



LAW  
ENVIRONMENT AND  
DEVELOPMENT  
JOURNAL

# LEAD

## THE NAGOYA PROTOCOL AND CUSTOMARY LAW: THE PARADOX OF NARRATIVES IN THE LAW

Saskia Vermeulen

ARTICLE



VOLUME  
9/2

*LEAD Journal (Law, Environment and Development Journal)*  
*is a peer-reviewed academic publication based in New Delhi and London and jointly managed by the*  
*School of Law, School of Oriental and African Studies (SOAS) - University of London*  
*and the International Environmental Law Research Centre (IELRC).*

*LEAD is published at [www.lead-journal.org](http://www.lead-journal.org)*

*ISSN 1746-5893*

*The Managing Editor, LEAD Journal, c/o International Environmental Law Research Centre (IELRC), International Environment  
House II, 1F, 7 Chemin de Balexert, 1219 Châtelaine-Geneva, Switzerland, Tel/fax: + 41 (0)22 79 72 623, [info@lead-journal.org](mailto:info@lead-journal.org)*

## ARTICLE

# THE NAGOYA PROTOCOL AND CUSTOMARY LAW: THE PARADOX OF NARRATIVES IN THE LAW

Saskia Vermeulen

This document can be cited as  
Saskia Vermeulen, 'The Nagoya Protocol and Customary  
Law: The Paradox of Narratives in the Law',  
*9/2 Law, Environment and Development Journal* (2013), p. 185,  
available at <http://www.lead-journal.org/content/13185.pdf>

Saskia Vermeulen, Senior Lecturer at the Lancaster Environment Centre, Lancaster University, UK,  
Email: [s.vermeulen@lancaster.ac.uk](mailto:s.vermeulen@lancaster.ac.uk)

Published under a Creative Commons Attribution-NonCommercial-NoDerivs 2.0 License

## TABLE OF CONTENTS

---

1. Introduction	187
2. Setting the Scene	189
3. Narratives and the Law	190
4. Oral Evidence in Native Title Claims	192
5. The Founding Moment of Law	195
6. Exclusions from Law and the Nagoya Protocol: A Theoretical Understanding	197
7. Conclusion: A Return to Legal Pluralism	199

# 1

## INTRODUCTION

It is apparent that progress is being made in developing national and international protection mechanisms for safeguarding traditional knowledge systems and respecting the norms and practices of local communities. While the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity (Nagoya Protocol) respects the rights of indigenous and local communities relating to the access and benefit sharing provisions of the Convention on Biological Diversity (CBD), there is still reason for concern as to what extent the voices of indigenous peoples are sufficiently and accurately represented in the final text of the Nagoya Protocol. This point of critique relates to a wider debate about how to incorporate non-Western legal systems into the dominant legal jurisprudence. Recent decisions of the United States Supreme Court ruled that tribal jurisdictions are not enforceable when non-natives are involved.<sup>1</sup> Consequently, some scholars question the relevance and the pragmatic utility of recognising or developing customary laws to protect cultural property if those laws will be unenforceable outside the jurisdiction of indigenous peoples or the region of origin.<sup>2</sup> The problem of limits on enforcing tribal law is another manifestation of the law's institutional response to the paradox brought about by the global movement for social justice.

The issue of protecting traditional knowledge and genetic resources is a textbook example of a legal problem in a world of hybrid legal spaces where a single problem, act or actor is regulated by multiple legal regimes. Unmistakingly, the Nagoya Protocol deserves credit for formally recognising community protocols and customary laws as noted in Article 12 (1):

In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.

The explicit reference to customary law is a clear sign that international environmental law is ready to acknowledge that the issue of protecting traditional knowledge cannot escape a tiered system of laws – international, national and customary. On an international but rather abstract level, the Nagoya Protocol promises to protect the resources and knowledge of indigenous peoples in accordance with the worldviews and norms of indigenous and local communities. The jury is still out and only time will tell whether the Nagoya Protocol can keep up its promises on the ground. In the mean time this article explores the challenges we face in this brave new world of 'cosmopolitan legality'. The concept of cosmopolitan legality or subaltern cosmopolitanism refers to the work of de Sousa Santos who is interested in theorising counter-hegemonic globalisation movements in the global South.<sup>3</sup> The purpose of this concept is to expose the potential and the limitations of the law-centred strategies for the advancement of counter-hegemonic struggles in the context of globalisation. It encourages the subaltern, such as indigenous peoples, to speak in the global arena and to accept their speech as law, a law that is an amalgam of United Nations' resolutions, national law, local norms and customs.<sup>4</sup> While law can indeed be used as a tool to provide domination and resistance (sometimes even simultaneously), based on observations in the field through work with the San peoples on the Hoodia benefit sharing agreement,<sup>5</sup> this article resides itself

1 See, for example, *State v. A-1 Contractors*, 520 U.S. 438, 459 (1997). For more details see Angela R. Riley, "Straight Stealing": Towards an Indigenous System of Cultural Property' 80 *Washington Law Review* 69 (2005).

2 See, Riley, *Id.*

3 Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalisation and Emancipation* (London: Reed Elsevier (UK) Ltd, 2nd ed. 2002).

4 Naomi Johnstone, 'Indonesia in the REDD: Climate Change, Indigenous Peoples and Global Legal Pluralism' 12/1 *Asian-Pacific Law & Policy Journal* 93 (2010-2011).

5 For more details about the Hoodia benefit sharing agreement, see R. Chennells, 'Traditional Knowledge and Benefit Sharing after the Nagoya Protocol: Three Cases from South Africa', published in this issue of LEAD Journal.

with the critical socio-legal scholars who have taken it in their stride to show how 'legal institutions may lend authority to certain interpretations while denying status to others'.<sup>6</sup>

What this article seeks to do is to 'recreate the experience of life on the bottom'.<sup>7</sup> This requires listening to the voice of those who have suffered oppression and discrimination and to put 'critical' in front of the concept of legal pluralism. While legal pluralism valorises non-state actors as norm generating communities, by according these alternative discourses a similar power as the legal discourse of the State, legal pluralism has been criticised for continuing to use state law and the rule of law as the normative norm against which other norms are measured and allowed. Critical legal pluralism creates a platform that incorporates a heterogeneous group of legal subjects; it allows interpretations and narratives of the law beyond the official ones.<sup>8</sup>

