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The Dilemmas of Silence: Evidence, Indigenous Traditional Knowledge and Secrecy in Four Cases Involving Indigenous Peoples in Cultural and Territorial Isolation

Los dilemas del silencio: Evidencia, conocimientos tradicionales indígenas y el secreto en cuatro casos de pueblos indígenas en aislamiento cultural y territorial

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Resumen

En muchas culturas indígenas, el conocimiento tradicional y espiritual se considera secreto. Requiere iniciación y está salvaguardado por diferentes grupos o niveles de autoridad religiosa dentro de una comunidad. La transmisión de tales conocimientos se realiza generalmente en momentos y lugares específicos, y solo a personas seleccionadas. Cuando las comunidades indígenas reclaman sus derechos respecto de los territorios tradicionales en foros legales de orientación occidental, deben presentar evidencias de su conexión con dichas tierras y hablar sobre la importancia que tienen los terrenos sagrados en su tradición; incluso se les exige que lo hagan de acuerdo con el discurso jurídico y el protocolo occidentales. Cuando las evidencias no representan ni respetan la cultura nativa, las partes indígenas del caso a menudo guardan silencio o corren el riesgo de silenciar las prácticas que originalmente pretendían proteger. Este artículo analiza el dilema al que se enfrentan las comunidades indígenas cuando se les pide que aporten pruebas a pesar de las restricciones culturales a la transferencia de conocimientos tradicionales. En primer lugar, se examinan las pruebas y los conocimientos secretos en el caso *Pueblo of Jemez vs. United States of America* (2019), resuelto en los tribunales federales de EE. UU., y se sugiere un conjunto de mapeos probatorios alternativos que respetan las normas de intercambio de conocimientos tradicionales del Pueblo de Jemez, elaborados por la autora y los miembros de la comunidad de Jemez. A continuación, se abordan los actos de rechazo al compartir información detallada sobre los lugares sagrados y sus consecuencias, en los casos *Havasupai Tribe vs. United States of America* (1990) y *Pueblo of Sandia vs. United States of America* (1995), ambos litigados ante tribunales federales estadounidenses. Por último, se analizan las cuestiones relativas a la producción de pruebas en el caso *Pueblos indígenas Tagaeri y Taromenane vs. Ecuador*, el primer caso sobre pueblos en aislamiento voluntario que resuelve la Corte Interamericana de Derechos Humanos.

Palabras clave

derechos humanos
derechos indígenas
conocimientos tradicionales
evidencia
mapa de evidencia
Pueblo of Jemez
Corte Interamericana de Derechos Humanos
Tagaeri y Taromenane

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Abstract

Within many Indigenous cultures, traditional and spiritual knowledge is considered secret. It requires initiation and is safeguarded by different groups or levels of religious authority within a community. Transmission of such knowledge is usually performed at specific times, places and to selected peoples only. When Indigenous communities are claiming their rights to traditional land in western-oriented legal forums, they are required to provide proof of their connection to the lands and speak about the importance the sacred grounds hold in their tradition–and are required to do so according to Western legal discourse and protocol. When requirements for evidence neither represent nor respect Native culture, Indigenous parties to the claim often go silent, or else risk silencing the practices they originally aimed to protect. This article discusses the dilemma Indigenous communities face when asked to provide evidence despite cultural restrictions on traditional knowledge transfer. It first looks at evidence and secret knowledge in the case *Pueblo of Jemez vs. United States of America* (2019) adjudicated in federal US courts, and suggests a set of alternative evidentiary mappings that respect Jemez Pueblo rules of traditional knowledge sharing, produced by the author and Jemez tribal members. It then turns to acts of refusal to share detailed information on sacred sites and its consequences, litigated over in the US federal court cases *Havasupai Tribe v. United States of America* (1990) and *Pueblo of Sandia vs. United States of America* (1995). Finally, it discusses questions of evidence production in the case *Pueblos Indígenas Tagaeri y Taromenane vs Ecuador,* the first case on peoples in voluntary isolation to be adjudicated by the Inter-American Court of Human Rights.

Keywords

human rights
indigenous rights
secrecy
traditional knowledge
evidence
mapping evidence
Jemez Pueblo
Inter-American Court of Human Rights
Tagaeri y Taromenane

Introduction

When Indigenous nations claim their rights in Western-oriented legal fora, they are required to speak according to Western legal protocols. Principles for establishing truth within Western-oriented legal fora do not allow for other truth evaluation systems such as Indigenous ways of knowing. Native cosmologies are not given equal weight as Western understandings of territory and nature, oral history is rarely accepted as “reliable” proof, and methods of traditional knowledge organization within communities are often disregarded. When Indigenous nations try to reclaim ancestral territories, they are asked to provide proof of the lands’ importance to their traditional and spiritual culture. Requirements for evidence that aren’t culturally sensitive however often prevent Native communities from bringing forth their arguments. The research presented in this article tries to highlight the difficulties faced by Indigenous communities, and their representatives in cases of peoples in voluntary isolation, and to respond to the urgent need for alternative approaches to evidence production in cases involving Indigenous communities. As case studies on evidence production in an environment of secrecy, it looks at the aboriginal title case *Pueblo of Jemez vs United States of America* (2019) litigated in U.S. federal courts, *Havasupai Tribe v. United States* (1990) and *Pueblo of Sandia v. United States* (1995)–two U.S. federal court cases originating in information-sharing-conflicts within procedures in U.S. federal government’s frameworks aiming to provide Native cultural heritage protection–and *Pueblos Indígenas Tagaeri y Taromenane vs Ecuador*, currently at the Inter-American Court of Human Rights.[2] While all Indigenous communities party to the different cases are to be seen as clearly distinct, it is interesting to look at them jointly due to their varying degrees of voluntary cultural and territorial isolation from outsiders to the tribes and the different challenges this poses on legal evidence production. Indigenous Pueblo communities in the North American Southwest, among them Jemez Pueblo and Sandia Pueblo, participate in all aspects of U.S. majority society and may choose to live and work outside their pueblo in the state capital, however

2 This article draws on research on evidence production and cultural secrecy within the aboriginal title case *Pueblo of Jemez vs. United States of America*, which I conducted from 2012 to 2019 while the case was ongoing. The research included recurring visits to the Pueblo of Jemez and their legal team and the production of three alternative evidentiary mappings (two of which are presented in this article). The research was published as a book by Sternberg Press in 2019. For a more detailed account of this research please see: Nina Valerie Kolowratnik, *The Language of Secret Proof: Indigenous Truth and Representation* (Berlin: Sternberg Press, 2019). This article furthermore draws on research I am currently conducting in the framework of my doctorate which looks at evidence and Indigenous knowledge at the Inter-American Court of Human Rights and focuses on the *Tagaeri y Taromenane* and *Kichwa de Sarayaku* cases.

they are known to closely guard their traditional knowledge and only allow restricted access to their territories and villages to outsiders. The Tagaeri and Taromenane peoples live in voluntary isolation on their traditional territory in the Ecuadorian Amazon. Their refusal of contact is twofold: They do not seek contact with the outside world and fiercely defend their lands from outside intruders.

