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Listening for the Law:
A Jurisprudence of Oral Narratives[1]

Marie Detjen
(University College London / Humboldt Universität zu Berlin)

Introduction

This essay asks how oral narratives can come to constitute customary law. I will argue that they can and should be understood as legal texts, but that such an understanding both requires and generates a rethinking of law itself: oral narratives are not just law, and they are law in ways profoundly different from European law.[2] Rather than proposing yet another definition of law under which to subsume oral narratives, however, I propose to "listen" for what ideas about law the narrative itself might contain. This approach allows us to think through oral narratives as law without rigidly defining them as such, thus generating a responsive, dialogical, and open-ended way of identifying customary law.

Firstly, I suggest that customary law should be understood as an ascriptive concept whose boundaries are shifting and historically contingent. In doing so, I move away from questions about what law is, towards questions about what it means to claim something as law in the (settler-)colonial context. Secondly, I examine how court proceedings on aboriginal title in Canada have provoked reconceptualisations of both oral tradition and law. Finally, I turn to the genre of Otjiherero praise-poetry, showing why and how we can study them as legal texts without positing a definition of law.

The conundrum of customary law

Legal handbooks usually identify customary law by pointing to what it is not: it is law that exists outside of, or next to, official state law, which in turn is set up as variations of European legal systems – statutory and common law, institutionalised through the nation-state (Wilson 2000, 76). This approach was challenged, however, when courts and lawyers across the African continent began to realise in the 1980s that the customary laws in their books were very different from what actually happens in customary hearings (Diala 2017, 144). They struggle

1 This paper was written in fulfilment of a final-year undergraduate research module at University College London. Given its scope and context, it can only try to give a cursory impulse. I nevertheless hope to further develop its ideas in the future, and would accordingly be grateful for comments or feedback!

2 Following Bruce Miller, I use the term "oral narrative" to bypass a dichotomy between oral tradition and oral history (2010, 26).

ever since with adjudicating a 'living customary law', one that is fluid and evolving and raises the problem of distinguishing living customary law from custom proper (ibid, 154–156). This chapter explores how legal and anthropological theory has approached this problem in the context of (post-)colonial Africa.

Historicising customary law

Mahmood Mamdani described the colonial state in Africa as bifurcated: white settlers were governed by a centralized statutory or common law with legal rights, checks, and balances, while traditional or chiefly authorities, propped up by colonial administrators, ruled over Indigenous Africans. "Customary law", as this system of rule came to be called, was meant 'not to limit power, but to enable it', it was not an exception, but an extension of colonial administration (1996, 110). Sally Falk Moore and Martin Chanock provide more detailed accounts of how this played out. Chanock gives a materialist analysis of how colonial and postcolonial states use the notion of "customary land tenure" to legitimize the effective dispossession of Africans by prohibiting them from exercising individual land rights (1991). While Moore similarly understands customary law as a colonial construct, her ethnography focuses on the perspective of Chagga chiefs in crafting customary law (1986). For Moore, then, customary law is a 'cultural construct with political implications … embedded in relationships that are historically shifting' (1986, xv).

The historical analyses of Mamdani, Chanock and Moore show that the forging of customary law was central to colonial rule in Africa. They render attempts to record oral customary laws, such as Allott's restatement project (Ubink 2011, 5–7) or Hinz's self-statement project (2012, 2016), problematic, or at least incomplete. Both Hinz and Allott turned to traditional authorities as sources of the "living customary law". As we have seen, however, both traditional authorities and their customary laws are often products of colonial rule. South African jurist and legal anthropologist Anthony Diala therefore argues that the concept of "living customary law" reinscribes colonial notions no less than "official customary law," and does not constitute a truly indigenous legal order (2017). In theorising Indigenous law, we thus want to think beyond re- or self-stated customary law, and beyond the law that is adjudicated in traditional courts – and consider the possibility of legal traditions that persist without being explicitly categorised as customary law.

Definitional debates and anthropological interventions

The first ethnographer to study law in the absence of courts or written codes was Bronislaw Malinowski, writing on the Trobriand Islands. Malinowski rejected the existence of a state as a prerequisite for law, which he considered 'rather an aspect of … tribal life, than any independent, self-contained social arrangement' (1926, 84). Law, to Malinowski, is 'a body of binding

obligations, regarded as a right by one party and acknowledged as a duty by the other … inherent in the structure of society' – and thus universal to social life (83).

