Biocultural Community Protocols and Conservation Pluralism

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Abstract

Despite an increase in the number and scope of rights enshrined at the international and national levels, States' obligations vis-à-vis communities are often unfulfilled at the local level. Communities face inherent challenges when engaging with legal and policy frameworks that undermine their ability to ensure their local self-determination. Rights-based approaches to conservation are an attempt to address this issue, but remain a limited response if communities are not empowered to engage with implementing and other agencies as equal partners. By integrating legal empowerment with endogenous development processes, communities are better placed to overcome a variety of challenges associated with engaging with government agencies, researchers, and non-governmental organizations. Biocultural community protocols are community-led, rights-based instruments that enable communities and their local institutions to affirm their right to self-determination in ways commensurate with their values, customary laws, and traditional institutions. They also provide a means for communities to advocate for their right to diversity, including respect for their customary laws (in essence, legal pluralism) and rights to manage their territories according to their customary knowledge, innovations, and practices (in essence, conservation pluralism).

Four seemingly unrelated events have taken place in separate parts of the world over the last 12 months. The Raika community filled the streets of Sadri, Rajasthan, India, to protest their arbitrary exclusion from the Kumbalgarh Forest and to call for the reinstatement of their customary grazing rights for their livestock.[2] In Mpumalanga, South Africa, a group of traditional healers engaged in multi-stakeholder dialogue to discuss their proposals about how to conserve endemic medicinal plants and protect their traditional knowledge.[3] In Copenhagen, Denmark, a procession of local community and non-governmental organization (NGO) representatives marched through the last climate Conference of the Parties, chanting the slogan, "No Rights, No REDD!"[4] In Cochabamba, Bolivia, the World People's Conference on Climate Change culminated with a draft proposal for the Universal Declaration on the Rights of Mother Earth.[5]

Despite their geographic dislocation, these otherwise disparate events are intrinsically related. Collectively, they represent a growing moral and legal claim of Indigenous peoples and local and mobile communities[6] to the right of self-determination[7], to manage their natural resources according to their customary values, and to ensure that any environmental laws and policies respect their rights to decide whether, how, and by whom the laws will be implemented. These events are part of

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2 Sebastian, S., July 26, 2010. "Raikas demand grazing rights in forest land". Hindu Times. Last accessed August 4, 2010, at: http://www.hindu.com/2010/07/26/stories/2010072658320500.htm. For more information about the Raikas' struggle for recognition of their grazing rights, see Lokhit Pashu-Palak Sanstan (no date). Last accessed August 4, 2010, at: http://www.lpps.org.

3 On September 6, 2010, the Bushbuckridge Traditional Health Practitioners Association engaged in first-round negotiations with Silk SA, a company also based in the UNESCO Kruger to Canyons Biosphere Region. Last accessed September 7, 2010, at http://natural-justice.blogspot.com/2010/09/bushbuckridge-traditional-health.html.

4 "REDD" is an acronym for Reducing Emissions from Deforestation and Forest Degradation in Developing Countries. One of the authors was involved in this impromptu protest at the 15th Conference of the Parties of the United Nations Framework Convention on Climate Change in Copenhagen, Denmark. Last accessed August 4, 2010, at: http://www.iisd.ca/climate/cop15.

5 See "Rights of Mother Earth". Last accessed August 4, 2010, at: http://pwccc.wordpress.com/programa/.

6 Hereinafter referred to as 'communities'.

7 The right to self-determination is enshrined in the common Article 1 of the 1966 International Covenant on Civil and Political Rights (CCPR) and 1966 International Covenant on Economic, Social and Cultural Rights (CESCR), as well as Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples.

a global movement[8] calling for alternatives to the dominant development model, the latter of which has neither banished poverty nor solved world hunger, but continues to drive widespread biodiversity loss and climate change.[9] The events also highlight two critical sites of struggle towards a new conservation paradigm: at the national and international legislative and policy-making level, where positive laws are made, and at the community level, where the law is implemented.

International Rights and Local Wrongs

Two major international environmental legal instruments are currently being negotiated under the auspices of their respective United Nations (UN) Conventions that will have far-reaching implications for communities: the (Nagoya) Protocol on Access and Benefit Sharing (ABS)[10] and the programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD).[11] Communities are struggling to fully and effectively participate in both sets of negotiations to ensure that the consequent international instruments provide communities with critical safeguards such as the right to free, prior and informed consent to any activities that take place on their territories or will affect their ways of life.

International rights are far from a panacea against local disempowerment or the denial of procedural and substantive justice.

Ensuring that communities' rights are enshrined in international and national laws is of paramount importance to ensuring respect and support for biocultural diversity[12] at the local level. As such, communities and their representatives are compelled to engage with the negotiations of multilateral environmental agreements and their protocols and other soft-law instruments. Yet the harsh paradox is that even when hard-fought negotiations result in communities' rights being enshrined in law, their local effects are often muted because of the complex socio-political contexts within which communities live.[13] For example, Linda Siegele *et al.* detail a plethora of rights relating to communities across a range of hard and soft law instruments.[14] Their exhaustive review, including multilateral environmental agreements, human rights instruments, UN agencies' policy documents, and International Union for Conservation of Nature (IUCN) resolutions, illustrates the scale of communities' rights agreed at the international level. However, their telling conclusion is that "good policy is just a starting point – good practice is more difficult to achieve."[15] Similarly, Lorenzo Cotula and James Mayers highlight the gap between what is "on paper" and what happens in practice in the context of local land tenure and REDD projects[16]. They underscore the fact that despite a growing international recognition of communities' rights to self-determine their futures and manage their natural resources,[17] international rights are far from a panacea against local disempowerment or the denial of procedural and substantive justice.

