More importantly, it situates law as a phenomenon that historically transcends the boundaries traditionally

170 Rodolfo Sacco, 'Mute Law' (1995) 43(3) *American Journal of Comparative Law* 455, 455.

171 Ibid 456–60.

172 Ibid.

173 Ibid 456, citing M Fortes and EE Evans-Pritchard (eds), *African Political Systems* (Oxford University Press, 1940).

174 Sacco (n 170) 455–547.

175 Ibid 456–60.

176 Roberts (n 168) 6.

connected with its positivist definitions, permeating all social structures to a foundational extent. Sacco's deconstruction of the positivist concept of law demonstrates the state cannot claim a conceptual monopoly over the law as a time immemorial defined phenomenon.

Thus, the simple dichotomy between state law and non-state law — an intellectual construct of the dichotomous or binary thinking in law[177] — becomes restrictive in this expanded conceptual dimension. If the terms used to define state law are relatively uniform and straightforward (law, state law and official law), the terms used for non-state law are much more controversial. The initial distinction between law and custom or folk law is deconstructed by Diamond, who opposes the notion that custom or folk law are forms of primitive law that will gradually develop into state law.[178] This distinction and categorisation is also dismissed in the current paper as inadequate and superficial and not reflecting the complex legal reality of Indigenous law, its theoretical elements and practical applications. The need for some other inclusive organising constructs that will allow the theoretical elaboration and conceptualisation of many different types of law — emanating both from state systems and stateless legal orders,[179] such as the Indigenous legal orders — and their relations with one another, has been strongly emphasised.[180]

2.4.1 Legal Tradition

In the search for such an inclusive construct, Krygier proposes the concept of law as tradition.[181] He asserts that law is a 'profoundly traditional social practice' and propounds 'traditionality' to be the hallmark of almost every legal system.[182]

The etymology of the word 'tradition' is to be found in the Latin *traditio*,

177 The rooted character of binary logic in contemporary legal thought can be sourced to the classical Greek principle of *diairesis*, meaning division, according to which human knowledge is best pursued by dividing the world and its knowledge into two parts: see Lee Franklin, 'Dichotomy and Platonic Diairesis' (2011) 28(1) *History of Philosophy Quarterly* 1; Plato, *Statesman*, eds Julia Annas and Robin Waterfield, tr Robin Waterfield (Cambridge University Press, 1995) 4–5 [258e], 9 [261b]. The thrust of binary thinking in law is a foundational 'law of identity' expressed usually in the form of 'A is not -A'. This assertion proceeds from the inference of a total isolation of A from all of that which is not -A: see also Andrea Errera, 'The Role of Logic in the Legal Science of the Glossators and Commentators: Distinction, Dialectical Syllogism, and Apodictic Syllogism' in Andrea Padovani and Peter G Stein (eds), *A Treatise of Legal Philosophy and General Jurisprudence: The Jurists' Philosophy of Law from Rome to the Seventeenth Century* (Springer, 2007) 79, 81–4.

178 Anne Griffiths, 'Legal Pluralism' in Reza Banakar and Max Travers (eds), *An Introduction to Law and Social Theory* (Hart Publishing, 2002) 289.

179 John H Barton et al, *Law in Radically Different Cultures* (Stanford University Law School, 1979) 13–14.

180 Glenn, *Legal Traditions of the World* (n 6) ch 1. See also Martin Krygier, 'Law as Tradition' (1986) 5(2) *Law and Philosophy* 237; Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (n 102); Michael Freeman and Fiona Smith (eds), *Law and Language: Current Legal Issues 2011* (Oxford University Press, 2013); Seán Patrick Donlan and Lukas Heckendorn Urscheler (eds), *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Routledge, 2016).