Unlike Malinowski, the first influential legal anthropologist writing on Africa, Isaac Schapera, did not aim to identify overarching principles of Indigenous legal orders. Instead, Schapera limited his analysis to the rules of Tswana courts and distinguished laws from customs by the 'ultimate sanction of judicial enforcement' (Schapera 2005[1938],.81). Malinowski's ideas about law without formal courts, however, returned in the context of Africa in the 1950s, inflaming the so-called "Gluckman-Bohannan-debate" about the use of Western legal categories in the study of non-Western normative orders. Gluckman, on one side, suggested that the Lozi had a body of rules that could be analysed and compared as law (1955). His stance, notably, was part of a wider argument for racial egalitarianism, showing that African legal systems were as logical as Western ones (Moore 2005, 349). Bohannan's study of the Tiv, conversely, distinguished "folk" from "analytical" systems, and criticised Gluckman for using Western analytical legal concepts to describe "folk" normative orders. Bohannan instead employed only Tiv vocabulary, which he considered untranslatable and incomparable (1957, 5–6).

Decades later, the Gluckman-Bohannan controversy was echoed in debates around legal pluralism. Legal pluralism is both a concept and an interdisciplinary field of scholars who explore how multiple legal orders coexist, interact, or become entangled with one another in the same social space. Although increasingly focusing on transnational legal pluralism, their original concern lay with (post-)colonial states, where the co-existence of European, customary, and religious laws made legal pluralism 'an obvious and unambiguous fact of life' (Merry 1988, 874). Intellectually influenced by Malinowski, legal pluralism aims beyond anthropology, against a jurisprudence that still recognises Indigenous law only where it resembles Western state law (Anker 2016, 127). In contrast, legal pluralist scholars initially called for a wide concept of law, that could decentre state law and find law where classical jurisprudence did not. Rejecting state-centralist models, however, raised the problem of distinguishing legal analysis from 'simply describing social life' (Merry 1988, 878). Functionalist approaches, understanding law as what upholds social order or resolves disputes, suffered from simultaneous over- and under-inclusiveness: many aspects of social life uphold order, for example, while law often fails to do so, as well as doing much more (Tamanaha 2017, 43–48). While some legal pluralists followed John Griffiths in declaring that, as no clear criteria emerged, 'all social control is more or less legal' (Griffiths 1986, 39), most insist that 'distinctions must be made that identify the provenance of rules and controls' (Moore 2005, 357). Simon Roberts, notably, considered a specifically *legal* pluralism unnecessary and encroaching. Mirroring Bohannan's stance, he argued that we must recover non-state normative orders on their own terms, not by 'telling them what they "are"' (1998, 105). Consequently, legal pluralist scholars increasingly refer instead to 'normative pluralism' (Twinning 2003, 250) or 'rule-system-pluralism' (Tamanaha

2000, 306). Even Griffiths revised his wide conception and now speaks of 'pluralism in social control' (2006, 64).

In both the Gluckman-Bohannan and the legal pluralism debate, empirical and normative claims were entangled – to claim something as law was part and parcel of claims for recognition and justice. Ultimately, however, both debates led scholars to move away from using law as an analytical category. The Gluckman-Bohannan debate had become increasingly sterile and polarizing, and legal anthropologists wanted to reinvigorate the field by turning to other questions (Goodale 2017, 16). Legal pluralists similarly sought to escape the circular definitional impasse. As a result, legal anthropology by and large have abandoned the problem of definition (Moore 2005, 2). Tensions arising from the entanglement of normative and descriptive claims to being law, as well as questions about the concept of law, could thus be circumvented – without being solved.

Listening for Law

Rather than abandoning it, I propose that we can work with (and through) the concept of law without positing a theoretical definition. In this endeavour, oral narratives serve both as subject, and theoretical guideline: they call for an approach that *listens* to what law might, rather than anticipates what it should look like. Oral narratives are fluid, transformative, and intersubjective: their meaning is not stable, but 'part of a communicative process', shifting with the circumstance and cultural understanding of narrator and listener (Cruikshank 2000, 40–44). Subsuming oral narratives under rigid definitions – of law, or, in Cruikshank's argument, history – would essentialise them into fixed categories and authoritative versions, distorting what makes them socially and culturally meaningful.

How, then, can we recover the legal potential of oral narratives without 'telling them what they "are"' (Roberts, op.cit.)? In what he calls a conventionalist approach, Brian Tamanaha proposes a general jurisprudence that can distinguish between law and social control, without reducing non-state legalities to Western conceptions of law (2000; 2017). Law, in Tamanaha's view, has no essence that can be abstractly defined. It is a label shared by multifunctional and 'diverse phenomena, not variations of a single phenomenon' (2000, 313). Law, therefore, is 'whatever people identify and treat through their social practices as law (or droit, Recht etc)' (ibid).