In efforts to secure their rights over natural resources and traditional knowledge and protect their ways of life, communities continue the international struggle for the recognition of their rights across a number of legislative and policy frameworks.[18]

8 Escobar, A., 1998. "Whose Knowledge, Whose Nature? Biodiversity, Conservation and the Political Economy of Social Movements". *Journal of Political Ecology*, 5: 53-82.
9 Secretariat of the Convention on Biological Diversity, 2010. *Global Biodiversity Outlook 3*. Secretariat of the Convention on Biological Diversity: Montreal, Canada.
10 The Protocol on ABS is expected to be adopted at the 10th Conference of the Parties of the United Nations Convention on Biological Diversity from October 18-29, 2010, in Nagoya, Japan. For more information, see Tobin, B., 2010. "'The Law Giveth and the Law Taketh Away': The Case for Recognition of Customary Law in International ABS and Traditional Knowledge Governance", pages 16-25 in this issue of Policy Matters.
11 REDD is expected to be further discussed at the 16th Conference of the Parties of the United Nations Framework Convention on Climate Change from November 29-December 10, 2010, in Cancún, Mexico. For more information, see Lovera, S., 2010. "Rights and REDD: Can They Be Matched?", pages 40-47 in this issue of Policy Matters.
12 Maffi, L., and E. Woodley, 2010. *Biocultural Diversity Conservation: A Global Sourcebook*. Earthscan: UK.
13 For example, see Nelson, F., 2010. "Conservation and Citizenship: Democratizing Natural Resource Governance in Africa", pages 233-241 in this issue of Policy Matters.
14 Siegele, L., D. Roe, A. Giuliani, and N. Winer, 2009. "Conservation and Human Rights, Who Says What?", pages 47-76 in Campese, J., T. Sunderland, T. Greiber, and G. Oviedo (eds.), *Rights-based Approaches: Exploring Issues and Opportunities for Conservation*. CIFOR and IUCN: Bogor, Indonesia.
15 Siegele *et al.*, 2009, page 69.
16 Cotula, L., and J. Mayers, 2009. *Tenure in REDD – Start-point or afterthought?* Natural Resource Issues No. 15. International Institute for Environment and Development (IIED): London, UK, page 23.
17 For example, see Morel, C., 2010. "Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya". *Housing and ESC Rights Law Quarterly*, 7(1). Last accessed July 14, 2010, at: http://www.cohre.org; and Morel, C., 2010. "Conservation and Indigenous Peoples' Rights: Must One Necessarily Come at the Expense of the Other?", pages 174-181 in this issue of Policy Matters.
18 For example, see the latest round of the Interregional Negotiating Group of the Ad Hoc Open-ended Working Group on Access and Benefit Sharing, held September 18-21, 2010, in Montreal. Last accessed September 22, 2010, at: http://www.iisd.ca/biodiv/absing.

However, international advocacy must be augmented by the improved exercise of rights at the local level. There is a legal maxim that there is no right without a remedy[19]; equally, an international right without local effect is no right at all. Before addressing legal empowerment and rights-based approaches to conservation, a critique of positive (national and international) law from the community perspective illustrates certain inherent challenges.

Figure 1. The livelihoods of Samburu pastoralists in Kenya are inextricably based on the interlinkages between their livestock, culture, and local biodiversity. © Harry Jonas

Biocultural Diversity and the Law

Indigenous peoples' and local and mobile communities' diversity of worldviews, cultures, and ways of life are helping to conserve and sustainably use the world's biological diversity.[20] Biological diversity cannot be seen as separate from cultural and linguistic diversity, as "the diversity of life in all its manifestations … are interrelated (and likely co-evolved) within a complex socio-ecological adaptive system."[21] The multiplicity of interrelated knowledge, innovations, practices, values, and customary laws[22] are embedded within mutually supporting relationships between land, natural resource use, culture, and spirituality.[23] This connectivity underpins communities' dynamic worldviews and understandings of the laws of nature.[24]

Within this context, communities face a number of inter-related challenges when engaging with positive (State) legal systems. Three in particular have ramifications for communities seeking to assert their rights to self-determination and well-being. First, laws compartmentalize the otherwise interdependent aspects of biocultural diversity by drawing legislative borders around them and addressing them as distinct segments. While communities manage integrated landscapes,[25] the State tends to view each resource and associated traditional knowledge through a narrow lens, implementing corresponding laws through agencies that separately address, for example, biodiversity, forests, agriculture, and Indigenous knowledge systems.[26] The result is that communities' lives are disaggregated in law and policy, which effectively fragments their claims to self-determination into specific issue-related sites of struggle.

The multiplicity of communities' traditions and values that are embedded within land, resource use, and culture underpins their understandings of the laws of nature.

In addition to the challenge of legal fragmentation, the law affects the very nature of whom or what is defined as 'community'. In general, people have a variety of ways of establishing who is a member of a family or community and who is an outsider. Communities may define

19 This maxim is written in Latin as *Ubi jus ibi remedium*. Constitution Society, 2009. "Principles of Constitutional Construction". Last accessed August 4, 2010, at: http://www.constitution.org/cons/prin_cons.htm.
20 Maffi and Woodley, 2010.
21 Maffi, L., 2010. "What is Biocultural Diversity", pages 3-12 in Maffi and Woodley, 2010, page 5.
22 This is also referred to as 'collective biocultural heritage', which is the knowledge, innovations, and practices of Indigenous peoples and local and mobile communities that are "collectively held and inextricably linked to traditional resources and territories, local economies, the diversity of genes, varieties, species and ecosystems, cultural and spiritual values, and customary laws shaped within the socio-ecological context of communities." This definition was developed at a workshop of research and Indigenous partners of the project on Traditional Knowledge Protection and Customary Law that was held in Peru in May, 2005. See Swiderska, K., 2006. *Banishing the Biopirates: A New Approach to Protecting Traditional Knowledge*, Gatekeeper Series 129. IIED: London. Also see IIED, 2010. "Protecting community rights over traditional knowledge". Last accessed August 24, 2010, at: http://www.iied.org/natural-resources/key-issues/biodiversity-and-conservation/protecting-community-rights-over-traditio.
23 See, for example, Descola, P., 1992. "Society of Nature and the Nature of Society", pages 107-157 in Kuper, A. (ed.), *Conceptualizing Society*. European Association of Social Anthropologists, Routledge: London.
24 See, for example, Davidson-Hunt, I., and F. Berkes, 2003. "Learning as You Journey: Anishinaabe Perception of Social-ecological Environments and Adaptive Learning". *Conservation Ecology*, 8(1): 5-26; and Alexander, M., P. Hardinson, and M. Arhen, 2009. *Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law, CBD Information Document prepared for the 7th Meeting of the Ad Hoc Open-ended working Group on Access and Benefit Sharing*. UNEP/CBD/WG-ABS/7/INF/5, page 9.
25 Watson, A., L. Alessa, and B. Glaspell, 2003. "The Relationship Between Traditional Ecological Knowledge, Evolving Cultures, and Wilderness Protection in the Circumpolar North". *Conservation Ecology*, 8(1): 2-15.
26 In South Africa, for example, the Department of Environmental Affairs has a mandate to manage the country's biodiversity, but they share responsibility to protect communities' associated traditional knowledge with the Department of Science and Technology.