Drawing parallels between access and benefit sharing agreements and native title claims allows this article to identify the problems that can arise when Western jurisprudence translates customary laws cross-culturally. The challenges that indigenous peoples are facing in native title claims can show how Western law interprets traditional law and customs and can be used as a benchmark to anticipate the problems indigenous peoples and local communities will encounter when Article 12 (1) of the Nagoya Protocol will be applied on the ground. The history of recognition of aboriginal rights in Canada is in particular useful. Section 35 (1) of the Canadian Constitution recognises and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. However, giving meaning to

terms such as 'existing', 'recognised' and 'affirmed' has caused debate and the only institution that has real power to interpret the meaning and significance of Section 35(1) is the Supreme Court of Canada.<sup>9</sup> A number of major cases in Aboriginal law in Canada (some of which will be discussed in more detail in this article) have shed further light on how Aboriginal legal theory has evolved in Canadian law. Aboriginal rights are now firmly accepted as constitutional rights and subsequently are embedded in Canadian law and politics. However, indigenous peoples of Canada still find it unacceptable that their rights are only legitimate within the legal and political contours of the Canadian state. They defend their rights through the concept of Aboriginal nationhood and question the sovereignty of the Canadian state over 'their' lands.<sup>10</sup> The issue of state sovereignty is also at stake in the Nagoya Protocol and indigenous peoples argue that state sovereignty overrules their prior rights. Canada has indeed a long history of dealing with indigeneity in its courts and hence provides a useful benchmark to question within the context of the Nagoya Protocol to what extent laws and customs of indigenous peoples will be recognised as providing evidence of ownership. What native title claims and the Nagoya Protocol have in common is that both are examples of complex interrelationships between different legal orders.<sup>11</sup> Native title claims in Canada are a testing ground to explore the potential of enforceability of plural legal orders in the Nagoya Protocol. Before native title claims will be discussed in more detail, the article will first provide a wider background of the Hoodia benefit sharing agreement and the Nagoya Protocol. The final part of the article will explore from a theoretical point of view why customary law is being excluded or misinterpreted in Western courts.

6 Rosemary Coombe and Jonathan Cohen, 'The Law and Late Modern Culture: Reflections on *Between Facts and Norms* from the Perspective of Critical Cultural Legal Studies' 76 *Denver University Law Review* 1029 (1998-1999).

7 Mari J. Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' 22 *Harvard Civil Rights - Civil Liberties Law Review* 323 (1987).

8 Martha-Marie Klenhans, 'What is Critical Legal Pluralism?' 12/2 *Canadian Journal of Law and Society* 25 (1997).

9 Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006).

10 *Id.*

11 Elisa Morgera, 'Bilateralism at the Service of Community Interests? Non-Judicial Enforcement of Global Public Goods in the Context of Global Environmental Law' 23/3 *The European Journal of International Law* 743 (2012).

## 2 SETTING THE SCENE

The San Hoodia agreement illustrates the potential conflict of legal orders in access and benefit sharing agreements. The San are one of the most ancient populations on the planet. Remains of their ancestors date back some 12,000 years in their present homelands. Today there are nearly 99,000 San living in Namibia, Botswana, and South Africa, with smaller numbers remaining in Angola, Zambia and Zimbabwe. Only a very small number of San groups still follow their traditional hunting and gathering life. The vast majority live in extreme poverty in villages, practicing a mixed economy, or attached to Bantu villages and cattle posts, or working on commercial farms and ranches, or in government resettlement camps. The San peoples of the Kalahari Desert have a long history of chewing *Hoodia* as a water and food substitute. A patent was awarded to South Africa's Council for Scientific Industrial Research (CSIR) in 1998 without the consent of the San peoples. After some campaigning the San signed a benefit sharing agreement with the CSIR. The Hoodia benefit sharing agreement has often been applauded as a major step forward in the recognition of the knowledge of indigenous peoples and it is seen as a mechanism that can provide social justice. However, when the San's history of *Hoodia* is recorded within the context of the benefit sharing agreement and the CBD, it becomes positivistic and its life force is translated in a discourse of property rights and economic value.<sup>12</sup> When the San's oral stories and narratives entered the 'marketplace of ideas',<sup>13</sup> original stories of cosmologies and

sharing<sup>14</sup> were translated into stories of science and exclusive property rights.<sup>15</sup> The cosmologies of the San remained confined to the red sand dunes of the Kalahari. The legal regime of the CBD only recognised the rhetorics of the powerful – the elite – and rejected the stories of the dissidents or those who contested the Hoodia benefit sharing agreement. The opponents of the Hoodia benefit sharing agreement were confronted with a legal regime that rejected the stories of outsiders. This article will draw attention to why some of the dissenting narratives and stories remain hidden from international environmental law.

The CBD has as one of its objectives the fair and equitable sharing of the benefits derived from the utilisation of genetic resources. To implement this objective, the Nagoya Protocol was adopted at the tenth meeting of the Conference of the Parties to the CBD (COP 10), held in Nagoya, Japan from 18-29 October 2010. The most important remit of the Nagoya Protocol was to deal with the criticisms that were aired against access and benefit sharing provisions in the CBD. The basic reproach has been that the CBD is mostly concerned with assuring access to and sharing the benefits of genetic resources and little has been achieved in terms of providing

---

14 As the author has argued elsewhere (see Vermeylen, note 12 above), the San's customs with regard to property and benefit sharing can be found in some of their stories usually associated with conflicts between iconic animals (hyenas, jackals and lions) and their fights over food. Stories about the importance of sharing of food - told through the reporting of mischiefs that happens to the animals if in their quest for food others are excluded or get killed - give insights into basic values that order San life. What these stories so aptly show is that for the San sharing is not only an economic principle; the string ethics of sharing food are part of a wider social network that can only exist when strong ethics guide the socio-economic relationship in the community.

15 As the author has illustrated with extracts from interviews recorded during fieldwork with the Khomani San in June 2004 and July 2007, a discourse of exclusive ownership rights is widely used and embedded in the rhetorics of the community members when discussing traditional knowledge in general and Hoodia in particular. This contrasts with some of the narratives used by those community members who do not belong to the elite or who were not part of the Hoodia benefit sharing negotiations. For detailed extracts, see Vermeylen, note 12 above.

---

12 Saskia Vermeylen, 'Law as a Narrative: Legal Pluralism and Resisting Euro-American (Intellectual) Property Law Through Stories' 61 *Journal of Legal Pluralism* 55 (2010).