While this definition is sufficiently lean to include various phenomena without dictating what they are, it has limitations. Although Tamanaha meant to set his threshold deliberately low, Twining argues that requiring numerous social actors to treat something as law 'might prove to be a rather stringent condition' (ibid, 225). Contestation, oppression, and marginalisation can limit or distort the capacity of social practices to identify something as law. This applies especially to the colonial context where, as we have seen, the category of customary law is itself an instrument of domination. Limiting the analysis to what is treated as law risks obfuscating

and reproducing the power structures that lie behind such categorisations. Law, then, should be studied as something that is (pro-)claimed, rather than something that *is*, generating questions about who decides what law is and why, how such decisions are contested, what alternatives they suppress or make invisible.

In attending to such processes of claiming and contesting "law", we can open our inquiry to alternative narratives of law that can subvert conventionally recognised law not only by denying its legitimacy, but by proposing alternative models of what law could look like, models that refuse integration into a conciliatory kind of legal pluralism, and instead exist as "legal antagonisms", characterised by opposition and incompatibility rather than coexistence. In this respect, (post)colonial differs from transnational legal pluralism: while the latter operates with similar concepts of law (notwithstanding disagreements over its validity), legal pluralism in colonial contexts implies fundamentally different ideas of what law looks like (Anker 2017, 282).

We may therefore reverse the inquiry: seeking out examples that are marginalised, not unambiguously or intuitively identified as law, and then ask why, how, by whom they are, or are not, invoked as law – and what invoking them as law would entail, whose power would be challenged, and how thinking through a particular practice as law affects our concept of law. Theoretically, this approach allows us to test the boundaries of our concept of law by identifying potentially legal phenomena that were disempowered by colonialism and side-lined by European jurisprudence. And politically, it can answer to the weight, both rhetorical and legal, that comes with being, or claiming to be, law. In the following chapters, I will try to listen for the law in oral narratives without defining them as such, showing that thinking about them as law can be fruitful whether or not they "are" law.

(De)Legalising Oral Stories: The Case of Delgamuukw

Delgamuukw v. B.C.

In 1984, representatives of the Gitxsan and Wet'suwet'en nations sued British Columbia for ownership and jurisdiction over 58,0000 square kilometres of land. Their claim relied primarily not on written or archaeological records, but on oral histories: on *adaawk*, a collection of formal oral narratives about the origins and territories of Gitksan Houses (Napoleon 2009, 7); and *kungax*, songs and dances that similarly tie together Wet'suwet'en lands, inhabitants, and ancestors (Cruikshank 1992, 34). While the Crown's lawyers opposed the admission of oral histories because of hearsay evidentiary rules, the BC Supreme Court did allow for their recitation (McEachern 1991, 137). Its ruling, however, found that oral narratives were full of 'mythology', prone to change, diverging interpretations, and thus 'suspect as trustworthy evidence of pre-contact history' (151).

The Supreme Court of Canada (SCC) refused to rule on the appeal due to procedural errors. It published an obiter dictum, however, that is considered a milestone in the adjudication of Indigenous rights. Firstly, it established Aboriginal Title as a sui-generis right to use of and jurisdiction on ancestral land, proven through occupation prior to the Crown's assertion of sovereignty (SCC 1997, 1017–1019). Secondly, it stipulated that courts must 'come to terms with the oral histories of aboriginal societies' and adapt their handling of evidence so that 'this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with' (1069).

The *Delgamuukw* decision was widely celebrated for recognising Indigenous oral narratives as legally relevant. Their admission as "historical evidence", however, must be seen in the context and as a continuation of what Joanne Fiske termed the 'delegalisation' of Indigenous laws (1997). According to Fiske, colonial magistrates and missionaries initially adjudicated disputes between Indigenous peoples and colonists both by customary and British law. Only from the 1880s, as Indigenous people insisted on their customary rights to resources, Indigenous laws were gradually disregarded, creating a 'lawless frontier' that needed British law for peace and order. Both "Indian law" and "oral tradition" were thus concepts used by colonisers as political instruments for upholding or discrediting Indigenous orders to their own economic benefit (268). The discursive displacement of "Indian law" into "oral tradition" was perpetuated by anthropologists, notably Franz Boas, who ignored the legal dimensions of the traditions they studied and categorised them instead as myths or folk tales (284). The "oral traditions" in the *Delgamuukw* trial thus appeared already transformed, and emptied of legal meaning, through colonial discourse.

