

Comparative Environmental Law and Orientalism: Reading Beyond the ‘Text’ of Traditional Knowledge Protection.

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Abstract

This paper uses traditional knowledge as a case study to address multiple discussions in the field of comparative law. First, it addresses the theoretical challenge about the role of comparative law as a critical research tool in the development of environmental law. Second, within the context of transnational legal processes, it questions to what extent comparative law as a method can further the relationship between different levels of law making by distinctive legal actors. It is timely to bring mainstream comparative law into conversation with critical perspectives from other disciplines such as postcolonial theory and poststructuralism when studying non-Western law. These issues have been firmly placed on the research agenda of comparative law scholars for quite a few years but studying these questions from the perspective of traditional knowledge brings a new outlook to these debates.

Key words

Traditional Knowledge, indigenous peoples, legal culture, legal orientalism

Introduction

The problem when looking into the protection of traditional knowledge is the diversity of potentially applicable laws. It is international environmental law that first drew the attention to the precarious situation when the Convention on Biological

Diversity (CBD) recognised the importance of traditional knowledge for indigenous peoples and local communities. Since then, a plethora of international environmental law instruments have recognised the significance of traditional knowledge for indigenous peoples and local communities.¹ Besides international environmental law instruments there are also human rights implements that are protecting traditional knowledge from misappropriation.² A third option to protect traditional knowledge can be found in the World Intellectual Property Organisation (WIPO), where since 2001 negotiations have been ongoing on intellectual property and traditional knowledge.³ Given the diversity of international law, there is no (uniform) definition of traditional knowledge, and the problem of how to protect traditional knowledge is not dealt with in a uniform way and often the law that is ultimately applicable is national law, bounded by territory. Besides binding laws, there is a whole plethora of other normative orders - some formal and recognised, others informal and unrecognised – that are trying to find a more equitable, fair and respectful solution for protecting traditional knowledge. Whilst these alternative rules and norms are diverse, one of the most important ones is indigenous peoples’ customs, mostly referred to as customary law.

¹ Reference to traditional knowledge can be found in the Rio Declaration, Agenda 21 (Chapter 26 is on indigenous peoples, chapter 32 on local farmers and indigenous peoples are also mentioned in chapter 15 on the protection of biological diversity and uses identical wording to Article 8(j) to the CBD. For more details see Agenda 21, Conference of the United Nations on Environment and Development, Annex 2 (UN Doc. A/CONF.15 1/26/Rev.1), Vol. 1 (1993)); The Forest Principles (Principle 12(d) of the Forest Principles stresses the importance of benefit sharing and Principle 2(d) and 5(e) also stress that benefits of traditional ways of living and emphasises the various needs and economic and cultural interests of indigenous and local groups); and international binding agreements such as the CBD and the Convention to Combat Desertification (relevant Articles in the Convention to Combat Desertification are Article 17(c), Article 18 and Article 19).

² Convention No. 169 Concerning Indigenous and Tribal peoples in Independent Countries of the International Labour Organisation and the United Nations Declaration on the Rights of Indigenous Peoples are the main international instruments.

³ WIPO through its Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC), regulates intellectual property issues emerging from the use of traditional knowledge.

We are dealing here with a methodological problem at multiple levels. First, there are multiple layers of formal and non-formal rules and norms dealing with traditional knowledge. Second, customary law is not always well-defined and recognised in national and international law and therefore lacks a legally binding quality. This makes traditional knowledge a case study *par excellence* for comparative lawyers interested in studying the changing nature of comparative law when focusing on cross-cultural legal comparisons. It sits within a wider debate about the widening of comparative law's theoretical ambition which is part of a broader awakening that comparative law as a method is more than just comparing legal rules, technical reforms, legal institutions and professional legal practices; more attention is placed on the wider socio-legal context that shapes the meaning of law.⁴ Furthermore, the paper also responds to the request that environmental law plays a bigger role in challenging the methodological approaches in comparative studies.⁵

This paper, therefore, uses traditional knowledge as a case study to address multiple discussions in the field of comparative law. First, it addresses the theoretical challenge about the role of comparative law as a critical research tool in the development of environmental law. Second, within the context of transnational legal processes, it questions to what extent comparative law as a method can further the relationship between different levels of law making by distinctive legal actors. It is timely to bring mainstream comparative law into conversation with critical perspectives from other disciplines such as postcolonial theory and legal pluralism

⁴ R. Cotterrell, *Comparative Sociology of Law*. Queen Mary University of London, School of Law. Legal Studies Research Paper No. 96/2011. Electronic copy available at: <http://ssrn.com/abstract=1971611>

⁵ J. Darpö and A. Nilsson, 'On the Comparison of Environmental Law' 3 *Journal of Court Innovation* (2010), 315-336 at 316.

when studying non-Western law.⁶ These issues have been firmly placed on the research agenda of comparative law scholars for quite a few years⁷ but studying these questions from the perspective of traditional knowledge brings a new outlook to these debates.

First, it contributes to ongoing discussions about the meaning and definition of legal culture by drawing upon legal pluralism as a critical lens to reflect upon the meaning of legal culture. Second, the functional comparison of different legal frameworks to protect traditional knowledge opens up the debate about the hierarchical ordering of law making. Through a post-colonial theoretical lens questions can be raised to what extent comparative law as a method is well equipped to give voice to non-Western legal processes from an epistemological and ontological point of view. After all, comparative law as a discipline has been criticised for being orthodox and even comparatists themselves have argued that comparative lawyers approach law as a positivistic ‘science’. Orthodox comparative lawyers study what is law and what counts as binding law in a given jurisdiction describing neutrally, objectively, logically and scientifically the law in force.⁸ But Pierre Legrand questions to what extent comparatists pay respect and recognise the law of the ‘other’. Understanding particular legal problems requires a deeper reading of the historical, political, social, demographic and epistemological reasons behind specific legal rules.⁹

⁶ T. Ruskola, ‘Legal Orientalism’, 101 *Michigan Law Review* (2002), 179-234, at 181.

⁷ See e.g. D. Nelken & J. Feest (eds), *Adapting Legal Cultures* (Oxford, Hart Publishing, 2001); D. Nelken (ed), *Using Legal Culture* (London, Wildy, Simmonds & Hill Publishing, 2012).

⁸ P. Legrand, ‘Siting Foreign Law: How Derrida Can Help’, 21 *Duke Journal of Comparative & International Law* (2011), 595-629, at 598.

⁹ P. Legrand, n. 8 above, at 601.

The paper starts with a genealogy of the meaning of legal culture in comparative law, moving next to a close reading of the work of Pierre Legrand and his engagement with Jacques Derrida's deconstruction of law as text. The paper then focuses on a functional comparison between international, regional and national laws dealing with the protection of traditional knowledge. The final part of the paper reflects on the methodological challenges comparative law is facing when dealing with non-Western legal systems opening up the debate about the value of difference and the voice of the 'other' in environmental law making and the protection of traditional knowledge.

As explained in more detail below, the cultural turn in comparative law studies requires a different method when comparing different legal systems. The act of comparison is perceived to be a political activity embedded in local contexts.

However, the latter reaches far beyond an understanding of the differences between legal systems on the basis of a historical, political, and social dimension; it requires a better understanding of the legal context in which norms are adopted, amended and applied.¹⁰ This requires studying the legal culture of the rules and norms that are currently in place to protect traditional knowledge. So while the paper engages with a functional comparison between the different international, national, regional and local legislations, this comparison serves as a platform from which to study cross-cultural legal contexts and to engage critically with the methodological challenges comparative law faces when studying across legal cultures.

¹⁰ P. Legrand, 'Comparative Legal Studies and Commitment to Theory', 58 *Modern Law Review* (1995), 262–273, at 262; P. Legrand, 'How to Compare Now (1996) 16 *Legal Studies* (1996), 232–242, at 232; S. Millns, n. 10 above, at 292.

