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Benefit-sharing and its Evolution through the Recognition of the  
Notion of Local Community in Nagoya Protocol**

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# The Inadequacies of the French System Regarding Access and Benefit-sharing and Its Evolution through the Recognition of the Notion of Local Community in the Nagoya Protocol

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## Abstract

The French law for the reconquest of biodiversity aims to transpose the Nagoya Protocol into national law. Rather than supporting the notion of an autochthonous and local community or even taking into account the autochthonous character of the concept of a local community, the legislature has chosen to use the notion of a community of inhabitants. The notion of local community, which is specific to environmental law, nevertheless satisfies the requirements of constitutional jurisprudence, as it does not consist of a community of origin, culture, language or belief. Beyond the logic inherent in the Law of 8 August 2016, the recognition of local communities, which is at the heart of the mechanism for sharing access and benefits, could make it possible to correct the multiple shortcomings, in terms of access to both genetic resources and traditional knowledge, associated with the sharing of the benefits that result from their use.

## Keywords

autochthonous communities – local communities – inhabitants' communities – Nagoya Protocol – genetic resources – traditional knowledge – access and benefit-sharing – French law

By adopting the law for the reconquest of biodiversity, nature and landscapes, the French legislator has taken the initiative to transpose into domestic law the 2010 Nagoya Protocol on access to genetic resources and the fair and equitable

sharing of benefits arising from their utilisation to the convention on biological diversity (corresponding in particular to the addition of Articles L.412-1 to L.412-20 of the Environment Code) and Regulation No. 511/2014 of the European Parliament and of the Council of 16 April 2014 on measures concerning compliance by users in the Union with the Nagoya Protocol. Title IV, “*Accès aux ressources génétiques et partage juste et équitable des avantages*” (APA),<sup>1</sup> was facing a constitutional obstacle immediately following the drafting of the bill, as both the protocol and the regulation made common use of the notion of ‘autochthonous and local communities’. Despite a constant doctrine establishing the idea of autochthony in French law<sup>2</sup> and some slight parliamentary inclinations,<sup>3</sup> the constitutional court is not particularly favourable to the integration of autochthonous communities or peoples into the French people. It is necessary to point out that the Constitutional Council, on the basis of the principles of unity of the French people, the indivisibility of the Republic and the equality of citizens before the law, considers that the Constitution “only knows the French people, composed of all French citizens without distinction of origin, race or religion”, thus rejecting any legislative reference to any other people than the French.<sup>4</sup> One can therefore legally question the affirmation of the National Consultative Commission on Human Rights, in its recent opinion of 23 February 2017, declaring that “the recognition of the identity of autochthonous peoples is an exception, based on their cultural specificity, and not a precedent that would call into question the principles of indivisibility of the Republic”.<sup>5</sup> It is evident that the constitutional judge does not appear to have

1 Access to Genetic Resources and Fair and Equitable Sharing of Benefits.

2 N. Rouland, ‘Autonomie et autochtonie dans la zone pacifique sud: approches juridique et historique’, 104 *Revue Française de Droit Constitutionnel* (2015) pp. 91–934; S. Guyon and B. Trépied, ‘Les autochtones de la République: Amérindiens, Tahitiens et Kanak face au legs colonial français’, in I. Bellier (ed.), *Les peuples autochtones dans le monde, les enjeux de la reconnaissance* (L’Harmattan, Paris, 2013), pp. 92–112; F. Garde, ‘Les autochtones et la République’, *Revue française de droit administratif* (1999) pp. 1–15.

3 Despite warnings from both the rapporteurs and the government during the second reading of the Biodiversity Bill, the MPs have ventured to amend the bill by replacing the notion of ‘community of origin inhabitants’, originally formulated by the government, by that of ‘indigenous and local community’.

4 Decision No. 91–290 DC of 9 May 1991, Loi portant statut de la Collectivité territoriale de Corse, cons. 13; see also Decision No. 99–412 DC of 15 June 1999, Charte européenne des langues régionales ou minoritaires, cons. 10 and Decision No. 2004–505 DC of 19 November 2004, Traité établissant une Constitution pour l’Europe, cons. 16.

5 Commission Nationale Consultative des Droits de l’Homme, Avis du 23 février 2017 sur la place des peuples autochtones dans les territoires ultramarins français: la situation des kanak de Nouvelle-Calédonie et des amérindiens de Guyane, p. 1.

any intention of making an exception to these jurisprudential principles, except towards the Kanak people, in accordance with the Noumea Agreement, whose constitutional validity was recognised in the decision of the Constitutional Council No. 99-410DC of 15 March 1999.<sup>6</sup>

The French legislator, in the incapacity of making use of the notion of autochthonous community, has chosen to place at the core of the APA system the community of inhabitants, defined in Article L.412-4 (4°) of the environment code as “any community of inhabitants who traditionally derive their livelihood from the natural environment and whose way of life is of interest for the conservation and sustainable use of biodiversity”. It would have been just as appropriate to deal with the second alternative of the notion of ‘Aboriginal and local community’. It is not only the notion of autochthonous people that is ignored but the set of terms to designate eligible communities under the Nagoya Protocol: the notion of local community undoubtedly suffers from a suspicious proximity, if not confusion, concerning the term ‘autochthonous’. Such a choice has impacted the French system with a fundamental deficiency, illustrating both the will of the government and the parliamentary majority to relegate the communities concerned to a secondary role within the APA system. However, insofar as it consists of a specific element of environmental and biodiversity law, the notion of local community can be rigorously distinguished from that of an Aboriginal community and be considered as fully in accordance with the requirements of constitutional jurisprudence (I). The difficulties governing the notion of a community of inhabitants naturally extend into some deficiencies peculiar to the APA system. The substitution of this notion for the benefit of one of the local community, in addition to stressing the relationship between these communities and their environment, biological resources and traditional knowledge, must contribute to consolidating the APA system after the effective entry came into force, dated 8 August 2016, of the Law for the reconquest of biodiversity (II).

## **1 Insufficiency and Overcoming of the Notion of ‘Community of Inhabitants’**

The notion of ‘community of inhabitants’ corresponds to a default notion, originating more from the constraints of constitutional jurisprudence than from an ambition to recognise, in law, the qualities of a community cultivating

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<sup>6</sup> Decision No. 99-410 DC of 15 March 1999, Loi organique relative à la Nouvelle-Calédonie, cons.16.

a close relationship with the natural resources derived from the land and the traditional knowledge from which it is inseparable. Applied to the APA framework, this logically demonstrates some insufficiencies and uncertainties (A) that require correction by means of the legislative recognition of the notion of local community (B).

### 1.1 *The Inadequacies of the Notion of ‘Community of Inhabitants’*

The insufficiencies and uncertainties weighing on the notion of community of inhabitants equally concern the deficiencies governing its definition (1) more so than the difficulties relating to its identification and articulation with Polynesian and New Caledonian rights (2).

#### 1.1.1 The Deficiencies in the Definition of the Notion of ‘Community of Inhabitants’

The notion of ‘community of inhabitants’ is not new: it can be initially identified under the terms of the Decree No. 87–267 of 14 April 1987, amending the code of the domain of the State,<sup>7</sup> as well as amending finance Law No. 89–936 of 29 December 1989,<sup>8</sup> to currently find it in various provisions of the environmental code concerning the Amazonian park of Guyana.<sup>9</sup> These texts mainly relate to the rights of collective use for the practice of hunting, fishing and any activity necessary for the subsistence of these communities, as well the mechanisms of assignments and concessions in the exclusive context of the Department of Guyana and afterwards, the Amazonian park of Guyana.

However, there is no aim here to use the notion of a community of inhabitants for the purpose of transposing Article 8 (j) of the Convention on Biological Diversity (CBD) and the APA mechanism. It is – at most – possible to identify an elementary transposition of Article 8 (j) to Article 33 of Overseas Orientation Law No. 2000-1207 of 13 December 2000,<sup>10</sup> which urges the State “and local communities [to encourage] the respect, protection and maintenance of knowledge, innovations and practices of autochthonous and local communities based on their traditional ways of life and which contribute to

7 Decree No. 87–267 du 14 avril 1987 modifiant le code du domaine de l’État et relatif aux concessions domaniales et autres actes passés par l’État en Guyane en vue de l’exploitation ou de la cession de ses immeubles domaniaux, Journal Officiel de la République Française du 16 avril 1987.