The *Delgamuukw* proof of title test perpetuates this process of delegalisation. Even when Indigenous traditions do enter courts as "Aboriginal law", they appear not as laws in their own right, but as supporting evidence for common law conceptions of ownership and possession. As the *Delgamuukw* judgement states,

> "[A]boriginal perspective on the occupation of their lands can be gleaned, in part, … from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples. … As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title" (1997, 1100).

This recognition of an "aboriginal perspective" does not engage with Indigenous laws as a legal order, but as historical evidence of occupation. It fixes their meaning in the past and turns them into cultural artifacts. In Moulton's words: "This is not the recognition of law *as law*" (2016, 365).

(Re-)Legalising Oral Stories

Critical of the court's "aboriginal perspective", a growing number of Indigenous legal scholars in Canada began to theorise Indigenous narratives not as oral history, but as a dynamic and

living legal order (Bryan 2011, 271). According to Indigenous scholars Napoleon and Friedland, oral narratives can 'record relationships and obligations, decision making and resolutions, legal norms, authorities, and legal processes' (2016, 739). *Adaawk* specifically 'record territory ownership and land tenure laws' (Napoleon 2005,.153). The fact that they are changing and polysemic, then, does not attest to their unreliability as historical evidence, but to their continued relevance as a living, sometimes contested legal institution (Borrows 2010b, 152–154). One *adaawk* recited in the *Delgamuukw* trial, for example, told the story of fishermen who used fishbones for decoration, whereupon a supernatural grizzly-bear destroyed their village. The court understood the *adaawk* to account for a historic landslide, and thus as evidence that Gitxsan had historically occupied the territory (McEachern 1991, 162–165). But the same *adaawk* also stipulates what fishing practices are appropriate, and what happens if these principles are violated. Today, Gitxsan people derive from the site of the land slide legal principles that continue to regulate fishing and guide deliberations in the event of their breach (Borrows 2010b, 33–35).

Echoing the legal pluralists' rejection of centralist approaches, Boisselle cautions that legal scholars who privilege 'univocal, explicit forms of normative production' inevitably overlook Indigenous law (2017, 85). The law that oral narratives contain is often implicit, not framed as rules, and not clearly demarcated from other ecological or spiritual principles (Coyle 2020, 817). But the accounts of law that the emerging Indigenous legal theory produced – Boisselle on Stó:lō (2017), Napoleon on Gitxsan (2009), Borrows on Anishnaabe law (2002, 2010a, 2010b), and many others – do not operate without or with arbitrary concepts of law. Instead, they forge their own answer to the perennial question of "what is law": an answer informed by Indigenous traditions themselves, rather than subsuming them under a preconceived definition. From each tradition can arise a different, although often related concept of law. They start from an extremely wide view of what law could be, and what could be law. Law may exist as institutionalized rule-systems, principles for collective decision-making, claim-making or dispute resolution: the point is, that the concept of law, and what differentiates law from other aspects of social life, is discerned from the traditions themselves, and requires deep familiarity with the tradition before it can be articulated. Thus, when Mills states that 'without having begun to internalize our lifeworld, one has no hope of understanding our law', he refers not only to the content, but to the *being law* of Indigenous laws (2016, 852). Equally, when Napoleon and Friedland refer to stories as intellectually demanding 'tools for thought', they understand them as law, but also as a way of identifying law. The recognition of law in oral narratives is guided by the narratives themselves – enabling what Henderson calls a legal theory 'silently guided' by his ancestors (2002, 7).

This approach differs from state-centric jurisprudence, but also from descriptive, socio-legal approaches that find law by observing disputes. It replaces them with a methodology that is grounded in Indigenous traditions and lands. Borrows, for example, takes his students into

nature to learn the legal principles that emanate from plants, stones, and water (2016, 822–823). Friedland interprets the Wetiko, a cannibalistic giant in Cree stories, as a legal concept for dealing with child abuse (2018). Walkem incorporates Nlaka'pamux oral traditions into her legal investigation by adopting their narrative style (2005, 2), while Mack turns the theoretical insights he derived from totemic traditions onto Western law, suggesting that one can 'think of the settler's constitution as a particular kind of totem' (2009, 131). Each of these carry ideas about what law can look like, without ever positing a definition of law. The concepts of law that arise from the stories are as plural, dynamic, and intersubjective as the stories in which the laws are found.

