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Reimagining native reality, worldview and legal capital through the advancement of community cultural wealth in teaching customary law

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1 Introduction

As a point of departure, the chapter posits that the academic medium and the jurisprudence of customary law in particular, is not in all material respects a direct correspondence of the lived realities of the natives.[1] As a result, it is arguable that the jurisprudence of customary law is based on incorrect foundations and misunderstanding of that law's nuanced culture and meanings. Thus, it will be submitted in this chapter that the denial of epistemic capital of native culture into the South African law amounts to epistemicide.[2] To counter this denial and epistemicide, this chapter advances the notion of granting native culture and reality epistemic access and equality in the South African jurisprudence. A good start for that access would, in the opinion of the present author, be through a correct, native centred teaching of their world-views in academia. In the opinion of the author, this native centred teaching of customary law would require empirical research as proposed below.

1 See for example Monyamane 'Creating and sustaining a 'tunnel version' argument for the application of customary law – a language conundrum' 2022 *SAPL* 1-18. In it, the author argues that the popular customary law adoption represents officialdom and not the lived reality of the Bapedi people in particular.

2 Ramose 'In search of an African philosophy of education' 2004 *SAJHE* 156.

1.2 Points of departure

Care must be taken to heed the thoughts of Abdi, who has opined that the education of the colonisers was not meant to benefit the colonised nor serve their interest.[3] In fact, Abdi goes so far as to infer that colonial interests sustained itself through the creation of intellectual buffers from amongst natives.[4] These intellectual buffers advanced the interests of the colonisers at the expense of the illiterate native.[5] Despite the continued existence of these buffers, it is the view of this chapter that the identity, self-hood and the interwoven nature of custom and lived experiences of the natives is embedded nowhere clearer than in their communities and languages.

Still, before Abdi, Freire had long accepted that education is not value-neutral.[6] In South Africa Moloi appears to support this proposition in asserting that formal schooling is a form of alteration and subjugation of knowledge.[7] In law, the 'Roman-Dutching' of South African law and the subsequent loss of values by customary law[8] is a clear example of lack of value neutrality and the agency of intellectual buffers. This thought process is supported by McCasling and Breton who opine that '[t]he colonial system of laws was not designed with Indigenous values in mind or to favour Indigenous interests, nor does it inspire respect for how human beings are related'.[9] Equally significant is Modiri's characterisation of the Constitution as continuing the subordination of customary law and African jurisprudence as a whole.[10] In his view, South African law is premised on Western constructions of the law which is

3 Abdi 'Clash of dominant discourses and African philosophies and epistemologies of Education: Anti-colonial analyses' in Abdi (ed) *Decolonizing philosophies of education* (2012) 137.
4 As above.
5 As above.
6 Freire *Pedagogy of the oppressed* (2005) 54.
7 Moloi *Enhancing problem-solving skills in a Grade 10 – mathematics classroom by using indigenous games* (PhD in Education 2014 University of Free State) 17.
8 Ndima *Re-imagining and re-interpreting African jurisprudence under the South African Constitution* (LLD 2013 UNISA) 122.
9 McCaslin & Breton 'Justice as healing; going outside the colonizers's cage' in Denzin, Lincoln & Smith (eds) *Handbook of critical and indigenous methodologies* (2008) 524.
10 Modiri *The jurisprudence of Steve Biko: A study in race, law and power in the 'afterlife' of colonial-apartheid* (PhD in Law 2017 University of Pretoria) 76.

inclined towards treating law as a separate and independent field.[11] As a consequence, customary law jurisprudence is at the mercy of Western praxis of law under the guise of a supreme Constitution. In fact, to further point out the epistemic denial of African theory and knowledge systems, Ramose argues that the settlers did not consider the philosophy and or epistemology of natives worthy to be included in the foundational paradigms of South African education in general.[12]

Be that as it may, this chapter endorses the notion that humanness and being human are situated at the apex of a true system of customary law that embodies the cosmology of the natives.[13] However, instead of appreciating this fact and seeking reconciliatory grounds between customary law and their Roman-Dutch law, the settlers declared the Cape a *terra nullius*.[14] This arrogant historical fact birthed the 'Roman-Dutching' of South African law which continues to be the dominant paradigm of law to this day.[15] The disregard of native laws and ways of life had the adverse consequence that resulted in its loss of value.[16] Nevertheless, this fact alone does not suggest that people abandoned their customs and ways of life altogether. The *terra nullius* notion of the settler colonialists was not only arrogant but it was equally not feasible. The natives and their laws could not simply be thought away and disappear from the surface of their land. Wherefore, to truly provide epistemological access to natives in the academy, one must endeavour to gather the information at source instead of relying on the agency of intellectual buffers.