8 Loi 89–936 du 29 décembre 1989 de finances rectificative pour 1989, Journal Officiel de la République française du 30 décembre 1989.

9 Arts. L.331-15-3 and L.331-15-5 du code de l’environnement.

10 Loi d’orientation pour l’outre-mer No. 2000-1207 du 13 décembre 2000, Journal officiel de la République française du 14 décembre 2000.

the conservation of the natural habitat and the use of sustainable biodiversity". The former Article L.331-15-6 of the Environmental Code, referring to the APA device within the framework of the Amazonian Park of Guyana, does not mention any form of communities. Thus, and with the exception of the Kanak people, French law distinguishes communities of inhabitants circumscribed to the sole territory of Guyana and Amazon and, surprisingly, the autochthonous and local communities associated with a summary scheme for the protection of traditional knowledge overseas.

For the first time, the law for the reconquest of biodiversity seeks to associate the concept of 'community of inhabitants' with the APA system. This solution, however, is not without difficulties: a 'community of inhabitants' – in view of a definition insisting that it draws '*traditionally its livelihood from the natural environment*' – is not necessarily an autochthonous or local community within the meaning of the CBD and the Nagoya Protocol. It is not only a question of sticking to conventional texts but, above all, finding the appropriate terms in order to allow their effective transposition in the light of French constitutional jurisprudence. Yet, it is clearly observed that the legislative definition of the notion of a 'community of inhabitants' is particularly restrictive,<sup>11</sup> so that many parliamentarians have been annoyed that the disappearance of any reference to the autochthonous character of the concerned communities tends to "oust[ing] the fundamental principle that autochthonous rights result from their connection to their land".<sup>12</sup> In the absence of such a relationship, there remains the issue of identifying "who belongs to a community of inhabitants: Will it be the inhabitants of a village, or even a territory?".<sup>13</sup> This identification will probably be tedious as the criteria for defining a community of inhabitants seem restrictive and clumsy.

If the second part of that definition, mentioning a "lifestyle [that] is relevant to the conservation and sustainable use of biodiversity" is directly extracted from Article 8 (j) of the CBD, the first part, referring to "any community of inhabitants that traditionally derives its livelihood from the natural habitat", raises many more questions. While this is not an incidental introduction of the

11 Assemblée nationale, Rapport d'information du 20 juin 2018 déposé par la commission du développement durable et de l'aménagement du territoire sur la mise en application de la loi No. 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages, <http://www.assemblee-nationale.fr/15/rap-info/i1096.asp>, p. 114.

12 Olivier Falorni, Assemblée nationale, Compte rendu No. 42 de la commission du développement durable et de l'aménagement du territoire, Monday 7 March 2016, p. 10.

13 Assemblée nationale, Compte rendu No. 73 de la Commission du développement durable et de l'aménagement du territoire, *supra* note 11, p. 27.

notion of autochthonous and local community, it is clear that the livelihood criterion is rather subsidiary to the logic underpinning the Nagoya Protocol. Such a conception is obviously restrictive, since the APA device resulting from the Nagoya Protocol refers to anything other than a community identified from its livelihood. The point actually at issue is insisting on the natural resources and the environment, from which this community is inseparable, as well as the territory in which these resources are located and the traditional knowledge that can be derived from them. These are essential criteria for placing these communities at the core of a mechanism that relates to traditional knowledge and genetic resources. Indeed, by opting to define the notion of a ‘community of inhabitants’ based on the origin of their livelihood, or even their way of life, the French legislator has failed to associate this fundamental concept with an environment and a land. This omission is by no means fortuitous, since it was originally an attempt to reject “totally the idea that the rights [of these communities] derive from their relation to the land”,<sup>14</sup> taking into account the underlying idea that “in the protection register, the loss of knowledge can also be associated with the loss of access to the territory of plants”.<sup>15</sup> The definition of communities of inhabitants is also archaic, in that it connects them to a primitive and rudimentary way of life, even though some communities may have evolved and even got fairly close to a certain form of modernity. Therefore, a form of inadequacy is present in this notion with regard to the objective clearly stated by the law of 8 August 2016 which is, according to the terms of the explanatory memorandum, “to contribute to implement a virtuous circle on the valuation of biodiversity”.<sup>16</sup>

### 1.1.2 The Difficulties Governing the Identification of Communities of Inhabitants

The issue of identifying communities of inhabitants has been a priori outlined, according to the study conducted in 2011 by the Office of the Commissioner General for Sustainable Development on the relevance and feasibility

14 T. Burelli, ‘La France et la mise en oeuvre du protocole de Nagoya: Analyse critique du dispositif l'accès aux ressources génétiques et de partage des avantages (APA) dans le projet de loi français relatif à la biodiversité’, 14:2 *Vertigo La revue électronique en sciences de l'environnement* (2014), <journals.openedition.org/vertigo>, visited in 2018.

15 T. Bambridge and P-Y. Le Meur, ‘Savoirs locaux et biodiversité aux îles Marquises. Don, pouvoir et perte’, 12:1 *Revue d'anthropologie des connaissances* (2018) pp. 29–55.

16 Projet de loi No. 1847 relatif à la biodiversité, enregistré à la Présidence de l'Assemblée nationale le 26 mars 2014, <http://www.assemblee-nationale.fr/14/projets/pl1847.asp>.

of overseas access and benefits sharing,<sup>17</sup> and is also, *a posteriori*, part of the information report of 20 June 2018 on the implementation of the law for the reconquest of biodiversity, nature and landscapes. The two co-rapporteurs, Ms Nathalie Bassire and Ms Frédérique Tuffnell, noting implementation gaps in the law and the decrees of application, recommend the need to: “identify and list” the ‘communities of inhabitants in accordance with the law, keepers of traditional knowledge associated with the use of genetic resources, [...] to enable these communities to assert their rights to benefit-sharing and thereby preserve this heritage of knowledge, especially in overseas’.<sup>18</sup> Having regard to the deficiencies which govern the notion of a community of inhabitants, this notion undeniably deserves to be reconsidered or even replaced, unless to accept the notion and prolong the difficulties in identifying the communities that are likely to benefit from the APA framework.

A second difficulty lies in the superposition of notions and definitions existing in Polynesia and New Caledonia. On the one hand, the Nouméa agreements have made it possible to recognise the communities that make up the Kanak people in the territory of New Caledonia.<sup>19</sup> It should be noted, however, that the environment code of the Southern Province of New Caledonia is not directed explicitly at either the Kanak people or at any other autochthonous community when merely noting: “local communities embodying traditional lifestyles that are relevant to the conservation and sustainable use of biological diversity”.<sup>20</sup> On the contrary, the bill of the country of New Caledonia on the safeguarding of the intangible heritage insists on identifying “the Kanak

17 According to the study, “the question of the identification of the participating CAL in the APA scheme in the absence of a definition adopted in domestic law. Indeed, if certain criteria can be identified, they must be legally applicable to the very diverse situations of the overseas CAL”, Commissariat Général au Développement Durable, Pertinence et faisabilité de dispositifs d'accès et de partage des avantages en outremer, portant sur les ressources génétiques et les connaissances traditionnelles associées, Paris, Études et documents No. 48, septembre 2011, p. 57.

18 Assemblée nationale, Rapport d'information du 20 juin 2018 déposé par la commission du développement durable et de l'aménagement du territoire sur la mise en application de la loi No. 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages, *supra* note 11, p. 134; about the communities of inhabitants in French Guyana and Wallis and Futuna, *see* the same report, p. 129.