themselves in a number of different ways and in different contexts, based on multiple factors such as heritage, ethnicity, language, geographical proximity, and shared resources or knowledge.[27] State law, however, is insensitive to local, adaptive conceptions of community and tends to impose an over-generalized and homogeneous classification as a static and rigidly defined entity. This contradicts local realities and can further divide and weaken local institutions and social structures.[28] However, this challenge can be overcome by using the law as the basis for adding a new dimension to local constructions of community that progresses the right to self-determination. For example, in Bushbuckridge, South Africa, a group of traditional healers spread across a large number of villages and from two different language groups came together to define themselves as a community of knowledge holders[29] in the context of new rights provided under South African ABS law.[30] Although this type of law tends to place a disproportionate emphasis on the sharing of traditional knowledge as the means by which to characterize a community[31], the Bushbuckridge Traditional Health Practitioners are using its provisions to create and occupy a new legal space, within which they are asserting their rights to traditional knowledge and customary practices. All communities are dynamic and issues of self-definition and fluid identity are neither new to traditional communities nor inherently destructive to their social structures. The critical determinant is whether they are able to engage adequately with legal and policy processes to avoid potential negative impacts of change and drive positive developments according to their own values and priorities.[32]

The disaggregation of communities' lives through law and policy fragments their claims to self-determination into issue-specific sites of struggle.

As a third and cross-cutting challenge inherent to engaging with legal frameworks, positive law (both international and State) may conflict with the customary laws that govern communities' sustainable use of natural resources.[33] For example, the understanding of 'property' under positive law is based on the private rights of a person (human or corporate) to appropriate and alienate physical and intellectual property. In contrast, communities' property systems tend to emphasize relational and collective values of resources.[34] Furthermore, the implementation of positive law tends to overpower and contravene customary law. A system that denies legal pluralism[35] has direct impacts on communities' lives, for example, by undermining the cultural practices and institutions that underpin sustainable ecosystem management.[36] While recognition of communities' customary laws and traditional authority over resources is progressing in some jurisdictions,[37] the challenge of legal pluralism goes beyond the mere co-existence of legal regimes, wherein customary law is applicable only to Indigenous peoples within their territories. Instead, meaningful legal pluralism requires "incorporation directly or indirectly of principles, measures and mechanisms drawn from customary law within national and international legal regimes for the protection of traditional knowledge."[38]

Legal pluralism goes beyond the mere co-existence of legal regimes and requires the incorporation of aspects of customary law into national and international law.

27 Agrawal, A., and C. C. Gibson, 1999. "Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation". *World Development*, 27(4): 629-649.
28 Bosch, D., 2003. "Land Conflict Management in South Africa: Lessons Learned from a Land Rights Approach". Last accessed August 4, 2010, at: http://www.fao.org/docrep/006/j0415t/j0415t0a.htm.
29 For more information about the Traditional Health Practitioners of Bushbuckridge, including a copy of their biocultural community protocol, see Natural Justice, 2010. Last accessed August 4, 2010, at: http://www.naturaljustice.org.
30 Bioprospecting, Access and Benefit Sharing Rules, 2008. *Government Gazette* No. 30739, February 8, 2008. Department of Environmental Affairs and Tourism, Pretoria, South Africa.
31 For example, the San and Nama in Southern Africa share ethnobotanical knowledge of the Hoodia succulent. See Bavikatte, K., H. Jonas, and J. von Braun, 2009. "Shifting Sands of ABS Best Practice: Hoodia from the Community Perspective". United Nations University Traditional Knowledge Initiative. Last accessed August 4, 2010, at: http://www.unutki.org/default.php?doc_id=137.
32 Cotula, L., and P. Mathieu (eds.), 2008. *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa*. IIED: London, page 10.
33 Cotula and Mathieu, 2008, page 11.
34 Tobin, B., and E. Taylor 2009. "Across the Great Divide: A Case Study of Complementarity and Conflict Between Customary Law and TK Protection Legislation in Peru". *Initiative for the Prevention of Biopiracy*, Year IV: 11, page 10. Such systems have been described as "...commonly characterized by collective ownership (where the community owns a resource, but individuals may acquire superior rights to or responsibilities for collective property), and communal ownership (where the property is indivisibly owned by the community)." See Tsosie, R., 2007. "Cultural challenges to biotechnology: Native American cultural resources and the concept of cultural harm". *Journal of Law, Medicine & Ethics*, 35: 396, cited in Tobin and Taylor, 2009, page 36.
35 This type of system could be referred to as legal monoculture.
36 Sheleef, L., 2000. *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*. Frank Cass: London, England, and Portland, Oregon.
37 Van Cott, D., 2000. "A Political Analysis of Legal Pluralism in Bolivia and Colombia". *Journal of Latin American Studies*, 32: 207-234.
38 Tobin, B., 2009. "Setting Traditional Knowledge Protection to Rights: Placing Human Rights and Customary Law at the Center of Traditional Knowledge Governance", pages 101-115 in Kamau, E., and G. Winer (eds.), *Genetic Resources, Traditional Knowledge and the Law. Solutions for Access and Benefit Sharing*. Earthscan: UK, page 111. This is arguably a huge challenge and most States are a long way from incorporating Indigenous worldviews into legal and policy frameworks.