13 Chris Preston, 'A Past of Tragic Stories: The (Non-) Treatment of Native Peoples' Oral Histories in Canada' 2/1 *Undercurrent* 54 (2005).



adequate protection for the traditional knowledge and well being of indigenous peoples.<sup>16</sup> While the CBD emphasises state sovereignty over territory or the fruits of private invention, for indigenous peoples these resources are part of their right to self-determination and rights to heritage and property.<sup>17</sup> The adoption of the Nagoya Protocol is seen as a milestone in the recognition of the rights of indigenous peoples, nevertheless giving all control over natural resources to the state severely limits the control of indigenous peoples and local communities over their natural resources and ecosystems. One of the main criticisms against the Nagoya Protocol is the vagueness and obfuscating language that is used whenever it refers to the rights of indigenous peoples and local communities. Article 12 (1) is a good illustration of the double standard when it specifies that Parties shall only take customary law into account in accordance with domestic law.<sup>18</sup> This raises the issue to what extent customary law will be taken into account. Learning from past experiences when the law is confronted with a site of struggle will help to unravel the extent of implementation challenges that the Nagoya Protocol is facing. In particular, this article is interested in exploring to what extent the law will be prepared to allow multiple narratives and stories as evidence of ownership with regard to traditional knowledge and genetic resources.

### 3 NARRATIVES AND THE LAW

Indigenous law originates in the rich stories, ceremonies and traditions of indigenous peoples. Narratives and stories play a dominant role in the way elders reveal to the younger generation the deeper meanings of order and disorder in their community. Stories and narratives act indeed as normative 'lawmaking' sources.

Stories and storytelling are central components in discourses that represent history, memory and particular places. Increasingly, narratives have become an important and recurring theme in legal scholarship, but this is not surprising because law has always been concerned with narratives. To put it bluntly in the words of Scheppelle:

in law all courts have is stories [...] judges and jurors are not witness to the events at issue; they are witness to stories about the events.<sup>19</sup>

However, only some stories are accepted and other stories are rejected even though the latter might be more accurate versions of the event.

The power of narrative in constituting social relations is one that has been acknowledged by a number of disciplines, including law. Narrative endorses a multiplicity of forms from a diverse range of sources. But regardless of the form they are given, a key issue is always the basis upon which narratives are accorded recognition, or denied legitimacy. A second focal question asks how they are situated with respect to other narratives and the type of authority that they command.<sup>20</sup>

16 Katharina Rogalla Von Bieberstein and Konstantia Koutouki, *The Nagoya Protocol: Status of Indigenous and Local Communities* (Montreal: Centre for International Sustainable Development Law (CISDL), Legal Aspects of Sustainable Natural Resources Legal Working Paper Series, 2011), available at <http://cisdl.org/public/docs/legal/The%20Nagoya%20Protocol%20-%20Status%20of%20Indigenous%20and%20Local%20Communities.pdf>.

17 Elisa Morgera and Elsa Tsioumani, 'Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity' 21/1 *Yearbook of International Environmental Law* 3 (2010).

18 Committee on the Elimination of Racial Discrimination 80<sup>th</sup> Session 13 Feb - 9 March 2012 UN, Geneva. Response to Canada's 19<sup>th</sup> and 20<sup>th</sup> Periodic Reports: Alternative report on Canada's Actions on the Nagoya Protocol (2012), Joint Report by the Grand Council of the Cress, Assembly of First Nations and many others, available at [http://www2.ohchr.org/english/bodies/cerd/docs/ngos/NGOs\\_Nagoya\\_Protocol\\_Canada\\_CERD80.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/ngos/NGOs_Nagoya_Protocol_Canada_CERD80.pdf).

19 Kim Lane Scheppelle, 'Foreword: Telling Stories' 87 *Michigan Law Review* 2073 (1989).

20 Anne Griffiths, 'Doing Ethnography: Living Law, Life Histories, and Narratives from Botswana', in June Starr and Mark Goodale eds, *Practicing Ethnography in Law: New Dialogues, Enduring Methods* 160 (New York: Palgrave Macmillan, 2002).



Formal law recognises a narrative that is embodied in legislation and judicial decision-making, and increasingly other narratives of lawmaking challenge this essentialist form of lawmaking.<sup>21</sup> Narratives have entered legal studies as a vehicle to contest traditional forms of legal reasoning and argumentation.<sup>22</sup> Marginalised and excluded groups can use storytelling to make their voices heard and to contest formal legal judgments.<sup>23</sup>

However, legal accounts tend to adopt the stories of those who are privileged and expel the stories and experiences of people of colour, the poor, women and those who cannot describe their experience in the positivistic language of the law.<sup>24</sup> Those whose stories are rejected before the law become outsiders because they are judged to have a different history, a different set of background experience and a different set of understandings than insiders. Insiders perceive the outsiders as bizarre and strange and indeed primitive when the outsiders represent their stories to the legal establishment – the insiders. Nowhere is this practice so familiar as within the context of indigenous peoples and their quest to gain sovereign and self-determination rights.

In *Masphee Tribe v. New Seabury Corp.*,<sup>25</sup> Indian witnesses were interrogated about their identity and belonging to the Masphee tribe. The ultimate question in this case was whether the Masphee tribe existed and whether this tribe could be party to a lawsuit. In the critical legal literature,<sup>26</sup> the trial has become an illustration of a conflict between two narratives of Indian history. The opposing sides held different images of tribal status, culture and identity. The trial exposed a disjunction between legal and ethnographic identities. The defendants relied on written history, the archive, to develop categorical definitions of a tribe. The defendants showed that the so-called Masphee tribe was not a distinct tribe at all, but instead consisted of a loose composition of refugees from several other tribes and ethnic groups.

For the plaintiffs, on the other hand, the Masphee story was one of coercion, adaptation and survival. The Masphee people had moved casually, and sometimes invisibly between Indian and non-Indian life. The hybrid identity of the Masphee people made it possible for them to survive. At the end of the trial, the jury rejected the story of the Masphee people.

Despite such legal setbacks, the recognition of the importance of narratives in legal settings has encouraged indigenous peoples to use narratives when negotiating land claims - and increasingly with some success. In the *Delgamuukw* ruling,<sup>27</sup> the Supreme Court of Canada has accepted oral histories of indigenous peoples as legal evidence in aboriginal rights cases. But as Fiske<sup>28</sup> warns, there is a danger that storytelling will become embedded in the politics of difference as soon as the courts start to absorb the narratives of indigenous peoples into their own legal discourses. Only those stories that are framed in the English language of self governance, aboriginal rights and co-management are recognised by the courts but this is the language of the dominant society, the language of the policy makers.<sup>29</sup> Stories that emphasise another way of knowing are dismissed as different, and the social position of the storytellers is reduced to being an outsider.

This throws up the issue to what extent the law distorts narratives when it starts to incorporate and translate cultural differences in its jurisprudence. Lessons can be learned from the critical (legal) literature that questions the nature of the difference that is recognised in aboriginal rights claims in general and native title claims in particular.<sup>30</sup>

21 *Id.*

22 Peter Brooks and Paul D. Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1996).

23 *Id.*

24 See Scheppele, note 19 above.

25 *Masphee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979).

