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Recognizing Indigenous Customary Law of Totemic Plant Species: Challenges and Pathways

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1. INTRODUCTION

Indigenous customary laws and practices exist as a part of Indigenous peoples' conception of the world, their conception of order, and their rule of law. For Indigenous Australians this is a result of their spiritual understanding of the Dreaming (see Stanner, 1991). Often described as "living laws" (Tobin, 2014) because they evolve, connect and continue, Indigenous customary laws provide the basis for how Indigenous people interact with each other, land, plants and animals, and *vice-versa*. This paper focuses on Indigenous knowledge which is often discussed in terms of natural resources, including biological resources; and is also linked to traditional cultural expressions (TCEs), folklore and other intangible aspects of cultural knowledge (see Vermeylin, 2010 and Drahos, 2014, p84 for critique; McKeough and Stewart, 2012; Blakeney, 2013; Janke, 2018 on TCEs in Australia). This paper attempts to draw attention to the use of Indigenous customary law in biodiversity conservation, while also noting that a specific focus on biodiversity makes a Western "cut" in the networks of relations for plants and animals (Whatmore, 2002). The paper provides a broad discussion about Indigenous customary law and the need for it to be to recognised in Australian law. In Australia, limited recognition is given to the use of Indigenous customary laws in the criminal justice system through "Circle Courts" as a means to make court processes more culturally appropriate and engender trust between the court and Aboriginal peoples (Marchetti and Daly, 2004).

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The *Nagoya Protocol to the Convention on Biological Diversity* (CBD), and the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration), provide the international basis to recognise and analyse, in policy and law, the role of Indigenous customs and law in protecting Indigenous knowledge. The reality at the state level and for Indigenous peoples, however, is that it is extremely difficult to recognise customary law. Several socio-legal scholars have discussed the challenges in recognising Indigenous customary law related to Indigenous knowledge, including Tobin (2013, 2014), Drahos (2014) and Blakeney (2013). Drahos (2014) goes furthest in the Australian context in describing the inherent challenges in recognising "ancestral law" (rather than the British term, "customary law") in the Western jurisprudential typology of law. He explains "this is in part because this [ancestral] law appears to describe forces that can be harnessed by individuals to help bring about physical consequences in the world" (Drahos, 2014, p.19) and that ancestors remain in some form active agents in the world – in landscapes/geographies and in plants and animals.

This paper builds on this existing literature (especially Indigenous Australian voices) and recent projects in legal geography (see Braverman, 2016; Robinson and Graham, 2018) to conceptualise pathways for states to provide recognition of Indigenous laws. As we will describe, and relating directly to ideas underpinning legal geography (that law and geography are mutually co-constituted), Indigenous Australian law derives from "country", which is an Aboriginal term for more than just landscape, and which requires acknowledging the connectivity with their cosmological system as conceptualised in the "Dreaming" (see Stanner, 1991). At the heart of this issue for Indigenous peoples are the legal structures established through settler colonialism, and the subsequent failure to recognise customary law or Indigenous law.[1] Underpinning lack of recognition are epistemological and ontological differences in the way laws and nature (including plants, animals and country) are imagined, constructed and performed, and are an extension of the colonisation of Indigenous peoples and lands. This issue is especially pertinent in a setting like Australia, where almost 250 years of colonisation and dispossession have undermined Indigenous peoples and their self-determination.

[1] We use both terms interchangeably here because of the prevalence of "customary law" in certain forums but prefer the term Indigenous law.

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Australia made some attempts at identifying ways to recognise customary law through state law structures in the 1980s through the Australian Law Reform Commission (ALRC), and its analysis of Indigenous laws and customs. This was followed by the Mabo cases, and the establishment of the Native Title Act, which we explain in the following sections. However, the prism of existing laws and legal structures still provides limited application to Indigenous knowledge related to plants and animals. Therefore, here we examine and review legal, anthropological and historical texts that explain Aboriginal and Torres Strait Islander laws and customs, specifically relating to biodiversity and associated Indigenous knowledge.

There are also issues associated with the misappropriation, or “biopiracy”, of biological resources and traditional knowledge. Highlighting the extent of this issue, Robinson and Raven (2017) have identified more than 1300 patents that mention in the title, abstract or claims, the species name of commonly used “bush foods and medicines” that Aboriginal and Torres Strait Islander peoples have used traditionally and in current personal or commercial use. This means researchers are making a monopoly claim over innovations that are based on bush foods and medicines. The extent to which Indigenous knowledge has been used for these patents is not possible to discern. This requires forensic analysis of all patent applications to track any references used. It does however, suggest, that the motivation for the research on these species, that have led to the patents, may have been based on Indigenous knowledge which was found either in the “public domain” or was gathered through other means. The result of these patents is that Indigenous peoples may be deprived of recognition of ownership over their own knowledge and that there can be restrictions placed on Indigenous commercial activities through the threat of law-suits such as in the “gumbi gumbi” case (see Robinson et al., 2018).