These three challenges, among others, highlight the fact that the imposition of international and national environmental laws, which are inherently fragmentary and based on static misperceptions of local realities, has the potential to undermine the interconnected and adaptive systems that underpin biocultural diversity. The implementation of such laws compounds these challenges by requiring communities to engage with disparate stakeholders[39] according to a variety of disconnected regulatory frameworks, many of which may conflict with their customary laws and traditional governance structures. Communities thus face a stark choice to either spurn these inherently limited frameworks (something which is a virtual impossibility considering the ubiquitous nature of State law) or engage with them at the potential expense of becoming complicit in the disaggregation of their otherwise holistic ways of life and governance systems. If the latter is chosen, the resultant challenge is for communities to draw upon and further develop appropriate means to effectively engage with State and international legal and policy frameworks, specifically in ways that accord with their biocultural heritage, support their integrated systems of ecosystem management, are commensurate with their customary laws, and recognize traditional forms of governance. In the absence of such approaches, the very act of using rights can be disempowering and disenfranchising.[40]

Figure 2. *Gunis* (traditional healers) in Rajasthan have cultural and spiritual values and duties that underpin their use of medicinal plants and the sharing of their knowledge. © Harry Jonas

Rights-based Approaches and Pluralism in Conservation

Rights-based approaches are being promoted as a means to ensure that conservation policy and practice support communities' rights to self-determination and well-being[41] and promote social, cultural, and environmental justice.[42] Such approaches are described as "integrating rights norms, standards, and principles into policy, planning, implementation, and outcomes assessment to help ensure that conservation practice respects rights in all cases, and supports their further realization where possible."[43] They are based on the principle that communities are not merely stakeholders whose views governmental and conservation agencies may take into account, but are rights-holders to whom implementing agencies have statutory obligations. In addition, every right is accompanied by responsibilities and duties to the self and to other individuals and collectives.[44] Communities may take this principle even further by acknowledging their duties to specific plants, totemic animals, or all of Mother Earth.[45] Rights-based approaches must thus acknowledge not only the rights of all parties (including communities) under both positive and customary law, but also their duties.[46] Such an understanding of the fundamental nature of rights ensures that rights-based approaches to conservation are not simply defensive demands by marginalized groups, but are commitments to work constructively towards consensus on the basis of mutual recognition of parties' respective rights and duties.

The integrity[47] of rights-based approaches must be ensured both within institutions and within communities. At the

39 Examples include government agencies, conservation and development NGOs, private sector companies, and researchers.

40 This is also supported by anecdotal evidence by public interest lawyers such as Fatima Hassan (former senior attorney, AIDS Law Project, South Africa) who argues that even when ordinary people do use the law and engage legal systems, the process is often both disempowering because of the asymmetrical "lawyer-client" relationship and dehumanizing because of the Kafkaesque nature of legal proceedings.

41 Reflecting Principle 1 of the Declaration of the United Nations Conference on the Human Environment (Stockholm, June 16, 1972): "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being". Last accessed August 4, 2010, at: http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503.

42 Notably, the environmental justice movement represents "an integration of civil rights and environmental laws that may aptly be described as a quest for environmental civil rights." Roberts, R. G., 1999. "Environmental Justice and Community Empowerment, Learning from the Civil Rights Movement". *American University Law Review*, 48: 229-260, page 232. Also see Greiber, T. (ed.), 2009. *Conservation with Justice: A Rights-Based Approach*. IUCN: Gland, Switzerland, page 2.

43 Campese, J., T. Sunderland, T. Greiber, and G. Oviedo (eds.), 2009. *Rights-based approaches: Exploring Issues and Opportunities for Conservation*. CIFOR and IUCN: Bogor, Indonesia, page 8.

44 In her seminal World War II-era work, Simone Weil argues that rights only exist in relation to corresponding duties and obligations, which transcend the world of competing interests in the pursuit of justice. See Weil, S., 2001. *The Need for Roots: Prelude to a Declaration of Duties Towards Mankind, 2nd edition*. Routledge Classics: UK.

45 Martin, J., and E. Inns, 2010. "Totem poles as a representation of natural law of Indigenous peoples of Clayoquot Sound". *Endogenous Development Magazine*, 6: 15.

46 This may be described as a duties-based approach.

47 For an in-depth discussion of the concept of integrity as it applies to the environment and justice, see Westra, L., 2005. "Ecological Integrity",

institutional level, implementing agencies must improve their understanding of communities' rights and duties and instate measures to ensure that their actions accord with the standards and procedures established by customary, national, and international laws. The Conservation Initiative on Human Rights (CIHR) is a good example of the institutional change that is being undertaken by a consortium of international conservation NGOs that seek to improve the practice of conservation through the integration of human rights.[48] The commitment shown by these organizations is commendable and necessary, but constitutes only part of the multifaceted approach that is required to enact institutional change in policy and practice. The ability of communities to engage as equals in the implementation of environmental laws is also critically important, and legal empowerment is one contributing factor to this transformation.[49]

Rights-based approaches are not simply defensive demands, but constructive commitments to work towards consensus on the basis of mutual recognition of parties' respective rights and duties.

The need for legal empowerment in the context of rights-based approaches can be illustrated with reference to the IUCN Environmental Law Centre's stepwise approach.[50] This graduated method encourages implementing agencies to ensure that any measures undertaken towards conservation and climate change mitigation are in accordance with stakeholders' rights by following five steps, namely: undertaking a situation analysis; providing information; ensuring participation; taking reasoned decisions; and monitoring and evaluating the implementation of the rights-based approach. The approach provides clear guidance to implementing agencies, but arguably risks being considered a replacement for the independent empowerment of communities.