19 It is also possible to mention the deliberation from Province du sud No. 06-2009 of 18 February 2009 relating to the exploitation of biochemical and genetic, Journal Officiel de Nouvelle-Calédonie, No. 8294 of 26 February 2009, p. 1277 which was superseded by the deliberation 25-2009/APS of 20 March 2009 relating to the code de l'environnement de la province Sud, Journal Officiel de Nouvelle-Calédonie du 9 avril 2009, p. 2590.

20 Art. 311-5 du code de l'environnement de la province Sud de Nouvelle-Calédonie.



population, the only autochthonous people of New Caledonia”.<sup>21</sup> On the other hand, Article 2000-1 of the French Polynesia Environment Code<sup>22</sup> makes use of the notion of ‘source of autochthonous origin’. This is defined as “any person or member of a family line native to French Polynesia and having an ancestral link with land in the said territory that may invoke the rights provided for in Articles 24 and 25 of the United Nations Declaration on the Rights of Autochthonous Peoples of 13 September 2007, that was itself custodian of one or more traditional knowledge before transmitting it to the ‘holder’ designated by this Law of the Country”.<sup>23</sup> In spite of the logic governing these two communities’ own legal arrangements, the Act of 8 August 2016 emphasises the applicability of Article L.412-4 4 and 5 of the Environment Code, including, respectively, the definition of the notions of ‘community of inhabitants’ and of ‘traditional knowledge’.<sup>24</sup> It can be easily deduced that Kanak communities must be recognised as communities of inhabitants under the 2016 law. Whether then affirming that these communities, arising from a source of autochthonous origin, are eligible for the Polynesian system, also falls under the category of communities of inhabitants. The legislator would have found some merit in clarity on this point and would have been well advised to respect the field of competence recognised in these two communities.

Furthermore, there exists a final difficulty regarding the status of these communities of inhabitants and the ascription of a legal personality to them. This point is never directly and explicitly addressed in the text of the law, while the legal personality was recognised for the benefit of Kanak clans in New Caledonia following two rulings of 22 August 2011 of the Nouméa Court of Appeal.<sup>25</sup>

21 The bill of the country of New Caledonia on the safeguarding of the intangible heritage substantially uses the notions of ‘autochthonous or local cultural groups’, ‘autochthonous community’, ‘traditional community’ or even ‘local community’. See T. Burelli, ‘Propriété intellectuelle et savoirs traditionnels en Nouvelle-Calédonie, pertinence et potentialités du projet de loi relatif à la sauvegarde du patrimoine immatériel autochtone’, in J.-Y. Faberon and T. Mennesson (eds.), *Peuple premier et cohésion sociale en Nouvelle-Calédonie – Identités et rééquilibrages* (PUAM, Aix-en-Provence, 2012), pp. 115–129; R. Lafargue, ‘Rapport en vue de l’élaboration d’un projet de Loi du Pays au statut coutumier des savoirs traditionnels, et à la protection des droits intellectuels autochtones’, (2010), p. 90.

22 Loi du pays No. 2017-25 du 5 octobre 2017 relative au code de l’environnement de la Polynésie française, Journal Officiel de la Polynésie Française No. 66 NS of 5 octobre 2017.

23 Art. LP 3000-1 du code de l’environnement de Polynésie française.

24 Art. 43 of the Law of 8 August 2016 pour la reconquête de la biodiversité, de la nature et des paysages.

25 Cour d’appel de Nouméa, 22 August 2011, RG No. 2010/531, *Clan Tiaouniane v. Poady et GDPL, clanique de Baco*, Cour d’appel de Nouméa, 22 August 2011, RG No. 2010/532, *Clan Tiaouniane vs. SAEML « Grand projet VKP »*.

However, in any other territory of the French Republic, including Polynesia, Mayotte and Guyana, the communities that are likely to be identified as communities of inhabitants under the law of 8 August 2016 cannot benefit from the status of legal personality. The possibility remains, as what is required in Guyana under concession and transfer mechanisms,<sup>26</sup> for these communities to incorporate as an association or a commercial company.

### 1.2 *The Autonomous Concept of Local Community as a Substitute for the Notion of a Community of Inhabitants*

The deficiencies in the notion of a community of inhabitants could have been overcome during the drafting stage of the bill had the government paid greater attention to the notion of local community and its autonomy regarding the autochthonous community (1). This raises the question of the constitutionality of such a notion and the definition that can be drawn (its definition) (2).

#### 1.2.1 The Autonomy of the Concept of Local Community

The notion of autochthonous and local community is placed at the core of Article 8(j) of the CBD and the Nagoya Protocol, but neither of these two treaty texts proposes any element of differentiation between these two forms of community. However, there is no doubt that “the creation of a distinct concept is a result of political reasons, since it has certainly been difficult for some States to accept the concept of autochthonous peoples”.<sup>27</sup> While there is no mention of the notion of local communities in international texts relating to autochthonous peoples, these two concepts have been systematically associated in most environmental and biodiversity-related texts since the CBD. Principle 22 of the 1992 Rio Declaration on Environment and Development refers to “autochthonous people and their community and other local communities” to point out their “vital role in environmental management and development because of their knowledge of the environment and traditional practices”.<sup>28</sup> Yet until the Paris Agreement of 2015, no government text proposed any definition of the concept of ‘local community’.

26 Arts. L.272-5 du code forestier et L.5143-1 du code général de la propriété des personnes publiques.

27 S. Von Lewinski, *Indigenous Heritage and Intellectual Property, Genetic Resource, Traditional Knowledge and Folklore* (2<sup>nd</sup> edn., Wolters Kluwer, London, 2008), p. 32.

28 Rio Declaration on Environment and Development, adopted at the end of the United Nations Conference on Environment and Development, held in Rio from 3 to 14 June 1992, [http://www.unesco.org/education/pdf/RIO\\_E.PDF](http://www.unesco.org/education/pdf/RIO_E.PDF).

Such a definition can be identified in some internal or regional legal texts relating to the mechanism of access to biological resources;<sup>29</sup> the Organisation of African Unity model law for the protection of the rights of local communities, farmers and breeders, as well as the regulation of access to biological resources, defines a local community as “a human population in a distinct geographical area, with ownership over its biological resources, innovations, practices, knowledge and technologies partially or wholly governed by its own customs, traditions or laws”. This definition, which has been transposed more or less faithfully in some internal legal systems,<sup>30</sup> is based on criteria that are, in part, distinct from those specific to the notion of the autochthonous community. In particular, it draws attention to the link to a distinct territory, the relationship to biological resources and associated traditional knowledge, as well as the existence of specific customs and traditions. Thus, despite what is indicated by parliamentary debates on the law for the reconquest of biodiversity (which do not differentiate the concept of the autochthonous community from that of the local community), the concept of the local community enjoys full autonomy, which means a separate wording is required; in the preamble of the CBD,<sup>31</sup> the preparatory work for the Nagoya Protocol<sup>32</sup> and the WIPO draft articles on the protection of traditional knowledge,<sup>33</sup> the notion of autochthonous peoples (or populations) is clearly separated from that of local communities. The autonomy of the concept of local community also results

29 Loi-Modèle de l'Organisation de l'Unité Africaine de 2000 pour la protection des droits des communautés locales, des agriculteurs et des obtenteurs et pour les règles d'accès aux ressources biologiques, [www.wipo.int/wipolex/fr/text.jsp?file\\_id=252153](http://www.wipo.int/wipolex/fr/text.jsp?file_id=252153).

30 See for example in Ethiopia, the law No. 482/2006 of 27 February 2006 relating to Access to Community Resources and Knowledge and Community Rights, in the Democratic Republic of Congo, the Law No. 14/003 of 11 February 2014 on the Conservation of Nature or in Kenya, the Law No. 33/2016 of 7 September 2016 on the protection of traditional knowledge and cultural expressions.

31 12th preambular paragraph of the Convention on Biological Diversity: “Recognizing that a large number of local communities and autochthonous peoples are closely and traditionally dependent on biological resources...”.