Genealogy of Legal Culture

In an attempt to engage on a more theoretical level with the question how to compare legal systems, comparative law has experienced a cultural turn under auspices of scholars like Pierre Legrand,¹¹ David Nelken¹² and Csaba Varga.¹³ The cultural turn has been inspired by previous studies on legal cultures such as the socio-legal approach of Lawrence Friedman¹⁴ and the critical reflections advocated in the legal theory of the post-modern legal scholar Günther Frankenberg.¹⁵ Frankenberg criticised the functional approach in comparative law for giving a false sense of neutrality. According to Frankenberg, it is impossible to find a point of view from which to compare different legal rules in a neutral way. Furthermore, he questions the usefulness to compare just the legal rules, particularly since legal institutions are embedded in a wider social context which should be part of the legal comparative enquiry. Legal scholars' attention to culture has a longer history with roots in the Western Romanticism movement of the 18th century. Romanticists reacted against the rationalisation and universalization of science during the Enlightenment and pleaded for a return to history, emotions and nature in science and philosophy, including law.

¹¹ P. Legrand, n. 10 above

¹² D. Nelken, 'Disclosing/Invoking Legal Culture: An Introduction' 4 *Social and Legal Studies* (1995), 435–452; D. Nelken, 'Using the Concept of Legal Culture' 9 *Australian Journal of Legal Philosophy* (2004), 1–26.

¹³ V. Csaba, 'Legal Traditions? In Search for Families and Cultures of Law' 46 *Acta Juridica Hungarica* (2005), 177–197; V. Csaba, 'Comparative Legal Cultures. Renewal by Transforming into a Genuine Discipline' 48 *Acta Juridica Hungarica* (2007), 95–113.

¹⁴ L. Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975); L. Friedman, 'Is there a Modern Legal Culture?', 7 *Ratio Juris* (1994), at 117.

¹⁵ G. Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law', 26 *Harvard International Law Journal* (1985), 411–456.

The concept of legal culture is characterised by three distinctive approaches and theoretical genealogies.¹⁶ The first one has its roots firmly in comparative law and studies legal families and traditions and how they develop and cluster together. Initially, legal families were distinguished from a Western point of view and three main legal families were distinguished: Roman-Germanic law, common law and the socialist family. These main families have also been adopted in former colonies and after decolonisation most African countries, for example, kept the European laws of their rulers. However, comparative law has significantly moved on from this tradition and have developed a far more sophisticated view of the ‘world map of law’ in distinctive ways.¹⁷ For example, the classification in three legal families is seen as an approximation and comparatists are now thinking in more dynamic terms about legal traditions and legal cultures to emphasise the interaction between the different legal families, traditions and cultures.¹⁸ A good example of this more advanced thinking is Ugo Mattei’s work on legal taxonomies as a reaction against the Euro-American classification and proposes a classification based on a deeper understanding and reaction to social dynamics in the areas of professional law, political law and traditional law.¹⁹

Western legal culture distinguishes itself through its emphasis on individualism and rationalism. Non-western legal cultures, on the other hand, are neither individualistic nor rationalist. At the risk of overgeneralising, in non-western legal cultures, law is not separated from religion and morals and often law is not conceived as rational

¹⁶ S. E. Merry, ‘What is Legal Culture? An Anthropological Perspective’, in D. Nelken (ed.) n. 7, 52-76, at 58.

¹⁷ Mathias Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’ 50 *The American Journal of Comparative Law* (2002), 671-700, at 676.

¹⁸ *ibid.*, at 677-678

¹⁹ Ugo Mattei, ‘Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems’, 45 *The American Journal of Comparative Law* (1997), 5-44.

system of strict rules and norms, but rather as a means of social control in order to restore or keep peace in the community.²⁰

For some scholars, it is almost a futile exercise to compare the legal rules and institutions of the different legal cultures given their diversity in relation to the concept of law, the role of law and the way conflicts should be managed. Taking this criticism on board would mean that it only makes sense to compare across the same family or legal culture. However, globalisation and transnational legal movements make this a rather untenable position and it might be more useful to understand legal culture not just from a purely legal but also from an anthropological perspective.

The second approach towards understanding legal culture has been influenced by anthropology and in particular the work of Clifford Geertz²¹ and Lawrence Rosen²² has been pivotal. Fellow anthropologist, Sally Engle Merry,²³ gives a good overview of how interpretive anthropology has influenced the meaning of legal culture and what this means in the context of comparative law.

Geertz conceptualises law not just as a bounded set of norms, rules and principles but as a cultural frame which can give meaning to the world. Law is seen as a set of cultural principles and categories in which culture refers to the symbols and meanings that constitute, communicate and change the meaning of the law. Given the importance of symbols and their meaning for law, comparative law is not about a functional comparison but requires a heuristic approach, according to Geertz.

²⁰ *ibid.*, at 502-508.

²¹ C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983).

²² L. Rosen, *Law and Culture: An Invitation* (Princeton University Press, 2006).

²³ S. E. Merry, n. 19 above, at 59-60.

For Lawrence Rosen, to understand law requires linking it to wider cultural systems; law offers a deeper understanding in the larger culture but equally culture offers a frame of analysis to understand legal processes. For Rosen, law symbolises vernacular knowledge. Within this framework, comparing legal cultures requires examining the metaphors and cosmologies of legal systems, as well as the shared meanings of public symbolic systems within a social group.

Both approaches have been criticised by, amongst others,²⁴ Sally Engle Merry for conceptualising culture as a homogenous concept which extends the critique for seeing law as a relatively stable and unchanging legal and social sphere. In reality, law is more complex as it has been exposed to transfers, adaptations and hybridisations.²⁵

A third approach draws upon the work that is done in the area of sociolegal studies and is therefore heavily influenced by sociology. Lawrence Friedman's²⁶ work on legal culture has been very influential. Friedman has challenged the methodological approaches in comparative law and suggested that comparative law should align itself more closely with law and society studies as law is not an autonomous undertaking and is part of a wider social system.²⁷ His critique was particularly aimed against the mainstream methods used in comparative law: comparative doctrinal analysis and system-level taxonomy. While the latter categorises legal systems according to shared

²⁴ For more critique, see the edited volume D. Nelken (ed.) n. 7 above.

²⁵ S. E. Merry, n. 19 above, at 60.

²⁶ L. Friedman, n. 17 above.

²⁷ T. Ginsburg, 'Lawrence M. Friedman's Comparative Law', in R. Gordon (ed.), *Law, Society and History: Essays on Themes in the Legal History and Legal Sociology of Lawrence M. Friedman* (New York: Cambridge University Press, 2010). Electronic copy available at: <http://ssrn.com/abstract=1524745>

and dominant legal characteristics, doctrinal analysis focuses on the relationship between doctrinal developments in different jurisdictions. Both approaches have been influenced by a scientific methodology. According to Friedman, law cannot be divorced from its social context, contrary to what is believed in orthodox comparative law that a legal rule can be separated from its social context in order for being transferable across borders. For Friedman, law is part of cultural norms which vary across different societies; legal culture is all about values, opinions, and beliefs about law that are shared in a community.²⁸ However, Friedman is not interested in studying the particular, he still believes that legal culture can be studied at a general level across different traditional families of comparative law as the rule of law is not necessary Western in outlook but rather modern. So Friedman sees similarities between the legal cultures of Germany, the Netherlands, Japan and the United States (to name a few) on the basis of the shared problems they face as industrial societies, and not so much on the basis of belonging to a Western legal family.

The concept of legal culture has been criticised though by scholars working in the area of law and society and some have suggested different terminologies in an attempt to avoid seeing culture as a unity rather than an aggregate.²⁹ For example, Roger Cotterell³⁰ problematizes Friedman's holistic use of the term legal culture and instead proposes the alternative concept of legal ideology; the latter being more related to doctrine. Susan Silbey³¹ acknowledges the difficulty in defining culture and therefore

²⁸ L. Friedman, *Some Thoughts of the Rule of Law, legal Culture and Modernity in Comparative Perspective. Toward Comparative Law in the 21st Century*. (Tokyo, Chuo University Press, 1998), 1075-1090.

²⁹ S. E. Merry, n. 19 above, at 53.

³⁰ R. Cotterrell, *Law, Culture and Society: legal Ideas in the Mirror of Social Theory* (Ashgate, 2006)

³¹ S. Silbey, 'After Legal Consciousness', 1 *Annual Review of Law and Social Science* (2005), at 323.

urges using it in combination with the idea of legal consciousness³². This allows focusing on the micro dimensions of law making in everyday practice; paying particular attention to power relations and inequality in law-making processes.