Cultural secrecy within the Jemez Pueblo aboriginal title claim

Figure 1

'Welcome to Jemez Pueblo, Respect Our Tradition: Do not use cell phones, photography, sketching, cameras, audio or video devises. Electronic devises will be confiscated and fined.' Banner at the entrance of Jemez Pueblo, New Mexico, on November 12 Feast Day that is open to the public, 2012

Photo: Nina Valerie Kolowratnik.

On the annual San Diego Feast Day at Jemez Pueblo—one of the two days a year the sovereign Indigenous nation is open to the public—signposts are placed on New Mexico State Road 4 as one approaches the community. The signs read: "Welcome to Jemez Pueblo, Respect Our Tradition: Do not use cell phones, photography, sketching, cameras, audio or video devises. Electronic devises will be confiscated and fined." Visitors are allowed into Jemez Pueblo only two days a year, and while they are invited to witness the dances performed, recording them on video, it is strictly forbidden to record them on video, audio or in a sketchbook.

In 2012, the sovereign Indigenous nation Jemez Pueblo[3] located within New Mexico state boundaries, filed a lawsuit against the United States to establish its right to ownership of the area known today as Valles Caldera National Preserve. The preserve is part of the 2.850 km^2 of western Hemish ancestral homeland, spanning the Jemez Mountains in northern New Mexico.[4] The homeland contains ruins of over forty Hemish villages linked by an large network of trails, along with agricultural land, thousands of field houses, numerous traditional sites and Wâavemâ Mountain, where the Hemish principal shrine is located. The Pueblo needs to visit the sites regularly to maintain its spiritual order in balance. The land base of today's Jemez Pueblo consists of barely 364 km^2, one eighth of the original land base, and is divided into three parcels that are not connected. The population of Jemez Nation is concentrated in the only remaining village. Within the lawsuit *Pueblo of Jemez vs United States of America* the Pueblo was reclaiming a parcel of nearly 400 km^2 that the US Congress gave to Spanish settlers in 1860 and which has been under non-Native ownership ever since. In 2000, the land was purchased by the federal government and turned into a national preserve, which opened a window for the Pueblo to file a claim.

In a claim to Aboriginal title in United States federal courts, the burden of proof is on the Native plaintiff. To prove their claim to ancestral land, the community must show evidence of current and continued "use and occupancy", which has been defined to mean the tribe's settlement pattern, farming, hunting and ceremonial use of the area. While it must be seen as a positive advancement that Indigenous culture is given space and legitimacy in Western-oriented proceedings, the requirement to prove traditional use does not take into consideration that Indigenous Pueblo communities in the North American Southwest are structured around a system of secrecy concerning all aspects of spiritual beliefs and ceremonial practice.

Within Pueblos of the North American Southwest, traditional knowledge is not openly exchanged but rather disseminated through multiple tightly controlled layers of religious, political and

3 In 1909, the U.S. Board on Geographic Names named the Hemish people's town "Jemez," which derives from the Spanish colonial pronunciation, although the Indigenous nation calls its people, traditional land, and culture "Hemish." Following the advice of See-Shu-Kwa Christopher Toya, tribal historic preservation officer for the Pueblo of Jemez, in this article I use "Hemish" when referring to the people, traditional land, and culture, and "Jemez" when referring to legal and political matters.

4 The eastern Hemish ancestral homeland surrounds historic Pecos Pueblo in northern New Mexico. The western and eastern homelands are not adjacent.

social organization.[5] Scholars have long described cultural secrecy of Indigenous Pueblo communities in the Southwestern United States[6] as a defensive tactic reflecting centuries of outsider interference in the free exercise of cultural traditions.[7] Destruction of ceremonial spaces, public burnings of ceremonial objects, witchcraft trials, and imprisonment for the practice of Native beliefs were typically understood as the reason for the increased closure of Pueblo grounds to non-members and for secrecy to become an important tool to control knowledge transmission. While recurrent violence and repressive acts of Spanish, Mexican and US imperialism that aimed at cultural change and Christianization certainly forced Pueblo ritual to go underground, Pueblo secrecy[8] however is also, and firstly, directed towards the inside, and plays a key role in structuring the Pueblo's internal religious, social, and political system.[9] Within Pueblo communities, different religious groups guard different forms of spiritual knowledge and no single individual is in possession of it all. In Pueblo belief systems, knowledge of ritual and the spiritual world represents the source of power that can influence nature's forces. When such knowledge is used irresponsibly by people not initiated to its uses, the knowledge loses its power or can turn destructive towards the community. It constitutes highly sensitive information specific to each pueblo, and it is, therefore, considered a secret. Spiritual knowledge requires initiation that begins during childhood and gradually advances because of lifelong membership in a particular religious group. How much knowledge a single pueblo individual holds depends on the person's status in the religious hierarchy. Degrees of access to knowledge in turn define eligibility to participate in traditional political leadership and one's social status. Restricting the transmission of spiritual knowledge to initiated members thus has the dual function of keeping information from turning destructive through inappropriate use and of keeping the tribe's internal organization in balance.[10] Pah-Tow-Wei Paul Tosa—Hemish traditional leader, grandson of Hemish spiritual leader Wah-Bah Francisco Tosa, and threetime governor of Pueblo of Jemez—explains that when secret knowledge were disclosed, "[i]t would affect the person who discloses secret information for a lifetime, and it would be disastrous for the Pueblo. The strength of the society group would be very much weakened, as well as the strength of the whole Pueblo structure. And that is the danger of it. And not only the current Pueblo structure, but it would disrupt an order that has been kept since ancestral times. The vow that information received during initiation [...] cannot be brought out openly, but needs to be kept very closely, very tightly, has been continuously renewed since ancestral times."[11]

To safeguard secret knowledge and ritual, Pueblo communities openly resisted the image-making practices of outsiders and banned photography at ceremonies as early as 1890, after anthropologists, government agents, and tourists became equally intrusive. Nonetheless, anthropologists such as Elsie Clews Parsons and Matilda Coxe Stevenson are shameful examples of how outsiders continued written and visual documentation until the late 1930s, not out of ignorance of Pueblo restrictions but despite the Pueblo's clear objections. Secret interviewing and recording compromised sensitive knowledge and led to serious internal conflicts within the Pueblos.