32 See, for instance, Study on compliance in relation to the customary law of indigenous and local communities, national law, across jurisdictions, and international law – Ad hoc open-ended working group on access and benefit-sharing, 7th meeting, Paris, 2–8 April 2009 UNEP/CBD/WG-ABS/7/INF/5; Report of the 10th meeting of the Conference of the Parties to the Convention on Biological Diversity, Nagoya, Japan, 18 and 29 October 2010, UNEP/CBD/COP/10/27.

33 Organisation Mondiale de la Propriété Intellectuelle, La protection des savoirs traditionnels: projets d'articles, [http://www.wipo.int/edocs/mdocs/tk/fr/wipo\\_grtkf\\_ic\\_21/wipo\\_grtkf\\_ic\\_21\\_ref\\_facilitators\\_text.pdf](http://www.wipo.int/edocs/mdocs/tk/fr/wipo_grtkf_ic_21/wipo_grtkf_ic_21_ref_facilitators_text.pdf).

from the fact that it is not a community “connected by historical continuity with pre-invasion and pre-colonial societies”. This latter element, essential in the definition of an autochthonous community, is inappropriate in the definition of a local community. As an aside, such empowerment is not new in French law, as it is formulated distinctly in the environment code of the Southern Province of New Caledonia.<sup>34</sup> The text of the New Caledonia Country bill on the Safeguarding of Intangible Cultural Heritage also provides insight by distinguishing the term ‘autochthonous community’ as directed to the “Kanak people, the only autochthonous people of New Caledonia”, from the notions of ‘traditional community’ and ‘local community’, simply designating other non-autochthonous population groups in New Caledonia.<sup>35</sup> The report for the drafting of a Country bill on the customary status of traditional knowledge and the protection of intellectual rights, prepared by Regis Lafargue, states that “beside the Kanak people, indigenous people, the law also protects the traditional knowledge of the other populations especially Oceanians who live in New Caledonia”.<sup>36</sup> The notion of ‘traditional community’ exclusively includes the Polynesian and Vanuatu populations (2% and 1% of the New Caledonian population respectively), which are therefore not autochthonous, but may have retained a traditional character in their way of life and practices. It remains that all these texts show that the notion of local community has an autonomous legal existence from that of an autochthonous community, even if the question of its constitutionality remains unresolved.

### 1.2.2 The Notion of Local Community with regard to the Criteria of Constitutionality

The concept of ‘local community’ raises some questions as regards the nature of, and the capacity to fulfil, the requirements of constitutional jurisprudence in relation to it. In the first place, this notion must be distinguished from that of ‘traditional community’, present in certain legal texts relating to the APA system. Further, in the absence of a generally accepted definition, and the elements thereof, the notion of a ‘traditional community’ also remains somewhat confusing. Some legal texts operate an assimilation between the ideas of ‘local community’ and ‘traditional community’, as does the model Law of the Pacific as it concerns the *Protection of Traditional Knowledge and Expressions of*

34 Arts. 311-3 and 311-5 of the code de l’environnement de la Province du sud de Nouvelle-Calédonie.

35 Art. 5 du projet de loi de pays de Nouvelle-Calédonie relative à la sauvegarde du patrimoine immatériel autochtone, p. 66.

36 Lafargue, *supra* note 21, p. 38.

*Culture*; this considers that the notion of “traditional communities includes autochthonous, local communities and cultural communities” without clarifying the difference between these two notions.<sup>37</sup> Among the various texts making use of the notion of traditional community, a relatively successful definition can be identified in Article 2-IV of Brazilian Law No. 13.123 of May 20, 2015 on access to genetic heritage, protection and access to the associated traditional knowledge, and benefit-sharing for the conservation and sustainable use of biological diversity. Indeed, the notion of traditional community is defined in Article 2-IV as “a culturally differentiated group which recognizes itself as such, has its own form of social organization and occupies and uses territories and natural resources as a condition of its cultural, social, religious, ancestral and economic reproduction, using knowledge, innovations and practices generated and transmitted by tradition”. Obviously, such a definition could possibly conflict with the jurisprudence of the Constitutional Council, which prevents the recognition of a “living cultural and historical community”<sup>38</sup> or any group, defined by a community of origin, culture, language or belief”.<sup>39</sup> The notion of ‘local community’, on the other hand, is partially grounded on quite different criteria, if the definition proposed by the OAU Model Law is to be referenced. To be both consistent with the constitutional requirements and also with the content of the Nagoya Protocol, the notion of ‘local community’ could be defined as a community located in a distinct and circumscribed territory, whose way of life closely and traditionally depends on biological resources positioned in that territory and / or from which this community has developed traditional knowledge from which its (the community’s) identity is inseparable. Where this definition is used, the questions then raised are to do with the fulfilling of the requirement to preserve biodiversity, of which local communities are not dissociable, and not to do with the logic regarding the legal recognition of autochthonous peoples. Therefore, insisting on the existence of a link between a human entity and its environment is fundamental, without however leaving aside the criterion of territoriality, which is essential to the identification of

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37 Lignes directrices pour l’élaboration d’une législation nationale pour la protection des savoirs traditionnels et expressions de la culture fondée sur la loi type pour le Pacifique 2002, [http://www.wipo.int/wipolex/fr/text.jsp?file\\_id=186410](http://www.wipo.int/wipolex/fr/text.jsp?file_id=186410).

38 Art. 1 of the 9 May 1991 Law relating to the territorial community of Corsica, censured by Decision No. 91–290 DC du 9 mai 1991 – Loi portant statut de la Collectivité territoriale de Corse, cons. 13.

39 Decision No. 2004-505 DC du 19 novembre 2004, Traité établissant une Constitution pour l’Europe, cons. 16.

each community.<sup>40</sup> The reference in the OAU text to a community “partially or totally governed by its own customs, traditions or laws” is questionable from the point of view of constitutional review, even though this element may be factually present in such communities. On the other hand, the mere existence of a traditional link to biological resources and the associated traditional knowledge of these resources cannot, by itself, constitute a cultural element capable of defining a group or community, but without this element, the notion of a community of inhabitants, inseparable from traditional knowledge and livelihoods traditionally derived from this natural environment, should itself have been censored by the Constitutional Council under Decision No. 2016-737DC of 4 August 2016 on the law for the reconquest of biodiversity, nature and landscapes.

Secondly, the notion of local community must also be distinguished from that of ethnic community, the criterion of ethnicity being among those entirely prohibited under Article 1 of the Constitution. Not only does the Constitutional Council censor the principle of statistics based on ethnic origin,<sup>41</sup> but it also considers that the preferential measures developed for the benefit of the Polynesian population on the basis of Article 74 of the Constitution cannot be reserved only for persons whose ancestors were born in Polynesia. On the contrary, they must group together all the “persons with sufficient duration of residence in the relevant overseas collectivity”.<sup>42</sup> According to the comments on the Cahier du Conseil Constitutionnel “any other conception of the population, involving ethnic characteristics (apprehended, for example, by the place of birth of a parent), would be contrary to Articles 1 and 3 of the Constitution and Article 6 of the 1789 Declaration, without to find a basis in the concept of

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40 On the other hand, Loïc Peyen points out that “a too restricted approach [of the link between the human entity and its environment] would exclude a large number of communities from the mechanism, whereas a too flexible approach would dilute the very interest of resorting to this notion of “communities”. The use of the epithet ‘local’, which is often unsettling in law, highlights the need for a contextual approach. It is less a question of the territoriality of the group (its link with a specific space) than of its environmentality (its link with its environment or one or more of its constituent elements). The definition of these communities must be based on their relationship with their environment”, L. Peyen, *Droit et biopiraterie, contribution à l'étude du partage des ressources naturelles* (LGDJ, Paris, 2018), p. 273.

41 Decision No. 2007-557DC du 15 novembre 2007, Loi relative à la maîtrise de l'immigration, à l'intégration et à l'asile, cons. 29.