To summarise, legal anthropologists, like Sally Engle Merry, alert that legal comparatists might have misinterpreted the concept of culture, presenting it as integrated and relatively harmonious ideas and practices of a particular group, instead of seeing it more as actions, practices and beliefs that are relatively flexible and open to change.³³ For anthropologists, cultures are not static but porous vessels, with ideas and practices that are constantly shifting. As Sally Engle Merry argues ‘culture provides the lens through which new institutions and practices are adopted and transformed.’³⁴ [...] ‘Cultural ideas are contested and connected to relations of power. Cultural repertoires include values and practices, ideas, and habits, and innovations along with commonsensical ways of doing things. They are typically plural, with contending ideas about many crucial areas of social life. Culture is the product of historical influences rather than evolutionary change. It is marked by hybridity and creolisation³⁵, rather than uniformity or consistency. Local systems are embedded in national and transnational processes and particular historical trajectories. This is a more dynamic, agentic and historicised way of understanding culture. It emphasises

³² In her paper, *After Legal Consciousness*, Silbey provides an in-depth genealogy of the meaning of legal consciousness in law and society studies and argues for a critical sociological understanding of legal consciousness; in broad terms Silbey conceptualizes legal consciousness as an analytical ‘tool’ that makes specific laws work better for particular groups or interests. It makes the relationship between consciousness, ideology and hegemony more transparent.

³³ S. E. Merry, n. 19 above, at 54.

³⁴ S. E. Merry, n. 19 above, at 54.

³⁵ This should be interpreted as assimilation.

the active making of culture, society and institutions, and the grounding of this action in specific places and moments.³⁶

Methodological and Epistemological Challenges for a Comparative Law

Approach in Environmental Law

Legrand³⁷ criticised comparative law's scholarship for merely comparing legal rules from different legislations to distil similarities and differences. This straightforward assessment of 'law as rules' lacks theoretical depth and some of the most fundamental questions relating to the ontology of law are absent. Different legal cultures might have a diverse understanding about the boundaries of the law and where law sits in a wider societal and normative context. After all, law is not created in a vacuum and is part of a broader context. In order to understand the foundations of the normative context of law a wider interdisciplinary study of law is needed drawing upon other disciplines in the social sciences and humanities. For Legrand the old category of *legal families* in comparative law is defunct and replaces it with the concept of legal *mentalité* interpreted as cognitive orders of legal systems.³⁸ Zweigert and Kötz³⁹ also want to push comparative law as a method beyond the boundaries of functionality and conceptualise it as a way of grasping legal styles. What it means is that an understanding of law requires more than only reading and interpreting statutory rules and judicial decisions. In order to apprehend law, it must be placed in a broader historical, socio-economic, cultural, political and even ideological context.

³⁶ S. E. Merry, n. 19 above, at 55.

³⁷ P. Legrand, n. 10 above.

³⁸ *ibid.*

³⁹ K. Zweigert, H. Kötz, *An Introduction to Comparative Law* (Oxford, Clarendon Press, 1988).

Historically comparative law has its roots in positivism which ultimately is all about what counts as law. As a positivist discipline, comparative law's role is to identify what counts as the law in force in other jurisdictions.⁴⁰ But for scholars like Legrand, this is not what comparative law should be about. For Legrand, comparative law is not just about a process of identification, it is rather a political act, especially when the comparative lawyer is dealing with foreign law.⁴¹ Comparative lawyers have the difficult task that they have to provide information of a legal culture whose language they not speak and whose legal institutions and codes have their own history with their own specific ideologies and self-image. Translating different legal cultures⁴² comes with an ethical responsibility to recognise the difference of the other and a willingness to admit the limits of one's own 'language'.⁴³ Comparatists must not only try to read and understand this otherness (sometimes hidden in unexpressed codes) they must also convey forcefully this otherness to an audience that is equally not familiar with foreign law(s).⁴⁴ This demands an approach that goes beyond functionalism, which is mainly focused on identifying universal problems shared by some societies and analysing how the different societies have solved the common problem; the legal solutions are functionally alike and hence comparable.⁴⁵ Legrand, on the other hand, emphasises diversity, and comparative law should therefore research the fundamental differences and legal mentalities of different systems.

⁴⁰ P. Legrand, n. 8 above, at 603.

⁴¹ *ibid.*, at 602

⁴² For more details about the importance to theorise about translation and the language of law, see the edited volume by S. Glanert, *Comparative Law – Engaging Translation* (Abingdon: Routledge, 2014).

⁴³ M. Adams and D. Heirbaut, 'Prolegomena to the Method and Culture of Comparative Law', in M. Adams and D. Heirbaut (eds) *The method and culture of comparative law: essays in honour of Mark Van Hoecke* (Oxford: Hart Publishing, 2014), 1-21, at 7.

⁴⁴ *ibid.*, at 4.

⁴⁵ T Ruskola, n. 6 above, at 188.

Methodologically, the approach then shifts to studying diversity and cultural originality of law.⁴⁶

For some, functionalism leads to an epistemological imperialism and a form of legal Orientalism.⁴⁷ This means that we ‘either [...] find in foreign legal cultures confirmation of the (projected) universality of our own legal categories, or, equally troublingly, we find “proof” of the fact that other legal cultures lack some aspect or other of our law.’⁴⁸ Orientalism as a concept is related to postcolonial discussion, and has its roots in the work of the postcolonial literary scholar Edward Said,⁴⁹ who coined the term to refer to the Occident’s constructed discourses of the Orient to form an opinion of the East. This has reduced the Orient to a passive object that can only be known by a cognitively privileged subject – the West.⁵⁰ Understanding comparative law through a postcolonial lens means that Western legal cultures are no longer used as a benchmark from which to study other legal cultures. ‘Accordingly, attempts are made to give the constitutive other in law a voice of its own.’⁵¹ This requires from comparatists to start a conversation with critical theory, a challenge that Legrand has aptly taken on in his work on Derrida and comparative law.⁵²

The Relationship between Self and Other in Comparative Law

⁴⁶ J. Husa, ‘Research Designs of Comparative Law – Methodology or Heuristics?’, in: M. Adams and D. Heirbaut (eds.) n. 40, 53-68, at 64.

⁴⁷ T. Ruskola, n. 6 above; J. Husa, n. 46 above, at 64.

⁴⁸ T. Ruskola, n. 6 above, at 190.

⁴⁹ E. Said *Orientalism*. (London, Penguin Books, 1978).

⁵⁰ T. Ruskola, n. 6 above, at 192.

⁵¹ J. Husa, n. 43 at 64.

⁵² P. Legrand, n. 8 above; P. Legrand, ‘Paradoxically, Derrida: For a Comparative Legal Studies’, 27 *Cardozo Law Review* (2005-2006) 631-717.

As one of the main methodological and epistemological challenges in comparative law is the interpretation of foreign law texts, it is not a surprise then that Pierre Legrand has sought inspiration in the work of the French philosopher Jacques Derrida who has dedicated his academic career to studying the relationship between self and other, ethnocentricity and otherness in texts. Legrand uses Derrida's work to construct a more sophisticated understanding of texts against the background of a relationship between self and other.⁵³ Given Legrand's successful dialogue between comparative law and Derrida's work, I will rely mainly on Legrand's interpretation of Derrida's original work.⁵⁴

For Derrida, the reading of a text starts indeed conventionally with acknowledging the authorship on the surface of the text, but Derrida adds very quickly that giving meaning to the text requires a *double gesture*. Undeniably what is visible on the page gives important meaning and presence to the text, but grammatical and philological substance is not all there is. Another meaning can be present as text even though it may not graphically be visible. For Derrida, a text compromises a visible and invisible dimension, and it is the invisible aspect that allows the embracing of the other in the text: the text is not the book – it is not limited to the book: it compromises and does not therefore exclude the world, it embraces the other.⁵⁵ Derrida refers to the *imperceptible* element as a trace in the sense of a sign or clue. So apart from visible graphical features, for Derrida a text has an infinite assemblage of traces. These traces are not visible to the interpreter of the text but they *haunt* the text. Consciously Derrida uses the word haunting to make us aware that the invisible traces in the text

⁵³ Pierre Legrand engages mainly with J. Derrida's work *De La Grammatologie* and refers to the original French edition of 1967 by de Minuit.