Parsons later stated she was aware of the consequences for the Pueblo of depicting certain forms of knowledge as well as the sanctions the informant had to face: "Religious knowledge and ritual, when divulged to the non-initiated, lose their

5 See following paragraphs on cultural secrecy within pueblos of the American Southwest represent a summary of the chapter 'Pueblo Cultural Secrecy' in: Kolowratnik, *The Language of Secret Proof*. Please see pages 11-18 for an elaboration on the topic.

6 Today there are a total of nineteen Pueblo nineteen in the Southwest of the United States, among which Taos, Acoma, Zuni, Jemez and Hopi are the best-known. They share common agricultural, material, and religious practices to which scholars refer to as Pueblo culture. Pueblo, which means "village" in Spanish, originated from Colonial Spanish, who used it to refer to the people's particular style of dwelling.

7 See: Edward H. Spicer, *Cycles of Conquest: Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533-1960* (Tucson, US: University of Arizona Press, 1962); and Edward P. Dozier, "Rio Grande Pueblos," in *Perspectives in American Indian Culture Change*, ed. Edward H. Spicer (Chicago: University of Chicago Press, 1961), 94-186.

8 Anthropologist Elisabeth Brandt uses Taos Pueblo as a case study for exploring the sociology of knowledge in southwestern Pueblo culture, expressing confidence that the general model, including cultural secrecy, is applicable to all southwestern Pueblo communities. See Elizabeth A. Brandt, "The Role of Secrecy in a Pueblo Society," in *Flowers of the Wind: Papers on Ritual, Myth, and Symbolism in California and the Southwest*, ed. Thomas C. Blackburn (Socorro, US: Ballena Press, 1977).

9 See: Elizabeth A. Brandt, "On Secrecy and the Control of Knowledge: Taos Pueblo," in *Secrecy: A Cross-Cultural Perspective*, ed. Stanton K. Tefft (New York: Human Sciences Press, 1980).

10 Pah-Tow-Wei Paul Tosa, conversation with the author, Jemez Pueblo, NM, March 6, 2017.

11 Ibid.

potency. Just as a prayer or medicine depreciates when imparted, so the life of the Pueblo will be impaired if outsiders know about it. Besides the life of the informer is endangered, magically and practically."[12] Today, visual documentation is prohibited in most Pueblos, and many are closed to the public except on feast days.

Looking at the neglect of cultural privacy by generations of researchers claiming to work for the benefit of Pueblo communities, it is crucial to understand that framing Pueblo secrecy as a practice directed toward the outsider is mistaken and misleading. In fact, as anthropologist Elizabeth Brandt argues, for certain information, there are outsiders within the Pueblo as well.[13] Thus claiming good intentions is not a valid argument for circumventing Pueblo cultural privacy rules. Within Pueblo culture, 'outsider' in the broadest sense refers to non-Natives and members of other Native groups; and in a narrower sense, the term is used to differentiate among the social roles and statuses of individuals based on their participation in Pueblo information networks. As Brandt notes, an individual might be an insider to one's own religious group but an outsider to others.[14] External secrecy is a powerful mechanism to maintain boundaries, however the focus of secrecy is always internal. Secrecy represents the basic structuring element of Pueblo spiritual beliefs, society, and cultural politics.

Although southwestern Pueblos are among the most traditional Indigenous communities in the United States—with a very distinct system of cultural secrecy—the issues they face when entering the legal system are similar to Native claims elsewhere in the country. Thus, many of the challenges they are confronted with apply to Indigenous struggles in other parts of the United States and Western courts in general.

The dilemma of evidence production for indigenous communities organized around secrecy

Within aboriginal title claims in the United States, such *Pueblo of Jemez vs. United States of America*, the Native plaintiff must show evidence of "actual, exclusive and continuous use and occupancy 'for a long time' of the claimed area."[15] Within US case law, aboriginal use and occupancy have been defined to mean the tribe's 'habits and modes', including its settlement patterns within the area, as well as the tribe's farming, hunting, and ceremonial use of the land in question.[16] Yet paradoxically, while Indigenous peoples' ways of life are accepted to show the existence of aboriginal title, what the US legal and judicial system accepts as reliable evidence is mostly limited to empirical facts, verified through methods of Western science. Thus, to qualify as full evidence, Indigenous peoples' relationships to the land may be represented as archaeological, ethnographic, and geospatial data. These data sets then typically include precise coordinates of cultural sites and provide descriptions of their traditional use. Space and territory are thereby to be mapped as understood by Western culture rather than as narrated, perceived, and lived by Native groups. Evidentiary maps in Indigenous territorial cases usually adopt the concept of ownership and private property, a concept linked to Western culture which does not correspond with the holistic understanding of the environment that many Indigenous communities share. A relationship to land that is characterized by responsibility, stewardship and belonging. The preferred visualization format of these maps represents orthographic projection, which traces and compartmentalizes land along linear measures and within the static frame of the Cartesian grid.

Oral histories—the primary method of knowledge production and transmission within most Native communities—are often reduced to hearsay status, and remain unheard, as they can't be evaluated according to Western scientific standards. Western law strives for definite statements and expert knowledge that can be attributed to individuals. Oral histories do not have a set starting point or end, they cannot be traced back to one single originator–and if they do the original or first storyteller might not be able to appear in court to deliver testimony. Oral histories often vary according to the individual creative expression of the storyteller and are allowed to change over time, they are alive. In fact, it is precisely because intergene-

12 Elsie Clews Parsons, *Isleta Paintings* (Washington DC: Smithsonian Institution, 1962), 2.
13 See Brandt, "The Role of Secrecy in a Pueblo Society," 13.
14 See Brandt, "On Secrecy and the Control of Knowledge," 125.
15 United States Court of Appeals Tenth Circuit, *Pueblo of Jemez v. United States of America*, June 26th 2015, 43-4.
16 Ibid., 42.

rational memory can only be performed when a community's traditional culture is continuously practiced, that the oral format itself represents the embodiment and proof of a Native group's continuous history. As legal scholar Robert Hershey, Jennifer McCormack and Gillian Newell assert, that "currently, oral histories as employed in 'Indigenous' cases are seen as reliable only when standing alongside corroborating 'scientific' evidence such as archaeological and/or geological data not uncommonly accompanied by a Western-certified 'expert.'" They explain that "fact finders are not comfortable placing conclusive weight on intergenerational memories. This discomfort is based on Western society's ideas about what constitutes reality and reliability and results in Indigenous communities being held to strictly Western and overly lineal principles."[17]

Asked to provide proof in a Western court, Native plaintiffs thus face both the translation of Native relationships to their land into Western understandings of territory and ownership, and a conceptual and structural change in knowledge transmission, when dynamic, oral history is translated into static Western forms of recording.