This paper builds on 15 years of work related to “biopiracy” and Indigenous knowledges (Robinson, 2010; Robinson and Raven, 2017). We have identified and challenged spurious patents relating to plants, bush foods and medicines and Indigenous knowledge and continue to challenge these where there is evidence that they are dubious, unfair, and where they “free-ride” on existing knowledge. As human geographers, and within that, legal geographers, we seek to understand the operation of laws at different scales, in different places (for example, Australia, Thailand and the Pacific), and for different Indigenous and cultural groups and communities. This includes understanding the complexities of legal

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pluralism[2] and layered legal regimes in postcolonial and non-Western contexts (see Forsyth, 2013a; and Gillespie, 2018). Where legal geography meets legal pluralism, we acknowledge authors such as Vermeylin (2010, p.53) who encourages researchers to "embrace the idea of a hybrid legal space where law-making consists of a praxis that interlocks a whole range of legal actors ranging from international institutions to daily localised legal actors". It also means understanding the mutual co-constitution of both law and place, which is often discussed by legal geographers in regards to the enactment of planning and environmental laws, through case law analysis, and in studying the enactment of laws in different places (Bartel and Graham, 2016; Bennett and Layard, 2015; Delaney, 2015). In this case the mutual co-constitution of law and place/country/nature goes especially deep; and is encompassed by Indigenous origin beliefs and stories. This article encourages us to continue with the deeper readings of legal pluralism and legal geography (Davies, 2017; Robinson and Graham, 2018), for an expanded understanding of law, and towards further recognition and acceptance of Indigenous ways of thinking, seeing and doing.

2. THE DREAMING AND "LAW STORIES": INDIGENOUS CUSTOMARY LAW IN AUSTRALIA

In Australia, Indigenous law is often referred to as customary law. An important starting point for recognising Indigenous "lore" as Indigenous *law,* is to understand "the Dreaming" (Glowczewski, 1991), from which Indigenous Australians descend and from which their lore and laws emerge – a very distinct co-constituted legal geography. The Dreaming, a term coined by Australian anthropologist W.E.H. Stanner (1953), describes "a complex of meaning" that Aboriginal peoples use to refer to a totem, a place their spirit came from, and the existence of custom (Stanner, 1953). The Dreaming also includes the sites of both ancestry and law, made by ancestral beings, in the landscape and within the rocks, animals and plants (Rule and Goodman, 1979). As Stanner argued, "the dreaming is many things in one. Among them, a kind of narrative to things that once happened; a kind of charter of things that still happen; and a kind of *logos* or principle of order transcending everything

[2] Sally Engle Merry (1988, p. 870) defines legal pluralism as where "two or more legal systems coexist in the same social field". John Griffiths (1986, p. 1), defines legal pluralism as where "law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities which may support, complement, ignore or frustrate one another".

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significant for Aboriginal" people (Stanner, 1953, p.48). And as Glowczewski argues, "Aboriginal people talk about the Dreamings in plural to designate these Beings, the names or totems they inherit from them, the mythical stories which tell of their journeys and are re-enacted in their rituals" (Glowczewski, 1991, p.16).

The Dreaming is also explained in the Warlpiri people's (Aboriginal people from Central Australia) own concept and story of *Jukurrpa,* which "may be applied to individual ancestral beings, or to any manifestation of their power and nature, i.e. knowledge of their travels and activities, rituals, designs, songs, places, ceremonies" (Laughren et al., 2006, cited by Goddard and Wierzbicka, 2015, p.44). *Jurkurrpa,* which is not just located in the past but has a continuing ongoing life-force, establishes the prototype for human and non-human activity, development and behaviour (Laughren et al., 2006, cited by Goddard and Wierzbicka, 2015).

Likewise, Watson (2000), of the Tanganekald peoples, uses the Ngarrindjeri word "*Kaldowinyeri*" to refer to the Dreaming as, in part, the beginning, a long time ago. As Watson (2000, p.3, with italics added) states:

> *Kaldowinyeri*: a time when the first songs were sung, first dreams were dreamed, first visions, thoughts and ideas took form. The songs sang the beginning of law itself. Law began in *Kaldowinyeri*, coming out of the creation. The creation of the first sunrise and first songs. In the beginning law was naked or "raw", naked like the land and its peoples. Law emanates from a place of rawness and truth. In nakedness it is without facade, the truth is laid bare.

The Dreaming has a holism that is distinct from Western law, and is fundamentally difficult to conceptualise from "outside". As Watson (2002, p.255) explains:

> Law is different to the European idea of sovereignty, different in that it is not imposed by force of arms and does not exclude in its embrace, it envelops all things, it holds this world together… Law is in all things. It has no inner or outer, for one is all, all is one.

Indigenous law is also embedded in notions of "country" and country is multi-dimensional (including land, sea and sky country) – it consists of people, animals, plants, Dreamings,

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underground, earth, soils, minerals and waters, surface water, and air (Rose, 1996b). Watson's writings provide several important Aboriginal law-stories including: the sun-dreaming about the birth and importance of the sun; the law-story of the *Wargle* – the great snake that formed the Swan River in Perth, and became the Boyagin Rock – which explains the law and tells people how to live in harmony with all things; and the law-story of *Gurukmun* the Frog (also well-known as the children's story *Tiddalik* which is reputedly a name from the Gunai people) which tells of his greed in consuming all the water in the landscape (Watson, 1997). Watson emphasises in her law-stories, that the Dreaming was not just something in the past, but that it forms the law that regulates behaviour today.

As Rose (2011, p.133) explains, these stories constitute more-than-human genealogies that enmesh people in cross-species transformations – Indigenous Australians have stories about how their life is related to other species. The temporal aspect of this is important. Dreaming and ordinary times are separated by something like a temporal boundary, but there is a continuance and cycles of lives (Rose, 2004). For example, the flying fox Dreamings are seen as the source for flying foxes in the world today, and at the same time are the sources for the flying fox people (a 'totemic' connection) who are also descended from the ancestral creators (Rose, 2004).