For example, Element 2 of the Convention on Biological Diversity's Programme of Work on Protected Areas (PoWPA), which addresses governance, participation, equity, and benefit sharing, establishes procedural and substantive standards for States to involve communities in protected areas. Parties are called on, *inter alia*, to "effectively involve indigenous and local communities, *with respect for their rights consistent with national legislation and applicable international obligations*, and stakeholders at all levels of protected areas planning, establishment, governance and management, with particular emphasis on identifying and removing barriers preventing adequate participation."[51] PoWPA's reference to 'effective' involvement, like IUCN's emphasis on 'ensuring' participation, is a subjective term influenced by complex political and social dynamics at the State and local level.[52] Full and effective involvement and participation are not just rights to be ensured by top-down processes, but are also contingent upon empowered communities engaging with implementing agencies as equal but distinct partners. Similarly, IUCN's stipulation that communities are provided information (the lack of which is one of the "barriers preventing adequate participation" noted by PoWPA Activity 2.2.2.) is important, but not as meaningful as communities knowing which information to ask for, obtaining it, and conducting their own processes to formulate and assert their views about and involvement in any proposed protected area. The oft-cited right of communities to provide free, prior and informed consent[53] must also entail the right to refuse to provide such consent; only then could their subsequent involvement in the governance and management of protected areas have local integrity.

Towards the goal of improving equity and benefit sharing, PoWPA also calls on Parties to establish "policies and institutional mechanisms with full participation of indigenous and local communities, to facilitate the *legal recognition*

pages 574-578 in Mitcham, C. (ed.), *Encyclopedia of Science, Technology, and Ethics, Volume 2*. Macmillan Reference USA: Detroit.

48 CIHR partner organizations include BirdLife International, Conservation International, Fauna & Flora International, IUCN, The Nature Conservancy, Wetlands International, the Wildlife Conservation Society, and the World Wide Fund for Nature. See Roe, D., G. Oviedo, L. Pabon, M. Painter, K. Redford, L. Siegele, J. Springer, D. Thomas, and K. Walker Painemilla, 2010. *Conservation and Human Rights: The Need for International Standards*. IIED: London, United Kingdom; and Springer, J., J. Gastelumendi, G. Oviedo, K. Walker Painemilla, M. Painter, K. Seesink, H. Schneider, and D. Thomas, 2010. "The Conservation Initiative on Human Rights: Promoting Increased Integration of Human Rights in Conservation", pages 81-83 in this issue of Policy Matters.

49 Without corresponding legal empowerment, rights-based approaches will fall foul of the same criticisms that Stephen Golub made of rule of law programmes in the 1990s, which he characterized as privileging judicial reform ("the power of the lawyers") over improving access to justice ("the power of the people"). Golub, S., 2003. *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Rule of Law Series, Number 41. Carnegie Endowment for International Peace: Washington, D. C., page 3.

50 Shelton, D., 2009. "A Rights-based Approach to Conservation", pages 5-36 in Greiber, 2009.

51 Convention on Biological Diversity, Programme of Work on Protected Areas, Activity 2.2.2 (emphasis added). Last accessed August 4, 2010, at: http://www.cbd.int/protected/pow/learnmore/intro/?prog=p2.

52 For example, see Madzwamuse, M., 2010. "Rights-based Approaches to Conservation in Protected Areas: What are the Issues for Southern Africa?", pages 223-227 in this issue of Policy Matters.

53 This right is enshrined in Articles 10, 11(2), 19, 28, 29(2), and 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples, 2007. General Assembly Resolution 61/295. Also see Colchester, M., and M. Farhan Ferrari, 2007. *Making FPIC Work: Challenges and Prospects for Indigenous Peoples*. Forest Peoples Programme: United Kingdom.

and effective management of indigenous and local community conserved areas in a manner consistent with the goals of conserving both biodiversity and the knowledge, innovations and practices of indigenous and local communities."[54] With reference to the discussion above on legal pluralism, Element 2 of PoWPA underscores the need for implementing agencies to recognize and support the right to conservation pluralism – the diversity of community-based approaches to the conservation and sustainable and customary use of biodiversity.

Figure 3. The law can be used to tackle power asymmetries and build community resilience and well-being.
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Legal Empowerment and Endogenous Development

Participatory legal empowerment will further enable communities to gain recognition of and support for the plurality of approaches to conservation law, policy, and practice. Legal empowerment is defined as "the use of legal tools to tackle power asymmetries and help disadvantaged groups have greater control over decisions and processes that affect their lives."[55] Evidence suggests that non-lawyers are equally equipped to use the law (and sometimes more adept at doing so) to solve local challenges when they are empowered in a legal context.[56] Legal empowerment of the poor[57] is based on the twin principles that law should not remain a monopoly of trained professionals and that in many instances, forms of alternative dispute resolution are more attuned to local realities than formal legal processes. Ideally, the act of using the law becomes as empowering as the outcome of the process itself.[58] By organizing themselves around rights and duties, communities initiate adaptive dialogue processes both internally and vis-à-vis outsiders. Building internal resilience to external influences and responding proactively and according to local values and priorities are both critical to a community's well-being.[59] A court victory handed to a community, for example, can be supremely useful, but a process that is driven by the community is tangibly more powerful.[60] As such, effective legal empowerment is a combination of social mobilization and legal action[61] that acts as a positive feedback loop towards both aims.

Effective legal empowerment is a combination of social mobilization and legal action that acts as a positive feedback loop towards both aims.