26 Guyora Binder and Robert Weisberg, 'Cultural Criticism of Law' 49 *Stanford Law Review* 1149 (1997).

27 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

28 Jo-Anne Fiske, 'Positioning the Legal Subject and the Anthropologist: The Challenge of Delgamuukw to Anthropological Theory' 45 *Journal of Legal Pluralism* 1 (2000).

29 Julie Cruikshank, 'Oral Traditions and Material Culture: Multiplying Meanings of 'Words' and 'Things'' 8/3 *Anthropology Today* 5 (1992) and Julie Cruikshank, 'Negotiating with Narrative: Establishing Cultural Identity at the Yukon International Storytelling Festival' 99 *American Anthropologist* 56 (1997).

30 Brenna Bhandar, 'Re-Covering the Limits of Recognition: The Politics of Difference and Decolonisation in John Borrows' Recovering Canada: The Resurgence of Indigenous Law' 27 *Australian Feminist Law Journal* 125 (2007) and John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: Toronto University Press, 2002).

## 4 ORAL EVIDENCE IN NATIVE TITLE CLAIMS

There is a longstanding Western cultural tradition of maintaining a binary opposition between orality and literacy. The distinction between writing as civilised and orality as primitive has been used to justify the hierarchical relationship between the coloniser and the colonised.<sup>31</sup> As Jacques Derrida argues:

The continued use of the oral/written distinction is always haunted by the underlying racist distinctions of the colonial project.<sup>32</sup>

In *Of Grammatology*, Derrida posits that the Western world's obsession with the 'Truth' explains why texts or written accounts have been associated with being more reliable and trustworthy because they are perceived to be more stable, ongoing and unchanging and hence closer to the 'Truth' than oral accounts. This metaphysical framework that the truth and absolute knowledge is out there waiting to be discovered also lies at the heart of the Western legal system and explains why judges have ambivalent feelings when they are confronted with oral evidence.<sup>33</sup>

The world's leading case on the admission and interpretation of oral history of First Nations as evidence remains *Delgamuukw v. British Columbia*.<sup>34</sup> Despite the oral testimony given by the elder Johnny David in the *Delgamuukw* hearings, Chief Justice McEachern gave little weight to the evidence of the

hereditary chiefs. As illustrated hereafter with some extracts from the court hearings, the Chief Justice struggled with the cross-cultural barriers and hence in his rules of evidence rejected oral testimonies. Later, the Supreme Court of Canada overturned much of the trial judgment and accepted oral history as evidence in its judgment. Nevertheless this overturning of the initial judgment, *Delgamuukw I*,<sup>35</sup> remains illustrative in highlighting the problems associated with cross-cultural communication and translation of colliding worldviews in native title claims.

One of the striking examples in the *Delgamuukw I* case is the difference between the concept of hearsay in Western jurisprudence and the understanding of what one is empowered to talk about. In Witsuwit'en culture one can give valid testimony about events that were not witnessed but that were passed down through stories as long as one has the authority to talk about these events. However, in Western jurisprudence, events that were not witnessed are reduced to hearsays and other witnesses or written accounts need to be produced in order to validate the particular event.<sup>36</sup>

Even more telling was the status given to oral traditions. A defining moment in the *Delgamuukw* case is when Johnny gives evidence about Tas Dleese, the story of the monster at Dzikins Lake which in the cultural tradition of the Witsuwit'en is an important story that can support evidence for establishing historical rights to territory. However, for Judge McEachern, the story was reduced to an unreliable myth and he dismissed the importance of these myths to First Nations as valid and sacrosanct validations of rights to land.<sup>37</sup>

Even though the Supreme Court of Canada eventually accepted the oral history of First Nations as evidence in native title claims in *Delgamuukw III*<sup>38</sup> and *Mitchell v. M.N.R.*<sup>39</sup>, Canadian courts kept struggling with the relevance they should attribute

31 Drew Milton, 'A Bad Connection: First Nations Oral Histories in the Canadian Courts', in Renée Hulan and Renate Eigenbrod eds, *Aboriginal Oral Traditions: Theory, Practice and Ethics* 79 (Halifax: Fernwood Publishing, 2008).

32 Jacques Derrida, *Of Grammatology* 101 (Baltimore: John Hopkins Press, 1976) quoted in Milton, *Id.*, at 80.

33 See Milton, note 31 above.

34 Antonia Mills, *Hang on to these Words: Johnny David's Delgamuukw Evidence* (Toronto: University of Toronto Press, 2005).

35 *Delgamuukw v. British Columbia*, (1991) 79 D.L.R. (4<sup>th</sup>) 185 (B.C.S.C.).

36 See Mills, note 34 above.

37 *Id.*

38 See *Delgamuukw* note 27 above.

39 *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, para 27.

to oral evidence. The ambivalent positioning of the courts towards oral evidence has become a main hurdle for First Nations in their quest to gain recognition of their rights, mainly because oral histories are accessed and used in a transcribed and prescribed written form – the mainstream historical discourse.<sup>40</sup> As a result, the stories of indigenous peoples get lost in ‘the shuffle of legal formalities’.<sup>41</sup>

Borrows<sup>42</sup> draws attention to another challenge that is posed by accepting oral histories as evidence in native title claims. The oral evidence of indigenous peoples in the courts has multiple purposes and besides providing historical ‘facts’, the stories of indigenous peoples often question at the core the nation state’s legal and constitutional structure.

[Aboriginal peoples’] evidence records the facts that the unjust extension of the common law and constitutional regimes often occurred through dishonesty and deception, and that the loss of Aboriginal land and jurisdiction happened against their will and without their consent.<sup>43</sup>

In other words, oral traditions can question the legitimacy of the law. This makes it even more difficult for the court to accept the oral stories of indigenous peoples as a full expression of their ‘suppressed’ voice. Courts are faced with a dilemma. They can either accept the stories of indigenous peoples highlighting the law’s illegitimacy or impose a legal language that distorts or hides the full expression of the ‘voice’ of indigenous peoples. For Vermette, the coloniser has still a monopoly over interpretation; ‘the legal system lies at the heart of the anti-dialogical action of the oppressor’.<sup>44</sup> The reluctance of the courts to interpret the social meanings of the presented oral histories in a correct way has led to a questioning of the legitimacy of the law and its dominant forces.