Recent work in "more-than-human" geography (Whatmore, 2002) and anthropology seeks to recognise an ontology of belonging and co-becoming, wherein beings, things, and non-tangibles have less-than-clear boundaries that can never be entirely known (Wright et al., 2012). They escape humans as they are also part of humans and part of each other, and are part of an active and dynamic world-making for Indigenous Australians and the people who work with them (Suchet-Pearson et al., 2013; Rose, 2011). The theoretical space opened up by more-than-human geography enables Indigenous geographies – and with it the Dreaming, Indigenous customary law, and relationships to country – to exist in a place which has previously been dominated by empiricism and neo-liberalism.

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3. INDIGENOUS TOTEMIC PLANT AND ANIMAL SPECIES: CUSTOMARY LAW EXAMPLES

If the Nagoya Protocol wants States to recognize customary law related to genetic resources and associated traditional knowledge, then in Australia this means recognising Indigenous customary law and protocols that are embedded in Dreaming stories. Aboriginal and Torres Strait Islander peoples may recognise, relate to, and regulate plants and animals through the Dreaming as 'totemic' species, which are assigned obligations or rules by specific individuals or families. "Totem" is a term imported from the Ojibway (in Northern America) (Frazer, 2009), which refers to a plant, animal or an object that has spiritual significance. "Totemic" species are sacred plants or animals that are used in rituals and part of Dreaming, may be spirit homes, and have medical restrictions placed on them. As Frazer argued, the connection between a person and their totem is mutually beneficial; the person shows their "respect for the totem in various ways by not killing it if it be an animal, or not cutting or gathering it if it be a plant" (Frazer, 2009, p.4).

Totems[3] are a way of understanding Indigenous laws that relate to plants, animals and place and that appreciate the connections between humans, animals, plants, and country. For instance, as Watson (2000) argues, the Nunga people, from southern South Australia, believe that humans are descended from beings of *Kaldowinyeri*. Watson (2000, p6, italics added) goes on to argue:

> They are called *ngaitji* or totems. And this *ngaitji* represents our spiritual attachment to ancestral beings. Our *ngaitji* teaches us about the unity we share with all things in the natural world… At *Kaldowinyeri* the ancestors were both human and animal. The relationship between humans, animals and the natural world is known as our *ngaitji*, or our *ngaitji* relationship. This relationship tells us who we are, and what our relationship is to the natural world. From our *ngaitji* we learn about the interconnectedness of all life and are reminded that humanity is just a small part of the overall fabric of life.

[3] Although "totems" is an inherited term, it has become widely used in Australia by Aboriginal people and by people working with them. There are likely to be many Aboriginal language terms like *"ngaitji"* that represent totems.

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According to the Wik-Mungkan people's conception of totemism, as it applies to the relationship between people and animal species, their ancestral beings, called *pulwaiya,* wandered across the face of the earth giving it form and definition and then "went down" and settled back into the earth (Bennett, 1983). Where they "went down" is called an *auwa* (sacred site). As Bennett (1983, p.20) explains:

> The wanderings of the *pulwaiya* closely reflect the territories of the species with which they are associated. The *auwa* is normally near the centre of breeding grounds or nesting sites where the associated species is abundant and is believed to be the origin of and destination for the spirits of the people and animals of the totem associated with it.

It is common that totemic species are revered, controlled or protected in various ways. For example, the Wik-Mungkan will not harm or kill a totemic animal near its *auwa* because it is part of their belief and law that these animals are the sprits of their kin in totemic form. This same prohibition on harming or killing applies to any animal thought to contain a human spirit, which would receive the respect and deferential treatment due to an ancestor (Bennett, 1983).

There can be other impacts on totemites if their totem is injured, impacted or killed. For example, if a crocodile is wounded or killed, members of the crocodile clan will suffer some injury or become ill (Bennett, 1983). Rose (1996a, p.9) explains that the individual person is not conterminous with the body: "People who are countrymen share physical substance with their country, and when the country is damaged, people get sick or die." This sort of interspecies ethics and relationship has been noted amongst different Indigenous peoples internationally and in terms of a range of totemic species including Hawai'ian taro, yams, *Eremophila* species and others; the *Supporting Information* discusses these.

Richmond (1993) explains that some *Eremophila* species were used in some important ceremonies and that it was a medicine of significance for a number of Indigenous peoples. The reportedly widespread significance of this plant indicates that it had legal as well as ritual significance. If a plant like *Eremophila* has sacred ritual significance, should patents be

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allowed on it or its derivatives?[4] This question can only be answered through direct conversation with Indigenous peoples who used this plant. In answering this question, we must consider if biological resource or "access and benefit-sharing" (ABS) laws in Australia have sufficiently functioned to require Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT) of Indigenous "resource access providers". Because patents are not required to disclose this information, it is uncertain in this case if PIC and MAT have been sought, where the plant may have been obtained, and if Indigenous people were involved. In any case, would PIC and MAT be sufficient to ensure respect of Indigenous knowledge, beliefs and laws associated with the plant? These and related questions are likely to continue to arise until the patchwork of ABS laws in Australia is harmonized and there are mechanisms for better recognition of Indigenous laws within these state law structures (e.g. the ABS laws) (see Janke, 2018a, 2018b). Fair and equitable ABS agreements might be possible, and Janke (2018a, 2018b) highlights some examples including agreements R&D on spinifex and others. But to date these are rare and there are thousands of patents, with many held by foreign researchers, on native Australian plants (Robinson and Raven, 2017). If countries like Australia are serious about implementing the Nagoya Protocol, this means also finding legal mechanisms to respect totemic relations Indigenous Australians have with the plants and animals (genetic resources), which we discuss in the next section. This may require recognitions through native title, or through other processes, such as Indigenous-led "rights to nature" approaches.