2 Ethnography – creating space for native voice in the academy

2.1 Introduction to ethnography

It is submitted above that the chapter is aligned to the notion that humanness and being human are situated at the apex of true laws of the natives. Emanating from this, it is therefore important to engage

11 As above 252.
12 Ramose (n 2) 138.
13 Ndima (n 8) 2.
14 Modiri (n 10) 73.
15 Ndima (n 8) 122.
16 As above.

in methodologies that will magnify this humanness. This, the chapter submits, cannot be attained through desktop and or doctrinal inquiries of native law. It is for this reason that the chapter invites educators to explore ethnography as a choice methodology to grant access and equality to native episteme. Ethnography is loosely defined as '[t]he act of observing, documenting and interpreting social life with the explicit aim of uncovering processes and meanings that undergird the [...] realities of everyday life'.[17] From this definition, it is apparent that the focal point of this methodology is a reflection on people's realities. However, it must be noted that ethnographic research is not only a way of hearing but also determines what counts as hearing.[18]

In that light, it is unsurprising that Schostak has noted that ethnography is often an abused term that for all intends and purposes is often deployed to fit the occasion necessitated by a specific author.[19] This, it would appear, suggests that it is a contested research design.[20] Hughes et al posits that this methodology's capacity to both 'illuminate and divide opinion', especially in the social sciences, anthropology, educational research *et cetera* is common discourse.[21] Thus, it is commonly accepted that this design is neither an innocent practice[22] nor is it pure.[23] Despite this propensity to both divide and illuminate opinions, this methodology, when correctly applied, is a measured desire to pursue new regimes of truth that is not only academically sound but will resonate with the lived experiences of the natives.[24] To safeguard its inherent bias and or prejudices, the quality criteria; *vis* credibility, confirmability and

17 Hughes et al (eds) *Contemporary approaches to ethnographic research* Vol I (2018) xxiii.
18 Hillyard 'Responding to text construction: Goffman's reflexive imagination' in Massey & Walford (eds) *Studies in educational ethnography* (1999) 59.
19 Schostak 'The Cr/eye of the witness' in Massey & Walford (eds) *Studies in educational ethnography* (1999) 128.
20 Hughes et al (eds) Vol I (2018) xxiv.
21 As above.
22 Soukup 'The postmodern ethnographic Flaneur and the study of hyper-mediated everyday life' in Hughes et al (eds) *Contemporary approaches to ethnographic research* (2018) 98.
23 Pfadenhauer & Grenz 'Uncovering the essence: The why and how of supplementing observation with participation in phenomenology-based ethnography' in Hughes et al (eds) *Contemporary approaches to ethnographic research* Vol II (2018) 187.
24 Denzin & Lincoln 'Critical methodologies and indigenous inquiry' in Denzin, Lincoln & L Smith (eds) *Handbook of critical and indigenous methodologies* (2008) 8.

dependability of both method and results, ought to be clarified to enable researches to achieve correct results.[25]

It is contended that the definition of ethnography used hitherto essentially underscores the personal experiences and or everyday realities of the people. Consequently, it is plausible that the experience or reality may lend itself to ambiguity in certain defined circumstances.[26] As such, it is almost undeniable that a singular methodology or research design is not plausible nor should it be encouraged.[27] There is a need to engage in what can loosely be termed 'methodological pluralism' that is grounded on the specific context and topic under study.[28]

2.2 Methodological plurality – a casuistic inquiry into native reality

To counter the obvious dangers of ethnography indicated above, one must explore the other, less contested ways of getting information at source. Admittedly, this approach invites a casuistic inquiry of research.[29] In some instances, for example, both case studies and document analysis may be employed to fit the specific occasion. According to Kekeya, case study does not have a singular definition.[30] Therefore, for present purposes, the chapter aligns itself to the definition offered by Maswanganyi. She defines it to include an exploration of different components of amongst others institutions and practices that are studied holistically.[31] On the other hand, document analysis is defined as a systematic review of documents, be it printed or electronically.[32] This method is used in combination with other qualitative designs to make the research inquiry whole.[33]

25 Hillyard (n 18) 61-62; Berry (Vol I 2018) 25.
26 Tomaselli, Dyll & Francis 'Self and other: Auto-reflexive and indigenous ethnography' in Denzin, Lincoln & Smith (eds) *Handbook of critical and indigenous methodologies* (2008) 348.
27 As above.
28 Pfadenhauer & Grenz Vol II (2018) 187.
29 As above.
30 Kekeya 'Qualitative case study research design: The commonalities and differences between collective, intrinsic and instrumental case' (2021) *Contemporary PNG Studies: DWU Research Journal* 28.
31 Maswanganyi *Assessing teaching approaches and strategies of foundation phase teachers in developing learners' writing proficiency: A case study in Warmbaths Circuit, Limpopo Province* (PhD of Education 2022 TUT) 10.
32 Bowen 'Document analysis as a qualitative research method' (2009) *Qualitative Research Journal* 27.
33 As above 28.

The underlying rationale of the plurality of methodology that underlies ethnography is to ensure that all available data in native cosmology is studied within the acceptable designs and approach.

