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Charles Darwin University

## Chthonic legal traditions

### A standpoint legal research paradigm for comparative analysis on Australian Indigenous legal orders

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## **Chthonic Legal Traditions: A Standpoint Legal Research Paradigm for Comparative Analysis on Australian Indigenous Legal Orders**

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### **Abstract**

*In contemporary comparative legal scholarship, it is no longer controversial to assert the relevance of investigations into chthonic legal orders; however, there is a significant divergence on how they should be undertaken. The paper takes in consideration the Australian chthonic legal orders and argues that their investigations by non-Indigenous researchers need to be undertaken acknowledging an Indigenous epistemological approach to research, with methodological frameworks that, consistent with the principles of an Indigenous standpoint theory, aim to develop a legal standpoint research paradigm informed by Indigenous legal ontologies, epistemic theories and research practices. The research paradigm so elaborated is justified by the necessity of devising new epistemological models to guide understandings—and theoretical elaboration—of Australian Indigenous orders which are consistent and coherent with their ontological, epistemological and axiological universe.*

**Keywords:** *Chthonic Law; Indigenous Legal Tradition; Comparative Law; Standpoint Theory; Research Paradigm*

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## 1. Introduction

Australian Indigenous legal orders<sup>1</sup> belong to the chthonic legal tradition. The term chthonic has been used by Goldsmith to describe people who live in or in close harmony with the earth.<sup>2</sup> Glenn defines 'legal tradition' as transmitted information concerning what is a legal order and its law, where to acquire knowledge of them from, and the kind of approaches to use while seeking valid information about them.<sup>3</sup>

To define a legal tradition as chthonic means to attempt to define it from within, by criteria internal to itself, rather than relying on imposed criteria.<sup>4</sup> It is an endeavour to see it from a time prior to the emergence of colonial language. From a chthonic legal tradition perspective, it becomes clear that Australian Indigenous legal orders cannot be separated from life and compartmentalized in the manner in which the Australian legal system can be separated from the political and religious dimensions of life.<sup>5</sup> In light of that, any investigation on Australian Indigenous legal orders might be a difficult undertaking for a non-Indigenous legal scholar, educated and trained in the parallel legal universe of the Western civil law and the common law legal traditions.

The main challenge consists of undoing the Western legal research methodological framework grounded in positivism and elaborating new methodological frames to understand and research legal traditions which

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<sup>1</sup> 'Legal order' refers to stateless and decentralised systems of governance whose law is embedded in social, political, economic and spiritual institutions. The expression is used to distinguish Indigenous system of governance from a 'legal system', which, instead, refers to post-Westphalian state-centred systems of 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. In distinguishing between a 'legal order' and a 'legal system', the author hope to avoid imposing Western legal concepts and institutions onto Indigenous societies.

<sup>2</sup> E Goldsmith, *The Way: an Ecological World View* (London: Rider, 1992), xvii.

<sup>3</sup> H Patrick Glenn, *Legal Traditions the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2004).

<sup>4</sup> *Ibid.*

<sup>5</sup> It is beyond the scope of this paper to expound Australian Indigenous legal orders in terms of their sources, nature, scope and legitimacy. Kelly's doctoral dissertation provides an insight on the topic, with specific reference to the sources of *Madayin* legal order of the *Yolngu* People. See Danial Terence Kelly, "Law from the Earth, law from the demos and law from heaven: nature and intersection of authority in *Madayin*, Australian Law and Christianity in Arnhem Land." (PhD Thesis, Charles Darwin University, 2014). An extensive literature exists on North American chthonic legal orders: see especially, John Borrows, *Canada's Indigenous Constitutions* (Toronto: University of Toronto Press, 2010); Sydney L Haring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994); further, on the New Zealand Māori's chthonic legal order, see Carwyn Jones seminal article, "A Maori constitutional tradition." *New Zealand Journal of Public and International Law* 16, no.2 (2014):187-204.

are learnt, transmitted and implemented orally. It requires acknowledgment at the outset that the researcher is observing and examining unlike normative/legal universes and applications of law, unlike conceptual underpinnings, philosophies, intellectual standards and ethical/legal understandings. In the lack of such acknowledgment, early research on and about Indigenous societies by non-Indigenous researchers,<sup>6</sup> have been often undertaken without proper considerations of the lifeworld<sup>7</sup> into which Indigenous societies are embedded.<sup>8</sup>

It has been only in the last two decades of the twentieth century with the beginning of the twenty-first century that researches on Indigenous societies, including also investigations into their systems of authority, are conceptually reconceived as frontiers, where frontiers have been conceptualised both as physical and spatial boundaries, and as the interaction of distinct worldviews' and diverse ontological, epistemological and axiological horizons.<sup>9</sup> This paper rides on the flows of the nascent twenty-first century legal literature starting to explore Indigenous legal traditions from a theoretical perspective which is grounded into Indigenous normative and legal ontologies.<sup>10</sup> In particular, with reference to the Australian chthonic legal orders, the paper argues that their investigations by non-indigenous researchers need to be undertaken acknowledging an Indigenous epistemological approach to research, with methodological frameworks that, consistent with the principles of an Indigenous standpoint theory, aim to develop approaches to research and knowledge production based upon Indigenous worldviews.

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<sup>6</sup> See Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New Zealand: Zed Books, 2<sup>nd</sup> ed, 2012); Lester-IRabinna Rigney, "Internalization of an Indigenous Anticolonialist Cultural Critique of Research Methodologies: A Guide to Indigenist Research Methodology and its Principles." *Journal of Native American Studies* 14, no.12 (1999): 109; Karen Martin, *Please Knock Before You Enter: Aboriginal Regulation of Outsiders and the Implications for Researchers* (Country Flaxton: Post Pressed, 2008).

<sup>7</sup> Mill's defines 'lifeworld' as the set of ontological, epistemological, axiological and cosmological understandings that situate indigenous community in creation'. Aaron Mills, "The Lifeworlds of Law: On Understanding Indigenous Legal Orders Today." *McGill Law Journal* 54, no.4 (2009): 847- 850.

<sup>8</sup> John Henry and Wendy Brabham, *Aboriginal Learning Styles and the Legacy of Biological Determinism in Contemporary Koorie Education: The History of Attempts to Define and Measure the Intellectual Capacities of Aboriginal Australians Within Western Scientific Tradition* (Melbourne: Deakin University, Institute of Koorie Education and Faculty of Education, 1994).

<sup>9</sup> Anne Mead, *Working with Aboriginal Worldviews: Tracks to Two-Way Learning* (Western Australia: West One Service, 2012).

<sup>10</sup> See especially, John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); "Living Law on a Living Earth: Aboriginal Religion, Law and the Constitution." in *Law and Religious Pluralism in Canada*, edited by Richard Moon (Vancouver: University of British Columbia Press, 2008); *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); *Drawing Out the Law. A Spirit's Guide* (Toronto: University of Toronto Press, 2012); Valerie Ruth Napoleon, "Ayook: Gitksan Legal Order, Law and Legal Theory" (PhD Thesis, University of Victoria, 2009)

As regards the methods through which relevant material for this paper has been selected, the research is archival and textually driven, while the paper is multidisciplinary and interdisciplinary at the same time: it is multidisciplinary as it draws on knowledge from different disciplines, such as comparative law, legal theory, anthropology, philosophy. It is also interdisciplinary as it analyses, synthesizes and harmonizes links between those disciplines in order to create a new conceptual apparatus and methodological approach to investigate the complex normative and legal dimensions of Australian Indigenous legal orders, which could not occur if they were separately handled with an orthodox positivist conceptual apparatus and research paradigm. However, for the sake of locating this paper in the literature, it may be primarily positioned within the disciplinary field of legal science, specifically comparative law and legal theory.