I understand this approach to be an Indigenous answer to the Gluckman-Bohannan-debate, and to legal pluralists' qualms about "telling things what they are". Sákéj Henderson especially prefers to discuss Indigenous traditions in Indigenous languages and finds English legal terms distorting (2002). Nevertheless, he refers to oral traditions as law. The approach I have outlined allows him to use the concept in a way that divorces it from its European origins, since recognising oral traditions as law simultaneously reinvents what law can be. Rather than only recognising them within the coloniser's framework, they take the concept of law for what it is – constructed – and (re)construct it in a way that recovers the complexity and normative power of oral narratives.

Competing Legalities

The SCC noted in *Delgamuukw* that the accommodation 'on equal footing' of Indigenous oral evidence must not occur in a way that 'strains the Canadian legal and constitutional structure' (1066). Taking oral narratives seriously, however, may inevitably do so. They firstly contest the legitimacy of the legal order, and reveal injustice at its core, by recording the fact that Indigenous peoples did not voluntarily renounce their lands and jurisdiction (Borrows 2001, 25). Secondly, treating them as law threatens Canada's claim to legal exclusivity and turns the battle for Aboriginal title into a 'jurisdictional dispute between two competing levels of government' (Moulton 2016, 366). While the admission of oral narratives as historical evidence allows for their co-option, their recognition as law exposes and opposes an unjust, contradictory settler colonial legal order.

In this way, the concept of law becomes engaged in the political struggle for Indigenous sovereignty. The Anishnaabe philosopher Dale Turner prominently called for 'word warriors', indigenous philosophers trained both in Western and Indigenous systems of knowledge who use their knowledge to 'assert, defend, and protect the rights, sovereignty, and nationhood of indigenous communities' (2006, 95). Henderson similarly refers to Indigenous jurists as 'legal warriors' (2002, 3). Word and legal warriors know well that rights, sovereignty, and nationhood belong to the language and political categories of the coloniser, but deploy them in the fight for

survival – while remaining deeply rooted in the Indigenous traditions they seek to defend. For post-Delgamuukw legal warriors, then, the concept of law is not only an analytical category, but a weapon in the fight for self-determination. They fight not only with discourses from within the law, such as Indigenous rights or ownership, but with the very concept of what law is.

Problematising Tamanaha's theory, the case of *Delgamuukw* shows that what people call law is distorted by colonial "delegalisation". But it also reveals the emancipatory potential of "treating something as law" – not just as a sociological observation, but as an active, generative process. Scholars who start treating something as law can recover the law, and in doing so re-frame what it means to speak about law in the first place.

Singing the Land, singing the Law? Otjiherero Praises of Place

The scholars I introduced in the previous chapter found law, not by positing a definition and looking for equivalents, but by listening to oral narratives *as law*, thus allowing the narrative to guide and question their concept of law. Taking up this idea, this chapter begins to listen for the law in Otjiherero praise-poems, so-called *omitandu*.[3]

Omitandu (singular: omutandu) are a highly valued and frequently recited genre of Herero oral tradition (Kavari & Bleckmann 2009, 476). Omitandu can be recited in religious ceremonies, in political speeches, or everyday conversations; either as extensive performances or as short interjections of verse-elements (Bleckmann 2007, 14).[4] Their subjects include individuals, lineages, historical events, places, animals, and objects (mainly guns and radios). Through a so-called 'hypertext structure', the performer can freely interweave different praises (ibid, 14–16). Omitandu thereby are authored not by individuals, but by interlinking new and older verses. This hypertext structure, as well as their condensed and allusive form, means that even native speakers often cannot grasp an omutandu's meaning unless familiar with an immense body of praises, as well as with the subjects they reference.[5] Skilled oral poets are therefore highly regarded, both as performers and as intellectuals and historians (Kavari 2000, 18). A major body of omitandu are praises of places, as almost every place that Ovaherero have lived or herded livestock in has at least one corresponding omutandu (ibid, 71). Praises of places can recount the natural features of a place, the people who inhabited, were born, or buried on the land, descriptions of events that occurred or cattle that grazed there (ibid).

Despite their ubiquity among Otjiherero-speakers, academic literature on omitandu is relatively scant and recent. Ohly (1990) and Kavari (2000) provide linguistic analyses and translations of numerous Herero praises. Other scholars tend to study omitandu as articulations of col-

3 Omitandu are translated as praise-poems, praise-songs, or praises.

4 Otjiherero-speaking communities in Namibia refer to themselves as OvaHerero, "Herero people". While originally a label for cattle owners, the term came to connote ethnicity in the 1870s (Wallace 2011, 49).