Evidently, these accepted methodologies and their application to native reality must be considered against the political nature of knowledge and its production or economy.[34] An undeniable submission calling for caution emanates from the imperialistic foundations of education.[35] Accordingly, it is generally accepted that qualitative research endorses colonial knowledge, truth and power.[36] As such care must be taken to heed the notion that a researcher's ontological make-up underlines the context from which the observations in the field are made.[37] Naturally, the inclination towards Western education of law is likely to manifest a production and preservation of that epistemology.[38] In law, the preservation and continued dominance of the colonising epistemology cannot be sustained if one endeavours to change the status *quo*. Accordingly, it is arguable that a re-indigenised customary law cannot be attained through a model or dominant Western episteme, good intentions notwithstanding.[39] Though ethnography is qualitative in nature, the researcher must endeavour to be intentional about not endorsing colonial knowledge and the perversion it has had on the system of customary law.

To achieve this intentional outlook, researchers must avoid the notion of viewing natives as a racialised other.[40] Critically, the ethnographer must satisfy himself or herself of the following important inquiries:

(a) Who writes for whom?

(b) Who is representing [natives]?

(c) How [and] for what purpose?

(d) For which audience?

34 Denzin & Lincoln (n 24) 11.
35 As above 4.
36 As above.
37 Kincheloe & Steinberg 'Indigenous knowledges in education: Complexities, dangers, and profound benefits' in Denzin, Lincoln & Smith (eds) *Handbook of critical and indigenous methodologies* (2008) 138.
38 Denzin & Lincoln (n 24) 6.
39 McCaslin & Breton (2008) 513.
40 Denzin & Lincoln (n 24) 5.

(e) Who is doing science for whom?[41]

This inquiry is important as a factor towards the promotion of true indigeneity and attempt to advance transformative theory and action. One must appreciate the worldview of the people and their cultures in meaning making.[42] This chapter advances an African worldview to knowledge in an attempt to open access to native episteme in the South African legal education and by extension the jurisprudence as a whole. A worldview is defined by Makgahlela as 'basic assumptions that a group of people develops in order to explain [their] reality and their place and purpose in the world'.[43] A proper way to granting native episteme access and equality in the law curriculum is through a full appreciation of the cultural location of natives.[44]

It cannot be emphasised enough that the history of customary law in South Africa is largely embedded in politics and the politics of episteme.[45] From this, it is arguable that there is a sense of disempowerment of natives in the contribution to the body of knowledge and education on customary law.[46] This disempowerment historically, and to this day, resulted in the proliferation of non-native 'experts' on customary law.[47] Aligned to the overall theoretical approach of Moloi,[48] these plurality of methodologies endeavours to ensure the validation of cultural knowledge, skills and abilities in the understanding of their world-views. A polemic view may be that the 'expertise' of non-native scholars in this endeavour may amount to or even continue cultural invasion, even with good intentions. This is so in that indigenous reality and or experiences will have to be transcript, translated and interpreted to a foreign language without a sound understanding of the original language. Potentially, this transcription, translation and or interpretation may

41 As above 9.
42 Velthuizen 'Applying endogenous knowledge in the African context: Towards the integrated competence of dispute resolution practitioners' (2012) *Africa Insight* 76-77.
43 Makgahlela *The psychology of bereavement and mourning rituals in a Northern Sotho community* (PhD in Psychology 2016 University of Limpopo) 10.
44 As above 252.
45 It is noted by Denzin & Lincoln (n 24) 4 that by its very (and current) nature education is a European imperialism and colonial activity.
46 Modiri (n 10) 93.
47 Modiri (n 10).
48 Moloi (n 7) 19.

make social inequalities invisible[49] or even aggravate them without a sound understanding of the rationale.

In the ethnographic present, it is submitted, it is difficult to argue that the political nature of research, with its embedded Eurocentric hegemony,[50] will not continue to validate its foreign conceptions of knowledge about the natives and their worldview.[51] As such, the dominant Eurocentric research domain and the concomitant English language's privileged position (and to some extent Afrikaans in the South African order) continue to subjugate indigenous languages and other cultural artefacts which language embodies. The result of this subjugation and stifled research necessitates a difficult conversation on new methods of realising a re-indigenised customary law and native episteme.

2.3 Creating space for sole native voice

To promote new academic agency in the pursuit of native access and epistemological equality, the significance of natives playing a central or only role cannot be avoided. This desire for an active role and the enjoyment of monopoly over this period of re-indigenisation is a counter to the inherent prejudices of 'othering' or more aptly, placing natives as the racialised other. To further justify this drastic, and perhaps a polemic view, it is important to note that language matters significantly to 'what we know, what we believe and what we may say'.[52] In this regard, it is rightly noted that language has the power to breathe life into the essence of identity, selfhood and one's perception of reality.[53] On the whole, language must be seen as the embodiment of a community or a people's worldview.[54] This makes it central to their epistemology and ontological realities. It is with this appreciation in mind that the use, by coercion or uninformed consent, of English and in later years Afrikaans as a medium through which customs and customary laws are taught, only achieves the result of alienating natives from the centre of their culture.[55]

49 Freire (n 6) 20.
50 Ramose (n 2) 139.
51 Denzin & Lincoln (n 24) 11.
52 Carr & Thesee 'Discursive epistemologies by, for and about the decolonizing project' in Abdi (ed) *Decolonizing philosophies of education* (2012) 20.
53 Schostak Vol II (1999) 127.
54 Abdi (n 3) 137.
55 As above 139.