42 Decision No. 2004-490DC du 12 février 2004 relative à la loi organique du 27 février 2004 portant statut d'autonomie de la Polynésie française, cons. 31.

population mentioned in Article 74 of the Constitution in its new wording”.<sup>43</sup> While retaining the notion of ‘local community’, it is certainly not a question of adopting an APA device based on belonging to a group sharing the same cultural or linguistic heritage, but instead of transposing the Nagoya protocol into this context while retaining its logic. It is possible, in this case, to exclude the criterion of ethnicity and the existence of a blood relationship in order to favour the membership of a territory and a relation to a set of biological resources as well as an associated traditional knowledge of these. The notion of a local community can therefore be seen to be very similar to the idea of a community of inhabitants in the way that it does not base itself on the existence of a community of cultural origin, language, identity or belief. This would, however, represent a paradigm shift since it would be no longer a matter of defining this community in terms of a way of life that is relevant to the conservation and sustainable use of biodiversity and livelihoods that derive from the natural environment, but in terms of territory, biological resources and traditional knowledge, three elements at the very foundation of the Nagoya Protocol.

Thirdly, the notion of ‘local community’ needs to be confronted again in relation to the criterion of origin - in this situation referring to territorial origin. It is not a question, by the use of this notion of local community, of endorsing the existence of a community founded on an identity, but instead of defining one based on a territory and an environment. This should not raise any constitutional problem since the criterion of territorial origin does not emanate from any of the items on the list of prohibited discriminations under Article 1 of the Constitution. The Constitutional Council has since considered a 1995 decision that “the principle of equality does not prevent the legislator from enacting [...] incentives for the development and planning of certain parts of the territory in order to ‘general interest’”.<sup>44</sup> The preservation of biodiversity and the protection of traditional knowledge can of course be associated to such an objective of general interest, whereas territorial origin, as a primary constituent element of a local community, cannot be assimilated into the criterion of ethnic or cultural origin, from the point of view of constitutional review.

To keep in accordance with the principle of constitutionality, the notion of local community cannot be made distinguishable from that of community of inhabitants. It should not by itself establish a specific status undermining

43 Cahiers du Conseil constitutionnel No. 9, Février 2001, <https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/cahiers-du-conseil-constitutionnel-n-9-février-2001>.

44 Decision No. 94-358DC du 26 janvier 1995, Loi d'orientation pour l'aménagement et le développement du territoire, cons. 34.

equality before the law, the indivisibility of the Republic and the uniqueness of the people. This notion reiterates the ZDUC (Zone de Droits d'Usages Collectifs) logic concessions and the transfers which took place in relation to French Guiana; these can be granted to Amerindians but also to any non-autochthonous community. Nevertheless, the notion of local community may still appear unsatisfactory and partial, particularly from the point of view of the defenders of autochthonous peoples, since it ignores all the cultural elements – customs, traditions, structures and cultural or traditional practices – related to the notion of autochthony and likely to identify communities involved in the APA scheme. Above all, it is a question of placing this notion in the context of conservation “of biological diversity and sustainable use [of] biological resources” as noted in the preamble of the CBD. This notion also excludes those communities which are not or are no longer attached to a territory, even though, on this last point, there is every reason to believe that the reference to the notion of aboriginal communities presents exactly the same difficulty. The fact remains that the notion of local community has this essential quality of sticking entirely to the text and substance of the Nagoya Protocol, while being capable of satisfying the requirements of the Constitutional Council's jurisprudence. Therefore, from this perspective, it is far more satisfactory than the notion of community of inhabitants, which it could usefully supplement or for which it could substitute itself.

## 2 Deficiencies and Consolidation of the French System of Access and Benefit Sharing

The difficulties pertaining to the notion of a community of inhabitants cannot be separated from all of the provisions of Title IV of the law for the reconquest of biodiversity, which can definitely be regarded as fading these communities into the APA framework's background. The legislative recognition of the notion of local community, far from being merely formal, enables evolution of the access mechanisms towards genetic resources (A) and traditional knowledge (B), as well as the sharing of benefits resulting from their use.

### 2.1 *The Obliteration of Communities of Inhabitants in access to Genetic Resources and Benefit-sharing Mechanisms Resulting from their Use*

By opting for the notion of a community of inhabitants, the legislator has forced the communities eligible for the APA mechanism towards a certain degree of obliteration, imposing a paradigm shift within the framework of both access to genetic resources (1) and the sharing of benefits resulting from their use (2).



### 2.1.1 Communities of Inhabitants and Local Communities in Access to the Genetic Resources Mechanism

Access to genetic resources emanates from two distinct procedures, depending on whether or not it seeks to achieve a direct objective of commercial development. In the absence of a direct objective of commercial development, access to genetic resources is subject to a declarative procedure with respect to the competent administrative authority (Minister for the Environment, or the regional councils of Guadeloupe and Reunion, the assemblies of Guyana and Martinique, and the departmental council of Mayotte). Conversely, in the presence of a direct objective of commercial development or in the absence of urgency, such access is subject to a procedure of authorisation with respect to this same administrative authority.

The notion of a ‘direct objective of commercial development’, lying at the intersection of these two procedures, is not without tangible difficulties. The National Assembly Committee on sustainable development and planning agreed at the first reading to amend the bill so as to replace the initially used term “direct commercial development intent” with “direct objective of commercial development” on the grounds that “one does not always know what will be found when one undertakes research”.<sup>45</sup> It is definitely right that the result of research is always uncertain, but the substitution of the term “objective” for that of “intention” does little to make this provision less ambiguous. The difficulty of this lies much more in the uncertainty which researchers can claim, not regarding the patentability of their research but regarding the commercialisation of the product that could result from their research. It is therefore possible to prejudge that the concerned parties will consider that the mere filing of a patent does not satisfy the criterion of the direct objective of commercial development, which exclusively is aimed at the marketing of a product.

The consequence would be to allow these researchers to evade, at least initially, the authorisation procedure to confine to the simplified procedure of the declaration.

A further difficulty relates to the implementation of the principles of prior informed consent and mutually agreed terms, which govern access to genetic

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45 Compte rendu No. 74 de la Commission du développement durable et de l'aménagement du territoire, *supra* note 11, p. 11. Un autre amendement a quant à lui vainement proposé qu'« un décret en Conseil d'État définisse les critères de l'objectif direct de développement commercial ». Assemblée nationale, Séance(s) du mercredi 18 mars 2015 Articles, amendements et annexes, Journal officiel de la République Française, Année 2015, No. 36 bis A.N. (C.R.), p. 16.

resources and the sharing of benefits resulting from their use. Under the CBD, these two principles exclusively involve users and States Parties, due to the latter's sovereignty over their natural resources. Articles 6(2) and (3)-f) of the Nagoya Protocol also allow the States Party to take "the necessary measures to ensure that prior informed consent or the agreement and participation of autochthonous and local communities are obtained for access to genetic resources". This is a simple option, entirely subject to the State's sole discretion. Clearly, the law for the reconquest of biodiversity has not fully endorsed this option/power. Certainly, an amendment voted by the senators in the first reading<sup>46</sup> has allowed communities of inhabitants to be associated with the authorisation and declaration procedures to the extent that access to genetic resources takes place in the territory of a local government wherein these communities are present. However, in such a situation, the competent administrative authority must accompany the declaration or authorisation of a simple information procedure for the communities of inhabitants. *A contrario*, during the parliamentary proceedings, the government obstinately refused to allow these communities to benefit from a prior consultation procedure, on the grounds that the Nagoya Protocol confers on the State only the power of whether or not to grant access to genetic resources.<sup>47</sup> However, an amendment voted by the deputies in the first reading enabled the inclusion of an obligation to consult the board of directors of the public institution of the national park of Guyana when access to the genetic resources involves an *in situ* sampling within the park's geographical limits.<sup>48</sup> It is obviously paradoxical that consultation is possible for the board of directors of a national park, while a Kanak clan with a legal personality or an incorporated community of inhabitants of Guyana only has a right to information.