The law is sometimes described as 'a sword and a shield'.[62] Negotiating in the shadow of the law[63] is an important strategy for communities who might otherwise not have the opportunity to engage with conservation policy and practice. However, law is about more than just establishing due process. When used imaginatively, laws can be the platform for creating an enabling legal and political environment by negotiating "space to place new steps of change"[64] and opening avenues of discussion between disparate groups towards previously unimagined relationships.[65] In this sense, legal empowerment can enable communities to break free from the typical patronizing

54 Convention on Biological Diversity, Programme of Work on Protected Areas, Activity 2.1.3 (emphasis added). Last accessed August 4, 2010, at: http://www.cbd.int/protected/pow/learnmore/intro/?prog=p2.
55 Cotula and Mathieu, 2008, page 15.
56 Maru, V., 2006. "Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide". *The Yale Journal of International Law*, 31: 427-476.
57 This is a reference to the United Nations Development Programme, 2010. "Initiative on Legal Empowerment of the Poor". Last accessed August 4, 2010, at: http://www.undp.org/legalempowerment/.
58 Maru, 2006.
59 Subramanian, S. M., and B. Pisupati, 2009. *Learning from the Practitioners: Benefit Sharing Perspectives form Enterprising Communities*. UNEP and UN University: Nairobi.
60 "The most valuable, useful and transformative legal challenges are those that include communities and that mobilize and educate people so that communities use the law to give effect to their own voices and their own issues." Hassan, F. (draft in progress). *10 Year History of Treatment Action Campaign*. Treatment Action Campaign: Cape Town, South Africa.
61 Cotula, L., 2007. *Legal Empowerment for Local Resource Control: Securing Local Resource Rights Within Foreign Investment Projects in Africa*. IIED: United Kingdom, page 110.
62 The phrase is used to describe the perceived nature of laws' ability to 'attack' criminality and 'defend' against injustice.
63 Cotula and Mathieu, 2008, page 12. 'Negotiating in the shadow of the law' references the way the existence of laws that provide rights and obligations can change the dynamic of a meeting of parties, especially in the context of power asymmetries. In this context, rights and obligations can help the weaker party overcome an initially disadvantaged position.
64 Angelou, M., 1993. "Inaugural Poem". Last accessed on August 4, 2010, at: http://poetry.eserver.org/angelou.html.
65 See, for example, Rozzi, R., F. Massardo, C. Anderson, K. Heidinger, and J. A. Silander, Jr., 2006. "Ten principles for bio-cultural conservation

dichotomy of either being 'spoken at' or 'spoken for'.

A recent compilation of case studies highlights the diversity of rights-based approaches that communities and their NGOs are experimenting with.[66] A dominant theme that emerges is the multifaceted attempts by a variety of communities to use the law to conserve their biocultural diversity. It highlights the critical need for the further development and sharing of communities' methods and approaches to using rights and engaging with the law on their terms, according to their values, and in ways commensurate with their customary laws – in other words, endogenously. Endogenous development is a community process of defining and working towards future plans according to local values and priorities.[67] In contrast with other theories of development that emphasize varying degrees of external input, it draws on a body of experience that suggests that communities are more likely to remain cohesive and sustain their traditions, cultures, spirituality, and natural resources when they develop their future collectively and base their plans on the resources available within the community. Endogenous development does not reject the notion of external agencies providing assistance, but stresses that any interventions must be undertaken only after the free, prior and informed consent of the community is given and when the activities are developed, driven, monitored, and evaluated by the community.[68] Endogenous development theory supports the proposition that the more endogenous the legal education and rights-based approach, the more likely the process is to be genuinely empowering. Biocultural community protocols, described below, are one endogenous rights-based approach that communities are using to affirm their right to self-determination.

Biocultural Community Protocols and the Right to Diversity

Biocultural community protocols are community-specific declarations of the right to diversity, challenging the fragmentary nature of State law.

Biocultural community protocols[69] are a response to the challenges and opportunities set out above. Although each is adapted to its local context, a biocultural community protocol is generally a community-led instrument that promotes participatory advocacy for the recognition of and support for ways of life that are based on the customary sustainable use of biodiversity, according to standards and procedures set out in customary, national, and international laws and policies. In this sense, biocultural community protocols are community-specific declarations of the right to diversity.[70] Their value and integrity lie in the process that communities undertake to develop them, in what they represent to the community, and in their future uses and impacts.

The process of developing and using a biocultural community protocol is an opportunity for communities to reflect on their ways of life, values, customary laws, and priorities and to engage with a variety of supporting legal frameworks and rights. A biocultural approach to the law empowers communities to challenge the fragmentary nature of State law and to instead engage with it from a more nuanced and integrated perspective and assess how certain laws may assist or hinder their plans for the future. A wide variety of community members are involved by integrating legal empowerment processes with endogenous development and communication methodologies such as group discussions, written documentation, various types of mapping and illustrations, participatory video and photography, performing arts, and locally appropriate monitoring and evaluation.[71] Biocultural community protocols vary in how they are documented, shared, and utilized and have been highlighted as something meaningful and affirmative that a community can be proud of.[72] The approach is intended to mobilize and empower communities to use international and national laws to support the local manifestation of the right

at the southern tip of the Americas: the approach of the Omora Ethnobotanical Park". *Ecology and Society*, 11(1): 43-70.

66 Campese *et al.*, 2009.

67 ETC Foundation and COMPAS, 2007. *Learning Endogenous Development: Building on Bio-cultural Diversity*. Practical Action Publishing: United Kingdom.

68 ETC Foundation and COMPAS, 2007.

69 Bavikatte, K., and H. Jonas (eds.), 2009. *Bio-cultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy*. Natural Justice and UNEP: Montreal.

70 A forthcoming paper by the authors focuses on the notion of the "right to diversity" as a way to define the body of rights required to support a community's biocultural diversity.

71 See, for example, Taylor, J., 2008. "Naming the Land, San Countermapping in Namibia's West Caprivi". *Geoforum*, 39: 1766-1775; Hoole, A., and F. Berkes, 2009. "Breaking Down Fences: Recoupling Social-ecological Systems for Biodiversity Conservation in Namibia". *Geoforum*, 31: 304-317; Tobias, T., 2000. *Chief Kerry's Moose: A guidebook to land use and occupancy mapping, research design and data collection*. The Union of BC Indian Chiefs and Ecotrust Canada: Vancouver, Canada; Lunch, N., and C. Lunch, 2006. *Insights into Participatory Video: A Handbook for the Field*. InsightShare: UK; Davies, R., and J. Dart, 2005. *The Most Significant Change Technique: A Guide to Its Use*, CARE International: United Kingdom; and Schreckenberg, K., I. Camargo, K. Withnall, C. Corrigan, P. Franks, D. Roe, L. M. Scherl, and V. Richardson, 2010. *Social Assessment of Conservation Initiatives: A review of rapid methodologies*, Natural Resource Issues, No. 22. IIED: London.