⁵⁴ P. Legrand, n. 8 above

⁵⁵ J. Derrida, n. 52 above, at 253 in P. Legrand, n. 8 above, at 606.

are ghosts, they are present but not visible. Importantly, the traces are signs or clues that are left behind by history, politics or philosophy; Derrida calls these deposits ashes or cinders.⁵⁶ The traces though that are left behind are *retentional*; this is typical Derridean leitmotif to imply that what remains and gets repeated in the text (invisibly) is a ‘repetition-with-a-difference’. The trace is a left behind of the power they represent, but it is not colossal or monumental and stable, on the contrary it is unstable and transient. In Derrida’s words: traces are ‘death strolls between the letters’.⁵⁷

In legal terms what Derrida shows is ‘the spectral structure of the law’; what legal positivists (and this includes indeed some comparatists) consider being outside the structure of the text – i.e. law – is, as a matter of fact, not to be exterior to it or absent from it. The *spectrality* of the law makes it per definition relational ‘[to] the living present to its outside, the openness upon exteriority [...], upon the non-self.’⁵⁸ As the traces are invisible, they await their revealing by the text’s interpreter who in his task of elucidation must engage with the opposite of amnesia, as s/he decodes they must remember collectively the traces. This gesture or what Derrida calls ‘the staging of the traces’ resembles a performative dimension. The life of the law-text can only be unearthed when traces are remembered as *survivancies*. But even when traces are unveiled the full text’s presence will never be discovered.

For Derrida, the interpreter is an inventor, meaning that s/he is both a finder and a creator. How does Legrand apply this thinking to comparative law? ‘It is the comparativist-at-law who, by going underground in order to explore the text’s

⁵⁶ J. Derrida, *Feu La Cendre* at 27 (éditions des femmes 1987) in P. Legrand, n. 8, at 607.

⁵⁷ J. Derrida, *l’écriture et la différence*, at 108 (Le Seuil 1967) in P. Legrand, n. 8 above, at 607.

⁵⁸ J. Derrida, *voix supra* note 21 at 96 in P. Legrand, n. 8 above, at 609.

rhizomes, awakens meaning, brings the traces into interpretive existence, makes the traces actively mean, attributes dynamic meaning to them, acts as an enabler of resonant meaning, makes the traces meaningful.⁵⁹ For Legrand, this means that as an interpreter, the comparatist can rely on prejudice defined as a pre-understanding, it allows the comparatist to leave her/his signature on foreign law or what Legrand refers to as an autobiographical inscription.⁶⁰ However, this is not without its own problems, as Derrida argues the moment we give meaning to something, we commit violence to it.

To summarise what we have established so far, ‘the traces haunting the words of the statute or of the judicial decision can be understood as telling us more about the law than an exegesis of these words themselves can ever do.’⁶¹ This does not mean, however, that we have to discard the graphical dimension of the text. Statutes and judicial decisions remain important to the study of the comparatist in a positivistic sense; tracing then is a radicalised version of legal positivism. When the comparatist embarks on inventing the traces in the law-text, it is important to acknowledge that the meaning of the text is always postponed, when a trace is found, it is not fully present, as the trace itself can be traced to another trace. As Derrida argues ‘there is no atom.’⁶² However, there is another reason why no definite meaning can be found in the text because textual meaning will differ with each interpreter. The structure of the text, which is never fully present, and the structure of the interpretation, which is never identical, makes it impossible to fix a meaning in the text. Derrida refers to this phenomenon as *différance*, signifying that the meaning of the text is indefinitely-

⁵⁹ P. Legrand, n. 8 above, at 610

⁶⁰ *ibid.*, 611

⁶¹ *ibid.*, 612

⁶² J. Derrida point de suspension 147 Elisabeth Weber ed. Galilée 1992 in P. Legrand, n. 8 above, at 614.

deferred and ever-different; it is always to come.⁶³ This means that there cannot be an accurate translation or legal transplant of foreign law. Translation cannot therefore erase difference; on the contrary, it intensifies it.

For Derrida, here lies the ‘cruel law of difference’: there is no outlook for an agreement, comparatists keep meeting their own failure to meet the other. What the comparatist can achieve is to engage with a strategy of re-presentation. Justice lies not in sameness, but in the recognition and respect of difference. This means that for the ‘[c]omparativists-at-law, who concern themselves with otherness, are asked to accept their hyper-responsibility vis-à-vis the trace-as-other must regulate the justice and the justness of their behaviour, of their theoretical, practical, and ethico-political decisions, to acknowledge that this ineluctable commitment, this indebtedness arising from a debt which cannot be cancelled (the other *is* there and *remains* there), demands an appreciation allowing for the other law’s irreplaceable singularity.’⁶⁴

To conclude, what can be learned from Derrida is first that there is more to a text than meets the eye/I. Second, it is the responsibility of the comparatist-at-law to trace the hidden meaning of the text in order to interrupt the repression of otherness that has been endorsed by legal positivism, accepting though that this interpretation never finishes ‘there is always more instantiation, more unrepresentability, more intermittence, more play’ – with no prospect for closure.⁶⁵ The comparatist must answer the call to move away from the politics of sameness and move towards an embracement of otherness, which has summoned the comparatist to act.

⁶³ P. Legrand, n. 8 above, at 615-616.

⁶⁴ *ibid.*, at 622.

⁶⁵ *ibid.*, at 623.

As mentioned already in the introduction, legal scholars and lawyers must act upon this call to embrace legal plurality and alternative perceptions of legal norms, values and justice in the area of traditional knowledge protection and indigenous peoples' self-determination rights. As international human rights increasingly recognises indigenous peoples' customary laws and institutions, the judiciary will progressively be under pressure to recognise and enforce customary law in the countries where traditional knowledge custodians reside but also equally in the countries where indigenous peoples' knowledge is being used (these are often countries with advanced research and the technological and financial capacity to develop new products in cosmetics, pharmaceutical, agro-industrial and biotechnology industry⁶⁶).⁶⁷ The concept of legal pluralism faces a challenge that goes well beyond an ordinary acceptance of the co-existence of different legal regimes. Recognition of customary law requires a deeper reading of legal texts, for one thing it will require the acceptance that Eurocentric and positivist law has a history of subordinating 'other' legal systems.⁶⁸ As Tobin argues: 'Recognition of a vast multiplicity of customary law regimes will require flexibility, sensitivity, imagination and, above all, respect for its place amongst the sources of law that form part of a global intercultural and pluralistic order.'⁶⁹ What Legrand asks the comparatist to do when judging foreign law is to be aware of the historical 'predatory legality'⁷⁰ that has subordinated

⁶⁶ B. Tobin, 'Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resources and Knowledge Rights', *9/2 Law, Environment and Development Journal* (2013), 142-162, at 147.

⁶⁷ B. Tobin, 'Setting Protection of TK to Rights – Placing Human Rights and Customary Law at the Heart of TK Governance', in E. Kamau and G. Winter (eds.), *Genetic Resources, Traditional Knowledge & The Law: Solutions for Access & Benefit Sharing* (London: Earthscan, 2009), 101-118, at 111.

⁶⁸ W. Menski, *Comparative Law in a Global Context. The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006), at 5.

⁶⁹ B. Tobin, n. 70 above, at 111.

⁷⁰ R. Munday, 'Accounting for an Encounter', in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions*. (Cambridge: Cambridge University Press, 2003), 3-28, at 11; U.

customary law when Western law was imposed upon local systems at the time of colonial conquest. If national and foreign law and policy will have to incorporate indigenous peoples' customary law, they will have to be aware of the historical legal violence when building bridges between international, national and indigenous peoples' legal regimes.⁷¹ This requires a proper and actual engagement with the somewhat abstract notion of reading beyond the text; how this can be done, will be illustrated later in this article. But before this article will deconstruct the *traces* of international environmental law in relation to traditional knowledge protection, it first needs to engage with a functional comparative approach.