The paper is structured into three main sections. First, it provides a discussion on the scarcity of lack of any accurate contemporary work on a comparative methodology designed to analyse Indigenous legal orders, and on the issue of insider-outsider Indigenous research undertaken by a non-Indigenous researcher. In doing so, the paper considers how a Western European legal framework of analysis necessitates a constant reflective awareness regarding how Western philosophical, normative and legal assumption might bias understanding of Indigenous traditional constitutional orders of what is law and where law comes from. Some of the issues addressed touch upon objectivity, subjectivity and political reflexivity.

Second, the paper considers how shortcomings in comparative law methodology regarding analysis of chthonic decentralised legal orders undertaken within a state-centred positivist research paradigm, necessitate the choice of a methodological approach to research informed by the key principles of Indigenous standpoint theory. The theory is considered an epistemic theory and research practice and is drawn upon for elaborating a research paradigm embedded in the fundamentals of an Indigenous worldview comprising ontology, epistemology and axiology.

Finally, the paper considers how such a standpoint research paradigm is most relevant to engage intimately with some of the most foundational aspects of Indigenous legal cultures and normative universes. In so doing, the paper argues that such a paradigm can assist conceptualisations and theorisations of Australian Indigenous legal orders according to emic understandings of what a legal order is, where it comes from and what it is for.

## 2. Analysis

### 2.1. Engaging with Indigenous Legal Orders: Reflexivity

Comparative scholars are mindful about the reflective nature of the comparative analysis, in that ‘any act of legal comparison primarily and initially’<sup>11</sup> is conceptually, theoretically or practically biased—consciously or not—by the scholars’ knowledge of the *modus essendi* and *operandi* of their own legal system. In Rouland’s words, ‘the observer is not impartial and the object of the observer’s gaze can be modified by his or her vision to undergo observation’.<sup>12</sup> From a comparative legal perspective, as Rouland observed, we bring our own legal culture with us in the process of considering and evaluating other legal systems.<sup>13</sup> Likewise, according to Alford:

the obligation to be vigilant does not preclude using the language and conceptual frameworks of our own society to try to understand and explicate for others the foreign societies we may be observing ... We ultimately must invoke ... our own]terminology and concepts to make intelligible to ourselves and our compatriots what we have observed .... Nor should our concern with being scrupulous preclude us from forming judgments about foreign societies, for the very effort to understand entails the formation of judgments, large and small.<sup>14</sup>

However, when using the language and the Western legal conceptual framework for inquiries into Indigenous legal traditions, Meyer points out that, ‘the risk is inherent: how does one discuss oranges with an apple vocabulary?’<sup>15</sup> In other words, how is it feasible to investigate chthonic legal traditions in order to identify legal narrative to present specific Indigenous legal data which are dynamic and fluid to a different legal audience? What does it mean and imply to be accurate in an analysis of Australian Indigenous legal traditions, as they are embedded in their own ontological, epistemological and axiological premises?

The issue then, for a non-Indigenous researcher becomes one of being committed to considering the philosophical perspectives of Indigenous peoples in the process of engaging and investigating their legal traditions. As a result, to minimise the risk of imposing Western European legal concepts and categories onto the Indigenous legal traditions observed and considered, the need arises to be continually reflexive about the position in relation to the European ontological, epistemological and axiological assumptions at

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<sup>11</sup> Norbert Rouland, *Legal Anthropology* (P Planel trans, London: Athlone, 1994), 136 [trans of: *Anthropologie Juridique*, first published 1988].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> William P Alford, “On the Limits of ‘Grand Theory’ in Comparative Law,” *Washington Law Review* 61(1986): 945, 947.

<sup>15</sup> Meleanna Meyer, *Ho`oulu. Our Time of Becoming* (Honolulu: Native Books, 1<sup>st</sup> ed, 2004), 76.

the core of the current academic Western legal world on what is law and where law comes from.<sup>16</sup>

The term reflexivity has been deployed by Bourdieu who argues that social scientists are inherently biased, and they can only be freed of them by becoming reflexively aware of their biases.<sup>17</sup> Bourdieu conceptualises reflexivity as a theory of intellectual practice that is foundational to theories of society and integral to social science methodology.<sup>18</sup>

Within the above limitations, any endeavour to research Australian traditional legal orders must be undertaken from a philosophical basis that focuses on both the internal study *of* law and external study *about* law. The internal study *of* law focuses on how law unfolds in context and legal arguments that are developed and deployed within specific legal traditions. The objects of an external study *about* law usually are historical and sociological narratives and interpretations of the very same body of law.<sup>19</sup>

Twining suggests that legal scholars are more likely than social scientific, such as anthropologists, to examine legal processes from an internal point of view. He also notes that ‘it is when working across cultures that the jurist’s tendency to develop an internal view of law is challenged by his or her conflicting ethnocentricity’.<sup>20</sup>

However, while a legal scholar might be aware of the internal processes and structures of other legal systems within a Western legal tradition, for example, it is not necessarily the case Indigenous traditional law is being investigated. Nor does legal scholars’ skill to perceive the internal point of view of law mean they are able to perceive the foundational societal context into which Western law or any other law are grounded.<sup>21</sup> In light of the foregoing, maintaining a reflexive approach about our own cultural horizon becomes an essential requisite of any scholar’s ethics.

Sack argues that a ‘culturally neutral, universal language of law is not possible, and any such attempts will only serve professional convenience

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<sup>16</sup> Johnny Mack, ‘Understanding Academic Critique as Relational Practice’ in *Thinking Through Relationship: The Ethics of Research and Reflectivity* (Collected papers presented at the Multidisciplinary Student Workshop of the Indigenous Peoples and Governance Conference, University of Montreal, 8–9 October 2008): 25-26.

<sup>17</sup> Pierre Bourdieu and Loïc Wacquant, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992).

<sup>18</sup> *Ibid.*

<sup>19</sup> Jeremy Webber, “The Past and Foreign Countries” *Legal History* 10 (2006):1-2; see also “Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples,” *Osgoode Hall Law Journal* 33, no.4 (1995); 623; ‘Legal Pluralism and Human Agency,” *Osgoode Hall Law Journal* 44, no.1 (2006):167; “The Grammar of Customary Law” *McGill Law Journal* 54, no.4 (2009): 579.

<sup>20</sup> William Twining, “Law and Anthropology: A Case Study in Inter-Disciplinary Collaboration” *Law & Society Review* 7(1973): 561.