What is added to the above challenges is that Indigenous communities in Western-oriented legal proceedings must also engage in a complex interrelationship between power and access to knowledge. Looking at the role of secrecy within Jemez Pueblo, the dilemma the community faces when pursuing legal efforts to reclaim ancestral sites is manifest. Evidence of use is required to fully demonstrate traditional significance to the Pueblo—however, the Pueblo must resist such evidentiary proof owing to the importance of cultural secrecy. The process of producing evidence runs counter to the structural organisation of traditional knowledge and positions the Pueblo in a double bind. Are they to remain silent because of their cultural demands to guard traditional knowledge, or do they comply with the imposed Western evidentiary criteria—which asks to pinpoint sacred sites and give detailed descriptions of rituals and when they are performed—thereby risking to silence the traditional practices they are aiming to protect?

In *The Differend*[18], Jean-François Lyotard describes the plaintiff inevitably becomes a victim when they are deprived of the possibility of bringing forth an argument in court, since the rule of judgment applied thus not reflect or acknowledge the plaintiff's culture. The differend is "a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments."[19] As Lyotard asserts: "One side's legitimacy does not imply the other's lack of legitimacy. However, applying a single rule of judgment to both in order to settle their differend as though it were merely a litigation would wrong (at least) one of them (and both of them if neither side admits this rule)."[20]

According to Lyotard, the plaintiff becomes a victim when they suffer a wrong and are deprived of the possibility to bring forth an argument in court. He sharply distinguishes between "damages"—which have been caused according to certain rules, are brought to court by the plaintiff, and can be repaired according to the same rules—and a "wrong," which is caused when the rules by which one's damages are judged do not belong to the same rules by which the damages have been experienced. A plaintiff made into a victim might therefore be "deprived (...) of the freedom to make his or her ideas or opinions public, or simply of the right to testify to the damage, or even more simply if the testifying phrase is itself deprived of authority."[21]

In the United States, there is very little discussion in Native communities about the form and content of legal evidence. This conversation however is urgent. Since the disclosure of traditional, often secret practices is currently the only viable way to win a Native land claim, many Indigenous nations decide to yield to court requirements, which results in lasting damages to cultural traditions. This has left several nations debating whether to appeal to the legal system at all.

17 Robert Hershey, Jennifer McCormack, and Gillian Newell, "Mapping Intergenerational Memories (Part 1): Proving the Contemporary Truth of the Indigenous Past," *Arizona Legal Studies Discussion Paper No. 14-01*, January 2014, 1.

18 Jean-François Lyotard, *The Differend: Phrases in Dispute* (Minneapolis, US: University of Minnesota Press, 2011).

19 Ibid., xi.

20 Ibid.

21 Ibid., 5. See also Kolowratnik, *The Language of Secret Proof*, 19-38, for a more detailed elaboration on the linkeages between the concept of the Different by Lyotard and the dilemma of Indigenous secret proof.

Mapping secrecy

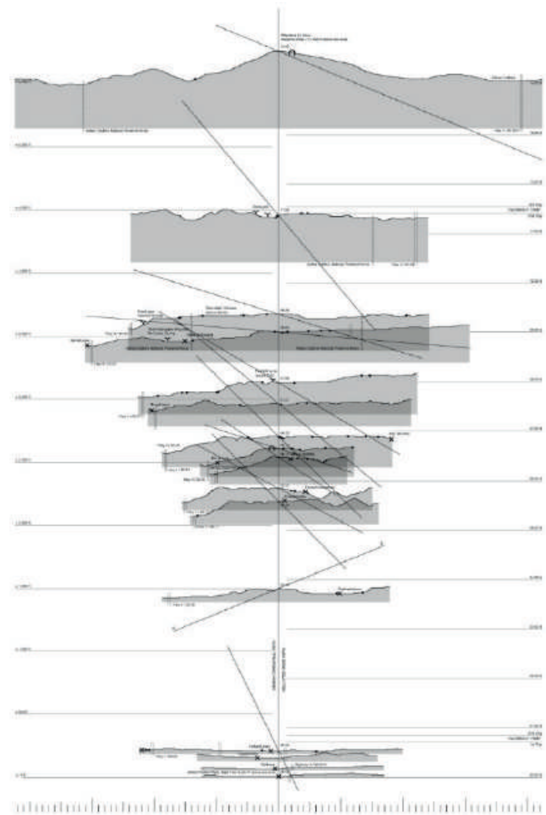
My research at Jemez Pueblo, titled *The Language of Secret Proof22,* builds on responses to evidence production for the Jemez Pueblo land claim, previously discussed, and was conducted while the case was ongoing. Within this project, Pah-Tow-Wei Paul Tosa and Sée-Shu-Kwa Christopher Toya of Jemez Pueblo[23] and I collaborated to devise an alternative set of evidentiary mappings[24] that provide proof of the pueblo's connection to the lands and speak about the importance the sacred grounds hold in their tradition, while holding on to their secrets. The spatial notational systems designed for each mapping are an attempt to produce documentation that communicates Native truths in a Western legal environment, while respecting cultural secrecy and complying with its rules. They further aim to unsettle the conditions under which Indigenous land claims are currently discussed by producing documentation that negotiates the dual demands of transparency and disguise.

Working towards the mappings, we asked: How to imagine a mode of evidentiary production which does not require a decision between either the protection of ancestral homeland or the protection of cultural secrets? How can legally admissible documents or speeches be made to include traditions of secrecy and instances of silence? Can my architectural background and my drawing skills help to produce a notational system that manages the demands of exposure and concealment?

To create proof of the ceremonial use of the claimed Valles Caldera area by the Jemez tribe, one the mappings documents the Jemez ceremonial trail *Nuna Soma Colay Pon* (Fig. 2). The trail is the path Hemish religious groups take when they walk from Jemez Pueblo to their primary sacred shrine that is located on Wâavemâ Mountain. The journey to the shrine takes two and a half days and includes several predefined stops at sacred sites and ancestral villages to pray and give offerings. The exact location of the trail and the places of ritual along it, as well as the ritual order, timing, manner of performance, and meaning of the rituals, can only be known by the members who walk the trail.

Figure 2

Hemish Ceremonial Trail



Mapping: Nina Valerie Kolowratnik, with support of Pah-Tow-Wei Paul Tosa and Sée-Shu-Kwa Christopher Toya.