Traditional Knowledge: A Comparison of Different Laws

In order to address the issue how traditional knowledge can be legally protected, it is important to find out first how it has been defined in emerging legal systems.

Subsequently, the paper will look into regional, national and international laws in relation to *sui generis* protection mechanisms.

There is no official or agreed definition of traditional knowledge. The CBD avoids a definition altogether, adopting the phrase in Article 8(j) 'knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles'.⁷²

Baxi, 'The Colonialist Heritage', in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions*. (Cambridge: Cambridge University Press, 2003), 46-75, at 46.

⁷¹ B. Tobin, n.70 above, at 114.

⁷² Article 8(j) states Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge innovations and practices. For further details on traditional knowledge and Article 8(j), see <https://www.cbd.int/traditional/> (last accessed 22 July 2015).

The WIPO secretariat uses a working definition that is similar to other approaches in international fora and defines traditional knowledge as: ‘tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.’⁷³ One of the biggest concerns about this definition of traditional knowledge is that it has mainly been drafted by people who are most interested in intellectual property rights, but indigenous peoples and local communities may not want to protect their knowledge for commercial purposes. Often their demand for better protection mechanisms are driven by their dependence on traditional knowledge systems for their cultural and physical survival and are not necessarily linking their demands to the remit of the CBD on sustainability and biodiversity conservation either.⁷⁴ Furthermore, the WIPO definition of traditional knowledge implies that traditional knowledge is a negative category as it suggests that it includes a broad category of knowledges having in common that they are currently not being protected by intellectual property rights laws.⁷⁵

For indigenous peoples, the struggle to get protection of rights over traditional knowledge is linked to the wider struggle of self-determination rights.⁷⁶ This requires, first, participation of indigenous peoples in law making, and second, respect for their

⁷³ WIPO IGC, Traditional Knowledge — Operational Terms and Definitions 11, WIPO Doc. WIPO/GRTKF/IC/13/9 (2002).

⁷⁴ G. Dutfield, *Intellectual ILO Property Rights, Trade and Diversity* (London, Earthscan, 2000) at 35-37

⁷⁵ O. B. Arewa, ‘TRIPs and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks’ 10 *Marq. Intel. Prop. L. Rev.*, (2006) 164-180, at 155.

⁷⁶ Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters* (Abingdon: Routledge, 2014), at 157.

customs and customary laws.⁷⁷ Both these requirements point to the rather precarious issue of different world views of indigenous and Euro-Anglo-American law. This problem has been discussed at great length for a few decades and so far the focus has been on understanding the tension between formal law of modern society, as expressed in intellectual property rights and biodiversity conservation, and the so-called informal legal systems of indigenous and local communities. But the legal issues surrounding traditional knowledge are complex because they touch upon wider issues such as sovereignty, self-determination rights and human rights.⁷⁸

Therefore it is recognised that it is important to develop a separate instrument in tune with indigenous peoples' and local communities' culture and customs.⁷⁹ Alternative solutions range from traditional resource rights, community rights legislations, disclosure of origin in patent application, model laws, national sui generis regimes and the development of biocultural protocols by indigenous peoples and local communities themselves. In each of these alternative suggestions, customary law plays a prominent role. A sui generis system is a regulatory regime that incorporates the relevant customs and customary laws in binding law. Presently, no internationally binding sui generis regime exist, but related regional and national instruments have

⁷⁷ For example International Labour Convention 169 (ILO C169) recognizes the cultural and other specificities of indigenous and tribal peoples in general terms and specifically recognizes customary law and customs of indigenous peoples in Article 8, 9 and 10.

<http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) equally recognizes customary law as a source of law. Given that the UNDRIP reflects customary international law, it is a binding principle that states should give due respect and recognize customary laws. United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, G.A. res. 61/295, U.N. GAOR, 107th Sess., U.N. Doc. A/RES/61/295 (2007), Article 26. Available on-line: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

⁷⁸ V. Gordon, 'Appropriation Without Representation? The Limited Role of Indigenous Groups in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore' (2014) 16 *Vand. J. Ent. & Tech. L.* (2014) 629-667 at 630-631.

⁷⁹ P. Kuruk, 'The Role of Customary Law under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge', 17 *Ind. Int'l. & Comp. L. Rev.* (2007) 67-118, at 72.

been developed as part of national governments' wider obligation to comply with the CBD as will be discussed further hereafter.

As detailed by Paul Kuruk,⁸⁰ one of the earliest regional sui generis instruments on traditional knowledge is the African Model Law for the Protection of the Rights of Local Communities, Farmers, Breeders and Regulation of Access to Biological Resources (African Model Law)⁸¹ adopted by the Council of Ministers of the Organisation of African Unity in June 1998. Article 16 of the African Model Law recognises the rights of communities over their innovations, practices, knowledge, and technologies acquired through generations. It also acknowledges their right to collectively benefit from the utilisation of such resources. These community rights must be protected in accordance with norms, practices and customary law found in, and recognised by, the concerned local and indigenous communities, whether such law is written or not. Article 23 of the African Model Law recognises "community intellectual rights," which are defined to include those rights held by traditional professional groups, especially traditional intellectual property practitioners. To be granted access to biological resources and traditional knowledge, prior informed consent and written permission must have been granted by local communities. Similar approaches relating to a sui generis protection regime for traditional knowledge can also be found in the Model Law for the Protection of Traditional Knowledge and Expressions of Culture in the Pacific Region (Pacific Model Law)⁸² and the Andean

⁸⁰ P. Kuruk, n. 73, above, at 73-78.

⁸¹ *Council of Ministers of the Organisation of African Unity, African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*, available at <http://www.wipo.int/edocs/lexdocs/laws/en/oau/oau001en.pdf> Last accessed on 14 June 2015.

⁸² *Model Law for the Protection of Traditional Knowledge and Expressions of Culture*, Reprinted in Secretariat of the Pacific Community, *Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* 3-15 (2002) available at

region with Decision 486 (The Decision)⁸³ on a Common Intellectual Property Regime adopted by the Andean Community in 2000. Most of the Model Laws are modelled after the provisions in the CBD and envisage a contractual agreement between indigenous communities and users of traditional knowledge as the main mechanism for achieving prior informed consent and access and benefit sharing principles.⁸⁴

On a national level, most sui generis measures for traditional knowledge combine two basic legal concepts to govern the use of traditional knowledge: first, the regulation of access to traditional knowledge, and second, the grant of exclusive rights for traditional knowledge.⁸⁵ Most measures, which are adopted and implemented, fall either in an intellectual property framework or access and benefit-sharing agreement. In this paper, for the comparative component, a sub-selection of the countries that have been selected by WIPO will be used.⁸⁶ These countries have been selected on the basis of the *major* sui generis measures and laws they have undertaken so far. In terms of access regulation most countries have specific access and benefit sharing agreements in place. However, with regard to intellectual property legislation,

http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_4/wipo_grtkf_ic_4_inf_2-annex2.pdf Last accessed on 14 June 2015.

⁸³ *Andean Community Commission, Decision 486: Common Intellectual Property Regime* (Dec. 1, 2000) available at <http://www.wipo.int/edocs/lexdocs/laws/en/can/can012en.pdf> Last accessed on 14 June 2015.

⁸⁴ P. Kuruk, n. 73, above, at 117.