5 The transcriptions studied for this essay come with extensive explanations, usually provided by the performer.

lective identity and memory. Alnaes (1989), for example, analyses the praises of exiled Herero in Botswana as fragile reformulations of Herero identity in exile and repositories of knowledge about the past, especially the 1904 war. Bleckmann, drawing on the theories of Maurice Halbwachs, understands omitandu as a form of spatialised collective memory (2007), while Hoffmann examines how they create collective identity by constructing a landscape imbued with meaning and a sense of belonging (2005; 2007; 2010). Finally, Förster (2005) and Henrichsen (1999; 2011) address the (ethno-)historical and spatio-political dimensions of omitandu.

Historic Land Rights

In his interpretation of omitandu as histories of pre-colonial settlements, the historian Dag Henrichsen suggests that they represented 'land claims and claims to power' (1999, 6). After a period of impoverishment and the loss of herds to conflicts with Nama-Orlaam commandos, the 1860s and 1870s saw the establishment of Herero communities as a wealthy, cattle-based society in what is today central Namibia. As Herero had in turn begun to raid Nama-Orlaam groups, they amassed large stocks of cattle, horses, and guns (Henrichsen 2013). This 'rapid repastoralization' (Bollig & Gewald 2000, 17) lead to the construction of a vast network of wells and pastures stretching across central Namibia. To maintain this network, access to wells and grazing areas had to be restricted and organised, both among Herero and with competing groups (Henrichsen 1999, 16–17). Unlike Nama herders, for example, who fenced in the land they used (Silvester & Gewald 2003, 137), Herero did not rely on physical demarcations. Instead, Henrichsen suggests, claims were memorised as structured praise-poems. Omitandu thus functioned as 'a "legal charter", with which to encode or define claims to a particular place and area and … challenge new ones' (1999, 17). The Herero lost their wealth, towards the end of the century, to a Rinderpest epidemic and colonial dispossession. The 'oral topology' of pastures and wells was violently replaced by the colonial 'farm map', with its German place names and clearly delineated parcels of land (ibid, 3–4).

Throughout displacement, apartheid, and, eventually, Namibian independence, Herero continue to memorise omitandu and remember the land, and the claims to land, that they represent. Omitandu are more, however, than nostalgic reminiscences. They remain, today as in precolonial times, claims to power (ibid., 17). As I will show in the next section, Omitandu continue to establish and articulate rights and legal claims in the context of an ongoing debate around land rights.

Omitandu and the Land Question

Namibia's Otjiherero speaking communities were among the most affected by colonial land dispossession. Upon the invasion of German forces, Herero, Nama, and Damara communities resisted colonial expropriation, and were murdered, enslaved, or exiled in the genocidal wars of 1904–1908. Under German and, after 1915, South African rule, colonial authorities turned

fractions of the expropriated land into "ethnic homelands", while the more fertile land was taken for settler farms (Sullivan 2021, 14). Upon independence in 1990, land reform became a central part of the ruling SWAPO party's political project. Ethnic homeland areas were converted into "communal lands", on which land rights are allocated according to customary law by traditional authorities.[6] The redistribution of freehold farmland, however, is progressing extremely slowly, and remains one of the most divisive political debates in Namibia (Melber 2014, 89–110).
Larissa Förster remarked that 'oral tradition is very rarely looked at when talking about the land question in Namibia' (2005, 3). Förster, as well as Hoffmann and Bleckmann, have done much to remedy this omission by exploring the symbolic, cultural, and emotional reflections of land in omitandu. As I will suggest, however, omitandu might also have a role to play *as law*, in two aspects: the allocation of communal land, and the debate around ancestral land rights.

Communal land

Omitandu firstly may continue to function as means of discussing and asserting rights to communal land. Recently, the question of how such rights are allocated according to customary law has caused controversy in disputes around conservancies: post-independence "community-based resources management" programmes that devolve both the conservation and economic valorisation of communal lands to resident committees (Bollig 2016, 774). To establish a conservancy, a group of applicants must demarcate the conservancy's territory, to which neighbouring residents must agree. In informal hearings, traditional authorities determine who has the right to apply for a conservancy, as well as its rightful borders (ibid, 781). Establishing a conservancy thus involves 'complex social processes of cooperation and competition for rights and recognition' (Mosimane & Silva 2014, 85). While these processes are often conflictual, the origin, articulation, and negotiation of such rights in the context of conservancies has received little scholarly attention (ibid., 91).[7] During her fieldwork on collective memory in Herero praises, however, Laura Bleckmann has noticed that omitandu are regularly recited in meetings on conservancy border disputes (pers. comm., 13/12/2021; cf. Bleckmann 2007, 105–106). As praises construct connections between a piece of land and a specific lineage or other group, they can establish who is accepted into a group of conservancy applicants, and which places may be included within its borders. Furthermore, the sophistication and prestige of the genre means that both traditional authorities and competing residents take them seriously, not only as historical evidence, but also as normative statements in their own right. They attest to the knowledge and status of the performer and give weight to his arguments, independently from the information