181 Krygier, 'Law as Tradition' (n 180) 239.

182 Ibid.

which in its common usage means transfer or transmission or conveyance.[183] In law, however, the concept of 'tradition' evokes normative information, that which has been 'transmitted … over time'.[184] Following Glenn, those normative information can be qualified, respectively, as 'living tradition' if they stand the test of time and continue to be operative; as 'submerged traditions' if they no longer attract adherence, because they are lost; 'frozen traditions' when the process of transmission was interrupted and they no longer attract adherence; or as 'suspended traditions' when they live 'in states of suspended animation', that is, when normative information has not been forgotten and may in time be resumed and adhered to.[185]

Krygier posits that every tradition is defined by three qualities.[186] First, its 'pastness':[187] the core beliefs, principles and practices of every tradition have, or are believed by its 'participants' to have, its source of origination in the dawn of time. Second, its 'authoritative presence':[188] though originated from a distant past — 'real or believed-to-be real past' — a traditional practice, doctrine or belief evolves and its 'traditionality' consists in its unfolding authority 'and significance for the lives, thoughts or activities of participants in the tradition'.[189] Third, a tradition is not merely a mechanical repetition of the past in the present: '[i]t must have been, or be thought to have been, passed down' from generation to generation, purposely; not merely uncovered from a 'past discontinuous with the present'.[190]

Law as tradition shares these elements and can be conceptualised as conveyed normative information on what is law, where we acquire knowledge of it from, and the kind of approaches we should use while seeking valid information about law.[191] Within this conceptual frame, a legal tradition encompasses a crux of information that may be collected over a prolonged period of time. The concept echoes a core of entrenched approaches and perspectives on the *modus essendi et operandi* of law in a given society and prescribes the mode by which law

183 H Patrick Glenn, 'Doin' the Transsystemic: Legal Systems and Legal Traditions' (2005) 50(4) *McGill Law Journal* 863, 872 ('Doin' the Transsystemic'). Cf Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008).

184 H Patrick Glenn, 'A Concept of Legal Tradition' (2008) 34(1) *Queen's Law Journal* 427, 430. The normative element distinguishes *tradition* from *custom*. The difference between the two is eloquently addressed by Bruce Rigsby, 'Custom and Tradition: Innovation and Invention' (2006) 6 *Macquarie Law Journal* 113; Edward Sapir, 'Custom' in Edwin RA Seligman and Alvin Johnson (eds), *Encyclopaedia of the Social Sciences* (Macmillan, 1931) vol 4 658, 658–62; Edward Shils, *Tradition* (University of Chicago Press, 1981) 24–5.

185 Glenn, 'Doin' the Transsystemic' (n 183) 873.

186 For a more extended discussion, see Martin Krygier, 'Tipologia della Tradizione' (1985) 5(2) *Intersezioni. Rivista di Storia delle Idee* 221, 238–41.

187 Krygier, 'Law as Tradition' (n 180) 240. See also Jones, 'A Māori Constitutional Tradition' (n 13).

188 Krygier, 'Law as Tradition' (n 180) 240.

189 Ibid.

190 Ibid.

191 Ibid 237–8.

should be legitimated, adopted, implemented, enforced, researched, studied, improved, taught and transmitted.[192] Thereby, research and analysis on a legal tradition implies research and analysis on 'the content and flow of large bodies of normative information [transmitted] over time and … space',[193] over a long period of time, or since time immemorial in the case of Indigenous legal traditions.

Consequently, the concept of laws as legal tradition, in the context of research and analysis of Australian First Nations constitutionalism brings into the analytical spectrum a significant core of normative information, identified with reference to a corpus of foundational principles, many of them embodied in non-textual sources of law, such as myths or creation stories, whose ultimate source of origination is the Dreaming.[194]

First Nations Peoples in Australia have many legal traditions including information to guide their behaviour and actions, mediate their relationships with other people, the spirit and human worlds and maintain societal order via authoritative resolution of conflicts and disputes.[195] Thereby, Australian Indigenous legal traditions, as with common law and civil legal traditions, organise and structure society, and create systems of authority that are consistent with the lifeworld in which the theory and practice of Australian First Nations law is embedded.