⁸⁵ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Comparative Study of Existing National Sui Generis Measures and Laws for the Protection of Traditional Knowledge*. Fifth Session Geneva, 7015 July, 2003 WIPO/GRTKF/IC/5/INF/4 (last accessed 22 July 2015)

⁸⁶ WIPO has compared the measures and laws for the protection of traditional knowledge of the following countries: African Union, Brazil, China, Costa Rica, India, Peru, Philippines, Portugal, Thailand and United States of America. For the purpose of this paper, the comparison will be restricted to Brazil (Provisional Measure No. No. 2186-16 of 2001 Regulating Access to the Genetic Heritage, Protection of and Access to Associated Traditional Knowledge); Costa Rica (Law No. 7788 of 1998 on Biodiversity); India (Biological Diversity Act of 2002); Peru (Law No. 27811 of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources); Philippines (Indigenous Peoples Rights Act of 1997).

recognition of indigenous rights and repression of unfair competition, only Peru has appropriate measures in place with the exception of the Philippines which also recognises indigenous rights. It is also Peru and the Philippines recognising explicitly customary law as a policy tool to recognise protection of traditional knowledge.⁸⁷ As reported indeed by Brendan Tobin, to date the most comprehensive regime for protection on Indigenous peoples' rights is in Peru which adopted Law 27811 in August 2002 for protection of the collective rights of Indigenous peoples over traditional knowledge relating to biological diversity.⁸⁸

Generic principles that can be distilled from the above examples of national laws are: the recognition that indigenous groups own or have rights of custodianship over indigenous resources; this confirms that indigenous groups have primacy rights whilst the State has just secondary rights over traditional knowledge; such rights are determined with reference to customary practices and not laid down by State rules; model laws allow exceptions to established intellectual property rights criteria where necessary to effectively protect traditional knowledge; model laws allow protection of traditional knowledge based on written or other (i.e. oral) evidence; and the duration of rights over traditional knowledge are indefinite.⁸⁹ In short, the regional and national model laws fulfil some of the criteria as specified by indigenous peoples as preferred method for the protection of traditional knowledge and differ significantly from existing intellectual property laws which indigenous peoples and local communities perceive as inappropriate protection mechanisms.

⁸⁷ The African Model Law also recognizes customary law but has not been incorporated in the comparison in this section as it has been discussed in the previous paragraphs.

⁸⁸ B. Tobin, n. 70, above, at 172.

⁸⁹ P. Kuruk, n. 73, above at 83-85.

However, as highlighted by Karolina Kuprecht,⁹⁰ the development of an international sui generis system is not comparable to the regional and national model laws in terms of the challenges that it may face. First, it will be difficult for an international system to incorporate a diversity of indigenous customs and customary laws. Second, the development of a sui generis system incorporating Euro-Anglo-American law and customs and customary law of indigenous peoples may result in misinterpreting the latter. Thirdly, a well-developed sui generis system may be too rigid and static. Finally, there might be a danger that a sui generis system is still too much top down even if indigenous peoples' customs and customary law has been incorporated, this might still be orchestrated from the top with insufficient respect for tribal structures of governance and law making. Against the background of these challenges it seems more appropriate to focus on general principles and norms of customary law rather than to attempt the full integration and implementation of customary law. Given these challenges, as illustrated below, both the CBD and WIPO have so far failed to deliver on a 'proper' sui generis system on an international level.

Customary law specialist, Brendan Tobin has provided a useful overview on the latest developments on sui generis regimes in the two most important international instruments – the CBD and WIPO.⁹¹

The importance of customary law in the process of protecting traditional knowledge was reaffirmed in the Nagoya Protocol on Access to Genetic Resources and Sharing of Benefits Arising from their Utilisation in October 2010. Although the Protocol does not grant direct property rights over traditional knowledge it does, however,

⁹⁰ K. Kuprecht, *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond*. (Cham: Springer, 2013) at 166.

⁹¹ Tobin, n. 70 above, at 158-170.

create obligation for Parties to provide necessary arrangements so indigenous peoples have extensive rights to control access and use of their knowledge. For example, article 7 of the Protocol creates obligations for both countries in which indigenous peoples reside and into which their traditional knowledge may be imported, to adopt measures to secure indigenous peoples' rights over their traditional knowledge. Customary law plays a role at the point of access and point of use. However, indigenous peoples will still face a battle with national states implementing the Protocol in national laws. A case in point has been the failure of the European Union's draft legislative proposal for implementation of the Protocol to fully acknowledge customary law (in addition to other disappointing measures).⁹²

In addition, article 12 requires states implementing the Protocol, to take into consideration indigenous peoples customary law and community protocols. While this requirement makes the Protocol the first international binding instrument to recognise formally the extraterritorial reach of indigenous peoples' and local peoples' customary law, it comes with the challenge of creating a platform that allows an effective communication and translation of different legal norms and procedures. The biggest hurdle is to guarantee that positivist law institutions, such as national courts, are fully equipped to interpret and implement in a fair, equitable and respectful manner customary law. As will be discussed in more detail in the concluding part of this paper, this is precisely the point where comparative lawyers can play an important role.

⁹² For example the draft legislation has been criticized for: facilitating economic utilization of genetic resources and traditional knowledge; restricting its scope to genetic resources and traditional knowledge accessed after the Nagoya Protocol comes into force; and adopting a narrow definition of traditional knowledge. For more details on the draft legislation see e.g. B. Tobin, 'Biopiracy by Law: European Union Draft Law Threatens Indigenous Peoples' Rights over their Traditional Knowledge and Genetic Resources', 36 *European Intellectual Property Review* (2014), 124-136.

WIPO through its Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC), regulates intellectual property issues emerging from the use of traditional knowledge. The ICG, established in 2000, took initially a rather hopeful holistic approach but as time went on has caused disappointment for several reasons. First, it distinguishes between traditional knowledge, folklore and traditional cultural expressions, a division rarely made by indigenous peoples. Second, it allows for exemptions for any act permissible under national law of a contracting party, for knowledge protected by patent, trade secrets and for material protected by copyright law.⁹³ This makes indigenous peoples' laws and customs relating to their traditional knowledge and cultural expressions secondary to intellectual property law.

Up until 2009 the WIPO IGC focused on developing a *sui generis* misappropriation regime incorporating recognition and respecting customary law and its role in protection of traditional knowledge. The 2011 version of the IGC draft Objectives and Principles expanded on these provisions and arranged that entitlements to share in benefits should be guided by the customary practices and laws of indigenous peoples and local communities.⁹⁴

All along WIPO was sending out messages in, for example, its issue paper on customary law in 2006, that it recognised the importance of customary law as the

⁹³ WIPO 'The Protection of Traditional Knowledge: Draft Articles', WIPO/GRTKF/IC/27/4. Draft Article 6.4 (2014)

⁹⁴ B. Tobin, n. 70 above, at 165.

basis for protecting traditional knowledge.⁹⁵ It also dealt with one of the more thorny issues of capacity building of national courts and administrative bodies so they could accept, interpret and enforce in an appropriate manner evidence of customary-law based rights and duties.⁹⁶

However, this sense of cautious optimism changed drastically in April 2013, days before IGC 24, when all references to customary law and its role in defining traditional knowledge, guiding benefit sharing and delimiting rights of custodianship, was deleted from the negotiating texts.⁹⁷ The text of traditional knowledge that came out of IGC 24 (22 to 26 April 2013) fixated mainly on the development of a system of exclusive proprietary rights for protection of traditional knowledge to be granted by states. As Tobin so aptly comments, “there was little *sui generis* about the proposal, which in essence proposed a new form of intellectual property protection, the very thing [i]ndigenous peoples had opposed from the outset”.⁹⁸ Furthermore, the draft articles also suggested a misappropriation regime based upon state obligations to prevent unapproved and uncompensated use of traditional knowledge in specific circumstances. The suggested proprietary regime was nothing close to what indigenous peoples and local communities envisaged as a protection mechanism as it could drastically change the unique non-proprietary character of traditional knowledge systems. In addition, the misappropriation regime makes indigenous peoples’ dependent on the capacity and willingness of the state to recognize indigenous peoples’ and local communities’ rights. It is very unlikely that these

⁹⁵ See WIPO, Draft Customary Law Issues Paper 1: Customary Law & The Intellectual Property System in the Protection of Traditional Cultural Expressions and Traditional Knowledge: Issues Paper – version 3.0 (2006)

⁹⁶ *ibid.*

⁹⁷ B. Tobin, n. 70 above, at 167.

⁹⁸ B. Tobin, n. 70 above, at 167.

‘vulnerable’ groups will be in a position to control their rights and take it to the courts if they would notice a violation of their rights.