6 Each "traditional community" has a traditional authority, consisting of a chief and traditional council (section 2(1)TAA). Article 66(1) of the constitution recognises customary law, next to Roman-Dutch civil and British common law, as sources of law.

7 Information on the customary adjudication of land disputes is scarcely available to the public due to the lack of written documentation (Werner 2021, 26).

they encode (ibid). One of Bleckmann's informants even states that 'if you know Omitandu, you will not lose your land' (2007, 105). Omitandu can thus both ward off and found the right to establish conservancy projects on communal land.

Ancestral land

Omitandu furthermore can articulate ancestral land claims. In contrast to South Africa, Namibia to date has neither legislation nor case-law on ancestral rights.[8] In 1991, the newly-elected SWAPO government decided to exclude ancestral land restitution from its reform program to avoid ethnic conflict (Nakuta 2020, 124). The demand, however, remains hotly debated. Legal scholars have largely focused their analysis on how international and Namibian state law may accommodate ancestral land rights, which are generally presumed to be grounded in Indigenous or customary law (Odendaal 2020). It is unclear, however, how such claims should be substantiated in the first place, and how they can be articulated within a customary law framework (Horn 2005, 92). Omitandu may contribute to understanding the foundations of Herero ancestral land claims. They not only evidence the precolonial land usage that underlies today's claims, but are integral in turning land into ancestral land in the first place. Firstly, omitandu function as a 'storage-medium' of ancestry (Bleckmann 2007, 75) by placing individuals in a lineage and recording their forefathers' names. Omitandu on places furthermore ground the lineage in the landscape – often quite literally, by locating graves. The omutandu for Okambukomatemba (Appendix A.3), for example, not only ties Katjimbonde to his ancestor Rukoro, but also contains the exact location of his gravesite -- which no longer physically exists (Förster 2005, 14). Apart from graves, omitandu can signal ancestral belonging to land through possessive pronouns, as in Appendix A.2 and A.4, or by recounting a family's settlement history (ibid, 11). By constructing ancestries and linking them to specific places, omitandu thus remember and uphold ancestral rights against the SWAPO government's nationalising discourse and policy.

A different kind of law

Omitandu do not only chart the territorial borders of land claims, but also articulate a certain kind of claim: they map both land and rights to land in ways that contradict dominant (post) colonial modes of entitlement. Taking omitandu seriously as a form of legal claim-making thus requires us to listen to their legal specificities, rather than simply construing them as claims to ownership.

Firstly, the prominence of the life-cycles of cattle suggests a different relationship between persons and places, whereby mobility is integral, and territories are not clearly bounded. The omutandu for Otjovisume can serve as an example:

8 A Hai||om lawsuit was curtly dismissed by the Windhoek High Court in 2018 and is currently appealed to the Supreme Court (Odendaal et.al. 2020).

> "The cattle of Humbu and Uanga: in the footsteps of the cattle of Mbizo with a bushy tail … To the two holes: the one where they drink and the one where they graze" (Appendix A.1).

If we read this omutandu as a legal claim, it is not simply a territorial claim. Rather, the claim is condensed in specific points in space (the two holes), and time (when the cattle drink or graze). The claim is furthermore mobile: it can follow other cattle's footsteps. Finally, it is contingent on the cattle's need to drink and graze. Omitandu thus invite us to think about land rights as networks, made of points and movement between points, rather than two-dimensional territorial demarcations. In this way, they contrast the clear-cut boundaries of conservancy projects that portray land, cattle, and persons as 'distinct and atomized' (Sullivan 2021, 30).