The dominant legal system rapes its way into legitimacy, and took form as law, based upon the right of its military attire and its ability through force to dominate all that is different or fails to conform to those who hold power. This is now law. Law is rooted in creation, it is a song, it is a love of law, and its land and its peoples. This *muldarbi* law works to erase peoples and their law.<sup>45</sup>

Looking at some of the transcripts of the *Delgamuukw* I court hearings in Mills<sup>46</sup> reminds the author of Benton’s critique of how colonial powers have sent ‘messages through legal institutions that were simply not received’.<sup>47</sup> Benton illustrates this with an extract from Achebe’s novel on colonialism, *Things Fall Apart*.<sup>48</sup> The protagonist, Okonkwo, is taken before the judge and jury, and convicted, without realising what is happening. He is not awed by the event because he does not know it is a trial. He does not know that the presiding British official is a judge; he does not know that the twelve men brought in to listen to the exchanges in the room compromise a jury. For Benton this passage in the novel epitomises the ‘burden of translation’ when the coloniser and the colonised are encountering each other:

Individuals and groups were identified right away to act as interlocutors or intermediaries. While cultural change reverberated through interacting societies, it was concentrated in the cultural transformation of these individuals. Within a historically short space of time we observe cultural practices that are products of neither dominant nor subordinate cultures, but of the interaction.<sup>49</sup>

Narratives and stories are told in specific settings for specific purposes and a story told at different times and different settings may present different

40 See Milton, note 31 above and Preston, note 13 above.

41 D’arcy Vermette, ‘Colonialism and the Suppression of Aboriginal Voices’ 40 *Ottawa Law Review* 225 (2008-2009).

42 John Borrows, ‘Listening for Change: the Courts and Oral Tradition’ 39/1 *Osgoode Hall Law Journal* 1 (2001).

43 *Id.*

44 Vermette, note 41 above.

45 Irene Watson, ‘Naked Peoples: Rules and Regulations’ 4/1 *Law Text Culture* 1 (1998).

46 Mills, note 34 above.

47 Lauren A Benton, *Law and Colonial Cultures: Legal Regimes in World History: 1400-1900* 16 (Cambridge: Cambridge University Press, 2002).

48 Chinua Achebe, *Things Fall Apart* (London: Penguin Classics, 1958, re-issued 2010).

49 See Benton, note 47 above.

selves and different histories. Stories are told in a situation of a transforming relationship between the elicitor and the narrator; they form part of a communicative interaction and exchange between the listener and the narrator each with their own agendas.<sup>50</sup> Ultimately, as illustrated above with Johnny's oral testimony in the *Delgamuukw I* case, the use of language in law is a communicative action and the success of the action depends on whether the hearer (in this case the judge) responds to the validity claims raised by the speaker.<sup>51</sup> Oral history is dialectic; the outcome of the story relies on the experience and interpretation of both the teller and the listener.<sup>52</sup>

Oral history is by definition subjective,<sup>53</sup> and indigenous peoples particularly value the subjective interpretation of history because it allows the teller to link the past with the present. Oral history is more than just a description of events or the quest to find the truth; oral history accommodates the fluid aspects of culture and tradition, it is about discovering social processes and understanding current problems through narratives.<sup>54</sup> The histories of indigenous peoples are often steeped in myths and legends; 'genres' that sit uncomfortable within the mainstream. When encountered in courts, oral traditions will be transcribed or translated. It seems that the only way oral histories can find a place in history is through these translations. However,

translating oral histories into written ones devalues their symbolism and meaning. Oral histories can only become legitimate by distorting the subjectivity of these narratives. Regardless of whether oral stories are recognised as legitimate testimonials in court hearings, by translating narratives into the mainstream, they continue to be marginalised<sup>55</sup> and aboriginal legal arguments are reinterpreted so they fall within Western legal concepts.<sup>56</sup> For Borrows this amounts to a practice that has made aboriginal peoples legally different and makes them live in 'tenuous legal conditions'.<sup>57</sup> The *Victor Buffalo*<sup>58</sup> case, which was one of the first major Treaty cases after *Delgamuukw*, made it clear that the latter instead of settling the debate had only intensified the battle over oral history evidence in Canadian courtrooms.<sup>59</sup>

Just as Canada has been struggling with the status of oral histories in its law courts, so has South Africa in the Land Claims Courts. After the collapse of the apartheid regime, the demand for justice required the law to bend its rules and hearsay oral evidence had to be admitted as legitimised evidence in Land Claims Courts. This has raised questions as to what extent oral evidence can be a 'record' and how this record can be alternatively 'stored' or archived. For Harris, the recording of narrative and the archiving of orality can easily destroy the fluidity of the narrative and can alienate the teller from the story. There are similarities between the legal status of oral histories in the courts of law and the societal processes behind archival theory.<sup>60</sup> The need to archive or to record oral stories as legal evidence

---

50 Corinne Kratz, 'Conversations and Lives', in Luise White, Stephan F. Miescher and David Cohen eds, *African Words, African Voices: Critical Practices in Oral History* 127 (Bloomington: Indiana University Press, 2001).

51 Deborah Cao, 'Legal Speech Acts as Intersubjective Communicative Action', in Anne Wagner, Wouter Werner and Deborah Cao eds, *Interpretation, Law, and the Construction of Meaning* 65 (Dordrecht: Springer, 2007).

52 See Borrows, note 42 above and Preston, note 13 above.

53 Julie Cruikshank, 'Oral History and Oral Tradition: Reviewing Some Issues' 75 *Canadian Historical Review* 403 (1994); Elizabeth Tonkin, 'Investigating Oral Tradition' 27 *The Journal of African History* 203 (1986); Elizabeth Tonkin, *Narrating Our Past: The Social Construction of History* (Cambridge: Cambridge University Press, 1995); Preston, note 13 above and David William Cohen, Stephan F. Miescher and Luise White, 'Voices, Words, and African History', in White, Miescher and Cohen eds, note 50 above, at 127.

54 See Borrows, note 42 above and Preston, note 13 above.

---

55 See Cruikshank, note 53 above and Preston, note 13 above.

56 Hester Lessard, Rebecca Johnson and Jeremy Webber, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* 15 (Vancouver: University of British Columbia, 2011).

57 John Borrows, *Drawing out Law: A Spirit's Guide* 55 (Toronto: University of Toronto Press, 2nd ed. 2010).

58 *Chief Victor Buffalo v. Her Majesty et al.*, (Fed. C.A., December 20, 2006) (31869).

59 Arthur J. Ray, *Telling it to the Judge: Taking Native History to Court* 67 (Montreal: McGill-Queen's University Press, 2011).

60 Verne Harris, *Archives and Justice: A South African Perspective* (Chicago: Society of American Archivists, 2007).

reinforces the voicelessness of the 'marginalised'. The archive becomes the terrain of power and history is littered with examples of archives that are used to manipulate social memory.<sup>61</sup>

## 5

### THE FOUNDING MOMENT OF LAW

The reluctance of the courts to embrace fully and whole heartedly the concept of customary law as evidence in native title claims is forcing us to re-evaluate the concept of law in a culturally diverse plural society. The rejection of myths as oral evidence is an example of a belief that the law remains temporally and spatially deferred, a phenomenon that can be illustrated with an extract from Kafka's story *Before the Law*.