After 15 years of ICG sessions, indigenous and local communities can only but remark that the Committee’s work to date has been developed without a meaningful participation of indigenous peoples and local communities.⁹⁹ The greatest criticism of all is that indigenous peoples and local communities cannot adequately participate in the negotiations that will define their international intellectual property rights.¹⁰⁰ Despite non-governmental organisations’ (NGOs) and indigenous groups’ status as observers in IGC session, they cannot vote, neither can they present proposals, amendments or motions.¹⁰¹ These limitations are further exacerbated as a result of their politically marginalized position and economically weak position. Consequently, their voice is barely heard or fairly represented in WIPO and the IGC. Another major concern is the unwillingness of some industrialised countries, mainly the United States (US) and Japan, to think constructively about a final outcome and the general indisposition to consider indigenous and other local communities’ rights and views in the negotiations.¹⁰²

To summarise, despite the lengthy negotiations in WIPO and the recent developments in the Nagoya Protocol, indigenous peoples and local communities are still facing the challenge to get recognition and enforcement capacities for their customary laws and customs when discussing appropriate protection mechanisms for traditional

⁹⁹ The Center for International Environmental Law (CIEL), *The Gap between Indigenous Peoples’ demands and WIPO’s Framework on Traditional Knowledge*. (Washington: CIEL, 2007), at 11.

¹⁰⁰ V. Gordon, ‘Appropriation Without Representation? The Limited Role of Indigenous Groups in WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore’, 16 *Vand. J. Ent. & Tech. L.* (2014) 629-667, 631.

¹⁰¹ *ibid.*, at 632.

¹⁰² *ibid.*, at 632.

knowledge. Acknowledgement of customary law is one of the principles that matters most for indigenous peoples and local communities given the intrinsic relationship between law and identity in indigenous cultures. For indigenous and local communities it is clear that international standards should and must provide for a regime that recognizes customary law that is enforceable across borders. While the IGC has initially tried to respond to such requests, more recent developments point in the opposite direction and achieving effective recognition and enforcement of their customary laws remains a major challenge for indigenous peoples and local communities. Despite recent attempts by WIPO to rekindle the discussions on traditional knowledge¹⁰³ in the aftermath of the failure to agree on the work to be done on traditional knowledge in the last general assembly (1 October 2014), legal connoisseurs are not hopeful that the WIPO ICG's position will drastically change. It is very likely that WIPO's position will continue to develop in the opposite direction of general human rights instruments, the latter recognizing the importance of the role of customary law for indigenous peoples' self-determination rights.¹⁰⁴ In the unlikelihood of a sui generis system under the auspices of the WIPO ICG, indigenous peoples will have to rely on alternative mechanisms provided in human rights law, the Nagoya Protocol and customary international law to control whether using their traditional knowledge complies with their customary laws. It is up to alternative dispute mechanisms, including national courts in foreign jurisdictions, to ensure that

¹⁰³ As reported on the website of Intellectual Property Watch, four roundtables were organized in 2015 by WIPO relating to Genetic Resources and Associated Traditional Knowledge funded by the government of Australia. The topics covered in the workshops are: Experiences with National Systems for the Protection of Traditional Knowledge and Traditional Cultural Expressions; Commercial and Non-Commercial Uses of Traditional Knowledge and Traditional Cultural Expressions – Examples Learned; Regional, National and Local Experiences with the Meaning and Relevance of the “Public Domain” in the Context of Traditional Knowledge and Traditional Cultural Expressions; and National Experiences with Disclosure Requirements related to Genetic Resources and Associated Traditional Knowledge. For more details see <http://www.ip-watch.org/2015/02/20/wipo-seminar-could-rekindle-discussions-on-genetic-resources-tk/>; last accessed 6 September 2015.

¹⁰⁴ B. Tobin, n. 69 above, at 152.

failure to respect customary law will result to loss of rights to use the traditional knowledge for research and development. It is important though to emphasise again that just recognition of customary law will not necessarily translate into a respectful and ‘faithful application’ of customary law.¹⁰⁵

This is where comparative lawyers could play a role by assuming their critical responsibility to construct meaning beyond the text.

Concluding Thoughts: Reading Beyond the Text

Comparative environmental lawyers should be more aware in their analysis that international environmental treaties often lack empathy about the law’s functioning in a postcolonial societal context.¹⁰⁶ Just like law in general, environmental law has and can be an instrument of power that plays an important role in colonial and postcolonial relations. As long as customary law is not fully recognised and caught up in translation issues and problems of legal transplantation across different legal cultures, international environmental law can still be accused for providing the master narrative that not only frames law, but also scaffolds and structures economic, social and political relations in societies. In a Foucauldian sense, international environmental law provides the conduit to regulate panoptic relations of domination.¹⁰⁷ Particularly, international instruments like WIPO and CBD in comparison to regional and national protocols, illustrate that the discourses of international environmental law are mainly ‘concerned with the discourses and

¹⁰⁵ *ibid.*, at 156.

¹⁰⁶ B. J. Richardson, ‘Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum’, 11 *Colo. J. International Environmental Law and Policy* (2000), 1-79, 3

¹⁰⁷ *ibid.* at 4.

strategies of institutionalised power informing elites' perpetuation of their position and their hierarchical relations with civil society.¹⁰⁸

A good example of this is the way traditional knowledge is being conceptualised in international instruments, such as the CBD and WIPO. Tensions exist in international instruments how to define terms like traditional knowledge indicating how these terms are embedded in historical, political and cultural differences that persist between and within indigenous groups and the international community.¹⁰⁹ As mentioned earlier, the focus is clearly on proprietary protection driven by a commercial need to protect traditional knowledge. However, engaging with Legrand's work and his reading of Derrida, *traces* of power and imperialism could be discovered when giving meaning to 'texts'. As well established in the fields of anthropology and science and technology studies, but barely touched upon in comparative and environmental law, traditional knowledge has become a scapegoat for many practitioners and academics for either disrupting development or on the other end of the spectre perceived as a panacea for saving the environment and biodiversity conservation.¹¹⁰ This framing is mainly driven by a wider discourse of an epistemological difference between local and scientific knowledge. However, recent trends in post-colonial theory, feminist studies or post-structuralism have made it clear that such an absolutist dichotomy plays an important part in Western philosophical thinking to justify a discriminatory representation of the other (in this

¹⁰⁸ *ibid.* at 4-5

¹⁰⁹ V. Gordon, n. 88 above, at 633

¹¹⁰ A. Nygren, 'Local Knowledge in the Environment-Development Discourse. 19 *Critique of Anthropology* (1999), 267-288, at 268.

context local knowledge systems).¹¹¹ It has its roots in Cartesian thinking and makes it possible to divide the world in a category of subjects who know and objects who are to be known. However, all knowledges are constructed and context-dependent, ‘thus the focus of analysis should be on those processes that legitimise certain hierarchies of knowledge and power between local and global (scientific) knowledges.’¹¹²

Intellectual property rights are still one of the strongest impetuses in the debate on traditional knowledge protection, but intellectual property rights are a symbol of a worldview that sees scientific knowledge as the paradigm of knowledge.¹¹³ However, it is not only the discursive power of science that needs deconstructing, Western scientific knowledge also co-constituted (including in the material sense) colonialism.¹¹⁴

International law does play a role in legitimising dominant epistemologies and ontologies. ‘During imperial colonial rule, such legal narratives rationalised the imposition of civilised legal orders on so-called primitive and underdeveloped colonies.’¹¹⁵ More recently, legal doctrines have been transferred to the global South through aid and development projects under the auspices of the United Nations system and other international treaties and agreements. It is important for environmental lawyers and comparatists to remember that the agreements that are in put in place for the protection of traditional knowledge are part of this politicized relationship. As one of the most renowned legal experts in this field admits, ‘there is a

¹¹¹ See e.g. M. McNeil, ‘Introduction: Postcolonial Technoscience’, 14 *Science as Culture* (2005) 105-112; S. Harding *Postcolonial and Feminist Philosophies of Science and Technology: Convergences and Dissonances*. 12 *Postcolonial Studies* (2009), 401-421.

¹¹² A. Nygren, n. 102 above, at. 268

¹¹³ *ibid.*, at 271.

¹¹⁴ S. Seth, ‘Putting Knowledge in its Place: Science, Colonialism, and the Postcolonial’. 12 *Postcolonial Studies* (2009), 373-388, at 374.