In fact, everything indicates that the legislator has reserved itself the control of the procedure of access to genetic resources because it is prejudged to be the sole proprietor. Demonstrating certain confusion, the rapporteur Geneviève Gaillard underlines that "it is the state that owns property of genetic resources. We cannot, on constitutional grounds, provide a form of sovereignty to certain communities over certain resources".<sup>49</sup> According to a more rigorous

46 Assemblée nationale, Compte-rendu intégral des séances du mercredi 18 mars 2015, pp. 417–418.

47 *Ibid.*, p. 2928.

48 Art. L. 412-8-I alinéa 2 du code de l'environnement.

49 Assemblée nationale, Compte rendu No. 42 de la commission du développement durable et de l'aménagement du territoire, *supra* note 11, p. 24; *see also* Assemblée nationale, Compte-rendu intégral des séances du 16 mars 2016, p. 2053.

formulation, the report on the legal status of genetic resources in domestic law produced in 2007 by the Ad Hoc Working Group on Access and Benefit-sharing reminds that “sovereignty in the field of the Convention competence, especially with regard to access and benefit-sharing, is not synonymous with ownership, but refers to the power of the State to determine the rights of ownership and control, including the right to determine the conditions under which access to genetic resources is granted and how benefits are shared within the territory of the sovereign state”.<sup>50</sup> The domestic legal regime for genetic resources remains particularly blurred, as the law for the reconquest of biodiversity has not made the choice to explicitly consider that these participate not only in sovereign rights but also in public property. Rather than endeavouring to clarify this difficulty, the legislator simply relies on the principle of state sovereignty to exclusively transmit it to the State, not only to determine the conditions under which access to genetic resource rights is granted but also to issue access authorisation, thus setting aside possible private or public owners.

The present difficulty deserves to be overcome by granting in favour of local communities the right to be consulted prior to the decision of the administrative authority, or even direct participation under prior informed consent.<sup>51</sup> Since local communities are inseparable from a distinct and circumscribed territory and a livelihood dependent on biological resources situated in this territory, it is possible to draw inspiration from Article LP.3412–2 of the Code of the Polynesian environment or Article 313–1 of the Environment Code of the Southern Province of New Caledonia, according to which “prior to any harvest, the harvester must obtain the informed consent of the owners of the lands on which the coveted resource is located”. The customary lands in New Caledonia<sup>52</sup> — with which the customary and family land regime in Wallis and Futuna can be associated<sup>53</sup> — proceed from such a logic (with which private

50 Groupe de travail spécial à composition non limitée sur l'accès et le partage des avantages, Rapport relatif au statut juridique des ressources génétiques en droit interne, y compris, le cas échéant, en droit des biens, dans certains pays sélectionnés, UNEP/CDB/WG-ABS/5/5, 30 août 2007, pp. 4–5.

51 Peyen, *supra* note 40, p. 526.

52 R. Lafargue, *La coutume face à son destin* (LGDJ, Paris, 2010), p. 417; R. Lafargue, ‘La coutume judiciaire en Nouvelle-Calédonie’, (2001) <[www.gip-recherche-justice.fr/wp-content/uploads/2014/07/00-38-RF.pdf](http://www.gip-recherche-justice.fr/wp-content/uploads/2014/07/00-38-RF.pdf)>, p. 147, visited in 2018.

53 See E. Rau, *La vie juridique des indigènes des îles Wallis*, Thèse pour le doctorat en droit (Les éditions Domat-Montchrestien, Paris, 1935), p. 199; Sénat, Rapport d'information au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale sur les Îles Wallis et Futuna, 19 novembre 2014, <[www.senat.fr/notice-rapport/2014/r14-103-notice.html](http://www.senat.fr/notice-rapport/2014/r14-103-notice.html)>.

properties can be associated). The situation is more complex in Mayotte, French Polynesia and Guyana (and even in other communities rich in biodiversity), wherein the notion of customary land has no legal existence. Property rules respond here to a classic subdivision between public and private property. The fact remains that in each of these areas, private property, though often bearing the stigma of the colonial system, just like Polynesian 'tomite',<sup>54</sup> can still today constitute a land or a territory specific to an autochthonous community (according to the terms of the Code of the Polynesian environment) or local community. As for the state-owned lands of Guyana, the communities of inhabitants have special mechanisms in the form of collective usage rights areas (ZDUC), concessions and assignments. The object of a ZDUC has remained thus far distant from the issues of the Nagoya Protocol, since it only deals with "the exercise of any activity necessary for the sustenance of these communities", while the benefit of a concession or a deed of assignment is strictly linked to an activity of cultivation, breeding or the need to provide for the habitat of the community. Still, the hypothesis of a redeployment of this mechanism can be raised in order to confer local communities a right of access to genetic resources located on plots of land conceded or assigned. Despite the many difficulties governing the relationship between communities and the land in French Guiana,<sup>55</sup> Articles L.412-7 and L.412-8 of the Environmental Code could authorise local communities to be consulted or to participate directly under the prior informed consent provided, as long as the coveted resources would be on a land on which they have rights. The authority with sovereignty over these genetic resources would not, however, lose its power to issue authorisation for access to those resources, taking into account the consultation or prior consent obtained from the community concerned.

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- 54 Y.-L. Sage, 'Droit foncier en Polynésie française: et si comparaison était (un peu) raison?', in A. Angelo, O. Aimot and Y.-L. Sage (eds.), *Dans Droit foncier et Gouvernance Judiciaire dans le Pacifique Sud* (Laboratoire GDI-UPF, RJP/CLJP Hors Série/Special Issue, Volume XII, 2011) pp. 59–80, <[www.victoria.ac.nz/law/research/publications/about-nzacl/publications/special-issues](http://www.victoria.ac.nz/law/research/publications/about-nzacl/publications/special-issues)>, visited in 2018; Y.-L. Sage, 'Droit foncier en Polynésie française, Bref examen critique et propositions de réformes', *Comparative Law Journal of the Pacific – Journal de droit comparé du Pacifique* (2013) p. 254; T. Bambridge and P. Neuffer, 'Pluralisme culturel et juridique en Polynésie française: la question foncière', 32–33 *Hermès* (2002) pp. 307–315; M. Panoff, *La terre et l'organisation sociale en Polynésie* (Payot, Paris, 1970), p. 286; R. Cochin, *L'application du droit civil et du droit pénal français aux autochtones des Etats d'Océanie* (thèse, Paris, 1949), p. 254.
- 55 A. Tiouka and P. Karpe. 'Droits des peuples autochtones à la terre et au patrimoine', 40:1–2 *Journal d'agriculture traditionnelle et de botanique appliquée* (1998) pp. 611–633.

### 2.1.2 Communities of Inhabitants and Local Communities in Benefit-sharing Modalities Arising from the Use of Genetic Resources

In accordance with Article L412-4-3<sup>o</sup> of the Environmental Code, benefit-sharing must be carried out with the State, because of the State's sovereignty over these resources, and without any intervention from communities of inhabitants. However, Article 5 (2) of the Nagoya Protocol recognises the State's ability to take all measures to "ensure that the benefits derived from the use of genetic resources held by autochthonous and local communities [... are] shared fairly and equitably with these communities on mutually agreed terms". However, this provision formulates only a mere power determined at the State's discretion. The French legislator has been reluctant with respect to such a possibility: not only are communities of people crowded out from mutually agreed terms, they are also ignored in different benefit-sharing modalities, even if the words "population" (without further details), "territory" and "at local level" are mentioned.

The fading of communities of inhabitants in the law regarding the conservation of biodiversity is consistent with the weakness of the criteria which govern this notion. There is no evidence, in the terms used to define it, that such a community may be a holder of genetic resources and, as such, be directly concerned with benefit-sharing. Yet the state sovereignty principle with regard to these natural resources does not impede it from taking the initiative of a consultation or a closer association with the concerned communities to establish mutually agreed terms regarding the use of resources and benefit-sharing. The substitution of the concept of local communities, given its dependence on a territory and the biological resources located thereupon, can be a decisive element for evolution of the benefit-sharing scheme. There is nothing to prevent the latter from endorsing the option offered by Article 5(2) of the Nagoya Protocol, requiring a rephrasing of Article L.412-4-3<sup>o</sup> of the Environment Code in order to explicitly associate the communities. The French device could thus be inspired by the New Caledonian and Polynesian frameworks. In the first case, the owner of the site receives from the user monetary or non-monetary benefits, negotiated between the parties under contract, and intended to preserve or enhance the collected biological resources or traditional knowledge.<sup>56</sup> In the second case, the consent of the local community is formalised in a contract, or even a customary deed when the resource is situated on customary lands. This contract "stipulates financial and non-financial compensation granted in return for access to resources", the sums thus collected being distributed

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<sup>56</sup> Art. LP. 3422-3 du code de l'environnement polynésien.

between the province and the owners of the land wherein harvest takes place, at a rate of 35 per cent for the province and 65 per cent for the owner(s).