It is from this alienation from the centre that natives were divorced from the intricacy of their language that breathed air into their realities.[56] It is argued that the extinction of language, and by extension culture, has the corresponding consequences that the people who use that language *de factu* exist as other people and not themselves.[57] From the foregoing, it is arguable that a system of law foreign to natives was born out of divorcing them from their languages.

To re-indigenise native worldview and magnify their lived experiences, it is important to appreciate its tradition and its economies within a proper setting. Historically, and to a large extent currently, traditional methods of the natives are orated in nature.[58] The consequent result of this orality is the storage of large volumes of traditions, idioms, methods *et cetera* in the memory banks of each community's or people's sages. From this tradition of orality then, there is born a culture of folklore.[59] In legal terms, this folklore is a form of dialogue about the makeup of society and as such should act as a precursor to reform.[60] It is submitted that folklore, although disappearing on the current literate generation of natives, can have a measured role in affirming the reality of people's lived experiences and form an important fabric of customary law reform. Regrettably, one of the hallmarks of a literate jurisprudence is its innate obsession with the certainty of principles and their application. In essence, the immeasurable value of folklore then has had to naturally carve into the (mis)translation by non-natives[61] and the intellectual buffers. Inevitably, the oral recollection by the cultural insider to the cultural foreigner tasked with transcriptions does not always proceed from the same epistemological and cultural assumptions.[62]

56 Prah 'Culture, rights and political order in Africa' in Nhlapo, Arogundade & Garuba (eds) *African culture, human rights and modern constitutions* (2013) 67.
57 As above.
58 Appiah 'African studies and the concept of knowledge' in Hamminga (ed) *Knowledge cultures* (2005) 53.
59 Masoga 'Folklorisation and reoralisation in context: Some narratives on the current challenges facing South Africa's migrant labourers' 2016 *Africa's Public Service Delivery & Performance Review* 232.
60 Duncan 'Critical race ethnography in education: Narrative, inequality, and the problem of epistemology' in Dixson & Rousseau (eds) *Critical race theory in education* (2006) 192.
61 Williams *The destruction of black civilization* (1974) 179.
62 Appiah (2005) 54.

Against that backdrop, it is submitted, a fertile ground was laid for language, historically and for generations to come still, to discriminate with impunity.[63] In the South African context, this impunity is jurisprudentially endorsed by the courts as per the decision of *AfriForum v University of the Free State*.[64] On the whole, the language of customary law in South Africa is not only a representation of the people, but it is as well a negligible misfit that ought to be corrected through re-questioning the cultural dominance of Western pedagogy. Manthwa is on record as expressly calling for natives to have exclusive rights over the re-indigenisation period.[65] His stand emanates from the need to provide clear conceptual frameworks and meaning of cultural norms[66] The underlying idea, it is submitted, in the ethnographic present is to magnify native reality and re-indigenise customary law.

3 Re-indigenisation of native worldview

3.1 Introducing community cultural wealth

This chapter supports the notion of a triangulated customary law. According to this view, customary law consists of an inseparable matrix of customs, religion and the lived realities or personal experiences of its adherents.[67] Aligned to that view of customary law, it is submitted that its true version can be advanced through Yosso's theory of community cultural wealth.[68] This theory is defined as 'an array of knowledge, skills, abilities and contacts possessed and utilized by [natives] to survive and resist racism and other forms of oppression'.[69] To justify community cultural wealth as the lens through which the future of customary law must be considered, the following factors are critical. Firstly, lack of

63 Gounari & Macedo 'Language as racism: A new policy of exclusion' in Mitakidou et al (eds) *Beyond pedagogies of exclusion* (2009) 31.
64 (CCT101/17) [2017] ZACC 48.
65 Manthwa *Re-ordering the existing legal hierarchy to reinstate African law to its rightful place as the primary component of the legal system of South Africa (Azania)* (LLD 2022 UNISA) 228.
66 As above.
67 Ndima (n 8) 2.
68 Yosso 'Whose culture has capital? A capital race theory discussion of community cultural wealth' (2005) *Race Ethnicity and Education* 69-91.
69 As above 77.

value-neutrality in the educational enterprise as espoused by Freire[70] and advanced by Abdi[71] among others. Secondly, the erosion of cultural capital in the Black Administration Act 38 of 1927 and the endorsement of this erosion by the Constitution. Thirdly, Maithufi and Maimela rightly argue that legal curricula is the systemic relegation of customary law as the 'other law'.[72] To counter these prejudices and advance a re-indigenised customary law, community cultural wealth is used as a 'tool of social justice'.[73] This is inspired by the need to explore the extent of the natives' cultural resources in the search for answers and their educational experience.[74] This, it is argued, is achieved through listening and learning from the natives' body of work in advancing justice and interacting with their own world.