Within the mapping the continuous space of the walking ceremony is broken into discontinuous horizontal slices in order to fragment and thereby occlude the specific locations of the pilgrimage. The trail is represented through a series of sectional drawings that cut through the topography at specific, and often important, moments of the ceremonial pilgrimage. The mapping is not oriented to the north, but the sections show the horizon of the surrounding landscape as seen from the perspective of the walker. These section drawings are indexed temporally rather than spatially. The spatial gaps between the section drawings are filled with the measure of time elapsed between walking from one point, or section, to the next. This tactic indicates spatial continuity without representing it directly. Since information in a section is confi-

22 This research project has been published as a book in 2019. Please see: Kolowratnik, *The Language of Secret Proof*.

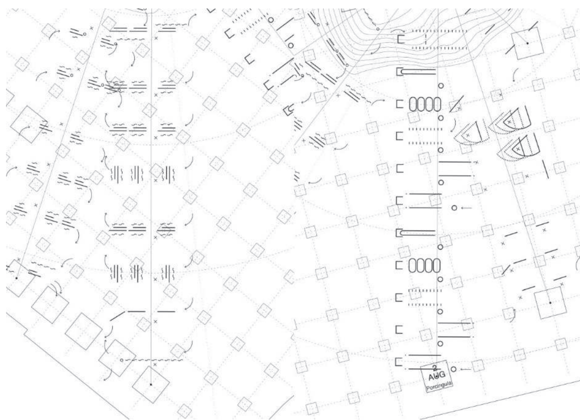
23 My two main collaborators for the set of alternative evidentiary documents were Pah-Tow-Wei Paul Tosa, Hemish traditional leader and three-time governor of the Pueblo of Jemez, and Sée-Shu-Kwa Christopher Toya, archaeologist, and current tribal historic preservation officer for the Pueblo of Jemez. Antony Armijo and Steven Gachupin provided additional information for a mapping on traditional-running, while several members of the pueblo provided general feedback.

24 For the full set of mappings including a third mapping that documents traditional running paths covering the ancestral homeland of Jemez Pueblo, please see: Kolowratnik, *The Language of Secret Proof*, 46-94.

ned to two dimensions (x and y), and the sections cannot be traced back to their original location in the landscape without a geographic reference, it is possible to visualize relatively detailed factual information about locations significant to Hemish tradition and spiritual culture without risking exposure of knowledge or allowing an outside reader to use it as a map to find and walk the trail. The mapping is thus not a guide, nor a GPS route, but nevertheless includes descriptive facts. The information each section contains then speaks to the importance of the Valles Caldera area for the Hemish people: the duration of the walk, the purpose of walking (as opposed to driving, for instance) up Wâavēmâ Mountain, the trail's relationship to ancestral homeland and villages, and the time spent within the national preserve during the walk.

Figure 3

Hemish Spiritual Pathway, detail



Mapping: Nina Valerie Kolowratnik, with support of Pah-Tow-Wei Paul Tosa and Sée-Shu-Kwa Christopher Toya.

The mapping titled "Hemish Ceremonial Pathway" documents the spiritual connection between the Hemish people and the shrine on Wâavemâ, located within the area claimed. It focuses on the ceremonial dances that structure the traditional Hemish calendar year and are performed at specific days on the plaza of Jemez Pueblo. Each dance sequence has a specific role in soliciting the blessings of the spirits residing on Wâavemâ Mountain; thus, dance movements and sequences are seen as a communication system and spatial manifestation of the spiritual pathway.

This mapping, then, also represents a cyclical calendar linked to moments of connection between the Pueblo and the spirits. Ancestral spirit relations and the times they must be enacted embody a temporality that cannot be captured by a standardized Western model of linear time. The mapping thus needs to represent a non-linear, non-directed, but repeating calendar and a calendar without specific dates, as all dances—except for two—are closed to the public, and the days they are performed remain undisclosed to outsiders. Dancers, ritual masks, clothing, and the meaning behind the symbolism and dance movements excluded from visual representation as well. The notational system corresponds with what anthropologist Elizabeth Brandt has outlined as the lowest category of traditional knowledge: the knowledge a non-Pueblo spectator gains when witnessing a ceremonial dance.[25] Since the non-Pueblo spectator is unable to understand the meaning of the dance and its role in the culture, this knowledge remains incomplete and fragmented, hence harmless to Hemish tradition.

Linking individual traditional knowledge with the meanings of the symbols used in the mappings should allow Hemish people to read the blank spaces and "complete" the mapping, similar to the concept of speech images within oral history–words specifically composed to generate certain images in the readers' mind, images whose meaning is only accessible to those initiated.[26] To an outsider and to a legal audience however, the only "accessible" components of the mappings we created are the encrypted representations, which in this case provide the proof, perhaps paradoxically, of secret knowledge.

The mappings presented here aim at loosening the corset of evidence production and creating new possibilities for representing Indigenous truths in legal frameworks without compromising cultural secrecy. They highlight the pressures put on Indigenous communities when asked to produce evidence according to Western legal standards and give incentive to rethink the demands placed on evidentiary documents, their formats, and the possibilities to present and perform them.

25 See Elizabeth A. Brandt, "The Role of Secrecy in a Pueblo Society," 14-5.

26 For more information on metaphor, composite words and speech images in Indigenous oral history, see Emory Sekaquaptewa and Dorothy Washburn, "They Go along Singing: Reconstructing the Hopi Past from Ritual Metaphors in Song and Image," *American Antiquity* 69, n.° 3 (2004): 457-86.

Resisting documentation within U.S. schemes of native cultural heritage protection: The cases of Havasupai Tribe and Sandia Pueblo

Cultural secrecy too has become a frequent concern when Native communities partake in the U.S. federal government's protection scheme of Native cultural heritage. This is also where we see the first examples of Indigenous nations resisting documentation requirements for traditional sites, both successfully and unsuccessfully. In the United States, a body of statutory laws aims to preserve Native culture by defining a set of conditions for its protection. In particular, the National Historic Preservation Act (NHPA) of 1966, the National Environmental Policy Act (NEPA), the Archaeological Resource Protection Act (ARPA), the Native American Grave Protection and Repatriation Act (NAGPRA) of 1990 have proved useful when it comes to the protection of cultural sites, cultural items, and human remains. However, these four contain a significant flaw: as within Indigenous land claims, disclosure of sensitive information by the Native community is required for protection of traditional cultural property, yet subsequent protection is not guaranteed.