4. RECOGNITION OF CUSTOMARY LAW: NAGOYA PROTOCOL AND THE DECLARATION

Indigenous rights to knowledge are recognised through a number of international mechanisms. This paper focuses chiefly on the *Nagoya Protocol to the CBD* and the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration). It is important to contextualise the international legal framing of these two mechanisms because each has differing legal standings and will influence the extent to which Australia incorporates

[4] The World Trade Organization (WTO) TRIPS Agreement allows countries to have patent "ordre public" and morality clauses (Article 27.1). Countries like New Zealand have dealt with this through intellectual property (IP) advisory committees. On these, Maori experts can raise issue of cultural offense when patents or other forms of IP are filed (see Young, 2001).

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international standards into legislation. This section provides some examples of how each instrument recognizes customary laws and where variations may occur.

The CBD, which came out of the 1992 Rio Earth Summit, has led to global attention on 'biopiracy'. As Dutfield explains, biopiracy refers to "(i) the theft, misappropriation of, or unfair free-riding on, genetic resources and/or traditional knowledge through the patent system; and (ii) the unauthorized and uncompensated collection for commercial ends of genetic resources and/or traditional knowledge" (2015, p.651). The CBD provides for "the fair and equitable sharing of benefits arising out of the utilization of genetic resources" (abbreviated to "access and benefit-sharing" or ABS) (see Dutfield, 2015 and Robinson, 2015 for ABS critiques and case studies). Due to the ambiguity of the CBD text, many actors advocated for further protections. Eventually, after many years of negotiation, an international protocol to the CBD was developed (Bavikatte and Robinson, 2011; Harry, 2011).

The 2010 *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* built upon the CBD concepts of ABS. The Protocol was developed to deal with some of the "biopiracy" issues and to ensure PIC and "fair and equitable sharing of benefits" arising from the utilisation of biological resources (and associated traditional knowledge) for research and development (R&D); which are based on MAT. Importantly, the Nagoya Protocol encourage Parties to "take into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources" (Article 12(1). The Protocol asks countries to consider Indigenous customary laws in the ABS context, albeit couched within weak language of "take into consideration". State sovereign rights over natural resources are iterated in Article 3 of the CBD and reiterated in Article 6 of the Nagoya Protocol. However, while Australia has signed the Protocol in 2012, it is yet to ratify it, which has implications for Indigenous peoples and their knowledge in Australia.

The Declaration, negotiated over many years and finalised in 2007, sets out the principles for Indigenous human rights and the obligations on States to meet these rights. In particular, the Declaration indicates that Indigenous peoples have the right to practise and

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vitalise their own cultural traditions and customs, and that states may provide redress to Indigenous Peoples whose cultural and intellectual property has been taken without PIC and in violation of Indigenous laws, traditions and customs (Article 11.2). It provides for States to establish and implement a process to recognise and adjudicate Indigenous peoples' rights to Indigenous knowledge (Article 27). Lastly, in relation to Indigenous knowledge, the Declaration recognises that "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures", which includes seeds, medicines and knowledge of fauna and flora, and the right to "maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions" (Article 31).

Both of these instruments have provisions to recognise customary laws. However, as the Nagoya Protocol is a "hard law" and the Declaration is a "soft law" their implementation varies. While soft laws lack binding force, as Barelli argues "their legal significance and potential to affect State behaviour cannot be taken for granted" and should not be dismissed as non-law (Barelli, 2009, p.959). While "hard law" has implementation obligations, the context of soft law should not be discounted, as the "contexts within which an instrument is adopted, the circumstances which have led to its establishment, its very normative content and the institutional setting within which it exists" are important (Barelli, 2009, p.960).

The Nagoya Protocol is a legally binding international optional protocol to the CBD that came into force in 2014. Countries, including those yet to ratify it, are figuring out how to implement it. Additionally, the Declaration is a non-binding international instrument that sets international principles for Indigenous human rights and is a significant international development for Indigenous peoples. While States cannot ratify The Declaration, there is an expectation from Indigenous peoples that they will uphold the principles set out in it. The Declaration is a tool used by Indigenous peoples to assert rights to self-determination. However, due to government's lack of action Indigenous people continue to find meaningful and practical ways to assert self-determination. In Australia, this includes, for example, the 2017 "Uluru Statement from the Heart" – a position statement from Indigenous Australian leaders seeking rights to self-determination.

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While international agreements provide the frameworks for recognising Indigenous customary laws; a state's implementation of international agreements is variable and subject to existing constitutional parameters, laws and legal norms. To date, Australia's patchwork of ABS laws is inconsistent and gaps in the southern states mean that ABS legislation does not function properly (see for example, the specific case of the Kakadu Plum highlighted in Robinson, 2010). For these reasons, and because of the complexities involved in recognising Indigenous law, it is worth analysing the challenges to making the "bridge" between Indigenous law and state law in Australia, which is undertaken later in this paper.

The recognition of Indigenous laws within state law systems can also be problematic for Indigenous peoples, because Indigenous laws are often derived from fundamentally different belief systems and cosmologies of country, "resources" and knowledge, and have often been orally transmitted (Blakeney, 2013; Drahos, 2014; Stoianoff et al., 2014; Watson, 1997; 2002). Additionally, the practice of Australian colonialism was aimed at wiping out Indigenous peoples', their belief systems, oral traditions, customary laws and practices, and traditional forms of governance. The level of trust between Australian Indigenous peoples' and the state has degraded to the point that many Indigenous people are distrustful of actions taken by governments. As a protective or recognition measure, including Indigenous laws within the state legal system may be viewed with suspicion.