However, there is no obligation to alter the established order under Article L412-4-3<sup>o</sup> of the Environment Code, which requires prioritising actions in favour of biodiversity, sustainable development or benefit-sharing. *A contrario*, the instalment of financial contributions, provided for in the last paragraph of this same provision, can never be considered a priority. Besides, in case financial benefits are paid, these must be allocated exclusively to the French Agency for Biodiversity, which is called upon to ensure that they are used in accordance with the non-financial actions previously mentioned, as well as a fair and equitable redistribution for the benefit of ‘overseas biodiversity’, considering “its share in national biodiversity”.<sup>57</sup> Here again, the legislator would have been well inspired to recognise the important part of the local overseas communities in national biodiversity, without this being part of any difficulty.

## 2.2 *The Difficulties of the Mechanism for Access to Traditional Knowledge and the Sharing of Benefits Resulting from their Use*

Traditional knowledge differs from genetic resources in that it directly originates from communities concerned by the APA framework. However, the law for the reconquest of biodiversity again presents some serious difficulties, both with regard to the notion of traditional knowledge (1) and the situation of the inhabitants’ communities and its substitution to that of the local community within the framework of the mechanism for access to traditional knowledge and benefit-sharing resulting from its use (2).

### 2.1.1 The Inadequacies of the Notion of Traditional Knowledge

Despite expressed criticism of the bill,<sup>58</sup> the legislature persisted in defining the notion of traditional knowledge as “a knowledge, innovation or practice held in an ancient and continuous way by one or several communities of inhabitants”. The only change between the bill and the statute enacted on 8 August 2016 concerned the addition of the word “innovations” to those of “knowledge” and “practices”. This amendment, voted by the National Assembly at first reading, sought to bring this provision into conformity with Article 8 (j) of the CBD.<sup>59</sup> Much more than the word “innovation”, the terms “held in an ancient and continuous way” raise an important difficulty. Some parliamentarians attempted

57 Art. L412-8-VI du code de l’environnement.

58 Burelli, *supra* note 14.

59 Assemblée nationale, Compte rendu No. 73 de la Commission du développement durable et de l’aménagement du territoire, *supra* note 11, p. 6.

to draw the government's attention to the fact that the use of these words "is unsatisfactory because this knowledge is less defined by its ancient character than by the origin of its emergence and mode of transmission".<sup>60</sup> With a very different appreciation, the rapporteur Jérôme Bignon considers that "the adjective 'ancient' clearly captures the idea of an accumulation of knowledge over time and a transmission of knowledge in a continuous way between the generations". It is hardly possible to subscribe to Senator Jérôme Bignon's argument, as these terms do not seem to conform to the way in which the notion of traditional knowledge is generally perceived in comparative law and in doctrine.<sup>61</sup> There is no domestic legal text relating to traditional knowledge that refers to the criterion of the length of this knowledge, practices or innovations. Proceeding with a substance identical to that of several doctrinal definitions, most of these texts make the mode of constitution and transmission of this knowledge the primary criteria for identifying and defining traditional knowledge. The legislative distortion of this notion is only the extension of the difficulties governing that of the community of inhabitants. This testifies to the atypical and outdated character of the French transposition model of the Nagoya Protocol, since traditional knowledge must necessarily be considered as an old and past element. As the notion of traditional knowledge is essential to that of the local community, it is necessary to restore the full dynamic and associate it with a definition inspired by the World Intellectual Property Organization draft articles resulting from the 31st session of 2017, which refer to

knowledge that is created, preserved and [...] developed by local communities and is directly [...] related to the cultural heritage [...] of local communities; which are transmitted from generation to generation, whether or not consecutively; which subsist in a codified, oral or other form; and which can be dynamic and evolving and can take the form of know-how, techniques, innovations, practices, teaching or learning.

60 Sénat, *Compte rendu intégral de la séance du 20 janvier 2016*, Journal Officiel de la République Française, Année 2016, No. 5 S. (C.R.) p. 413; see in the same perspective: *Assemblée nationale, Compte rendu intégral de la séance du mercredi 16 mars 2016*, Journal Officiel de la République Française, Année 2016, No. 28 A.N. (C.R.), p. 2054.

61 F. Berkes, 'Traditional ecological knowledge in perspective', in J.T. Inglis (ed.), *Traditional Ecological Knowledge: Concepts and Cases* (International Program on Traditional Ecological Knowledge and International Development Research Centre, Ottawa, 1993) pp. 1–9, <[library.umac.mo/ebooks/b10756577a.pdf](http://library.umac.mo/ebooks/b10756577a.pdf)>; G. Dei, 'Sustainable development in the African context: Revisiting some theoretical and methodological issues', *Africa Development / Afrique et Développement* 18:2 (1993) pp. 97–110.

Following the same atypical nature, the legislator has chosen to exclude “traditional knowledge associated with genetic resources that cannot be attributed to one or several communities of inhabitants” from the scope of the APA (Article L.412-5-I e of the Environment Code). Once more, these two provisions have been the subject of sharp criticism in the context of parliamentary debates. Nothing prevents protecting access and use of traditional knowledge whose initial community holder would no longer be identifiable. This hypothesis was put forward successively by Senator Philippe Madrelle and MP Bertrand Pancher, who proposed to replace a state body to the community of inhabitants in the procedure of access and benefit-sharing.<sup>62</sup> This hypothesis is very much within the spirit of Article 10 of the Nagoya Protocol, according to which “the parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of [...] benefits for which it is not possible to grant or obtain prior informed consent”.

Article L.412-5-I (f) of the Environmental Code also excludes, from the scope of the law of 8 August 2016, the “traditional knowledge associated with genetic resources whose properties are well known and have been used for a long time and repeatedly outside the communities of people who share them”. By such a provision, there is a question of clearing any risk of litigation on the researches prior to the law of 8 August 2016 and having consisted of an appropriation of a traditional knowledge without prior consent of the community from which this knowledge is indissociable and without any form of benefit-sharing resulting from this activity. One would be tempted to plead clumsiness but, as recalled in the explanatory memorandum, everything suggests that the intention of the legislator in this case proceeds from the need to secure the activities of research organisations in their activities related to genetic resources and traditional knowledge and not a complete will to provide legal protection for the relationship between these communities and biodiversity and their traditional knowledge.

### 2.3 *Communities of Inhabitants and Local Communities in the Mechanism for Access to Traditional Knowledge and Benefit-sharing Resulting from their Use*

Despite the possibility offered by Article 7 of the Nagoya Protocol, the French legislature has not chosen to place the concerned communities at the core

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62 Sénat, Compte rendu intégral de la séance du 21 janvier 2016, Journal Officiel de la République Française, Année 2016, No. 6 S. (C.R.), p. 413; Assemblée nationale, Compte-rendu intégral des séances du 16 mars 2016, p. 2055.



of the mechanism for access to traditional knowledge, preferring instead to replace them with a legal person of public law. Already in charge of the procedure for informing these same communities in the context of access to genetic resources, this legal person under public law must, after identifying the community of inhabitants holding the traditional knowledge that is the subject of the requested access, organise the information and then the consultation resulting from it. At the end of this consultation procedure, the legal person must record, in minutes, the progress of the consultation and its result; whether or not the prior consent to the use of traditional knowledge was obtained; the conditions of use of this knowledge and whether or not there is an agreement on how to use traditional knowledge and how to share its benefits.<sup>63</sup> Accordingly, the legislator took great care to specify in Article L.412-9-I. of the Environmental Code that “the use of traditional knowledge associated with genetic resources is subject to authorization, which can only be granted at the end of the procedure [aimed at] obtaining the prior, informed consent of the concerned communities of inhabitants”. However, the negotiating and signing competence with the user of the benefit-sharing contract is the sole responsibility of the only legal person of public law,<sup>64</sup> while the Minister for the Environment, the Regional Council of Guadeloupe or Reunion, the Assembly of Guyana or Martinique or the Departmental Council of Mayotte have the exclusive power to grant or refuse the use of traditional knowledge.