While these federal acts mandate "tribal consultation" and promote the protection of sacred sites, they require the Native community to first provide documentation about why the sites in question are sacred before the federal agency can determine whether the site should be protected under the respective statute or whether the proposed actions should be stopped or modified. In addition, a Native community that shares sensitive information to a federal land-management agency must consider that once the information is in the agency's possession, it may be subject to disclosure under the Freedom of Information Act (FOIA) [27]. Also, if an environmental analysis is prepared pursuant to NEPA, it is made publicly available. Consequently, Natives have been reluctant to share sensitive information with federal agencies for fear that it will be disclosed.

Several Indigenous nations have refused to disclose culturally sensitive information when using NHPA or NEPA to protect sacred sites, taking their case to federal court after agencies bypassed Native concerns.[28] *Havasupai Tribe vs. United States* is one case that illustrates the problems associated with cultural secrecy and protecting sacred sites. In 1990, the Havasupai Tribe in northern Arizona contested the US Forest Service's approval of a plan to develop a uranium mine in the Kaibab National Forest. Concerns were raised after the plans of the project were announced. An environmental impact statement (EIS) was issued attesting that the intervention would not harm the natural and cultural environment, and the federal government approved the plan. The Havasupai filed a lawsuit claiming the mine would interfere with various sacred sites, and since they refused to provide additional details about the sacred sites, the case was ultimately decided against the Indigenous nation. The district judge felt they were uncommunicative: "The Havasupai continuously claim that they are the only ones that know their religion, yet the record clearly shows that they were not forthcoming on the subject during the scoping process or the comment period leading up to the publication of the final EIS, nor would they identify specific sites of religious significance."[29]

In 1995, *Pueblo of Sandia vs. United States* was decided in favor of cultural secrecy customs. The case concerned Forest Service plans for new management strategies and related construction efforts in Las Huertas Canyon and Cibola National Forest in northern New Mexico. As a last resort to voice the Pueblo's concerns that numerous traditional sites in the canyon would be degraded by the construction efforts and increased number of visitors, Sandia Pueblo appealed the findings of the Forest Service's EIS, however to no success. The Forest Service asked Sandia Pueblo for "detailed information describing the location of the sites, activities conducted there and the frequency of the activities, [...] maps of the sites, drawn at scale 1:24,000 or better, as well as documenta-

27 In 1967, FOIA was adopted to require US governmental agencies to disclose information upon request in order to prevent abuse of power. Yet while celebrated as a cornerstone in Western democratic progress—even though soon followed by the Privacy Act of 1974—FOIA has proved to be very problematic for Native communities. For an analysis of the interaction of FOIA and NEPA with land-management laws that incorporate tribal consultation, see Ethan Plaut, "Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?," *Ecology Law Quarterly* 36, n.º 1 (2009): 137–66.

28 See Plaut, "Tribal-Agency Confidentiality"; Audrey Mense, "We Could Tell You, but Then I Would Have to Kill You: How Indigenous Cultural Secrecy Impedes the Protection of Natural Cultural Heritage in the United States," *Chicago-Kent Journal of International and Comparative Law* 11, n.º 1 (2011): 1-24; Glen Stohr, "The Repercussions of Orality in Federal Indian Law," *Arizona State Law Journal* 31 (1999): 680-704.

29 United States District Court for the District of Arizona, *Havasupai Tribe v. United States,* April 18th 1990, 1500.

tion of the historic nature of the property."[30] On several occasions, Sandia Pueblo communicated to the Forest Service that the area holds great religious and traditional importance and expressed concerns about cultural secrecy, consequently refusing to comply with the demand to produce documentation at the requested degree of detail. Instead they submitted two affidavits, one by tribal religious leader Phillip Lauriano and one by anthropologist Elizabeth Brandt, outlining the traditional uses of the canyon to a degree they found acceptable. Nevertheless, on the grounds that the documentation originally requested was not provided, the Forest Service determined that the site was not eligible for inclusion in the national register and therefore not eligible for protection. The State Historic Preservation Officer concurred with the Forest Service's decision.[31]

Sandia Pueblo and various environmental groups filed a suit to stop the plans and force compliance with Section 106 of the NHPA. This section requires the federal agency to establish whether or not the proposed undertakings would affect historic properties and whether they are eligible for inclusion in the national register, which would make it mandatory for the agency to consider the site in the management and construction effort. Reversing the district court decision, the Tenth Circuit Court of Appeals ruled that the Forest Service was to resume the process of determining whether the Native sites in question should be included in the national register, and held that merely requesting information from the Native community is not sufficient to reach the "reasonable and good effort to identify historic properties" that Section 106 requires.[32] The ruling stated that the "Forest Service should have known that tribal customs might restrict the ready disclosure of specific information." [33] In assessing what constitutes a reasonable effort to identify traditional cultural properties, the court observed that the "Guidelines for Evaluating and Documenting Traditional Cultural Properties" state that the level of effort should depend on the likelihood that these properties exist. The court found that the information the Forest Service received, including concerns of cultural secrecy voiced by Sandia people and Brandt was enough to constitute a likelihood that traditional cultural sites existed, and justified further investigation. It specified that "the information the tribes did communicate to the agency was sufficient to require the Forest Service to engage in further investigation, especially in light of regulations warning that tribes might be hesitant to divulge the type of information sought."[34]

Silence as expression of active native power-knowledge systems

The *Pueblo of Sandia vs. United States* ruling held that an Indigenous nation's refusal to provide detailed documentation on the basis of cultural secrecy does not indicate a site's lack of significance for the Native community; on the contrary, it justifies more effort on the part of the federal agency to research the site. Sandia Pueblo's silence was acknowledged to be an expression of its culture. It was a remarkable first step in bringing Native secrecy into federal court, but still a long way from accepting Indigenous truth as a form of representation in Western jurisprudence. In the Pueblo of Sandia case the acknowledgment of secrecy ultimately led to demands for more informed research on Pueblo cultural activities through experts certified by Western institutions. The State Historic Preservation Officer of New Mexico interpreted the requirement to mean hiring a professional ethnographer and outsider to Sandia Pueblo: "An independent professional is most likely to be able to work out any impasse that may have developed between the pueblos and the Forest Service. I also believe that this procedure will give the Pueblos a reasonable opportunity to provide us with enough documentation to conduct a formal determination of eligibility."[35]

Clearly secrecy, mandatory use of secrecy, and secrecy as a tool to delimit social and political participation is anathema to Western standards. Secrecy is viewed as a threat to democracy, which promotes governmental transparency and shared power. In regard to the domain of knowledge, Western societies putatively value an open

30 United States Court of Appeals Tenth Circuit, *Pueblo of Sandia v. United States*, March 14th 1995, 860.

31 The officer, who needs to be consulted within a Section 106 process, had not yet received from the Forest Service the affidavits submitted by the tribe. Upon receipt of the affidavits nine months later, when the Tenth Circuit appeals proceeding had already commenced, the officer withdrew his concurrence with the Forest Service decision.