<sup>21</sup> Richard L Abel and Phillip S C Lewis, *Lawyers in Society: An Overview* (California: University of California Press, 1995).

rather than contributing to a better understanding of law'.<sup>22</sup> Sack's line of thought is similar to the views expressed by Smith,<sup>23</sup> Slim and Thompson<sup>24</sup> and Moore,<sup>25</sup> who, from the perspectives of their different disciplines, argue that all research is fundamentally and inherently political. However, as Geertz posits, this does not mean that intellectual rigor can be discarded:

I have never been impressed by the argument that, as complete objectivity is impossible in these matters (as of course it is), one might as well let one's sentiments run loose ... That is like saying that as a perfectly aseptic environment is impossible, one might as well conduct surgery in a sewer. Nor on the other hand, have I been impressed with claims that structural linguistics, computer engineering, or some other advanced form of thought is going to enable us to understand men without knowing them.<sup>26</sup>

According to Tully, it is difficult to free ourselves from the 'problematizations and practices in which we think and act',<sup>27</sup> because our involvement makes our thinking, 'rule following and rule contestation pre-reflective and habitual'.<sup>28</sup> Constant political reflexivity is applicable not only to the research process, but also to the larger world surrounding the research and the research subject itself.<sup>29</sup> Tully remarks that

we are challenged to undertake the permanent task of making sure the multiplicity of practices of governance in which we act together do not become closed structures of domination under settled forms of justice, but remain open to practices of freedom by which those subject to them have a say and hand in.<sup>30</sup>

Although any analysis onto Australian chthonic legal traditions remains circumscribed by a non-indigenous researcher's own limitations, both acknowledged and otherwise, the reflective approach minimises the risk of imposing cultural apparatus that would be incommensurable with the Indigenous worldviews that give meaning to the legal orders investigated.

## 2.2. Methodological Problem of Comparative Law

The reflective approach implies a need to identify a theoretical approach to the methodology to draw upon to elaborate the methodological framework

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<sup>22</sup> Peter Sack, "Law, Language, Culture: Verbal Acrobatics and Social Technology" *Journal of Legal Pluralism & Unofficial Law* 41(1998): 15.

<sup>23</sup> Linda Tuhiwai Smith, *loc.cit.*

<sup>24</sup> Hugo Slim et.al, *Listening for a Change: Oral Testimony and Community Development* (Philadelphia: New Society Publishers, 1995).

<sup>25</sup> Sally Falk Moore, 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology 1949-1999,' *Journal of the Royal Anthropological Institute* 7, no.1 (2001): 95.

<sup>26</sup> Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), 30.

<sup>27</sup> James Tully, 'Political Philosophy as a Critical Activity,' *Political Theory* 30, no. 4 (2002): 533, 547.

<sup>28</sup> *Ibid.* 552

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

within which the investigation into Australian Indigenous legal orders can be carried out.

A discussion on the preferred theoretical approach to methodology necessarily includes reference to a wider definition of methodology. This means going beyond the conventional and practical aspects of data gathering, and referencing the world views of stakeholders in research endeavours. Methodology is defined as:

a system of methods and rules that facilitate the collection and analysis of data. It provides the starting point for choosing an approach made up of theories, ideas, concepts and definitions of the topic, therefore the basis of a critical activity consisting of making choices about the nature and the character of the social world.<sup>31</sup>

This definition emphasises that methodology in research refers to the ‘reasoning that informs particular ways of doing research, or the principles underlying the organisation of research’.<sup>32</sup>

Regarding research into Indigenous legal orders, recent ground-making comparative scholarship has pointed out the inadequacy of current comparative law methodology to cope with the increasing complexity of stateless legal orders in a legal intercultural world. Specifically, given the scarcity of comparative research on Australian Indigenous constitutionalism, the main difficulty facing any inquiry into the topic is the lack of a clear explanation of a methodological framework and associated research paradigm to engage with the study and analysis of the subject. Without such a framework, inquiries carried out by non-Indigenous researchers into Indigenous legal traditions might be compromised, even subconsciously, both at the level of the research process itself and data interpretation, by the European normative/legal assumptions at the core of current academic Western legal ontology and epistemology on what constitutes law and where it can be found.<sup>33</sup>

The methodological problem is interrelated with the ontological and epistemological dimensions of comparative law. As these terms are not frequently used in legal studies, it is beneficial to provide a basic definition. Ontology is concerned with the existence of things; the term is understood in its widest sense and thus, embraces beliefs, desires and the like.<sup>34</sup>

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<sup>31</sup> Chris Hart, *Doing a Literature Review: Releasing the Social Science Research Imagination* (London: Sage, 1998), 28.

<sup>32</sup> Gale Miller and Robert Dingwall, *Context and Method in Qualitative Research* (London: Sage, 1988), 2.

<sup>33</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Oxford: T Weir trans, Oxford University Press, 3<sup>rd</sup> ed, 1998), 34.

<sup>34</sup> Jean-Michael Berthelot ‘Programmes, Paradigms, Disciplines: Pluralité et Unité des Sciences Sociales’ in *Épistémologie des Sciences Sociales*, ed. Jean-Michael Berthelot (Paris: Presses Universitaires de France, 2001), 457, 550.

Epistemology is concerned with knowledge of things.<sup>35</sup> So while ontology deals with *what exists*, epistemology deals with the basic question, how we acquire *knowledge of what exists*.<sup>36</sup> These ontological and epistemological dimensions become evident the moment two fundamental questions associated with comparing Australian Indigenous legal orders are posed: What kind of knowledge is needed for undertaking comparative researches? How and to what extent, that knowledge can be located? Worded more directly, those dimensions emerge when the researcher is faced with the question of what comparing, and what should consider when doing so.<sup>37</sup>

According to Legrand, both questions can only be answered from the socio-cultural context in which the law operates.<sup>38</sup> Generally, understandings of legal systems or legal orders are hindered when they are analysed in isolation from their legal and non-legal, social context. Legal scholars and lawyers educated in their legal system have largely acquired knowledge of legal contexts through their legal education, familiarity with the national, regional and local culture, and thorough their general education and socialisation in the relevant communities. Subconsciously, this knowledge of shared values and worldviews plays a role in the way legal systems are understood, interpreted and handled.

While this is a problem in terms of simply understanding the law of remote legal cultures, a more hidden problem lies in misunderstanding apparently identical or comparable rules that have, in practice and because of their context, a completely different scope.<sup>39</sup> The thrust of the matter is the assumption that to have knowledge of legal systems is to have knowledge of legal rules. Likewise, the debate in legal theory has focused on what constitutes valid sources of legal rules. However, this rule-thesis is epistemologically vulnerable, and recourse to a strictly internal rule-thesis of what constitutes law becomes problematic for comparatists. Susskind argues that comparative law will never move beyond being an exercise in comparing rules until the rule-thesis, which has been the dominant model of what constitutes legal knowledge, is abandoned as the sum total of legal knowledge.<sup>40</sup>

The rule-model is questioned by Legrand. He supports his argument by moving beyond the orthodoxy of positive law. Positioning his argument in the scholarly tradition of 'law as culture', Legrand's definition of law

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<sup>35</sup> *Ibid.*

<sup>36</sup> See generally Pierre Legrand, *Le Droit Compare* (Paris: Presses Universitaires de France, 1985); *Épistémologie du Droit* (Paris: Presses Universitaires de France, 1994).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Konrad Zweigert and Hein Kötz, *op.cit.*

<sup>40</sup> Richard E Susskind, *Expert Systems in Law* (Oxford: Oxford University Press, 1987) 78–79.

embraces the ‘deep structures of legal rationality’.<sup>41</sup> Positive rules for Legrand are merely superficial. Any kind of comparative law that seeks to investigate culture and *mentalite* must, therefore, by its very nature, be interdisciplinary.<sup>42</sup> While this alone might not imply a need to have recourse to epistemology and philosophy in the natural science, it suggests social science theory ought not to be ignored.<sup>43</sup> In light of the foregoing, it emerges the necessity of identifying the relevant context for understandings of Indigenous legal orders that are consistent with their chthonic legal culture. This leads to the question of what extent does the environing legal history, legal culture, the social and economic context need to be considered. The relevance of those contexts is rarely explicitly raised or discussed in domestic research. According to the topic, different contexts may have diverging relevance. Occasionally, some more theoretical research, such as legal history and legal sociology, may be available, but an overall theoretical framework is lacking. There is the need to work out a theory of relevant context that allows comparative law to be carried out meaningfully, at the deeper level of the underlying lifeworlds of the legal orders investigated. Deeper level comparison minimises the risk of cultural bias when analysing legal systems/orders distinct from our own.