To be relevant, the information provided by a tradition must contain both 'principal' information on societal obligation and 'consequential' information on how to ensure the maintenance of the tradition through time. Scholarly work shows that Indigenous legal traditions have '"secondary" mechanisms' that can be referred to as secondary normative information and are apprehended in unwritten form.[196] Essentially, it can be opined that those secondary normative information fulfil the functions of Hart's secondary rules including rules of recognition, change, and adjudication that empower people to make authoritative determinations of the question whether a primary rule has been broken and how to restore balance and harmony in the societal, natural and spiritual dimensions of living. Analysis of First Nations legal orders, for example, has revealed that their legal processes operate at a level over and above mere 'etiquette' or primary obligations lacking an accompanying system for recognition, change and adjudication.[197]

Thus, the substantive, procedural and dynamic aspects defining the concept of

192 Glenn, 'A Concept of Legal Tradition' (n 184) 435.

193 Ibid 431.

194 Black, *The Land Is the Source of the Law* (n 14).

195 Ibid; Synot (n 14); Irene Watson (n 76).

196 Glenn, 'Doin' the Transsystemic' (n 183) 874. See especially Borrows, *Canada's Indigenous Constitution* (n 11); Henderson, 'Postcolonial Indigenous Legal Consciousness' (n 11); Cruz (n 11); Friedland (n 11); Deng, *Tradition and Modernization* (n 12); Hirini Moko Mead (n 13); Frame and Meredith (n 13); Gaykamangu (n 14); Gaymarani (n 14); Danial Kelly (n 14); Black, *The Land Is the Source of the Law* (n 14).

197 See above n 196.

legal tradition presents a level of analytical complexity comparable to Hart's structure of primary rules of obligation and secondary rules of recognition, change and adjudication.[198] While it is beyond the scope of this paper to explore whether Hart's theoretical articulation of a legal system, as the union of primary and secondary rules model, can resonate with internal features of Australian Indigenous legal orders,[199] in this context it is, however, pertinent to briefly point out that Hart conceived the law of Indigenous societies as unchanging because of the lack of secondary rules, where secondary rules could only appoint, modify and implement written primary rules.[200] While Hart does acknowledge that the rules of recognition may be unwritten and known only as a matter of social practice (otherwise known as custom), Indigenous systems of authority and governance, he asserts, inhabit a pre-legal universe in the absence of secondary rules.[201] However, Hart's proposition seems to rest on a false premise, as his theoretical construct of a 'primitive' system is based on Llewellyn and Hoebel's *The Cheyenne Way*, and on Hoebel's other anthropological works,[202] because, in his view, their work provides a study 'of the nearest approximations to this [pre-legal] state'.[203] The crux of the matter is that the anthropological writing on which Hart relies are grounded upon theories that have become obsolete. By way of exemplification, Hoebel was later to describe the Inuit as 'one of the most genuinely primitive groups known to anthropologists',[204] a statement which is highly controversial in the light of contemporary scholarship on Indigenous legal traditions[205] showing living legal traditions are necessarily complex in their structures, though the structures may not be materialised into formal legal processes and institutions.[206] Thereby, the deployment of the concept of legal tradition in inquiries on Australians' First Nations constitutionalism necessarily brings into the focal point of legal analysis substantial *corpora* of primary and secondary normative information on what is law, its source of origination, application, implementation and transmission.

198 HLA Hart (n 162) 92–6.

199 Hart's theoretical articulation of a legal system, as the union of primary and secondary rules model, can be a useful tool of analysis of non-Western stateless and decentralised legal systems and can facilitate a better understanding of their *modus essendi et operandi*: ibid.

200 Ibid 89–91.

201 Ibid 92.

202 The *Cheyenne Way* is a detailed study of Cheyenne legal practices, not the description of a society that fits Hart's notion of primitive law at all: see KN Llewellyn and E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press, 1941). See especially E Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Harvard University Press, 1954) 99 ('*The Law of Primitive Man*').