32 United States, *Code of Federal Regulations*, Title 36 § 800, Subpart B – The Section 106 process, November 18th 2022.

33 United States Court of Appeals Tenth Circuit, *Pueblo of Sandia v. United States,* March 14th 1995, 860.

34 Ibid., 860.

35 Ibid., 859.

system of information sharing. But how different are these two approaches when, as Chip Colwell-Chanthaphonh writes, "the veil of democratic knowledge sharing is lifted to show its long acceptance of propriety rights, including, inter alia, copyright, trademarks, patents, trade secrets and state secrets"?[36]And while it might be difficult to promote secrecy from a Western democratic perspective—even though trade secrets are but one instance where courts have regularly taken steps to maintain confidentiality—in fact, Jemez Pueblo lawyers referred to trade secrets when ultimately asking the court to keep certain information received strictly confidential—the courtroom is not the place where the traditional structure of Indigenous groups should be judged. Imposing a communication method based on transparency and unrestricted information flow onto communities whose traditional culture is defined by practices of secrecy can only be regarded as a colonial act.

Examples like *Havasupai Tribe v. United States* and *Pueblo of Sandia v. United States* show how U.S. state agency requirements to consult with Indigenous communities on issues related to cultural preservation, and in particular the information usually asked from Indigenous communities during consultation by state agents, can represent a serious difficulty for Indigenous communities and are increasingly met by silence due to cultural secrecy concerns. In *Just Silences: The Limits and Possibilities of Modern Law*, the legal scholar Marianne Constable writes, "Native silences [...] highlight the loquaciousness of a powerful U.S. law that is deaf to all that cannot be in its own—sociological—terms."[37] Referring to the Native American Languages Acts, the Native American Graves Protection and Repatriation Act, and the rule-like character of American law in delineating the conditions of preserving cultures, she states, "At least in the United States, the articulations of modern law [...] cover over and render inaccessible the nonarticulated truths and laws of those for whom law consists neither of social scientific realities nor of propositional truths."[38]

Yet within legal actions instigated by an Indigenous community to regain or protect their lands, nondisclosure also needs to be understood as a demonstration that Native power-knowledge structures are alive, and also attests to the conscious participation of the Indigenous nation in the power-knowledge game taking place in every trial. As Michel Foucault asserted, "Truth is linked in a circular relation with systems of power that produce and sustain it, and to effects of power which it induces, and which extend it—a 'regime' of truth."[39] According to Foucault, the event of a trial or the space of a courtroom is best represented as an encounter between power and knowledge. In this situation, knowledge is located on the side of the witness—where, however, there is no power. The other side has the desire to know and (usually) the power to retrieve the knowledge the witness holds. In the scene of a Native land claim in US court, two power-knowledge systems meet. Here, the witness is aware of the power their knowledge holds, both for their community and within the court. Withholding knowledge imbued with power thus speaks to the Indigenous party's awareness of the power-knowledge game at play and the desire to break open the circular and reciprocal production of truth and power by one hegemonic group.

To create proof for peoples in voluntary isolation: *Tagaeri y Taromenane vs. Ecuador*

In the case *Pueblos Indígenas Tagaeri y Taromenane vs. Ecuador*, which is currently being debated before the Inter-American Court of Human Rights, the Indigenous community stays silent as their members have chosen to remain without contact with the majority society and to live in voluntary isolation in the Amazonian rainforest.[40] In the case of the previously discussed Jemez Pueblo in New Mexico, tribal members participate in all aspects of the majority U.S. society. They might work and live outside the pueblo in the state capital Albuquerque, yet they bar outsiders from entering their territory and learning about their traditional practices. Tagaeri and Taromenane peoples live in voluntary isolation and refuse contact in both directions. They do not seek contact with the outside world and fiercely defend their territory from intruders. It is most likely that Tagaeri and Taromenane peoples don't know about the

36 See Chip Colwell-Chanthaphonh, "Sketching Knowledge: Quandaries of Mimetic Reproduction of Pueblo Ritual," *American Ethnologist* 38, n.° 3 (2011): 453.

37 Marianne Constable, Just *Silences: The Limits and Possibilities of Modern Law* (Princeton, US: Princeton University Press, 2005), 75.

38 Ibid., 74.

39 Michel Foucault, *Power* (New York: New Press, 2000), 132.

40 See Roberto Narváez, "Territorialidad de los grupos familiares de pueblos indígenas en aislamiento (PIA) en la región del Yasuní, Amazonía ecuatoriana," *Tipití. Journal of the Society for the Anthropology of Lowland South America* 16, n.° 1 (2018): 103-19.

legal case brought to the courts on their behalf[41]. This of course raises another set of questions in relation to evidence production and secrecy. As it will be the first time the Inter-American Court of Human Rights adjudicates a case on Indigenous peoples in voluntary isolation, this case will set a precedent for all future cases involving uncontacted peoples. Evidence production is arguably one of the most difficult aspects in cases where the victims themselves cannot participate in the proceedings. Evidentiary strategies and formats legal representatives decide to put forward in the *Tagaeri and Taromenane* case are therefore of heightened importance.

Similar to the *Pueblo of Jemez* case, questions to consider are: How to keep the community's culture secret in a public, and high-profile, legal proceeding? How to respect their wishes for isolation and no communication while proving their special bonds to the territory? Which methods and degrees of documentation are appropriate and not in violation of their right to be uncontacted? Due to the impossibility for the Tagaeri and Taromenane to actively participate in the case, here it is also necessary to ask who represents them in court, who speaks on their behalf, and is it necessary that someone does so?