Legrand argues that comparative law is, in essence, a hermeneutical exercise.<sup>44</sup> The task of comparatists is not simply to compare rules, as these are nothing more than ‘strings of words’, the surface appearance of law.<sup>45</sup> The comparatists must reach below their surface to discover the cultural *mentalite* these rules express. In other words, it is not the rule itself that should be the focus of comparison but what the rule signifies in terms of the political, social, economic and ideological context from which it has emerged.<sup>46</sup>

Berthelot explains that the hermeneutical scheme involves a vertical relationship between two elements, A and B, in which A is the signified (what it expresses) and B is the signifier (what it is).<sup>47</sup> ‘Deep structure of legal rationality’ means that beneath the surface rules (the signifier A) lies a set of deep structures that act as the signified B.

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<sup>41</sup> Piere Legrand, “European Legal Systems Are Not Converging,” *International and Comparative Law Quarterly* 45, no.1 (1996): 60–1.

<sup>42</sup> *Ibid.*

<sup>43</sup> John Bell, *French Legal Cultures* (London: Butterworks, 2001), 1–24.

<sup>44</sup> Pierre Legrand, *Le Droit Compare, op.cit.*

<sup>45</sup> Pierre Legrand, “The Impossibility of Legal Transplants,” *Maastricht Journal of European and Comparative Law* 4, no.2 (1997): 111.

<sup>46</sup> *Ibid.*

<sup>47</sup> Jean-Michael Berthelot, *L’Intelligence du Social* (Paris: Presses Universitaires de France, 1996) 72.

Scheme 1



A= surface rules (the signified, what it expresses).

B= deep structures beneath the surface rules (the signifier, what is).

In other words, when it reaches the required depth, the deep vertical hermeneutical approach will encounter a set of structures that form a scheme of intelligibility—the structural scheme—in which properties and relations ‘become signs’, or elements, of a system operating as a code.<sup>48</sup> It is in relation to these deep structures that epistemological work in the social science discipline has relevance for the law. Recent sociological studies that reflect Indigenous critical perspectives in research and do not approach the study of Indigenous systems of governance from a purely descriptive, positivist point of view, can be the fundamental starting point for devising the relevant methodological contexts within which to carry out the deep level comparative research into Indigenous legal orders.<sup>49</sup>

### **2.3. Theoretical Approach to Methodology: Indigenous Standpoint Theory**

#### **2.3.1 Indigenous Standpoint Theory**

The relevant methodological context within which to carry out the deep level comparative investigation into Australian legal orders is multidisciplinary and interdisciplinary in essence. As a result, the relevant methodological context positions itself between the discipline of legal and social science in that it has required a specific methodology able to combine the use of legal discourse and social science discourse. This methodology is the necessary outcome of the reflective premise discussed above and has

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<sup>48</sup> *Ibid*, 70.

<sup>49</sup> See especially Dennis Foley, “Indigenous Standpoint Theory: An Indigenous Epistemology,” *Journal of Australian Indigenous Issue* 5, no.3 (2002):3; “A Dichotomy: Indigenous Epistemological Views,” *Journal of Australian Indigenous Issues* 6, no.3 (2003):13; “Indigenous Epistemology and Indigenous Standpoint Theory,” *Social Alternatives* 22, no. 1(2003): 44, 52; “An Examination of Indigenous Australian Entrepreneurs,” *Social Alternatives* 8, no. 2 (2003): 133; see also Mark Van Hoecke, *Epistemology and Methodology of Comparative Law* (Oxford: Hart, 2004), 73–77.

been developed by acknowledging an Indigenous standpoint theoretical approach to research.<sup>50</sup> Specifically, Indigenous standpoint theory is a research methodology that is defined by Indigenous worldviews, knowledge and core values and has been developed to address the need for an Indigenous epistemological approach to Indigenous research in Australia.<sup>51</sup> It is an Australian centred approach to research methodology related to 'being Indigenous Australian' and is connected to Indigenous Australian philosophy and principles. It takes for granted the validity and legitimacy of the Indigenous Australian worldviews, knowledge and core values, and is concerned with the struggle for autonomy over their own cultural wellbeing.<sup>52</sup>

To fully understand the basic premises of the Indigenous standpoint methodological framework it is helpful to briefly consider its connection to critical social theoretical approaches to methodology; particularly, critical theory and feminist standpoint theory.<sup>53</sup> Critical theory and feminist standpoint theory are emancipatory and liberating epistemologies in their deconstruction process. They state that there is more than just one worldview and interpretation and have triggered the resurgence of Indigenous theoretical standpoints. These emancipatory theories have been foundational for conceptual and philosophical re-elaboration of Indigenous approaches to knowledge in a format and argument with which the non-Indigenous scholar is familiar.<sup>54</sup>

### **2.3.2 Critical Theory and Feminist Standpoint Theory**

The critical theory focuses on self-reflection with the aim of freeing those being researched from the restrictions and repressive ideologies of the social order they live in.<sup>55</sup> The theory's fundamental goal is thus to 'free individual groups and society from conditions of domination, powerlessness and oppression, which reduce the control over their own lives'.<sup>56</sup> Critical theory, as a liberating epistemology to foster human emancipation through the reformation of the society, questions positivist scientific methods. Yet, as

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<sup>50</sup> Michael Crotty, *The Foundations of Social Research: Meaning and Perspectives in the Research Process* (London: Sage Publications, 3<sup>rd</sup> ed, 2003), 10.

<sup>51</sup> Dennis Foley, 'Indigenous Standpoint Theory: an Indigenous Epistemology', *op.cit.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Aileen Moreton-Robinson, *Talkin' Up to the White Women: Indigenous Women and Feminism* (Brisbane: University of Queensland Press, 2000); Lester-Irabinna Rigney, "Internationalisation of an Indigenous Anti-Colonial Cultural Critique of Research Methodologies. A Guide to Indigenist Research Methodology and its Principles," *Journal of Native American Studies* 14, no.2 (1999): 109; Linda Tuhiwai Smith, *op.cit.*

<sup>55</sup> Brian Fay, *Critical Social Science: Liberation and Its Limits* (New York: Cornell University Press, 1987).