5. CHALLENGES TO RECOGNISING INDIGENOUS CUSTOMARY LAW

Some fundamental barriers exist in Australia to understanding and recognising Indigenous law. Drawing from the *Recognition of Aboriginal Customary Law* (ALRC, 1986) reports and Tobin (2014), some of the main challenges with connecting Indigenous customary law and state law have been: evidence, secrecy, decline or loss of knowledge and laws, Indigenous diversity, geographical and familial limits, loss of control of law, documenting/making static oral laws, complexity of links to culture and country, and political will towards constitutional and statutory recognition. As noted above, the fundamental underpinnings of Indigenous law, as based in Indigenous Dreaming rather than as an inherited Western historical-political product, also limits our ability conceptually and practically to bridge Indigenous and state laws.

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5.1 The False Binary of Oral Law versus Written Law: Diluting the Perceived and Practised Superiority of Written Laws

"More-than-human" geography has important implications for understanding Indigenous law as set against areas of Australian law such as property law and intellectual property law (Graham, 2010). Instead of individualised "ownership", there are complex relations with land and seascapes, animals and plants, which are described through oral traditions or "law-stories". There can be, for example, certain family or seasonal use rights for plants (not necessarily ownership), bound up in family stories and relations to country (Rose, 2004; 2011; Watson, 2002). As explorer George Grey noted in the 1830s, "there are even some tracts of land which abound in [wattle] gum… which numerous families appear to have an acknowledged right to visit at the period of the year when this article is in season, although they are not allowed to come there at any other time" (cited in Clarke, 2007, p.19).

British and Australian law encloses objects, resources and property, that may be considered by Indigenous Australians as ancestors, birthplaces and homelands – part of cultural memory (Godden, 2003). As Watson explains of British and Australian law, "The idea of an inside and outside determines boundaries, and boundaries which have been constructed from a place of power, invoke a closure" (2002, p.255). Indeed, as Rose (1996b) explains, a likely explanation for the European colonisers of Australia declaring it *terra nullius*, is that they took an egocentric view of the landscape, not able to identify their own familiar signs of ownership, property and culture. But because Indigenous law is lived and continuous, the imposition of British ideas of sovereignty and property law does not extinguish the law of Indigenous Australians – "they remain nevertheless in the embrace of law, for law is alive in all places and lives" (Watson, 2002, p.256).

Perhaps the biggest challenge to recognising Aboriginal customary law in Australia is that the Australian legal system, based on the British colonial legal system, is built on a foundation of superiority. The British colonial legal system retains a position that its written law is superior in its provision of ordering and sovereignty to the orally transferred laws of

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Aboriginal Australians and Torres Strait Islander peoples. As Aboriginal leader Mick Dodson (1995) explains:

> Supposedly, more enlightened views sought to depict our societies as possessing a set of principles, or traditions known as 'lore'. This 'lore' was described as a body of codes and prescriptions – usually unwritten – which was a defining criterion for peoples who had not, in the scale of humankind yet attained the status of proper, civilised societies which had law. This notion of Indigenous peoples' 'lore' was another of the colonisers legitimising charters for their denial of our fundamental rights – a denial based on the perceived superiority of Western legal, social, economic and political systems (Dodson, 1995, p.2).

Law was, and is often, passed off and ignored as "lore" despite "the word law being so prevalent in Indigenous parlance and imagination that one must plug one's ears to not notice Aboriginal and Torres Strait Islander love for law" (Wood, 2016, p2). In anthropological and ethnobotanical texts, oral histories, and biographies of Aboriginal elders, discussion of the law is prolific, albeit often passed off as "lore" by westerners. For example, the book by Bill Neidjie, a senior traditional owner, explaining his Gagudju "environmental and spiritual philosophies", argues that "Aboriginal law never change. Old people tell us, 'you got to keep it.' It always stays" (Neidjie, 2007, p.22).

The oral-written divide has a long history of debate in literature, anthropology and law. Some argue, for instance, that the oral and the written are an interface or part of a continuum of communication devices (Goody 1987). Laws in the oral-written divide sit upon, and are influenced, by a time-space continuum. Oral laws are often placed, or considered, as rules from the past that do not apply to the contemporary context; while written laws are positioned as contemporary rules. As we have heard from Watson (1997, 2000), this is a mis-placed assumption as Indigenous law has continuity. Recognising this continuity is important for breaking down an assumed binary between oral and written laws in Australia, and this is one reason why Indigenous Australians have been pushing for constitutional recognitions.

The interaction and presence of these debates places, and dis-places, the positioning of Indigenous knowledge "protection" in the legal system by assigning parts of the tradition

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into a category that it most closely resembles (Drahos, 2014; Tobin, 2014). Because Indigenous laws have been inscribed in a form that requires oral literacy, and because of Australia's violent and oppressive colonial history, this is just a starting point for what could be a larger project of explaining and understanding oral histories of Indigenous plant and animal laws. In later sections we return to Indigenous-based "rights to nature" approaches to assist our thinking about the natural/legal entities like rivers (e.g. the Whanganui river, see Charpleix, 2018), parts of the landscape, or even plants and animals (e.g. see Braverman, 2016). But the diversity of laws across Indigenous language groups and clans makes it difficult to generalise about Indigenous laws surrounding plants and animals. As Indigenous leaders, like Dodson (1995), have highlighted, it is important not to pigeon-hole aspects of Indigenous law according to the fit of Australian laws.

5.2 Australia's Biodiversity Conservation Legislative Landscape

As a federated state, Australia distributes environmental protection and biodiversity conservation measures, legislation and regulations across national (federal) and provincial (state) legislation. The National legislation, under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), includes two objectives to "recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity", and to "promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge" (Australian Government 1999, p.2).