The case *Pueblos Indígenas Tagaeri y Taromenane Vs. Ecuador* was brought to the Inter-American system by a group of three individual petitioners that were then joined by the Confederation of Indigenous Nationalities in Ecuador (CONAIE), the environmental activist organization YAsunidos and the young Taromenane woman Tewe Dayuma Michela Conta. The case concerns the international responsibility of the State for a series of violations of the rights of the Tagaeri and Taromenane Indigenous peoples and their members, in the context of actions affecting their territories, natural resources, and way of life. The case also refers to three groups of violent deaths of members of these peoples that occurred in 2003, 2006, and 2013; as well as the lack of adequate protection measures in relation to two Taromenane girls following the 2013 events, which left two underaged Taromenane girls in the care of the Waorani community. The petitioners claim that the state of Ecuador failed to adopt effective mechanisms to protect the existence of the Tagaeri and Taromenani Indigenous peoples in voluntary isolation and their ancestral territory, which can be seen in the acts of violence and killings that these peoples have suffered. They further hold, that there is a clear connection between the legal and illegal exploitation of the natural resources on their traditional territories and those incidents. While the state has designated a "restricted area" (*zona intangible*) of 700,000 hectares to the Tagaeri and Taromenane that prohibits extractivist activity, petitioners argue that the Tagaeri and Taromenane traditional territory–within which they move according to season and generational cycle–by far exceeds these boundaries.[42] The declared goal of the petitioners' legal team is that Tagaeri and Taromenane peoples can decide on their own if they want to be contacted, and are not forced into contact by the approaching oil and logging industries.[43]

Part of the proceedings is also a second Indigenous group, the Waorani, whose ancestral territories are neighboring the one the of the Tagaeri and Taromenane peoples and who maintain family relations with the Tagaeri[44]. Having been involved in the massacres subject to the case, the Waorani play an interesting role in the case. The state interprets the massacres as an inter-tribal conflict, an argumentation which allows the state to deny the link between illegal extractivist activities in this area (and its failure to prevent it) and the massacres series that have cost lives of Tagaeri and Taromenane, Waorani, as well as extractivist workers. Backed by extensive anthropological studies, the petitioners maintain a very clear position: The Waorani territorial land base has been drastically reduced by natural resource extraction industries. This forced the Waorani to move closer toward the areas that Tagaeri and Taromenane use–and some Waorani members to join these industries for generating income–which both spurred recent violent conflict. Overall, however, Waorani maintain a relationship of respect to their Tagaeri and Taro-

41 Notes by the author from a conversation with David Cordero-Heredia, lawyer in the Tagaeri Taromenane petitioner's team, Quito, June 2022.

42 See IACHR, *Report No. 96/14. Petition 422-06. Report on Admissibility. Tagaeri and Taromenani Indigenous Peoples in Isolation v. Ecuador*, November 6th 2014, https://bit.ly/3tXamoW.

43 See David Cordero and Nicholas Koeppen, "Oil Extraction, Indigenous Peoples Living in Voluntary Isolation, and Genocide: The Case of the Tagaeri and Taromenane Peoples," *Harvard Human Rights Journal* 34, n.º 1 (2021).

44 Tagaeri peoples were once part of Waroani community, who upon first contact with missionaries in the late 1960s decided to continue living without contact and eventually joined the Taromenane tribe. See scholarship of Roberto Narváez.

menane "brothers"[45] and comply with their wishes for isolation.[46] The petitioners, therefore, include Waorani needs for territorial protection in their demands for the extensions of the protected zone and its buffer area.

Evidence provided by the petitioners includes testimonies by the neighboring Waorani peoples among other as they face similar pressures from extractivist industries. While these pressures caused recent conflicts to escalate, they also unequivocally make the Waorani peoples part of the fragile ecosystem that sustains the Amazonian rainforest–as well as Ecuador's last peoples in voluntary isolation. While the Tagaeri Taromenane live isolated, they do not live in a vacuum. The petrol and logging industry has similar effects on their close neighbors, the Waorani Indigenous nation.

As the Tagaeri and Taromenane cannot themselves testify in court, Waorani members represent a welcome alternative: They can speak firsthand to the impact natural resource extraction has on their way of life and their land, including rivers that flow in and out of the area inhabited by the Tagaeri and Taromenane. They can speak to Waorani ways of belonging to the territory, which due to family ties show similarities to the way the Tagaeri and Taromenane relate to their lands.[47] Further, they can testify about recent communication between Tagaeri Taromenane and Waorani women. What both the petitioners' legal team and the Waorani witnesses themselves are very clear about is, that they do not speak on behalf of the Tagaeri and Tarmenane peoples but speak their truth to help protect their "brothers" in voluntary isolation, as well as to save their own ancestral lands under immediate threat.

The Waorani testimonies, as well as the Waorani delegation, which traveled to the public hearing in Brasilia for additional support, certainly also helped in providing a 'face' to the peoples in voluntary isolation. However, will the possibility to work with neighboring communities for the production of evidence also arise in the next cases on peoples in voluntary isolation? Will there be a neighboring community ready to testify about the impact of natural resource extraction industries and the close ties to their lands? Or will the very fact that the community decided to live in isolation on their traditional territory be seen as proof of their dependence on an intact environment for their survival? Will advances of the petrol and logging industry towards areas used by tribes in voluntary isolation suffice to proof an imminent threat towards these communities? Will their chosen silence be enough to change evidentiary standards?

Final reflections

In most Western-oriented legal fora adjustments to established protocols and rules of procedure in response to cultural differences are still an exception rather than common practice. Since the 1930s the discipline of anthropology and its principal instrument of ethnography underwent a process of critical self-inspection and change towards a more sensitive and respectful work with the people it studies. Today's generation of anthropologists is bound to elaborate ethical frameworks that guide their work and to which they can be held accountable[48]. Within law, however, the lack of response to cultural differences when it comes to evidence production involving communities pertaining to a culture other than the one of the dominant legal system is yet to be problematized. It is striking to see that the damages requirements for evidence can inflict on Indigenous communities are in fact not much different from those produced by anthropologists' early studies of these same communities. Oral histories, representing the traditional way to communicate the relation to territory and traditional way of life for many Indigenous communities, have still not entered western-oriented courts as full evidence. Indigenous silences are yet to be accepted as expressions of cultural knowledge and practices that can't be shared with outsiders. Rather than seeing secrecy as an impediment to understanding Native societies, Western legal systems need to accept and value it as an integral part of the organization of power-knowledge on which the culture is based. Instead of forcing Native peoples to adapt their culture to Western legal customs, cultural secrecy and non-disclosure should be addressed as valid legal communication.

45 As formulated by Waorani leader Alicia Cahuiya, conversation with the author, August 2022.

46 See Roberto Narváez, "Unreal Borders, Grandparents and Common Territories: The Yasuní Region Territory of Inter-Dependence and Interrelation of Waorani and Family Groups in Isolation," *Revista de Antropología* 64 (2021).

47 Notes by the author from a conversation with Roberto Narváez, anthropologist and witness in the *Tagaeri Taromenane* case, Quito, June 2022.

48 See Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: ZED Books, 2012); Catriona Mackenzie, Christopher McDowell, and Eileen Pittaway, "Beyond 'Do No Harm': The Challenge of Constructing Ethical Relationships in Refugee Rresearch," *Journal of Refugee Studies* 20/2 (2007): 299-319.

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