Yosso's community cultural wealth shares some similarities with the definition of ethnography advanced above. It is worth reiterating that ethnography places emphasis on the realities of the communities. The utilisation of community cultural wealth in conjunction with ethnography is an effort to empower natives and position them as the only stakeholders in the quest for true epistemic access. This theory originally consisted of six forms of capital identified by Yosso. These are: aspirational, linguistic, familial, social, navigational and resistant capitals.[75] Aspirational capital espouses the resilience of natives and the fighting spirit to retain hopes and dreams of a better tomorrow even in the face of social and structural adversity.[76] Linguistic capital refers to the broadened intellectual depth of natives gained through the social skills of communicating in more than one language.[77] Familial capital carries with it the bonds of family and kinship that inculcates community history, memory and cultural intuition.[78] Social capital embodies the social networks of people and the community resources necessary to

70 Freire (n 6) 54.
71 Abdi (n 3) 137.
72 Maithufi & Maimela 'Teaching the "other law" in a South African University: Some problems encountered and possible solutions' (2020)*Obiter* 1-10.
73 Yosso & Burciaga 'Reclaiming our histories, recovering community cultural wealth' (2016) *Centre for Critical Race* 2.
74 Acevedo & Solorzano 'An overview of community cultural wealth: Toward a protective factor against racism' 2021 *Urban Education* 2.
75 Yosso (n 68*)* 78-81.
76 As above 78.
77 Yosso (n 68*)* 79.
78 As above.

ensure success.[79] Navigational capital refers to the skills necessary to manoeuvre through the social structures that have not always welcomed natives.[80] Finally, resistant capital epitomise new knowledge and skills learned through opposition to forms of inequality.[81]

Moloi posits that for natives, ubuntu or *botho* (the Sesotho corresponding term) is a beacon of hope and light that underlie their courage in the face of obstacles.[82] To support this thesis, it is arguable that aspirational and navigational capitals are bounded together by ubuntu. Customary law has outlived attempts to erode it through the insertion of foreign lenses in the litigation of disputes through the state *fora*.[83] It is arguable that the use of endogenous systems and local actors in the cosmic order ensures its resilience.[84] Underlying this resilience in the cosmic order is the 'consciousness of mutual dependence'[85] in the rural communities in particular. This mutual dependence is underscored by the phrase *motho ke motho ka batho*.[86] In the cosmic present, it is submitted, harm and the search for its resolution involves the 'victims, offenders and [whole] community'.[87] In this light, the aspiration of the community is to maintain harmony and restore same in instances of breach.[88] The achievement of this harmony is through respect of conscience and mutual dependence. Being alive to this dependence, it is submitted, the community centres its process (navigation) of justice on ubuntu.[89] However, the effort to address breaches in harmony through ubuntu does not imply that everything is rosy within the communities. It

79 As above 80.
80 As above.
81 As above 81.
82 Moloi (n 7) 23.
83 Ntlama 'The centrality of customary law in the judicial resolution of disputes that emanate from it – *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC' 2019 *Obiter* 208.
84 Ghebretekle & Rammala 'Traditional African conflict resolution: The case of South Africa and Ethiopia' (2018) *Mizan Law Review* 326.
85 Ndima (n 8) 2.
86 Loosely translated, this means that a human being is a human being because of other human beings. Letseka 'In defence of ubuntu' (2008) *Studies in Philosophy and Education* 48.
87 Ndima (n 8) 26-27.
88 Sone 'Relevance of traditional methods of conflict resolution in the justice system in Africa' (2016) *Africa Insight* 52.
89 As above 60.

simply underscores the attempt to ensure the harmony of all and mutual dependence.

On the other hand, it is submitted that social capital and familial capital underlie the need for the promotion and maintenance of kinship. Although humanness or *botho*[90] is a critical aspect in native communities, the classification of a person as *motho* is not guaranteed or conferred to everyone. As a qualifier, one must display the characteristics of personhood to be recognised as such.[91] Those who meet the criteria of personhood form a community with set values. According to Sodi, Bopape and Makgahlela, this demands a show of certain characteristics including humanness, empathy, friendliness *et cetera*.[92] In the event of a breach of this kinship, restorative justice aims to achieve reconciliation through legal storytelling.[93] It is submitted that ubuntu is the vehicle through which reconciliation is achieved.[94] In sum, it is argued here that ubuntu and the desire for kinship creates close ties amongst aspirational and navigational capitals with familial and social capitals.

The language capital, while well defined by Yosso, require an exercise of caution in the South African context. Language, an important cultural artefact,[95] can be used as a form of disempowerment.[96] To appreciate the cultural location of native cosmology, it is critical to properly understand the original language through which people express themselves. Rammala is of the view that idioms represent a shared living experience amongst the natives.[97] Furthermore, *Motsepe v Khoza*[98] underscores the importance and educational value of idioms to natives. It is arguable that

90 Defined as 'an assemblage of qualities such as humaneness, compassion, gentleness, hospitality, generosity, empathy, kindness, friendliness, and related terms, all of which emphasise the essence of being a human person' in Sodi, Bopape & Makgahlela 'Botho as an essential ingredient of African psychology: an insider perspective' (2021) *South African Journal of Psychology* 442.