<sup>56</sup> Lester-Irabinna Rigney, *op.cit.*

Rigney opines, critical theory maintains a racialised epistemological approach, as do all dominant theories, in its overtly political intentions.<sup>57</sup>

Likewise, as the critical theory, the historical development of feminist standpoint theory has also evolved with a liberating agenda. The theory's basic assumption is that certain socio-political positions occupied by women can become 'sites of epistemic privilege' and thus can trigger questionings about those who are socially and politically marginalized, and also those who, by means of social and political privilege, are described as oppressors.<sup>58</sup>

The feminist standpoint theory is the evolutionary base of Indigenous standpoint. Harding has espoused a concept of non-gender Indigenous standpoint that both Smith<sup>59</sup> and Moreton-Robinson<sup>60</sup> have developed. They have taken feminist standpoint to another level in relation to a standpoint within Indigenous research. In *Decolonising Methodologies*,<sup>61</sup> Smith suggests that the question about connections between research, knowledge and power that form part of the feminist and Marxist critique, also resonate with Indigenous communities and their aspiration to self-determination.<sup>62</sup> Particularly relevant to Indigenous research are feminist critiques within the field of critical theory itself that challenge critical theorists to recognise their own marginalising practices. This requires researchers adopting reflective research practices and engaging in 'a process of critical awareness, reflectivity and openness to change'.<sup>63</sup>

Informed by critical social and emancipatory approaches to research, Indigenous standpoint theory can thereby be understood as a critical theory that is situated within an Australian Indigenous specific context. Paraphrasing Smith, this theory can be conceptualised as a local theoretical perspective through which the emancipatory goal of critical theory, in a specific historical, political and social context, can be achieved.<sup>64</sup> It draws on critiques of positivism and liberalism but is oriented by an Indigenous Australian worldview and connected directly to Indigenous Australian ontology, epistemology and axiology.

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<sup>57</sup> *Ibid*; Nancy Weiss Hanrahan, *Difference in Time: A Critical Theory of Culture* (London: Praeger, 2000).

<sup>58</sup> Sandra Harding, *Feminism and Methodology* (Bloomington: Indiana University Press, 1987); Patrick Fuery and Nick Mansfield, *Cultural Studies and Critical Theory* (Oxford: Oxford University Press, 2000).

<sup>59</sup> Sandra Harding, *ibid.*; Dorothy E Smith, *Writing the Social: Critique, Theory, and Investigations* (Toronto: University of Toronto Press, 1999).

<sup>60</sup> Aileen Moreton-Robinson, *op.cit.*; Aileen Moreton-Robinson, "Towards an Australian Indigenous Women's Standpoint Theory," *Australian Feminist Studies* 28, no.78 (2013):331-347.

<sup>61</sup> Linda Tuhiwai Smith, *op.cit.*

<sup>62</sup> *Ibid*, 69.

<sup>63</sup> *Ibid*, 71.

<sup>64</sup> *Ibid*, 74.

### 2.3.3 Research Paradigm

In this paper, such an informed methodological framework is deployed to develop a standpoint research paradigm for engaging with the study and analysis of Australian chthonic legal orders. The paradigm encompasses Indigenous worldviews on what reality is, how knowledge of it is acquired, the values underlying Indigenous research and is framed within Indigenous worldviews and is informed by Indigenous ontology, epistemology and axiology. It reflects Wilson's definition of paradigm as 'a set of beliefs about the world and about gaining knowledge that goes together to guide people's actions as to how they are going to go about doing their research'.<sup>65</sup>

The following sub-sections expound the essential elements forming such a standpoint research paradigm.

#### 2.3.3.1. Indigenous Worldview

Garrouette advocates an approach to research into chthonic traditions that is rooted in Indigenous peoples' roots and principles. In light of Garrouette's approach, which she conceptualises as 'radical indigenism', a necessary precondition to developing such a paradigm is a consideration of Indigenous worldviews.<sup>66</sup> Worldviews have been described as mental lenses that are entrenched ways of perceiving the world.<sup>67</sup> In essence, worldviews are cognitive, perceptual and affective maps that people continuously use to make sense of the social landscape and to find their way to achieve their goals. They are developed throughout a person's lifetime by a process of socialisation and are encompassing and pervasive in nature. Yet, they are usually subconsciously and uncritically taken for granted as being 'the way things are'.<sup>68</sup> In any society, there is a dominant worldview that is held by most members of a particular society, who do not take in consideration existing alternative worldviews.

Indigenous worldviews differ from the dominant Western worldview. Western worldviews stem from positivism, according to which the most reliable source of knowledge is information acquired and verified by logical, scientific, or mathematical methods. The knowledge that it is not so channelled is regarded with a great deal of suspicion and discarded as scientifically irrelevant. By contrast, Indigenous worldviews are more subjective as it is grounded in metaphysical beliefs. As a result, their methods to acquire knowledge are less prescriptive, as they sustain the

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<sup>65</sup> Sandra Wilson, "What is Indigenous Research Methodology?," *Canadian Journal of Native Education* 24, no.1 (2001: 175; *Research is Ceremony: Indigenous Research Methods* (Halifax: Fernwood Publishing, 2008).

<sup>66</sup> Eva Marie Garrouette, *Real Indians: Identity and the Survival of Native America* (Berkeley: University of California Press, 2003).

<sup>67</sup> Manulani Aluli Meyer, "Indigenous and Authentic: Hawaiian Epistemology and the Triangulation of Meaning," in *Handbook of Critical and Indigenous Methodologies*, K Normann et al, ed. (London: Sage, 2008), 217-232; M E Olsen, D G Lodwick and R E Dunlap, *Viewing the World Ecologically* (San Francisco: Westview Press, 2002).

<sup>68</sup> *Ibid.*

validity of many ways of learning about the world and our place within it. Indigenous standpoint is thus committed to epistemological pluralism in the acknowledgement that there are diverse 'versions of existence', diverse ways of being in the natural world, and subsequently, diverse experiences to appreciate and respect.<sup>69</sup>

Likewise, the system of knowledge stemming from the Indigenous worldview is opposed, almost incommensurable, to a Western worldview of reality and scientific system of knowledge. While Western science is based on written academic traditions, traditional knowledge is transmitted orally by the Elders from generation to generation.<sup>70</sup> Further, Western science isolates its objects of study from their living natural context and investigate them in simplified and controllable experimental environments, while traditional knowledge always depends on its context and particular local conditions.<sup>71</sup>

Despite the differences in worldviews and need to address such differences, Gill notes there is great conceptual anxiety when it comes to dealing with Indigenous worldviews. He suggests that 'it is frequently claimed by philosophers that Indigenous peoples and other non-literate peoples do not really have a coherent view of the world because they have not yet conceived of the possibility and/or necessity of sequential and critical thought'.<sup>72</sup> Thus, when dominant academic circles describe understandings of the world, they describe those understandings from Eurocentric worldviews contexts and perspectives and discard Indigenous perspectives and understandings as irrelevant.<sup>73</sup> Indeed, Eurocentric thought has come to mediate the entire world to the point at which worldviews that differ from Eurocentric thought are relegated to the periphery, if they are acknowledged at all.<sup>74</sup>

However, there is a strand of Western contemporary philosophical and anthropological thinking that strongly contexts the Eurocentric perspective. Feyerabend questions the widespread assumption that only Western science holds the criteria to determine the truth. He points out that any form of

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<sup>69</sup> *Ibid.*

<sup>70</sup> Jerry H Gill, *Native American Worldviews: An Introduction* (New York: Humanity Press, 2002).