Before the law stands a doorkeeper. To the doorkeeper there comes a man from the country who begs admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. 'It is Possible', answers the doorkeeper, 'but not at the moment.'<sup>62</sup>

A popular reading of this story is that the law is before the peasant but it is not present; it forever recedes to some other place and time.<sup>63</sup> Unless an institution can be duplicated it cannot have meaning in different contexts, and it is this very replication that opens it up to the possibility of change. In order for the law to be enforceable, it must be repeatable, but because the law is repeatable it is haunted by a paradox. In order to provide itself with a foundation and remain law, the law invokes self-evident truths,

God or appeals to natural law. But to quote Sokoloff, 'the paradox is that the founding moment of the law is itself unfounded'.<sup>64</sup> The law's institutional response to the paradox brought about by the iterability is to try and ensure that it is provided with a univocal interpretation that is received uniformly. This requires an examination of how to make the transition from a concept of law that is regarded as homogenous and universal despite prevailing diversities, to a postmodern conception that is reflective of its cultural diversity. In order to make this transition it is important to reflect further upon the founding moment of law.

The history of the rise of positive law can be told in different ways and the history we are probably most familiar with dates back to the Normans who initiated the process of moulding the chthonic British laws into state-centred, official law. A key role in forging this centralising of law was acquired by lawyers and judges. England's capacity for gradually absorbing various components into its national legal order through the activities of lawyers has made its history distinct from its continental European counterparts who sought refuge in Roman-inspired codification as the preferred means of consolidating their state systems into some sort of unity.<sup>65</sup> This has made the common law tradition remarkably distinct from the Napoleonic legal tradition and has led some commentators to argue that common law has more potential to respond to the demands of an ethnically plural social base. However, common law is itself sharply conditioned by culturally defining elements, and acts as a culturally homogenising institution. As Shah argues:

The balance between the chthonic and the lawyers' laws gradually shifted over time so that the history of the common law came to be largely written as one of judicial decisions that are nationally applicable rather than as analyses of the laws of various British peoples. By the 20<sup>th</sup> Century, local custom retained only a marginal status as a source for the common law [...] the ethno-cratic and

61 Lisa Klopfer, 'Oral History and Archives in the New South Africa: Methodological Issues' 52 *Archivaria* 100 (2001).

62 Franz Kafka, *The Trial* (London: Penguin, 1994).

63 See for example Margaret Davies, 'Derrida and Law: Legitimate Fictions', in Tom Cohen ed, *Jacques Derrida and the Humanities: A Critical Reader* 213 (Cambridge: Cambridge University Press, 2001).

64 Kafka, note 62 above.

65 Prakash Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law* (London: Glasshouse Press, 2005).



techno-cratic elements of the British legal order therefore appear to combine in suppressing the influence of other traditions.<sup>66</sup>

This becomes even more obvious when we examine the foundation of the law through the history of the mixed jury. This is a history that shows so aptly how ‘we moderns’ approach citizenship, law and knowledge through positivism. As Constable argues:

The story of the mixed jury, from its pre-statutory practice to its statutory abolition in 1870, is, in microcosm, a history of the rise of positive law. It tells of the emergence of a world in which the law of officials assumes exclusive standing as law, in which the territorial jurisdiction of a state replaces the principle of personality of law (that one lives and judged according to one’s own law), in which social science transforms the practices of a people into prepositional knowledges of norms, and in which laws become an instrument of social policy directed towards the management of a population.<sup>67</sup>

In early examples of pre-14<sup>th</sup> century mixed juries,<sup>68</sup> strangers or members of other communities together with the natives of those who stood trial, reached a conciliation of the customs of two communities. Early juries embody a principle of personal law, whereby both non-alien and alien persons are entitled to be judged *secundum legem quam vivit* – or literally according to the law by which one lives or indeed by the customs of the community to which the person belongs. With the development of the nation-state, the alien members of a jury come to be the alien party’s fellow citizens; in other words the laws of the state govern those who reside within the state’s geographical boundaries, regardless of the customs of the community to which a person belongs. According to Constable,<sup>69</sup> the significance

of the history of the mixed jury is the principle of personal law which sets out that the judgment of a person must be according to the law or customs of that person’s community; such judgment must be made by those with knowledge of those customs or by those who share in those customs and belong to the same community. When communities increasingly encountered the king and the law of the state after the 14<sup>th</sup> century, the history of the official doctrine of the mixed jury, as distinct from the tradition of its practice, began. Rather than the traditional merging of two laws, the state gradually declared itself the source of law, and as it did so, the unity of tradition and practice broke apart. In other words, the history of the mixed jury is the story of the rise of official law and the decline of practice.

But within the context of this article, the history of the mixed jury also draws attention to the founding moment of the law, namely that the positivist understanding of the law precludes the possibility of any law other than positive law. Anglo-American legal historians view communities governed by custom as somehow non- or pre-legal. English common law is official law, the law of the king’s courts, rather than custom. ‘The king’s laws developed against a background of local custom and through the centralisation of royal power developed into a particular system of rules, with their own rational coherence’.<sup>70</sup> As Plucknett<sup>71</sup> argues, ‘law consists in rules laid down by judicial or legislative authority, custom is not quite the same as law’. Custom, so argues Whitelock,<sup>72</sup> lacks the judicial machinery and procedure required for the production of law. In distinguishing custom from law, the positivist conception of law is sealed, granting primacy to the law of officials in their understanding of law as a system of prepositional rules. For Hart,<sup>73</sup> the defining moment of law or the origin of positive law is rooted in conquest,

<sup>66</sup> *Id.*, at 12.

<sup>67</sup> Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* 1 (Chicago: University of Chicago Press, 1994).

<sup>68</sup> For examples, see Constable, *Id.*

<sup>69</sup> *Id.*, at 25.

<sup>70</sup> *Id.* at 67.

<sup>71</sup> Theodore Plucknett, *A Concise History of the Common Law* 13 (Boston: Little, Brown and Company, 5<sup>th</sup> ed. 1956) and Constable, note 67 above, at 168.

<sup>72</sup> Dorothy Whitelock, ‘The Anglo-Saxon Achievement’, in C. Chevallier ed, *The Norman Conquest: Its Setting and Impact* 27 (London: Eyre and Spottiswoode, 1966) and Constable, note 67 above, at 169.