Environmental protection and biodiversity conservation measures are distributed across Australia's six states and two territories. Some of the states and territories have updated their respective legislation[5] following the *Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources* (Australian Government, 2002). While this legislative framework provides some limited protection for Indigenous "traditional" knowledge, it is highly focused on the "point of access" to genetic resources and associated knowledge (see Robinson, 2015 and Janke, 2018a for detailed analysis of these). This often means access to land or sea areas. So to understand the extent to which indigenous Australians can have their customary rights relating to plants and

[5] These pieces of legislation include, for example, Biological Resources Act 2006 (NT); Biodiscovery Act 2004 (Qld).; Biodiversity Conservation Act 2016 (WA).

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animals (“genetic resources”) respected, national legislation needs to be aimed at legally recognising Indigenous peoples’ ownership, rights, and title, to land and sea. This includes a set of land rights legislation distributed across a few states and territories[6], and “native title”. Leaving aside, for the most part, the complex mosaic of land rights legislation (see Humphries et al., 2017, for a detailed examination of ABS-relevant land reforms), the next section provides an overview of the role that native title may play in supporting Indigenous peoples’ customary law, and its relevance for protecting and conserving Indigenous knowledge.

6. MECHANISMS TO RECOGNISE CUSTOMARY LAW

There exist legal tools and processes through which Indigenous law has been, or could be, recognised. In Australia, native title has provided one pathway for recognition of ‘traditional laws and customs’ and the connection of Aboriginal peoples or Torres Strait Islanders with country. However, native title is often criticized by Indigenous people for being a narrowly constrained Anglo-Australian racist legal construct (Weir, 2012) (cf. the use of “native”). Additionally, the Nagoya Protocol includes provisions for community protocols to support the operationalization of access and benefit sharing related to biological and genetic resources and associated traditional knowledge. The following sections provide a brief overview of some of the mechanisms to recognize customary law.

6.1 Native Title Rights

Native title is the federal Australian mechanism for recognising Indigenous or customary law in Australia related to land, waters, and by association, plants and animals. Land rights Acts are the other mechanisms. “Native title” is a land title that was developed in response to a claim made, and won, by Eddie Koiki Mabo. Mabo was a Meriman man from Mer Island (Murray Island) in the Torres Strait Islands, who, along with other plaintiffs, successfully argued in the High Court (in *Mabo v Queensland* (No. 2)) that they had a possessory title

6 The following states and territories have land rights legislation: SA (1966)(1981); Vic (1970); NT (1976)(2006); Qld (1978)(1985); NSW (1983)(C’Wealth 1987); and Tas (1995). WA and the ACT are the only two jurisdictions to be without land rights legislation.

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based on long possession. The High Court of Australia found that "common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands".[7] However, this does not change the dominance of private property rights in the landscape, and the governmental organization of the land has remained largely untouched. Dorsett and McVeigh (2002, also Godden, 2003) explain that the jurisdictional spaces and places created through colonisation remain in place.

In response to the Mabo decision, the Federal government established the *Native Title Act 1993* (NTA). As a result of the initial claims made by Mabo and the other plaintiffs, there have been a number of other precedents set by case law in Australia. These include, for example, decisions made in *Mabo v Queensland* (Mabo 1); *Western Australia v Ward* (2002); *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005); and *Akiba v Commonwealth* (2013); *Western Australia v Brown* (2014). This section seeks to explore some of this case law, as it relates to the NTA, and how it may relate to efforts associated with biodiversity conservation, customary law and protecting Indigenous knowledge.

It is important to understand some of the machinations of the NTA. Firstly, the EPBC Act specifically states, in section 8, that "nothing in this Act affects the operation of section 211 of the Native Title Act 1993 in relation to a provision of this Act" (Australian Government, 1999, p.8). Secondly, native title determinations have relevance for establishing whether native title holders (or claimants) might be genetic resource "access providers" as recognized by the *Northern Territory Biological Resources Act* (2006) and the *Commonwealth Environmental Protection and Biodiversity Conservation Regulations* (2000) Part 8A.

Native title is defined in the NTA as the communal, group or individual rights and interests, laws and customs of Aboriginal peoples or Torres Strait Islanders in relation to land or waters as recognised by the common law of Australia (s223). Native title can be granted

[7] Mabo v Queensland (No 2) [1992] High Court Australia 23; (1992) 175 CLR 1 (3 June 1992).

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through litigation or a consent determination, and may provide a determination of exclusive or non-exclusive possession, or extinguishment of native title (s225 of NTA).

Native title determinations are likely to be important for ABS because they are a state-recognized benchmark for establishing customary rights over land from which resources could be accessed for R&D, and for requiring PIC, MAT, and resultant benefit-sharing. However, this is premised on a narrow view of "land" and plants and animals as "genetic resources" for which consent would be obtained and compensation (benefit-sharing) achieved.

One of the major issues associated with native title determinations relates to the "burden of proof" to prove continuity and observance of traditional laws and customs and connection to country (or "ongoing connection"). The skewing of the Act in this way has legitimated and reinforced past government policy and practices of removing Indigenous peoples from their land, removing children from their families, and outlawing the use of Indigenous languages, customs and laws. Indigenous people, because of government policies and practices, may find it materially difficult to prove continuity. This was certainly the case for the Yorta Yorta people of northern Victoria and southern New South Wales whose application for native title was rejected by both the Federal Court and the High Court.[8] As Godden (2003, p.80) explains "only in the barest of terms has [native title] law set about re-constituting a history of the dispossession and decimation of aboriginal communities, and in retracting one legal fiction, it has reinstituted property as the proper ground for law."