¹¹⁵ B. J. Richardson, n. 98 above, at. 3

growing body of international law that seeks to clarify the legal uncertainties, but in practice only seem to exacerbate them'.¹¹⁶ The main reason for much of that confusion is that economic discourses are being intertwined with new environmental planning ideologies of which the CBD is a prime example.¹¹⁷

Biodiversity-rich countries realising the economic potential of their biogenetic resources and using them for pulling in technology and scientific transfers have asserted their sovereign rights to control ultimately access to biogenetic resources. Adoption of the sovereignty principle in the CBD has been presented as a clear victory for biodiversity-rich countries, but for the custodians of traditional knowledge and biogenetic resources (i.e. indigenous peoples and local communities) the deal has been somewhat raw.¹¹⁸ In a Derridean sense, this shortcoming lies mainly beyond the grammatical text and can be *traced* back to 16th century Europe and the thought that a nation state has the right to permanent sovereignty over their territories and natural resources.¹¹⁹ The CBD explicitly upholds this rights in its preamble when stating that 'states have sovereign rights over their own biological resources'.

Taking the example of the WIPO IGC, the most affected people – i.e. indigenous peoples and local communities – were just observers in the negotiations and were not able to participate in a meaningful way in what has been framed as the most important negotiation about an effective instrument to effectively protect traditional

¹¹⁶ G. Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (London: Earthscan, 2004) at 3.

¹¹⁷ B. J. Richardson, n. 98, above at 3.

¹¹⁸ G. Dutfield, n. 104 above, at 6.

¹¹⁹ See for example, P. Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003).

knowledge.¹²⁰ The CBD and the national access and benefit sharing laws are focusing much more on contractual agreements which require equitable partnerships.¹²¹ This opens up a debate about power relations in these negotiations and the outcome may vary depending on: what induces parties to negotiate; the negotiation strengths and weaknesses of the parties; and whether there is clear national legislation regarding ownership of resources.¹²² Furthermore, there are strong indications that access and benefit sharing laws have been developed faster in those countries where highly visible biodiversity prospecting activities have led to increased public interest and national debate such as Costa Rica and Peru.¹²³ National sovereignty issues might have been more prominent on the mind of the respective government negotiators than the respect and recognition of indigenous peoples' self-determination rights. Most of the national access and benefit sharing laws have been criticised for the fact that they pay more attention to the establishment, regulation, facilitation and commercialisation of traditional knowledge rather than to the recuperation, consolidation and strengthening of traditional knowledge; the latter being more important for indigenous peoples than the former.¹²⁴

The lack of indigenous peoples' direct or indirect participation is simultaneously a sign but also adds further to a political marginalisation of indigenous groups and raises issues of fairness, equity and global justice.¹²⁵ The exclusion of indigenous peoples from negotiations on an equal footing is again a sign of continuous colonial

¹²⁰ V. Gordon, n. 88, at 631.

¹²¹ B. Tobin, 'Biodiversity Prospecting Contracts: The Search for Equitable Agreements', in S.A. Lair (ed) *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice*. (London, Earthscan Publications Ltd, 2002) 287-309.

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ B. Tobin, 'Redefining Perspectives in the Search for Protection of Traditional Knowledge: A Case Study from Peru', 10 *Review of European Community and International Environmental Law*, 47-64.

¹²⁵ *ibid.*, at 632.

practices. According to the feminist postcolonial scholar Spivak, marginalised people cannot speak with an authentic voice as they have been reduced to subjects by colonial powers and their voice is a reconstruction based on the terms and rules that the colonisers have reconstructed.¹²⁶ The colonial relations between international law and indigenous peoples can be followed through a link to the work of Francisco de Vitoria, a sixteenth-century Spanish theologian and jurist who in his two famous lectures, *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros*, reflected upon the relations between Spain and the Indians and in particular was preoccupied with questions such as: who is sovereign and what are the powers of the sovereign and are the Indians sovereign?

The sovereignty doctrine emerged in the work of Vitoria when he addressed the problem of cultural difference when he encountered the problem of having to create a system of law that could regulate and govern the relations between societies that belonged to different cultural orders each with their own ideas of governance and propriety.¹²⁷ Vitoria assesses the cultural practices of each society against the universal law of *jus gentium* and demonstrates that the Indians violate universal natural law. Hence, Indians can only be admitted to the legal system through disciplinary powers. Vitoria overemphasises the difference and portrays him as barbaric, backward and uncivilised to justify sanctions against the Indian because the Indian refuses to comply with universal standards. Ultimately, this difference and refusal to comply with universal rules justifies ‘the disciplinary measures of war, directed toward effacing Indian identity and replacing it with the universal identity of

¹²⁶ See G. C. Spivak ‘The Problems of Cultural Self-Representation’ Sarah Harasym, ‘In the Post-Colonial Critic: Interviews, Strategies’ 50 *Dialogues* (1990) in B. J. Richardson, n. 93 above, at 11

¹²⁷ A. Anghie, ‘Francisco de Vitoria and the Colonial Origins of International Law’ in Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Postcolonial* (Ann Arbor: university of Michigan Press, 1999) 89-107, 90.

the Spanish.’¹²⁸ For critical legal scholars there is a dark side to the notion of sovereignty and unlike the mainstream view that the sovereignty doctrine has its roots in Western European history, a more complex and critical reading of Vitoria’s work suggests that sovereignty as a concept has clear links with colonialism. Vitoria’s construction of a set of arguments emphasising, first, a difference between the Indians and Spanish in terms of their social practices and customs in international law; second, an attempt to bridge this difference through characterising the Indian as someone who possesses reason and therefore should be bound to *jus gentium*; and finally, a justification of disciplining the Indian because of his backward status refuses to comply with universal reason, is still being used today in international law to suppress the non-Western world.¹²⁹ Arguably, ‘non-European peoples have been continuously characterised as the barbarians compelling the further extension of international law’s ambit.’¹³⁰

To conclude, the indeterminate legal status of indigenous peoples and their traditional knowledge systems is particularly pertinent in international (environmental) legal instruments. Indigenous peoples and their knowledge systems are still attributed with distinctive characteristics that puts them in a ‘location outside of modernity’.¹³¹ Law inscribes cultural difference and as Pierre Legrand so aptly argues it is the responsibility of the comparatist-at-law to deconstruct the locality of law so it can travel; leaving local laws to stand in juxtaposition to universal laws is not an

¹²⁸ *ibid.*, at 102.

¹²⁹ *ibid.*, at 102-103.

¹³⁰ *Ibid.*, at 103-104.

¹³¹ C. Perrin, ‘Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples. Eve Darian-Smith and Peter Fitzpatrick (eds) *Laws of the Postcolonial* (Ann Arbor: university of Michigan Press, 1999) 19-38, at 25.

option.¹³² When taking up this challenge, comparative law might discover that it can be surprisingly ‘hospitable to other kinds of knowledge.’¹³³ Comparatists have focused for too long on either the unification of laws limited to proximate jurisdictions or aspire to a universal uniform law. In both instances difference is not explained but it is rather contained or even erased.¹³⁴ While there is still a long road ahead to full recognition of customary law in international and national law, a range of options are emerging for indigenous peoples’ to enforce respect for their legal customs, norms, and values. Tobin lists a series of opportunities ranging from empowerment of traditional decision making authorities to extension of indigenous peoples’ jurisdiction.¹³⁵ But whether national judicial capacity to apply customary law is raised or indigenous experts are included in judicial processes through the establishment of mixed judicial bodies, success of these measures will depend to what extent customary law is not going to be incorporated in a totalising system of universality. ‘Comparative legal studies must recognise and lay out a space of the other within the law.’¹³⁶ This means that comparative lawyers can help the judiciary in tracing the uniqueness of customary law, its history, occasion, place, and indeed its difference.

¹³² P. Legrand, n. 52, above at 710.

¹³³ P. Legrand, n. 52, above at 710.

¹³⁴ P. Legrand, ‘The Same and the Different’, in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions*. (Cambridge: Cambridge University Press, 2003), 240-311, at 248.

¹³⁴ B. Tobin, n.70 above, at 114.

¹³⁵ B. Tobin, n. 69 above, at 158.

¹³⁶ P. Legrand, n. 139 above, at 272.