91 As above.

92 As above.

93 Duncan 'Critical race ethnography in education: Narrative, inequality, and the problem of epistemology' in Dixson and Rousseau (eds) *Critical race theory in education* (2006) 192.

94 Sone (n 88) 60.

95 Prah (2013) 66.

96 Sachs 'The language question in a rainbow nation: The South African experience' (1997) *Dalhousie Law Journal* 7.

97 Rammala 'Lekgotla and idiomatic expressions in traditional dispute resolution: The Case of Makapanstad, North West Province, South Africa' (2021) *International Journal of African Renaissance Studies* 222.

98 [2013] ZAGPJHC 162 para 11.

idioms carry intellectual weight for natives and as such much caution is necessary in the use and interpretation in a foreign language. To firmly locate the natives at the centre of re-indigenisation, it is opined that idioms must be expressed in their original language as a point of departure.[99] In essence, the linguistic capital is central to advancing other capitals through legal storytelling. The resilience of native cosmology and intellectual consciousness can best be reflected in the wisdom of idioms. It is worthwhile to remember that *Motsepe* invites us to respect the native languages and their capital.

The resistant capital demands novelty from natives in their ongoing engagements with structural exclusions and other forms of prejudices. Jurisprudence, no different from education,[100] has imposed, justified and privileged the realities of others in the space of native laws. This, as Grosfoguel correctly posits, is done without a proper investigation of the differences in time and space between the imposed, dominant view and the people living according to the servient, inferior system.[101] During times and space gone by, there was express denial of other realities as so overtly expressed in the repugnancy clause in the now repealed section 11 of the BAA 38 of 1927. The repugnancy clause was a clear example of privileging the reality of the settlers at the expense of an indigenous reality and imagination. To sustain this privileging of a foreign reality on the social order, western episteme continue to be embedded in education in general to further ostracise indigenous reality from the minds of the so called literate natives.[102] In this fashion, none-native episteme is normalised and so too are the subtle perversion of that worldview.[103] It is argued above that this endorsement of a dominant foreign episteme has relegated customary law to otherness in legal education.[104] The Constitution sustains this order through the use of seemingly progressive language and universal rights of equality and human dignity.

99 Rammala 2021 *International Journal of African Renaissance Studies* 222.

100 Grosfoguel 'The structure of knowledge in westernized universities epistemic racism/sexism and the four genocides/epistemicides of the long 16th century' (2013) *Journal of the Sociology of Self-Knowledge* 74.

101 As above.

102 Masoga & Kaya 'Globalisation and African cultural heritage erosion: Implications for policy' 2008 *INDILINGA* 144-145.

103 Jimenez 'Community cultural wealth pedagogies: Cultivating auto ethnographic counter narratives and migration capital' 2020 *American Educational Research Journal* 777.

104 Maithufi & Maimela (n 72) 1-10.

Yosso and Burciaga have invited scholars to be fierce in their re-generation of the cultural capitals necessary to advance social justice.[105] This need to be fierce is necessary to unlearn the problems created by deficit ideologies[106] and the miseducation or misalignment identified hitherto. The question that naturally follows is how can we justifiably use the community cultural wealth framework to protest against constitutionalising natives? Asked another way, is this framework justifiable in a constitutional state like South Africa?

3.2 Overlooking constitutionalised culture

The chapter takes a position that the adulteration of customary law is accomplished through legislation even in the constitutional state. The view to civilise, modernise and constitutionalise natives without appreciating their lived reality and intellectual consciousness is proof of suppression of their worldview. Focused on the Constitution *in* South Africa, the chapter contends that the transaction between indigenous imagination and the Constitution elicit a view of deficit ideology against the former. In essence, sections 30 and 31 of the Constitution's limited scope for the enjoyment of cultural rights seemingly proceed from a position that other rights must be protected against cultural rights. Consequently, other rights are privileged and the rights to culture are enjoyed on the understanding that this must be compatible with others. On the whole, erosion of indigenous imagination is camouflaged as constitutionalism. It is unsurprising that the privileging of other views by the South African episteme and Constitution has allowed none natives to insist on a universalisation of the rights of the individual above the group;[107] and other authors to assume a universal sense of oddity between cultural rights and the right to equality,[108] to name just two examples of dominant but misplaced ideology.

105 Yosso and Burciaga 'Reclaiming Our Histories, Recovering Community Cultural Wealth' 2016 *Research Briefs* 2.

106 As above.

107 de Souza Louw 'Evolution of Provisions Relating to Violence against Women in South Africa's Traditional Courts Bill' 2020 *Acta Juridica* 87-133.

108 Ubink and Mnisi Weeks 'Courting Custom: Regulating Access to Justice in Rural South Africa and Malawi' 2017 *Law & Society Review* 831.