The stylistic devices employed by omitandu similarly challenge an understanding of land rights as demarcated and unidirectional. The hypertext-structure, firstly, makes them conducive to transformation and appropriation, as every omutandu is born from the interweaving of others. Furthermore, omitandu operate through what Hoffmann termed a 'poetic strategy of evasion' (2007). As omitandu are intelligible only to those who share intimate cultural knowledge, they create an 'undecipherable alterity' that acts against the 'colonial demand for complete knowability' (2007, 53). Omitandu do not allow for univocal interpretations, they are 'evasive, … and in their situative evanescence incapable of creating a single, normative discourse' (ibid, 48). As legal texts, then, omitandu resist the clear-cut categorizations that characterize European ways of claim-making. To read them as straightforward land title claims would ignore the intransigence, polyvocality, and openness to shifting interpretations that distinguish them as a poetic genre.

Thirdly, engaging omitandu as legal texts requires engaging with the historical and political contexts in which they emerged. As we have seen, precolonial central Namibia underwent drastic political and social changes in the second half of the 19th century. The network of wells and graves that omitandu upheld and legitimised constituted a 'structure of political control' that excluded and repressed other communities' claims (Henrichsen 2004, 59). Omitandu thus asserted one legal order against competing orders, rather than reflecting static pre-colonial rights that can simply be restored. In this light, the government's apprehensions regarding the conflict-potential of ancestral land claims may be justified: omitandu do transport the ethnicization and antagonisms of the 19th century into a post-colonial constellation. At the same time, even in the 1870s, resources were shared, and claims translated and negotiated across different groups and orders (Henrichsen, pers. comm., 25/11/2021). Recognising omitandu as legal texts thus requires situating them within a landscape that has always been legally plural, and investigating how they interact(ed) with competing claims and legal discourses.

The study of oral narratives can prompt legal theorists to envision rights and claims that are specific to the land, rather than simply transferring Indigenous title law from other contexts. Understanding omitandu as a form of legal discourse thereby implies studying what particular

kind of claim they manifest, thus rethinking how we engage with, and what we understand as, legal claims. The lack of (especially Herero) scholarship on omitandu, the scope of this essay, and the sheer complexity of the genre means that this can only serve as a cursory impulse, sketching out priorities and potentials, rather than arriving at conclusions. Paying more attention to omitandu, however, would not only advance our understanding of Namibian politics, but also our understanding of what law can do and look like.

Conclusion

This essay has stressed the importance of listening, rather than looking, for law.[9] While the latter requires an idea of what law looks like, the former allows us to derive this idea from the oral narrative itself. As oral narratives are dialogical, situative, and shifting, we must learn to operate with equally dialogical, situative, shifting notions of law. Rather than abandoning the concept of law, I thus propose to understand it as both a theoretical and political construction. As a political construction, it has been instrumental for colonial domination and dispossession. But by theoretically reconstructing it, the concept of law may also answer back to this instrumentalisation, exposing and countering it with the complex and polyvocal ways in which oral narratives can structure reality and provide normative order.

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9 Decentring state-centralist conceptions of law raises questions of priority. As Bryan remarks, insisting that cultural practices are law risks 'saying something akin to "these mint leaves are a lot like toothpaste"' (2011, 266). As a German law student researching oral poetry, I often wondered if I should not ask how German law is a lot like poetry, rather than poetry like law. This is another way in which oral narratives push us to think beyond established theoretical categories.

Appendix

Omitandu

A.1 Omutandu for Otjovisume (Tsumeb)

The cattle of Humbu and Uanga: in the footsteps of the cattle of Mbizo with a bushy tail; in the spear of Thindjou ua Makono; in the house of the wife of Namboori. To the two holes: the one where they drink and the one where they graze. The cattle of Mukaamuapo and the cattle of Tjiseua. Tjiseua's yellow-brown bulls come from Rukombo; they go to Muamuriro, to the beautiful dairy cow of Muarukunde, who is milked by the fireplace.
(Henrichsen 1999, 11; 2004, 8)

A.2 Omitandu for Kaondeka (Waterberg area)

Kaondeka of Tjombua and Kakura,
the second wife
at the lion of Tjambaza
whose skin was rubbed with the milk
of goats that were being herded
mountain of the thievish baboons
and of the tame snakes which do not bite
mountain that is the child of Kangombe
of the matrililineage of Katuse of Tjivanda
-- he is Kambazembi of Kangombe
Kangombe who was born of Tjiueza.
(Förster 2005, 8)

A.3. Omutandu for Okambukomatemba (Waterberg area)

When you move to this side
That is when you come to the grave
Of the son of Rukoro
To Katjimbonde of Rukoro
That is Okambukomatemba.
(Förster 2005, 8)

A.4. Omutandu for Ovitoto

To the big mountains which are at Katjiundja of Vikange.
To the child of Kambekura, the one which was killed by a cheetah while the people still like him.
(Hoffmann 2005, 28)

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