72 Köhler-Rollefson, I., 2010. *Bio-cultural Community Protocols for Livestock Keepers*. Lokhit Pashu-Palak Sanstan: Rajasthan, India, page 16.

to self-determination.

Communities establish a firm foundation upon which to develop the future management of their natural resources by setting out their values and customary procedures that govern the management of their natural resources, as well as their procedural and substantive rights to, among other things, be involved in decision-making according to the principle of free, prior and informed consent, develop the specific elements of projects that affect their lands, and ensure that they are involved in the monitoring and evaluation of such projects. This provides clarity to the drivers of external interventions such as protected areas, ABS deals, REDD projects, and payment for ecosystem services schemes, and can help communities gain recognition for, among other things, their territorial sovereignty, community-based natural resource management systems and community conserved areas,[73] *sui generis* laws, sacred natural sites,[74] and globally important agricultural heritage systems. In this regard, biocultural community protocols enable communities to bridge the gap between the customary management of their biocultural heritage and the external management of their resources, as mandated by positive legal frameworks. They also help communities to minimize the power asymmetries that often characterize government-community relations and promote a more participatory and endogenous approach to the future governance of their territories, natural resources, and biodiversity. By enabling a community to be proactive in relation to agencies and frameworks to which they have normally been reactive, protocols have the potential to shift the dynamic of conservation initiatives from merely attempting to 'ensure' communities' participation to becoming inclusive, locally appropriate processes driven by legally empowered communities.

The Raika

In response to their exclusion from the Kumbalgarh Forest noted above, the Raika pastoralists of Rajasthan, India, developed a protocol to communicate the fullness of the forest's meaning to their lives and the implications of their exclusion to their livelihoods, traditional knowledge, and the surrounding biodiversity and genetic resources.[75] Specifically, they set out their biocultural values and explain how they have developed and preserved unique breeds of livestock and the traditional knowledge associated with them, and how their pastoral lifestyle has co-evolved with the forest ecosystem that they have traditionally conserved and sustainably used. The Raika also detail the customary decision-making process that underpins the provision of free, prior and informed consent to any actions that might impact their grazing rights, animal genetic resources, and associated traditional knowledge. They draw on their description of their ways of life to detail their rights under Indian law[76] and call upon the National Biodiversity Authority to recognize and ensure the *in situ* conservation of their local breeds and associated traditional knowledge, and ensure that their free, prior and informed consent is obtained according to customary law before any decisions are taken relating to their genetic resources or associated traditional knowledge. They conclude by calling on the Secretariat of the Convention on Biological Diversity and the Food and Agriculture Organization of the United Nations to recognize the contributions of their knowledge, innovations, and practices to the conservation and sustainable use of plant and animal genetic diversity in Rajasthan. Overall, the Raika's protocol is a holistic response to a singular and fragmentary act of government that was undertaken without recourse to the integrated reality of their biocultural heritage.

Figure 4. The Raika demonstrate in Sadri (Rajasthan, India) for their grazing rights in the Kumbalgarh Forest. © Ilse Köhler-Rollefson

It illustrates a number of points about the nature of biocultural community protocols as a community-based response to the challenges of engaging with legal frameworks explored above. As highlighted in the first part of this paper, the Raika have international and national rights that were denied at the local level. The endogenous process of developing the protocol served as an opportunity for the community to provide a biocultural critique of their exclusion from the Kumbalgargh

73 See, for example, Ryan, S., K. Broderick, Y. Sneddon, and K. Andrews, 2010. *Australia's NRM Governance System: Foundations and Principles for Meeting Future Challenges*. Australian Regional NRM Chairs: Canberra.

74 Wild, R., and C. McLeod (eds.), 2008. *Sacred Natural Sites: Guidelines for Protected Area Managers*. IUCN: Gland, Switzerland.

75 The Raika bio-cultural protocol and other protocols are available on Natural Justice, 2010.

76 Biological Diversity Act 2002, Biological Diversity Rules 2004, Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, and the National Policy for Farmers 2007.

Forest, which has far-reaching implications for local diversity. Learning about the laws that support their ways of life helped the Raika develop intra- and inter-community awareness and mobilization to define a forward-looking strategy.[77] By articulating their worldview and providing supporting evidence[78] in the form of a protocol, they have reconstituted the terms of the debate about their exclusion, broadening it to include the effects of the exclusion on their livestock, culture, traditional knowledge, and the health of the forest ecosystem itself, as well as their existing rights under customary, national, and international law. In this sense, biocultural community protocols enable communities to communicate both a focused response to activities on their territories and an integrated and value-laden response to the broader trend towards the legal disaggregation of their ways of life and reification of their traditional knowledge. For the Raika, a protocol serves as an interface for constructive dialogue about their values and ways of life with government officials in a manner that embodies both the resilience and vulnerabilities of their biocultural diversity. In doing so, they are reclaiming the law to make a strong moral and legal claim for conservation pluralism.

The Raika are reclaiming the law to make a strong moral and legal claim for conservation pluralism.

The empirical benefits of pluralism in conservation law, policy, and practice are supported by Nobel laureate Elinor Ostrom's work on the commons. She argues that where certain design principles[79] prevail, local common property resource management systems are likely to avoid[80] what Garret Hardin described as the 'tragedy of the commons'.[81] Similar arguments are made by proponents of Indigenous peoples' and community conserved areas (ICCAs), which are natural sites, resources, and species' habitats conserved in a voluntary and self-directed way through community values, practices, rules, and institutions.[82] In the context of this paper, the tentative global movement towards the recognition of and support for ICCAs is essentially a community-driven struggle for conservation pluralism. Challenges inherent in community-managed and jointly-managed protected areas have been highlighted,[83] but it is hoped that innovative tools such as biocultural community protocols can assist in their locally appropriate recognition and support.