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*, 18.

<sup>73</sup> James Y Henderson, "Challenges of Respecting Indigenous World Views in Eurocentric Education," in *Voice of the Drum: Indigenous Education*, ed. Roger Neil (Manitoba: Kingfisher, 2000), 76.

<sup>74</sup> *Ibid.* 59; see also Marie Battiste and James Y Henderson, *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich, 2000); James Morris Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (New York: Guilford Press, 1993); Martin Nakata, "But What Does it Mean?" *Journal of Australian Indigenous Issues* 15(1998): 1.

knowledge only makes sense within its own cultural context.<sup>75</sup> Likewise, British anthropologist Bateson metaphorically compares knowledge about the material world to a map and the terrain the map describes: the map itself is not the terrain, but only one representation of it.<sup>76</sup> Just as different maps can give accounts of the same territory, so too can different forms of knowledge about the material world. Its actual representation ultimately depends on the observer's view.<sup>77</sup>

### 2.3.3.2. Indigenous Ontology, Epistemology and Axiology

Grounded in Indigenous worldviews, Wilson suggests there are three essential components that make up a research paradigm: 'ontology or a belief in the nature of reality. Your way of being, what you believe is real in the world; epistemology, which is how you think about that reality; and axiology, which is a set of morals or a set of ethics'.<sup>78</sup>

Table 1 represents the relationship between the three components:

Table 1: Wilson's research paradigm

<b>Ontology</b>	<b>Epistemology</b>	<b>Axiology</b>
What is reality?	→	How can reality be known?
	→	What are the values in research?

A standpoint research paradigm includes Wilson's essential components.

#### (a) Indigenous Ontology

Indigenous ontology is grounded in an holistic lifeworld view that interconnects the elements of the earth and the universe, animate and inanimate, whereby people, the plants and animals, landforms and celestial bodies are interrelated. It is defined by the interconnectedness and consequent interrelationship of three worlds: the physical, the human and the sacred.<sup>79</sup> The interrelationship is illustrated in Figure 1.<sup>80</sup>

<sup>75</sup> Paul Feyerabend, *Against Method: Outline of an Anarchistic Theory of Knowledge* (London: Verso, 1993).

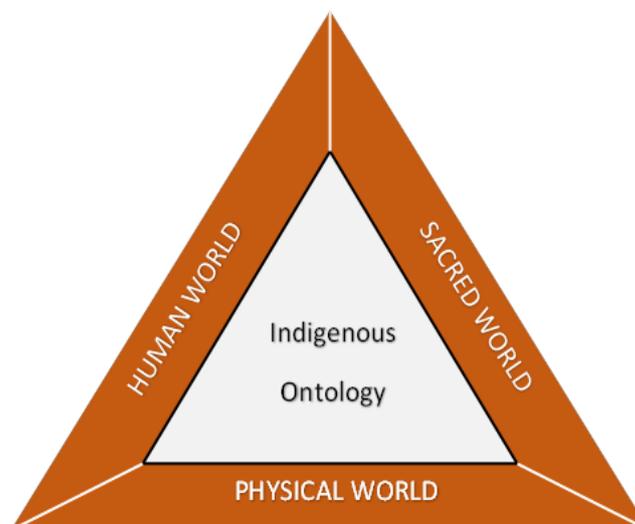
<sup>76</sup> Gregory Bateson, *Mind and Nature: A Necessary Unity* (Toronto: Clarke, Irwin & Company, 1979).

<sup>77</sup> *Ibid.*

<sup>78</sup> Sandra Wilson, *op.cit.*, 179.

<sup>79</sup> Errol George West, 'Speaking Towards an Aboriginal Philosophy' (Paper presented at the Indigenous Philosophy Conference, Linga Longa, 1998), 12.

<sup>80</sup> Figure adapted from Dennis Foley, "Indigenous Epistemology and Indigenous Standpoint Theory, *Social Alternatives* 22, no. 1(2003): 44, 46.



*Figure 1: Indigenous ontology*

These three worlds are best explained by Foley as follows: the physical world, which is the base, is the land that includes food, culture, and spirit and Indigenous identity.<sup>81</sup> The physical world contains the land, the sky and all living organisms. The human world includes the knowledge of Ancestral Law, normative and legal relationship between people, family and rules of behaviour, ceremonies and their mechanism for change.<sup>82</sup> The sacred world is not located entirely in the metaphysical sphere; rather, it is grounded in the spiritual and physical wellbeing of all creatures, Ancestral Law and its maintenance and care of the country.<sup>83</sup>

Indigenous ontology is defined by the interconnection of the physical, the human and the sacred worlds. Creation narratives encode meanings on how this interconnectedness between the three worlds is foundational for the healthy maintenance of the natural, social and spiritual dimensions of existence. The narratives recount how Ancestral Beings created order out of chaos, form out of formlessness and life out of lifelessness, and as they did so they established the foundational Law to maintain order and sustainability.<sup>84</sup> The Law establishes relationships and responsibilities between people, for the country including water sources, landforms and the species, and for their ongoing relationship with the ancestor spirits themselves. Indigenous ontology is based in connectedness to the time of creation, originating from eternity, the Ancestral Beings and the law. Thus, the Law is a moral/normative/legal code originating from eternity that the

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<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> See Vickie Grieves, "Aboriginal Spirituality: Aboriginal Philosophy, The Basis of Aboriginal Social and Emotional Wellbeing." (Discussion Paper No. 9, Cooperative Research Centre for Aboriginal Health, Darwin, 2009).

Ancestral Beings laid down, which governs the conduct of human life in itself and in its relationship with the spiritual and natural world.

The awareness of Indigenous worldviews and, in turn, ontological understandings of what exists—of reality—lead to an understanding that those worldviews and ontologies can be completely divergent from the Western Eurocentric views. Further, the divergence between generalised mainstream Indigenous worldviews and ontologies and generalised mainstream Australian-European ontology is significant enough to provide a different foundation to a research paradigm designed in light of Indigenous worldviews and values systems.

### **(b) Indigenous Epistemology**

‘Indigenous epistemology’ explains how Indigenous peoples come to know what they know. As a concept, it refers to an overarching Indigenous theory of knowledge. Within Indigenous academia, epistemology has been defined as the distinct beliefs people hold about knowledge and how knowing is conceptualised.<sup>85</sup> Thus, epistemology is a philosophy of what counts as knowledge, which, in turn, is dependent on what one believes to be ‘truth’ and ‘reality’.<sup>86</sup> Proceeding from the general to the particular, in Australia, there are diverse Australia Indigenous epistemologies and all are located in their own community. Each language group, each community has its own way of organising and applying knowledge. Until a theoretical conceptual framework on a transregional Indigenous epistemology based on commonalities of cultural knowledge is elaborated, developed and defined, it would be more appropriate to think and speak of Indigenous epistemologies as location-specific, each with its own distinctive knowledge, wisdom and learning processes.

With this caveat in mind, Kovach has synthesised the thoughts of several Indigenous authors who converged in identifying the following core of common defining characteristics of Indigenous epistemology.