As the ALRC (2015) points out, there are also a series of practical issues related to native title. It is resource intensive, and the costs are borne most acutely by Indigenous peoples because of the time required to lodge native title claims and finalize determinations. The transaction costs associated with native title can "reduce the basis for 'full' recognition of rights; and confine the scope of native title rights and interests" (ALRC, 2015, p.16).

Australia is yet to ratify the Nagoya Protocol, and doing so may require amendment of federal and state biodiversity conservation laws as well as greater national coherence of ABS laws. There are opportunities under the Nagoya Protocol to align Australian biodiversity

[8] Members of the Yorta Yorta Community v State of Victoria [2002] High Court of Australia 58 (12 December 2002).

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laws and native title, through “access provider” provisions of Australian laws, and measures in the Nagoya Protocol such as those set out in Article 6(2), which requires PIC of Indigenous peoples “where they have the *established right to grant access to such resources”*.[9]

Some interpretations have broadened native title rights to include commercial and non-commercial purposes that are of relevance for ABS. For example, in the 2013 case *Akiba v Commonwealth* 250 CLR 209, Chief Justice French and Justice Crennan held that “A broadly defined native title right such as the right ‘to take for any purpose resources in the native title areas’ may be exercised for commercial or non-commercial purposes”[10]. As a result of this, the ALRC *Connection to Country Report* recommendation 8-1 intended to give effect to the principle of a broadly defined native title right (including commercial rights) as recognised in *Akiba v Commonwealth* (2013) 250 CLR 209 and *Western Australia v Brown* (2014) 306 ALR [168]. [11]

The decision in *Akiba v Commonwealth,* and the latter case of *Western Australia v Brown,* extend the interpretation of native title rights to a broader interpretation that could include providing “access to genetic resources”. Through these cases a right to trade has been recognised in principle, further reinforcing the position that native title holders should be recognized as rightful providers of genetic resources, or as able to control access to plants and animals (see also Janke, 2018; Tobin, 2013; 2014).[12]

Importantly, Indigenous intellectual property rights or rights to Indigenous/traditional knowledge are not recognized in the NTA. In *Western Australia v Ward* (2002) (*Ward HCA)*, the majority held that the NTA cannot protect “a right to maintain, protect and prevent the misuse of cultural knowledge” if it goes beyond denial or control of access to land or waters (ALRC, 2015, 265-6).[13] However, there have been dissenting judgements in the High Court and Federal Court of Australia. As the ALRC *Connection to Country* report (2015, p.267) indicates, Justice Kirby, in *Ward HCA*, focused on the “very broad” phrase “in relation to” in the opening words of the NTA s223(1). He saw the right to protect cultural knowledge as

[9] Italics added.
[10] Akiba v Commonwealth (2013) 250 CLR 209, [21].
[11] Western Australia v Brown (2014) 306 ALR [168].
[12] Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group (2005) 145 FCR 442, [153], [155].
[13] Western Australia v Ward (2002) 213 CLR 1, [468].

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sufficiently connected to the area to be a right “in relation to” the land or waters for the purpose of s223(1). [14] In Australia, we are gradually seeing national judicial attempts to understand and recognize the relatedness of country to cultural knowledge. While these developments are fragmented and based on non-Indigenous legal and epistemological framings, there is some hope.

6.2 Community Protocols

The protection and recognition of rights to Indigenous knowledge might be achieved through soft law mechanisms. In particular, Article 12 of the Nagoya Protocol encourages Parties to broaden their regulatory toolboxes and to encourage, support and consider community protocols. Community protocols[15] are seen as tools that are developed by/with the community to assert their customary law. Protocols to protect Indigenous knowledge are defined as standards (Nakata et al., 2005); rules (Carter, 2010); tools that prescribe particular types of behaviour (Bowrey, 2006); acceptable practices and appropriate ways of communicating (Janke, 2018b); and rights-based approaches to affirm self-determination.

Community protocols may be documents generated by communities to set out how they expect other stakeholders to engage with them. Bavikatte and Jonas (2009) describe protocols as articulating information, relevant factors, customary laws, and traditional authorities, and helping other stakeholders to understand the community’s values and customary laws. Protocols may be used as quasi-legal tools and could be constituted as “private law” (Anderson, 2010; Bowrey, 2006). While protocols on their own may not be legally binding, “because protocols are articulated and negotiated with specific regard to practical detail within community contexts, they are a source and form of private law. This means that they can have legal standing” (Anderson, 2010, p.29). The ambiguous position of protocols allows them to be used in contracts when researchers seek to access Indigenous knowledge.

Community protocols provide communities an opportunity to focus on their development aspirations, to articulate for themselves and others their understanding of their bio-cultural

[14] Ibid, [577]–[578].
[15] They are sometimes also called biocultural protocols (BCPs)

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heritage, and therefore define the basis on which they will engage with a variety of stakeholders. By considering the inter-connections of their land rights, current socio-economic situation, environmental concerns, customary laws and knowledge, communities are better placed to determine for themselves how to negotiate with a variety of actors (Bavikatte and Jonas, 2009).

Although there is positive interest in community protocols and examples of their development with UNEP, and NGOs like Natural Justice, they are still relatively new and assessments of their effectiveness for supporting Indigenous self-determination and biocultural rights need to be undertaken.[16] In this regard, Carter (2010) notes that protocols become useless when they are not upheld or respected.