Such a system has visible deficiencies, particularly considering the place given to communities of inhabitants in the process of access and authorisation to use their own traditional knowledge. From the first reading, some deputies unsuccessfully attempted to amend the wording of the bill so as to “ensure that communities of inhabitants, that have initially developed traditional knowledge and skills, are involved in all stages of negotiation, including the signing of the APA contract”.<sup>65</sup> On the contrary, according to the rapporteur Geneviève Gaillard, on the one hand, “without having a legal personality, a community of inhabitants cannot sign a contract” and on the other hand, “such a provision would also contravene the constitutional principle of unity and unicity of the French people”.<sup>66</sup> However, it must be noted that the first argument is entirely erroneous, as already stated: the Kanak clans already have legal personality,

63 Art. L.412-11 du code de l'environnement.

64 *Ibid.*

65 Amendments No. CD577 and No. CD580, presented by Mme Auroi, M. Baupin, M. François-Michel Lambert and Mme Abeille, Assemblée nationale, Compte rendu No. 73 de la Commission du développement durable et de l'aménagement du territoire, *supra* note 11, pp. 18 and 20.

66 *Ibid.*

while nothing prevents other communities from forming associations, foundations or societies, as in the case of the system implemented in French Guiana. As for the second argument, there is no reason to consider that recognition, for the benefit of a community of inhabitants having legal personality, of the right to be associated with the negotiation and signing of a contract is undermining the principle of the unicity of the French people. The right for a legal entity, qualified as a community of inhabitants, to negotiate and sign a contract has nothing that could undermine such a constitutional principle.

In the absence of a direct participation of the communities of inhabitants, the parliamentarians also unsuccessfully attempted to make the opinion of the consulted community an assent. The expression ‘in view of’ the minutes, governing at the same time the signature of the benefit-sharing contract by the legal person of public law and the issuance by the administrative authority of the authorisation of access to traditional knowledge, could be assimilated to a simple visa. The parliamentarians proposed to replace this phrase with the following expression: “In accordance with the prior consent and the conditions recorded in the minutes”. Here again, the unfavourable opinion of the rapporteurs and the Government is surprising, since it is argued that “with such wording, [the legal person of public law] would be strictly bound to the opinion of the communities, which amounts to granting them a collective right. This goes against the principle of indivisibility of the French people, which again raises the risk of unconstitutionality”.<sup>67</sup> Nothing, however, in the jurisprudence of the Constitutional Council suggests that the principle of the indivisibility of the Republic or the unicity of the French people prohibits the existence of collective rights. As to the impossibility of consultation in the form of assent, it is possible to refer the legislator to Article 72-1 of the Constitution, which authorises local and regional authorities to submit to the decision of the voters, by referendum, draft deliberation or act within its competence.

It is regrettable that the situation of the communities of inhabitants did not garner further attention from the parliamentary majority. At the very most, there is a sign of an evolution of the bill in order to make it clear that the structures of representation likely to be solicited in the context of the consultation phase must be of a ‘customary or traditional’ nature. Senators demanded that these same representative structures be systematically handed a copy of the

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67 Sénat, *Compte rendu intégral de la séance du 21 janvier 2016*, p. 441, Assemblée nationale, *Compte rendu intégral de la séance du mercredi 16 mars 2016*, p. 2063; Sénat, *Compte rendu intégral de la séance du 11 mai 2016*, *Journal Officiel de la République Française*, Année 2016, No. 46 S. (C.R.), p. 7423.

minutes.<sup>68</sup> The text of the bill has also been amended to allow the Consultative Council of Amerindian and Bushinengue Populations of Guyana to be incorporated as a public-law entity with a view to organising the consultation of the communities of inhabitants holding traditional knowledge.<sup>69</sup> These few developments remain well below what could have been envisaged under the transposition of the Nagoya Protocol, Article 12 which, by the way, invites State Parties to take into account the customary laws of communities and their protocols and procedures for all traditional knowledge associated with genetic resources and encourages these communities to develop their own community protocols.

Although it is stated that “the benefits arising from the use of traditional knowledge associated with genetic resources are allocated to projects directly benefiting the communities of inhabitants concerned [and] conducted in consultation and with the participation of communities of inhabitants”,<sup>70</sup> nothing in the French model shows any concern for placing communities of inhabitants at the forefront of the mechanism of access to their own traditional knowledge. It is certain, however, that direct intervention by local communities in terms of access and benefit-sharing and the possibility for them to directly discuss and negotiate with users without intermediaries conditions the existence of a relationship of trust. In the absence of such a relationship of trust, access to such knowledge remains particularly uncertain. However, it is an antagonistic choice made by the French legislator, placing the communities of inhabitants in a situation of incapacity or infantilisation, under the tutelage of a moral person of public law regarding the access to the traditional knowledge and the authorisation to use them. Such an imbalance portends serious difficulties in the application of the APA system, especially as the implementing decrees provided for in Article L.412-10 of the Environmental Code and aimed at designating these legal entities as public law has not yet been published.<sup>71</sup> It is therefore logical to consider that this legal person under public law has no place to be, both in terms of informing communities in the

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68 Sénat, *Compte-rendu intégral de la séance du 11 mai 2016*, p. 7422.

69 Assemblée nationale, *Compte rendu No. 42 de la Commission du développement durable et de l'aménagement du territoire*, *supra* note 11, p. 23.

70 Art. L.412-9-11 du code de l'environnement.

71 Assemblée nationale, *Rapport d'information du 20 juin 2018 déposé par la commission du développement durable et de l'aménagement du territoire sur la mise en application de la loi No. 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages*, *supra* note 11, p. 128.

context of access to genetic resources and in terms of consulting these same communities in the context of access to traditional knowledge.

Instead, it is fundamental to ensure that local communities have the right to agree on the terms of use and benefit-sharing, as well as the right to prior informed consent. The French system would thus fully subscribe to the possibility offered by Article 7 of the Nagoya Protocol, placing it at the same level as the French Polynesia and the Southern Province of New Caledonia.<sup>72</sup> This does not undermine the power of the state authority or the community concerned to issue the access authorisation for traditional knowledge, even if the decision must be conditioned by the prior consent of the concerned community. Finally, the State authority remains fully competent for the registration of authorisations and declaration receipts in the clearing-house mechanism on access and benefit-sharing<sup>73</sup> and to enforce sanctions for breach of access and benefit-sharing rules.<sup>74</sup>

The idea of involving local communities in decisions on genetic resources and traditional knowledge is a matter of some sense when considering, above all, that the preservation of biodiversity relies first and foremost on those whose very existence is based on the land they occupy, as well as the natural resources and traditional knowledge that are inseparable from it. The legislator, fully absorbed by the risk of unconstitutionality weighing on the notion of (autochthonous) people and at the risk of clearing the APA system of all effectiveness, failed to consider that this was not only a notion specific to environmental law but also a device simply oriented towards the preservation of biodiversity.

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72 In the same perspective, *see* Law No. 482/2006 of 27 February 2006 relating to access to community resources and knowledge and community rights (Arts. 6 and 7) or the Peruvian Law No. 27811 of 10 August 2002 introducing a protection regime for the collective knowledge of autochthonous peoples associated with biological resources (Article 6).

73 Art. L.412-17-11 du code de l'environnement.

74 Art. L.415-3-1 du code de l'environnement.