It is arguable that indigenous reality is espoused by the cultural practices, norming, morality and the values embraced in terms of the indigenous cosmology.[109] Therefore, it is correct that in order to properly represent native voices in research, one must address their unique challenges within their time and space.[110] *Motsepe* has rightly instructed us to view native reality in the light of their relationship with nature.[111] Shokane and Masoga expand on this to propose a consideration of natives' experience with their surrounding eco-system.[112] At the end, to properly imagine a re-centring of native reality, the fierce rejection of marginalisation must validate indigenous imagination through what Grosfoguel calls a pluri-verse.[113] This is advancing epistemic plurality.[114] It is strange that jurisprudence has suggested that South African law is plural but has not as openly advocated for epistemic plurality as a parallel. In the articulation of this parallel plurality, care must be taken to ensure understanding of native worldview and how that influences social and cultural spaces.[115]

To distinguish the attitude of the Constitution *in* South Africa from the importance attached to culture at the World Conference on Cultural Policies, I borrow generously from the latter source.

> Therefore, expressing trust in the ultimate convergence of the cultural and spiritual goals of mankind, the Conference agrees: that in its widest sense, culture may now be said to be the *whole complex of distinctive spiritual*, *material*, *intellectual* and *emotional* features that characterize a *society or social group*. It includes not only the arts and letters, but also *modes of life*, the fundamental rights of the human being, *value systems, traditions and beliefs*; that it is culture that gives man the ability to reflect upon himself. *It is culture that makes us specifically human, rational beings, endowed with a critical judgement and a sense of moral commitment*. It is through culture that we discern values and make choices. It is through culture that man expresses

109 Shokane and Masoga 'African Indigenous Knowledge and Social Work Practice: Towards an Afro-Sensed Perspective' 2018 *Southern African Journal of Social Work and Social Development* 2.
110 As above.
111 *Motsepe v Khoza* para 16.
112 Shokane and Masoga 2018 *Southern African Journal of Social Work and Social Development* 4.
113 Grosfoguel 2013 *Journal of the Sociology of Self-Knowledge* 89.
114 As above.
115 Shokane and Masoga 2018 *Southern African Journal of Social Work and Social Development* 5.

> himself, becomes aware of himself, recognizes his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations.[116] [The emphasis is my own].

Clause 5 of the Declaration specifically takes the stance that a singular culture cannot determine the cultural currency of the world.[117] The idea, as espoused by this Declaration, makes it clear that there is no justification for ostracising indigenous imagination in South Africa and replacing it with a uni-versal notion embodied by Western ideology, or non-native ideology that is ensconced in the Constitution. By definition, culture refers to 'behaviours, beliefs, values, attitudes and practices that are transmitted or communicated from generation to generation'.[118] Literature has identified a few uses of culture; however, only those relevant to the current discussion are mentioned here. Historical use, which chronicles the people's traditions; normative use, which expresses rules and norms of a people; and psychological use, which expresses a group's capital in solving conflict.[119] By interpreting this from the perched seat of presiding officers in state courts, the chapter posits that the jurisprudence will advance the notion of a constitutionalised native and either consciously or unconsciously promote epistemic universality of South African legal education. It must be noted that from the perspective of native reality, culture is based on an attitude of orality.[120] Properly understood, an attitude of orality is not the same as lack of literacy as interpreted by Western canons.[121] It is instead, the embodiment of native reality and the vehicle through which morality is transmitted.[122] Wherefore, the promotion of the pluri-verse and native reality, requires a marked intention towards understanding culture within its relative time and place as opposed to imposing a uni-versal understanding embodied by constitutionalism.

116 Mexico City Declaration on Cultural Policies, 1982.
117 As above. The universal cannot be postulated in the abstract by any single culture: it emerges from the experience of all the world's peoples as each affirms its own identity. Cultural identity and cultural diversity are inseparable.
118 Shokane and Masoga 2018 *Southern African Journal of Social Work and Social Development* 6.
119 Masoga 'Memory, orality and 'God-talk' in sub-Saharan Africa' 2022 *Theological Studies* 3.
120 As above 1.
121 Jimenez 2020 *American Educational Research Journal* 784.
122 Masoga 2022 *Theological Studies* 2.