#### **(i) Fluidity of Knowledge**

Indigenous epistemology is characterised by fluidity in knowing, consequential to the oral mode of transmission of knowledge from generation to generation by storytelling. It emerges from traditional languages emphasising verbs. According to Martin, Indigenous epistemology is a fluid way of knowing embodied in the body and, in this sense, part of the way of being and tied to ancestral patrimony, which is considered a

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<sup>85</sup> Manulani Aluli Meyer, *loc.cit*; Veronica Arbon, *Arlathirnda Ngurkarnda Ityirnda: Being-Knowing Doing: De-Colonising Indigenous Tertiary Education* (Teneriffe: Post Pressed, 2008).

<sup>86</sup> Fred Dretske, ‘Perception’ in Robert Audi (ed), *The Cambridge Dictionary of Philosophy* (Cambridge: Cambridge University Press, 2nd ed, 1999), 654–658.

living expression of the never-ending interaction of the self in the world, and vice versa.<sup>87</sup>

(ii) Web of Connections

Indigenous epistemology arises from interconnections between the human world, the spirit, and inanimate entities. Arbo, an Arabana scholar, defines Indigenous epistemology, as a 'highly enriched' set of knowledge and experiences, derived from the connection and relationship among the human world with the spiritual and natural world'.<sup>88</sup> The natural domain local includes knowledge about soils, plants, climates and animals. The social domain includes knowledge about local organisation, local leadership and the management of natural resources, mutual help, conflict resolution, gender relations, art and language. The spiritual domain includes knowledge and belief about the invisible world, divine beings, spiritual forces and ancestors, and translates into values and related practices, such as rituals and ceremonies. None of these domains exists in isolation; rather, a notion of unity pervades them all. This notion of unity makes the natural, social and spiritual worlds inseparable and integrated. The epistemological framework so derived guides Indigenous people in fulfilling their obligation in life within a relational world. Knowledge and knowing is a never-ending intellectual process translated into ceremonies, everyday life and storytelling. Notably, some of those stories capture sacred knowledge that can only be told by those who have a ceremonial responsibility to reveal them or obligation to tell them.<sup>89</sup>

(iii) Ways of Knowing

Indigenous epistemology is garnered through dreams and visions. As a way of knowing, Indigenous epistemology is subjective, intuitive and introspective; it is shaped by values, beliefs, experiences, blood memories, intuition, family and the teachings and spiritual pathways pursued by Indigenous people. Derived from the interrelations between the human world, the spirit world and inanimate entities, it is embedded and guided by perceptual experiences and includes, as a major component, a form of experiential insight contextualised within a person's inner space and connected with happenings. Key people who can preside over phenomena of experiential insight are the Elders and practitioners who have undergone processes to develop this ability. Their findings are knowledge, and that

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<sup>87</sup> Margaret Kovach, "Emerging From the Margins: Indigenous Methodologies," in *Research as Resistance: Critical, Indigenous, & Anti-Oppressive Approaches*, ed. Leslie Brown and Susan Strega (Toronto: Canadian Scholars' Press, 2005), 19–36.

<sup>88</sup> Veronica Arbon, *loc.cit.*

<sup>89</sup> Marlene Brant-Castellano. "Updating Aboriginal Traditions of Knowledge" in *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World*, ed. George J Sefa et.al, (Toronto: University of Toronto Press, 2000), 21–36.

knowledge is encoded in epistemological community social mores to preserve and transmit it to future generations. Another aspect of Indigenous epistemology is perceptual experiences. While a perception has been defined as ‘the extraction and use of information about one’s environment (exteroception) and one’s own body (interoception)’,<sup>90</sup> it is considered more inclusively within Indigenous epistemology to ‘include the metaphysics of inner space’.<sup>91</sup> In other words, perception is understood to include a form of experiential insight. Through inward exploration tapping into creative forces that run through all forms of life, individuals come to subjectively experience a sense of wholeness.<sup>92</sup> This exploration is an experience in context, where the context is the self in connection with happenings, and the findings from such an experience are knowledge. Happenings may be facilitated through rituals or ceremonies that incorporate dreaming, visioning, meditation, and prayer. The findings from such experiences are encoded in community praxis as a way of synthesising knowledge derived from introspection.<sup>93</sup>

Hence, for Indigenous People, epistemology would encompass the spiritual and natural world, in their dimension of relatedness with, and interconnectedness to the human world. According to Martin, it would encompass the spiritual realm through practical applications of inner space discoveries. It would include a subjectively based process for knowledge acquisition/development, and a deeply personal ‘way of knowing’ expressed via traditional languages and knowable through dreams, visions, rituals, and ceremonies. The acquired knowledge would then be encoded in storytelling and transmitted as law from generation to generation through teachings.<sup>94</sup>

### **(c) Indigenous Axiology**

Building on Wilson’s outline of Atkinson’s recognition of certain values, ethics, and principles shaping research paradigms guiding inquiries into Indigenous realities, Hart has identified a core of overarching values to be held and actions that reflect those values. What follows is a list of the main values relevant for a non-indigenous researcher and the manner in which they should inform studies involving empirical data generation, such as

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<sup>90</sup> Fred Dretske, *op.cit.*, 654.

<sup>91</sup> Willie Ermine, “Aboriginal Epistemology,” in *First Nations Education in Canada*, ed. Marie Battiste and Jean Barman, (Vancouver: UBC Press, 1995), 101–112.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, 104.

<sup>94</sup> Karen Martin (Booran Mirraboopa), “Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Research,” *Journal of Australian Studies* 27, no.76 (2003): 203.

fieldwork, interview and focus groups, as well as studies that are theoretical and thereby archival and textually driven.<sup>95</sup>

(i) Reciprocity and responsibility

Both values need to permeate empirical and theoretical research, and can be demonstrated in the ways researchers share the finding of their research with the interested community, whose society has been analysed with the intent of supporting a community. Indigenous research must be for the benefit of the researchers' community or the wider Indigenous Australian community. Reciprocity and responsibility enable knowledge to be recorded for the community, not academia. The participants are the owners of the knowledge, not the researcher.<sup>96</sup>

(ii) Respect and safety

These values demand addressing confidentiality in a manner desired by the research participants. In theoretical studies, those values require the researchers be well versed in Indigenous worldviews, ontologies and epistemologies to ensure research into Indigenous societies are not carried out according to Western axiological approaches to research.