6.3 "Competent Cultural Authority"

The broader aspirations of Indigenous Australians for constitutional recognition, or treaties, and the recommendations under the Uluru Statement from the Heart are all part of a broader suite of recognitions which would support recognition of customary law. Alongside them, and the gradual but fraught recognitions we see under the NTA, there are a few other mechanisms worth mentioning.

One suggestion has been the formation of an Indigenous "competent cultural authority" which might have several different functions (Janke, 2018b; Stoianoff et al., 2014, 2018). One suggestion has been that the authority would be composed of Indigenous representatives and would receive applications where researchers plan to use Indigenous knowledge; as well as being the keepers of a repository or database of knowledge. While this is also a very useful suggestion, the focus of such an authority in Australia has been concentrated particularly on cultural expressions for which authorship might be more readily attributed to a particular individual or clan. Also, there have been practical concerns in other forums about the functioning of databases, what might be 'collected', how safe it would be, among other issues (see Robinson and Chiarolla, 2017). The question of who would represent which knowledge is also a particularly challenging one in a country like Australia, with extremely diverse clan groups and languages across such a wide continent, and an equally wide distribution of bio-geographical knowledge. Cultural heritage laws

[16] See: http://www.unep.org/communityprotocols/index.asp; http://www.community-protocols.org/

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across Australia also play a role in registering and protecting tangible assets and sacred sites, but these typically focus on points and areas on a map that are registered for protection, whereas knowledge relating to plants and animals is often spread unevenly with the range of those plants and animals. Similarly, totem beliefs and relationships vary widely across the country.

6.4 Rights of Nature

It is also worth considering "rights to nature" claims where they are based on Indigenous approaches and governance, which have emerged in several countries including the Ganges in India, to nature more generally in Ecuador (through its Constitution), and the Whanganui River in Aotearoa New Zealand. In these cases we have seen forms of legal personhood extended to parts of nature (Youatt, 2017), and in the Whanganui River case, the river has Indigenous custodians, reflecting their customary role (Charpleix, 2018). In most of these cases we have seen personhood conveyed to relatively fixed parts of the landscape. For plants and animals this might mean thinking about forms of collective personhood for many individuals, indeed with their own genetic, behavioural and other forms of variations. This might mean radical reforms that are too much for mainstream populations to stomach, but there could be narrower approaches to this. For example, drawing on the ideas about 'public order and morality', there could be Indigenous intellectual property advisory bodies that represent the 'legal personhood' of totemic species, or at the least, that scrutinize those filings of intellectual property that are most culturally offensive from the perspective of Indigenous law and Dreamings (see Young, 2001 on the approach in New Zealand).

7. CONCLUSIONS

Recognizing Indigenous Dreamings and laws within the Australian legal system is highly fraught and challenging, and we are still far from any effective or widely accepted form of legal pluralism in Australia, let alone being able to deal with the potential disjunctures of legal pluralism (see Rose, 1996a; Forsyth, 2013a). The tools we have – like native title and its associated determinations and court cases, as well as the CBD and Nagoya Protocol – are non-Indigenous legal constructs that can only poorly translate the human-plant/animal-country connections of Indigenous peoples. Whilst British common law has emerged

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partially out of the formalisation of custom and norms (Tobin, 2014), this is still markedly conceptually different from understandings of the law emerging from creation stories in the Dreaming. Expanding the regulatory toolbox and creating new tools such as community protocols, might be one way of connecting between Indigenous law and state law (see Forsyth, 2013b), although to date there are only a handful of recently developed community protocols to draw from globally as case studies. It is still difficult to know if protocols will be taken seriously by external parties.

While the Nagoya Protocol may have opened an opportunity for greater recognitions of customary laws of Indigenous peoples, it is still framed from very specific Western epistemological standpoints. In the context of the Nagoya Protocol, the framing of ABS relating to R&D on genetic resources is conceptually at odds with Indigenous understandings of plants and animals emerging from the Dreaming. The "genetic resources" are living beings, totemic species, relatives and ancestors, and also through what Watson (2000) refers to as "law stories", they are manifestations of Indigenous law.

However, as Rose (1996a) explains, "Anglo-Australian law has not developed a capacity to deal with the Indigenous social fact that the body is shared" and a person may be subject to pain and injury if their people, animals, country and Dreamings are mistreated. To recognize these relationships sufficiently, cyclical ideas of existence/life and death for species and connections to country, we may need to apply what Rose (2011) describes as "connectivity ethics." It may require, as Bawaka Country et al. (2015, p.279) advocates, methodologies of attending: more-than-human "doing and attending to others, to our co-becomings, [to] allow us to develop an awareness of another's language, knowledge and law."

Any legal efforts to protect and promote Indigenous knowledge need to find new paths and trails through which to give effect to the way Indigenous peoples conceptualise and relate with/in nature. There have been suggestions that the prevention of misappropriations of "genetic resources" and Indigenous knowledge might be effected by a patent "disclosure of origin requirement" (see Bagley, 2017), but this is likely only to result in a limited technical fix that might improve the likelihood of PIC and benefit-sharing. If we are to take seriously the relationships to country of Indigenous peoples in this context, patents on plants and animals could be banned, as has been suggested by the African Group and Bolivia in the

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WTO.[17] As discussed, it may also require "lively legalities" that move beyond the humanist perspective towards more-than-human conceptualizations of the "subjects and objects" and the process of subjectification within law (see Braverman, 2016), such as legal recognitions of personhood in country, or some version of this.

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[17] In WTO submissions, The African Group makes reference to public order, morality and cultural concerns relating to life patents. The Bolivian submission makes reference to their Constitution and "Pachamama" (commonly translated as "Mother Earth") and Indigenous cosmologies of nature.

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