3.3 Promotion of native legal capital

To recap, community cultural wealth is about overcoming all kinds of racism and or oppression using a variety of knowledge, skills and abilities.[123] Familial capital, referred to as pedagogy of the home, taps into the composite skills acquired in the home.[124] Consequently, unstable homes threaten the potency of the cultural wealth of natives. Kinship is the centre for the enjoyment of rights in the indigenous cosmology. The relationship that natives have with the eco-system surrounding them is traditionally commenced through the planting of the umbilical cord in the family yard after a successful birth.[125] Social capital embraces the creation of networks in the indigenous cosmology.[126] Notwithstanding this, care must be taken to appreciate changes that may be influenced by socio-economic factors amongst others. These changes can be both a gift and a curse. To counter these, Crumb et al opine that community unity is necessary to unify and organise behaviours of community inhabitants.[127] This, it is opined, is equally applicable to the changes within the social structures of the indigenous cosmology. Linguistic capital speaks to the intellectual consciousness of a people and the ability to speak in multiple languages.[128] In the current context, this is interesting because Western episteme and education has desecrated indigenous reality.[129] This has resulted in young people being alienated from their culture and their language.[130] This would mean that the attitude of orality is threatened and as well that there is voluntary assimilation into the culture of the dominant episteme. This must, out of necessity, invite fierce resistance if native imagination is to be sustained. Resistant capital, as the pillar on which this framework relies, is the composite knowledge and imagination necessary to oppose suppression and inequality on an ongoing basis.[131] From this, and to advance the flexibility of community cultural wealth,[132]

123 Yosso (n 68) 77.
124 As above 79.
125 Sodi, Bopape and Makgahlela 2021 *South African Journal of Psychology* 448.
126 Yosso (n 68) 79.
127 Crumb 'Rural cultural wealth: Dismantling deficit ideologies of rurality' 2023 *Journal for Multicultural Education* 130-131.
128 Yosso (n 68) 78-79.
129 Masoga and Kaya 2008 *INDILINGA* 144,
130 As above.
131 Yosso (n 68) 80.
132 Jimenez 2020 *American Educational Research Journal* 779.

there is space for the addition of a further capital to suit native reality and epistemicide. This capital shall be called legal capital.

Legal capital has been defined as an 'array of skills, intellectual consciousness, ability and knowledge of natives in the discharge of dispute resolution'.[133] Although Monyamane limits the definition of legal capital to dispute resolution, nothing precludes its extension to the intellectual consciousness of natives in promoting their worldview and culture as understood in this chapter. This capital underscores the continuation of customary law and reality despite the modernising and or suppressing view of legislation and constitutionalism. Though informed by an attitude of orality, natives' legal capital will potentially evolve to include literacy constructed for local conditions. If properly applied, legal capital will be manifested through a responsive virtue of ubuntu or *botho* to address the unique challenges arising from the indigenous cosmology. It is the view of this chapter that natives possess legal capital even if this is not properly recognised in the South African general jurisprudence and education. This capital, it is submitted, is in the collective memory and a part of native everyday reality.

It is submitted further that there exists no omnipotent episteme with infallible criterion for justness that must be imposed on native legal capacity as if the indigenous cosmology is *terra nullius*.[134] In fact, the feasibility of a *terra nullius* South is questioned by Ramose.[135] Thus, it is argued that in the ethnographic present natives continue to possess legal capital. As a result, to constitutionalise them without due regard to their indigenous cosmology and worldview is an attempt to legally think their reality away. This, it is argued, can be achieved even within the context of a human rights inclined Constitution.[136] To promote native legal capital and fully appreciate native intellectual consciousness, educators and academics alike are invited to collect information at source. However, to avoid duplication of erstwhile buffers and or the temptation to use

133 See Monyamane *Customary law of procedure and evidence: A juridical and ethnographic study in the Limpopo Province, South Africa* (LLD 2023 University of Limpopo) for the general scope of this proposed capital.
134 Monyamane 325.
135 Ramose 'An African perspective on justice and race' (2001) *Polylog: Forum for Intercultural Philosophy* 2.
136 Modiri (n 10) 76.

western ideologies to pervert native legal capital, researchers must always go into the communities as learners and not experts.

4 Conclusion

The call for proper interaction between the law curriculum and customary law as practiced in the cosmic order is not entirely new. Maithufi and Maimela called for the involvement of community experts in the lecture halls through guest lectures.[137] However, it is interesting that elsewhere in their chapter, the authors note that there may be some misalignment between the medium of education and the language through which customary law is expressed.[138] There is no doubt that the jurisprudence of customary law may benefit greatly from these guest lectures. The knock-on effect of this would be the granting of epistemological access to native worldview. However, the suggestion has blind spots that, in the opinion of the present author, can be cured by the visit of academics to the broader native communities. One such blind spot is what Armstrong et al indicate as the perversion of customary law by traditional elites who expressed their loss of power to colonialism through other forms of oppression on others with less power.[139] By interacting with the communities relative to the cosmic place and time, academics will uncover more nuanced meanings and applications of customs. The present chapter suggests that this can be done through ethnography in the main as this is intended to magnify the reality and personal experiences of the studied group. To further magnify these experiences and reality, the chapter is open to plurality of methodologies to uncover more meaning. This, it is argued, can be achieved through an intentional lens of community cultural wealth. At the end, the chapter posits that natives have always had legal capital which has enabled them to consciously create a system of laws and interact with that experience in the pursuit of kinship. Wherefore, the idea of constitutionalising them is a form of new age oppression that disregards their intellectual consciousness expressed through native legal capital.

137 Maithufi & Maimela (n 72) 9.
138 As above 6.
139 Armstrong et al 'Uncovering reality: Excavating women's rights in African family law' (1993) *International Journal of Law & the Family* 325.