(iii) Resistance

Resistance is the emancipatory imperative in Indigenist research. Both empirical and theoretical research must be undertaken as part of Indigenous Australia's struggle for recognition and self-determination. This value stands in contrast with the depiction of Indigenous peoples as oppressed victims in need of charity by challenging the power and control initial research has had on knowledge over the 'other'.<sup>97</sup>

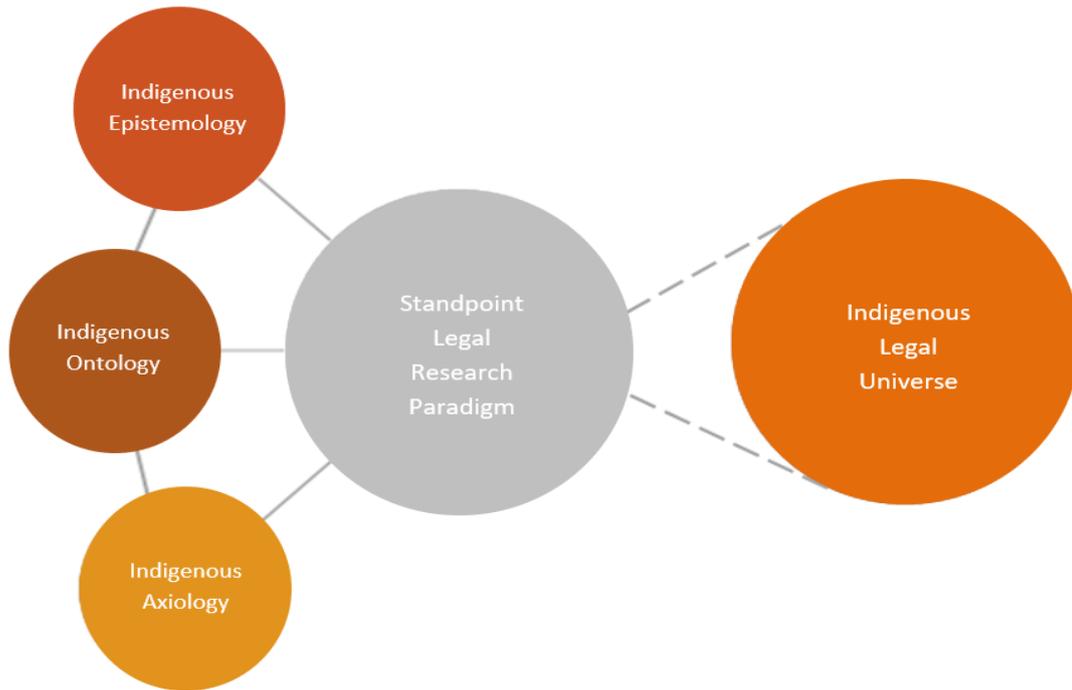
In consideration of the Indigenous standpoint theory approach to research and the Indigenous ontological, epistemological and axiological perspectives, the methodological model for investigations into indigenous legal orders is set out in Figure 2. The model is simple and interactive in that it positions itself within, and inter-relates with, the Indigenous legal culture and the normative universes which the Australian chthonic legal orders inhabit.

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<sup>95</sup> Michael Anthony Hart, 'Indigenous Worldviews, Knowledge, and Research: The Development of an Indigenous Research Paradigm,' *Journal of Indigenous Voices in Social Science* 1, no.1 (2010): 9-10.

<sup>96</sup> Michael Anthony Hart, *Seeking Mino-Pimatisiwin: An Aboriginal Approach to Helping* (Halifax: Fernwood Publishing, 2002).

<sup>97</sup> Lester-Irabinna Rigney, *loc.cit.*



*Figure 2: Research paradigm*

#### **2.3.4. Justification for Standpoint Methodological Framework**

A standpoint methodological framework so elaborated is justified by the necessity of devising new epistemological models to guide understandings—and theoretical elaboration—of Australian Indigenous orders consistently and coherently with their ontological, epistemological and axiological ‘universe’.<sup>98</sup> For several years a ‘legal’ ethnocentric approach to Indigenous traditional legal orders and their law has dominated the research methodological framework. In the context of this paper, a ‘legal’ ethnocentric approach is meant the evaluation of chthonic, non-Westphalian legal systems according to preconceptions originating in the Western doctrinal and jurisprudential framework of analysis, without mechanisms to differentiate the Indigenous foundational normative principles and values or allowing consideration of any Indigenous legal ontology, epistemology and axiology.<sup>99</sup>

Research into Indigenous societies in general, has traditionally benefited the researcher and the knowledge universe of the researcher’s academic community. When undertaking research either across cultures or within a minority culture, it is critical to recognise the power dynamics embedded in

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<sup>98</sup> *Ibid*, 102.

<sup>99</sup> Martin Nakata, “Anthropological Texts and Indigenous Standpoints,” *Australian Aboriginal Studies*, Australian Institute of Aboriginal and Torres Strait Islander Studies 4(1998):3; Lester-Irabinna Rigney, *loc.cit.*

the relationship with the reality that is being investigated. Researchers are repositories of privileged information that can be either interpreted within an overt theoretical framework, but also in terms of a covert ideological framework. They can ignore, overemphasise and draw conclusions on assumptions, subconscious value judgements and errors of perspectives rather than factual data. They have the privilege to expand the intellectual horizon or perpetuate ignorance. If the goal of academic inquiry is to develop, elaborate, deconstruct, reformulate or advance thinking, ideas, understanding and knowledge, then the choice of a standpoint methodological framework for investigations into Australian chthonic legal orders is justified. Certainly, such a methodological framework has no power to change the dynamics of power relationships, as Indigenous peoples still experience subjection. However, it does forge a novel legal 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 comparative law research.

Such a methodology, as applied in any inquiry undertaken by a non-Indigenous researcher, rides the flows of pragmatism evident in the proposal for reframing legal research paradigms to engage with stateless legal orders suggested by an increasingly broad spectrum of non-Indigenous academics. They share the commitment to move beyond the state-centred legal paradigm of what defines a legal system and law. It is a commitment that directs 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 explicitly normative, pragmatic terms. Likewise, from a legal scholarship perspective, the methodological position that this paper is trying to develop is one that examines Indigenous legal orders and their law as 'signifying practices' and 'schemes of intelligibility', where they 'become signs' of holistic systems of moral, political and legal authority operating as a binding code for living, commensurable in terms of legal theory.

### **3. Conclusion**

Given the lack of a clear articulation of a research paradigms and methodological models for investigating Australian Indigenous legal traditions, the aim of this paper has been to developing one. The paper has argued that in establishing specific guidelines in the preparation of the research methodology, priority must be given to Indigenous approaches to research. Specifically, the paper has shown that to undertake research into Indigenous legal orders, there is a need to frame the inquiry within a research methodology informed by an Indigenous standpoint with a research

paradigm shaped and defined by Indigenous worldviews, ontology, epistemology and axiology.

The paper has considered how without such a methodological lens, potentially, the outcome of any research could end up straining the analysis of Indigenous legal traditions for only those fragments that fit the dominating Western legal perspectives, with a research outcome that, either consciously or subconsciously, reinforces certain strands of scholarly imperialism in the legal academia. The elaboration of such a methodological framework and research paradigm is consistent with a self-reflective approach to research. It assists the process of framing the analysis of Australian chthonic legal orders within a research paradigm that is culturally sensitive to the emic understanding of what a legal order is and what is for. In doing so, it favours conceptualisation and theorisation in a way consistent with those understandings. The standpoint methodological framework might be one of the keys for opening the ‘global legal oecumene’<sup>100</sup> of the contemporary world to Indigenous Australian legal orders as legitimate systems of governance on their own terms.

### **Acknowledgment**

Author is a Guest Lecturer and a Ph.D Student at Charles Darwin University School of Law, Australia. The views expressed herein are those of the author and do not necessarily represent the views of the institution for which she is affiliated with.

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<sup>100</sup> ‘Oecumene’ etymologically comes from the Greek, οἰκουμένη, *oikouménē*, and literally means ‘inhabited’. It was an ancient Greek term for the known world, the inhabited world, or the habitable world. See *Oxford English Dictionary* (Oxford University Press, 2<sup>nd</sup> ed, 1989). For the purpose of this thesis, ‘oecumene’ is used to refer to the normative/legal universe as a unified whole.

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