<sup>73</sup> HLA Hart, *The Concept of Law* 112 (New York: Oxford University Press, 2<sup>nd</sup> ed. 1997).

meaning that understanding law only as positive law is an act that commits society to a law that is founded on conquest or force of will. 'The moment of origin of positive law coincides with the moment a conqueror imposes his will on a conquered people'.<sup>74</sup>

## 6 EXCLUSIONS FROM LAW AND THE NAGOYA PROTOCOL: A THEORETICAL UNDERSTANDING

As established above, it is undeniable that law's identity lies in its positivity. However, law also gains its identity from processes of exclusion.<sup>75</sup> If the concept of exclusion is firmly embedded in law's identity, it is important to gain a better understanding of how the law draws the line between inclusion and exclusion. Davies<sup>76</sup> explains this process of exclusion from two theoretical viewpoints: a structural/post-structuralist theory of meaning and psychoanalysis.

According to structural theory, exclusion, expressed through difference, is an essential component of identity. Thus, differentiating oneself from others forms one's identity. This principle translates itself in the legal domain as the identity of law being defined by excluding various non-legal phenomena. However, from a post-structural point of view, exclusion is not only formative of identity, it is also subversive of identity. Because identity is constituted by exclusion, from a post-structuralist perspective, identity is also threatened by exclusion. Exclusion antagonises, undermines and resists law's identity.<sup>77</sup> As this article has illustrated above, only certain expressions of difference are recognised in native title claims in order to protect the positivist identity of law. However, indigenous peoples have used their

culturally embedded legal expressions and evidence in the courts – narratives that are indeed initially excluded from the law on the basis of being non-legal phenomena – as a way to question law's identity and its representation in a uniform, sovereign, positivist structure. In other words, from a post-structural perspective, while exclusion initially seems to protect the identity of law, given the subversive nature of identity, exclusion also undermines and threatens the identity of law.

Another way Davies theorises about exclusion in the law is through the psychoanalytical distinction between foreclosure and repression.

Foreclosure refers to total exile or repudiation; the foreclosed object is alien or outlawed, completely exterior and beyond the comprehension of the foreclosing entity. In contrast, repression is an internal denial or act of censure. In the case of foreclosure the thing does not exist or cannot be seen, whereas a repressed entity may be recognised, perhaps tangentially, but is condemned or resisted.<sup>78</sup>

This distinction between foreclosure and repression offers a useful critical lens to further analyse the relationship between Euro-American and indigenous law. To reiterate, the Nagoya Protocol recognises, in Article 12 (1), customary law and community protocols. While the CBD's positioning towards customary law was still vague and unclear, the Nagoya Protocol seems to have included customary law as 'formal' law. In other words, as a result of socio-political and cultural pressure, the exclusion of indigenous or customary law from the formal body of law has become untenable and as such the foreclosure of customary law has become difficult to uphold in international fora such as the CBD. For a long time, Western state law protected its identity through the exclusion of customary law from the definition of law. The 'object' law could only maintain its position as a unified institutionalised normative system by excluding other systems of law which were characterised as non-law. However, as this article has argued above,

<sup>74</sup> See Constable, note 67 above, at 85.

<sup>75</sup> Margaret Davies, 'Exclusion and the Identity of Law' 5 *Macquarie Law Journal* 5 (2005).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*, at 9.



the idea that the law is a uniform normative institution cannot be maintained because the underlying philosophical ideas and norms that justify this distinction between inside and outside or between law and non-law have been criticised both by critical theories and emancipatory praxis.

The location of the line of exclusion is inevitably set by political and cultural considerations and in the contemporary context, recognition of a plurality of laws and concepts of law may both be normatively (ethically) preferable and empirically defensible. [...] Thus, the idea of an exclusive law defined by a clear inside/outside dichotomy has suffered several theoretical blows.<sup>79</sup>

Thus, a plurality of concepts of the law seems to be a newly accepted norm from a legal philosophical point of view. However, from the point of view of the law as a subject, the issue of exclusion seems to be more problematic and more difficult to challenge. By drawing upon Freud's concept of repression, it becomes obvious that the law might consider its subjects as equally existing under the law, but the law might not equally recognise their subjectivity. This type of exclusion is more subtle and is a form of internal exclusion which takes the form of 'silencing the subject who does not fit the predetermined legal stereotype'.<sup>80</sup> To use Davies' words:

[I]t is possible to be included in a category while still being excluded – one can be included formally and literally, yet still be disempowered, marginalised, silenced and in practice disenfranchised.<sup>81</sup>

While a total exclusion from the law has been rectified and customary law has become part of formal law, a repressed exclusion from the law becomes more difficult to challenge because the subject is already formally included in the law but at the same time stays excluded.

The person who is formally recognised as an equal legal subject, but poorly recognised in the symbolic, discursive, or representational spheres of law, is not wholly a legal outsider, but encounters resistance in their interactions with law.<sup>82</sup>

Referring back to the previous section of this article wherein the oral narratives of indigenous peoples as evidence in native title court cases are problematised, it becomes obvious to conclude that customary law, as expressed in narratives, finds itself in that repressed space of exclusion. This means that despite the acceptance of customary law as law, in praxis, customary law is still excluded because the law's identity remains to be based on exclusion or indeed repression because the subjects of the law, in this case indigenous peoples, remain excluded from the social domain.

While the Nagoya Protocol under the auspices of the CBD represents a major step forward in the recognition of the self-determination rights of indigenous peoples, from both a theoretical and empirical point of view, doubts must be raised as to what extent the Nagoya Protocol has become a legal instrument that is based on inclusion rather than exclusion. At this point it is useful to remind the reader again that, as this article has argued elsewhere, the Hoodia benefit sharing agreement has turned the San's knowledge and culture into property.

The uses and meaning of Hoodia in the San's culture became defined and directed by law. Law, through the Hoodia benefit sharing agreement, excluded alternative narratives. Only those San voices that were willing to commodify Hoodia were represented in the agreement. Dissident voices that were contesting the benefit sharing agreement were excluded. Often the dissident voices belonged to the most marginalised members of the community. Just like in native title claims, San narratives were used to subvert law's identity. Some of the stories that the author of this article has recorded in the field were not only narrated within the spirit to contest the Hoodia benefit sharing agreement but also to undermine the fetishism of exclusive property rights.

---

<sup>79</sup> *Id.*, at 13-14.

<sup>80</sup> *Id.*, at 21.

<sup>81</sup> *Id.*

---

<sup>82</sup> *Id.*

The legal regime that has been created with access and benefit sharing agreements has been one that sits uncomfortable with some San peoples who do not believe in the value of protecting their biocultural rights through a property rights framework. Instead, they have resorted to some of their older narratives about food sharing between the hyena, jackal and lion to show that the social organisation of the San or indeed their law is not based on a regime of exclusive property rights but on an ethos of sharing and reciprocity.