Community protocols are not a panacea. A recent consultation with community and NGO representatives in Sri Lanka highlighted a number of challenges, including that the process of developing a protocol could be abused by certain parties either from outside or from within the community.[84] This is closely linked to the potential of such processes to further entrench or perpetuate existing power asymmetries at the local level such as the exclusion of women and youth in decision-making mechanisms.[85] The fact that biocultural community protocols may become another top-down imposition by the development industry was raised, with one participant describing the approach as a potential "monster".[86] Ensuring community-based monitoring and evaluation of the approach was also heavily underscored.[87] With the inclusion of "community protocols" in the draft ABS Protocol,[88] which is likely to be adopted at the 10th meeting of the Conference of the Parties to the Convention on Biological Diversity in Nagoya in October, 2010, the above concerns have the potential to become reality. The growing challenge to assist communities to determine whether and how to develop

77 Köhler-Rollefson, I., 2010. *Bio-cultural Community Protocols for Livestock Keepers*. Lokhit Pashu-Palak Sanstan: Rajasthan, India; Köhler-Rollefson, I., and E. Matthias, 2010. "Livestock Keepers' Rights: a Rights-based Approach to Invoking Justice for Pastoralists and Biodiversity Conserving Livestock Keepers", pages 113-115 in this issue of Policy Matters.

78 The Protocol provides detailed information about their traditional livestock breeds. See Natural Justice, 2010.

79 Ostrom sets out 8 design principles in Ostrom, E., 1990. *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge University Press: United Kingdom.

80 Ostrom, E., J. Burger, C. Field, R. Norgaard, and D. Policansky, 1999. "Revisiting the Commons: Local Lessons, Global Challenges." *Science*, New Series, 284(5412): 278-282.

81 Hardin, G., 1968. "The Tragedy of the Commons". *Science*, New Series, 162(3859): 1243-1248.

82 Examples of ICCAs include Indigenous biocultural heritage territories, Indigenous protected areas, cultural land and seascapes, sacred sites and species, migration routes of mobile Indigenous peoples, sustainable resource reserves, communities' fishing grounds, wildlife nesting sites, and others, detailed in Corrigan, C., and A. Granziera, 2010. *A Handbook for the Indigenous and Community Conserved Areas Registry*. UNEP-WCMC: Nairobi, Kenya.

83 Rozzi, *et al.*, 2006; Borrini-Feyerabend, G., 2010. *Strengthening what works – Recognising and supporting the conservation achievements of indigenous peoples and local communities*. IUCN/CEESP briefing note no. 10.

84 Jonas, H., and H. Shrumm, 2010. *Exploring Bio-cultural Community Protocols in the Sri Lankan Context: A Report of an International Consultation and Training-of-Trainers Workshop on Bio-cultural Community Protocols in Avissawella, Sri Lanka*, page 15. Available online at Natural Justice, 2010. This is also reflected in Köhler-Rollefson, 2010.

85 Köhler-Rollefson, I., 2010, page 26.

86 Jonas and Shrumm, 2010, page 15.

87 Jonas and Shrumm, 2010, page 15.

88 Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity. UNEP/CBD/COP/10/5/Add.4. Last accessed August 24, 2010, at: http://www.cbd.int/doc/meetings/cop/cop-10/official/cop-10-05-add4-en.pdf.

community protocols should be addressed by inter-community lesson sharing, good practice guidelines, and rigorously tested methodologies and resources.[89]

Conclusion: Towards Conservation Pluralism

We live in a diverse world. The world's three core areas of biocultural diversity are in regions heavily populated by Indigenous peoples and local and mobile communities.[90] They are also the most threatened, suffering disproportionately high levels of environmental degradation and negative social change.[91] Communities' biocultural diversity is contingent upon the integrity of their traditional knowledge, innovations, and practices[92] and legal systems, all of which differ from the mainstream systems of law and conservation. The concept of diversity challenges the notion that certain people or approaches are inherently better than others. Until recently, communities' diversity has not been valued, and in many instances, has been actively undermined by policy makers and conservation practitioners alike. Recognition of the intrinsic and instrumental value of communities' biocultural diversity is growing, but this not enough. To support biocultural diversity, official recognition and support for the diversity of communities' legal systems (in essence, legal pluralism) and ecosystem management systems (in essence, conservation pluralism) is required. Seen in this light, diversity without pluralism is injustice. In the alternative, the recognition of diversity, matched by complementary forms of pluralism, is an expression of natural law.[93]

The recognition of diversity and pluralism is an expression of natural law.

As the world clamours to address unprecedented levels of biodiversity loss and increasingly unpredictable impacts of climate change, communities – who have contributed least to the underlying causes of such change – are being disproportionately affected by both the environmental changes and the measures being implemented to address those changes.[94] In this context, rights-based approaches and legal innovations such as biocultural community protocols have the potential to amplify communities' calls for self-determination, which includes respect for their diversity of ecosystem management practices and legal structures. A diverse world can only be sustained by a plurality of approaches. Rights-based approaches are contributing to a groundswell of recognition of and support for cultures, systems, and approaches that conserve and sustainably use biodiversity and address the root causes and effects of climate change. In turn, they are contributing to a paradigm shift in conservation law, policy, and practice towards the recognition of and support for the right to diversity through legal and conservation pluralism.

Additional resources:
- www.naturaljustice.org
- http://natural-justice.blogspot.com

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89 Natural Justice is working with partners such as the COMPAS Network, LIFE Network, Global Diversity Foundation, ABS Capacity Development Initiative, UNEP-DELC, UN University, and others in Africa, Asia-Pacific, and Latin America to develop the approach.
90 These are biological, cultural, and linguistic diversity. See Maffi and Woodley, 2010, plate 2 between pages 154 and 155.
91 Maffi and Woodley, 2010, plate 3 between pages 154 and 155.
92 Article 8(j), Convention on Biological Diversity.
93 Natural law or the law of nature (in Latin, *lex naturalis*) is law whose content derives naturally from human nature or physical nature, and therefore has universal validity. Last accessed on August 4, 2010, at http://www.newworldencyclopedia.org/entry/Natural_law.
94 United Nations Department of Economic and Social Affairs, 2009. *State of the World's Indigenous Peoples*. United Nations: New York.