203 HLA Hart (n 162) 244.

204 Hoebel, *The Law of Primitive Man* (n 202) 67.

205 Cf Jeremy Waldron, 'All We Like Sheep' (1999) 12(1) *Canadian Journal of Law and Jurisprudence* 169, 174.

206 See especially Borrows, *Canada's Indigenous Constitution* (n 11); Henderson, 'Postcolonial Indigenous Legal Consciousness' (n 11) Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous People and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009); Cruz (n 11); Friedland and Napoleon (n 11); Mills, 'Aki, Anishinaabek, kaye tahsh Crown' (n 11); Deng, *Tradition and Modernization* (n 12); Jones, 'A Māori Constitutional Tradition' (n 13); Palmer (n 13); Wright (n 13); Black, *The Land Is the Source of the Law* (n 14); Synot (n 14); Danial Kelly (n 14); Irene Watson (n 76).

CONCLUSION

The paper has shown how the contemporary re-elaboration of constitutionalism has widened the conceptual reach of the term beyond its usual referent of legal limitations on government powers via mechanisms codified in a written constitution. Such conceptual reach has been achieved, inter alia, by including in the legal universe Indigenous constitutionalism which is articulated into political institutions, legal discourses and practices that do not operate in terms of principles like the separation of powers, representative democracy, and the rule of law. Investigations into Indigenous constitutionalism, as compared to investigation into Westphalia nation-state constitutionalism, reveal that conceptual differences in legal science are entangled with differences of normative language, which in turn, in the case of a chthonic legal tradition, are the product of extended experience and long reflection spanning along time immemorial. Understanding those differences can be profoundly difficult to grasp, requiring immersion in normative and legal discourses of the society investigated. Those differences can also be vulnerable to rationalisation and misapprehension by discourses and practices of law externally imposed on an Indigenous society in ignorance of that society's own normative resource. With specific reference to Australian First Nations constitutionalism, the paper has suggested a foundational conceptual apparatus for analysis which can operate at the interface between Indigenous and Western legal worlds and that actually seems to set investigations into those Indigenous legal orders free from an old 'black-letter law' paradigm and the 'law in books' approach.[207]

The concepts are defined in a manner that draws on elements from multiple fields that study law, not just juristic studies, but sociology, philosophy, history and anthropology; hence, they are broad and contain most of the components we need to escape from an approach that would rather conceive Australian First Nations legal orders and their law in isolation from other dimensions of life, such as the spiritual and political ones.[208]

Therefore, the conceptual apparatus suggested might provide important arguments for an academic ethic of avoiding transplants of legal concepts devoid of any context across the normative divide. The reformulation of legal meaning to reflect the normative/legal dynamic and dialectic of Australian Indigenous constitutionalism might also assist a reconsideration of the very core of legal conceptualisation and systematisation. Instead of comprehensive coherence of normative and legal material that requires a continuous and static

207 Alan Watson, 'Legal Transplants and Law Reform' (1976) 92(1) *Law Quarterly Review* 79. See also William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43(4) *American Journal of Comparative Law* 489.

208 Reyntjens (n 128) 43–4 [tr Maria Salvatrice Randazzo]. See also Rosen (n 126).

conceptual taxonomy of all legal phenomena, both scholarly and practical reasons point towards contextual coherence as a legitimate end of theoretical analysis. Contextual coherence dispenses with traditional systematisation, and might trigger revisions in the legal practice of circumscribing the *nomos* of Australian state constitutionalism by inviting the inclusion of First Nations legal worlds that have been excluded by 'the jurisprudence of conventionalism'.[209] This is in keeping with the core of academic research, the main task of which is widening the horizon of knowledge by, inter alia, evaluating, challenging, rethinking, developing, re-elaborating, reconsidering, and improving ideas and understanding *about* and *of* the phenomena investigated.

209 Donald H Gjerdingen, 'The Future of Legal Scholarship and the Search for a Modern Theory of Law' (1986) 35(2) *Buffalo Law Review* 381, 387–9, 392.