The Hoodia benefit sharing agreement is an example of repressed exclusion. While in principle the law accepts customary law, de facto, the law still struggles to accept alternative narratives. Hoodia as a commodified property is protected through the benefit sharing agreement under the auspices of the CBD, but Hoodia as a life force that is a part of the San's wider cosmologies has been excluded from that protection. It is a narrative that remains muted and confined to the Kalahari sand dunes because its narrators are not the ones who have the power in the community to make their voice heard.

In short, from a theoretical and empirical perspective, the evidence is there to fear that the Nagoya Protocol will be a legal tool that is based on exclusion because the law's identity is based on a network of exclusions. Together with other critical legal thinkers, the author of this article argues that for customary law to become part of the law, the law as a concept needs to be challenged. It is not sufficient to pay lip service to customary law in the Nagoya Protocol as long as the law's identity remains unchallenged. The idea of the law needs to be reinvented. One way of reimagining law is to conceptualise it as a non-identity. The best way to do this is through a framework of pluralism.

Pluralism is the position that there is no single concept of law, law is multiple and heterogeneous in any community and cannot be reduced to a single identity.

Seeing the law as a heterogeneous non-identity opens up the possibility to think about the law as a practice of inclusion rather than exclusion. It allows for the law to be conceptualised as something that is inherently pluralistic.

## 7 CONCLUSION: A RETURN TO LEGAL PLURALISM

Within this context of legal pluralism, this article finds it particularly interesting to pursue further the idea of Chiba<sup>83</sup> that legal pluralism is about the law in conflict and the law in subjectivity. Modern jurisprudence, he argues, excludes this personal factor because of its emphasis on the law in objectivity. He continues:

The essential importance of the subjective perspective is that a person under legal pluralism is not only a passive recipient of legal regulation but also an active agent for the law by his/her choice of an alternative legal rule among the plural. The choice is made to support one of the plural standards and to reject the other ones.<sup>84</sup>

In other words, for Chiba, legal pluralism makes it possible for individuals to become agents of change when making culturally dependent subjective choices and as such legal pluralism allows developing conflict situations. A central point in Chiba's argument is that it is essential to observe conflicts within legal pluralism. How does this translate within the context of this article and the recognition of the legal system of indigenous peoples?

Berman<sup>85</sup> argues that communities react to legal pluralism or complex overlapping legal authorities by either re-imposing the primacy of territory-based authority or seeking universal harmonisation; both strategies are indeed familiar practices for indigenous groups. For Berman neither sovereign territorialism nor universal harmonisation can respond successfully to the hybridisation of the law and he

83 Masaji Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (Tokyo: Tokyo University Press, 1989). See also Shah, note 65 above.

84 *Id.*, at 239.

85 Paul Berman, 'Global Legal Pluralism' 80 *Southern California Law Review* 1155 (2007).

argues, instead, that the descriptive insights of legal pluralism call for deliberately seeking to create or preserve spaces for conflict among multiple, overlapping legal systems. People may never acquire agreement on norms but they may acquire agreement on procedural mechanisms, institutions or practices that take hybridity seriously, rather than ignoring it through assertions of sovereignty or dissolving it through universalist imperatives.

What might make the legal establishment (including courts) uncomfortable with Berman's plea for pluralism is that a pluralist approach will not provide an authoritative metric for determining whose norms prevail in this messy hybrid world, nor does it answer the question of who gets to decide. What pluralism does is to challenge fundamentally both positivist and natural rights-based assumptions that there can ever be a single answer to a question. It might be a rather unwelcome message, but drawing on the author's experience with the San peoples and the Hoodia case, there is some value in Berman's statement. Any definitive statement as to who is authorised to make decisions is itself inevitably open to contestation by others. A pluralist framework suggests a future research agenda that emphasises micro-interactions among different legal or normative systems, applying pluralism to the international arena of cultural property rights illuminates a broader field of enquiry than asking whose norms prevail but instead asks scholars to consider studying in more depth the processes whereby normative gaps among communities are negotiated.

What makes the concept of legal pluralism particularly interesting in the context of the Nagoya Protocol is that it offers possibilities for thinking about spaces of resistance to state law or official law because it examines the limits to the ideological power of state law, but pluralism also frees the law from an essentialist definition. The debate about law and non-law, official law and non-official law or common or customary law is largely irrelevant because the key questions involve the normative commitments of a community and the interactions among normative orders that give rise to such commitments, not their formal status. Legal pluralists refuse to focus solely on who has the formal authority to articulate norms or the power

to enforce them; instead, they aim to study empirically which statements of authority tend to be treated as binding in actual practice and by whom. This is the point where legal pluralism still has to fight its own challenges because as indigenous groups know all too well, political and economic power strongly affect how much influence any particular normative community is likely to have. However, by broadening the scope of what counts as binding law without having to engage with an endless debate, the international community can turn its attention to examine how best to mediate the hybrid spaces where normative systems and communities overlap and clash. Nevertheless there remains the challenge for indigenous peoples to accept the principles of procedural pluralism itself which are consonant with liberal principles and may reject it on that basis.

To conclude, oral histories in the context of the stories of indigenous peoples are more than just archives, they serve other social purposes such as communicating cultural traditions. If the law and the courts are serious about accepting oral histories as evidence, first and foremost the use of these stories must shift from providing factual evidence towards the context of the social production of these stories. As long as courts translate stories into facts we must raise doubts whether the courts and the law are up for translating and incorporating symbols in a meaningful way that can protect indigenous peoples from further subordination from the continued colonial practice of the law.

As Fitzpatrick<sup>86</sup> argues, accounts of myth in Western scholarship are presented as characteristics of the non-Western others and the pre-modern West. If we as an international community of critical scholars want to tackle the problem of how to embrace non-Western framings of law, we have to confront the supposed absence of myth in 'modernity'. The birth of the rational man and modern law are indeed just as mythical; the portrayal of the lawless nature of the savage has been used to justify the need for rationality and universality, but these concepts are just as mythical as the savage's supposed irrationality and bestiality. Instead of

---

<sup>86</sup> Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).

exoticising the other, the law needs to decolonise internally, only by 'exotising' its own myths can it de-exotise the other. Judging from the progress that has been made in native title claims on this issue, unfortunately, indigenous peoples will still empathise with Kafka's peasant in his story *Before the Law*.<sup>87</sup> Before the CBD stands a doorkeeper: To the doorkeeper there comes a man from the Kalahari who begs admittance to the CBD. But the doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. 'It is possible', answers the doorkeeper, 'but not at the moment'.

---

<sup>87</sup> Kafka, note 62 above.

*LEAD Journal (Law, Environment and Development Journal) is jointly managed by the  
School of Law, School of Oriental and African Studies (SOAS) - University of London  
<http://www.soas.ac.uk/law>  
and the International Environmental Law Research Centre (IELRC)  
<http://www.ielrc.org>*

