

Community stewardship: the foundation of biocultural rights†

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The term 'biocultural rights' denotes a community's long established right, in accordance with its customary laws, to steward its lands, waters and resources. Such rights are being increasingly recognized in international environmental law. Biocultural rights are not simply claims to property, in the typical market sense of property being a universally commensurable, commodifiable and alienable resource; rather, as will be apparent from the discussion offered here, biocultural rights are collective rights of communities to carry out traditional stewardship roles vis-à-vis Nature, as conceived of by indigenous ontologies.

Keywords: *biocultural rights, stewardship, property, environment, law, nature, indigenous people, customary law, commodity, post-development, political ecology, commons, Convention on Biological Diversity, Nagoya Protocol, traditional resource rights*

1 THE EMERGENCE OF BIOCULTURAL RIGHTS

Environmental law is at a political crossroads. Although, on the face of it, governments have a clear-eyed response to the ecological crisis confronting the planet, beneath the surface a battle is being fought over the most appropriate solutions.¹ The terrain of this battle is the law itself.

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1. Frédérique Apffel Marglin and Stephen A Marglin (eds), *Dominating Knowledge: Development, Culture and Resistance* (Oxford University Press, Oxford 1990).

In contention are solutions which are either technocratic in nature or ones derived from the experiences of local communities that have long-term attachments to the soil.² This article argues that affirmation of the latter is a preferable response to the current ecological crisis. The article goes on to elaborate and make a case for 'biocultural rights' as a means to secure these community-led solutions.

The term 'biocultural' has a long pedigree. As will be seen below, it has been used widely by communities, academics and civil society to indicate a way of life that has developed out of a holistic relationship between Nature and culture. Hence, biocultural rights affirm the bond between indigenous, tribal and other communities³ with their land, together with the floral, faunal and other resources in and on the land. In the literature, this relationship is generally described as one of stewardship.⁴

As yet, international environmental lawyers have undertaken little or no research into the development of biocultural rights, nor have they done much even to acknowledge these rights. As a result, although rights practised by different types of community have very similar content, no connection between them has been made. For instance, because of ostensible differences between the activities of livestock keepers, farmers and gatherers, their cases were advocated by scholars and practitioners independently of one another and the rights in question were thought to be different.⁵ Fundamentally, however, they are the same: a form of community stewardship over land and all that is associated with that land.

A major reason for the failure in international environmental law scholarship to produce a comprehensive biocultural jurisprudence lies in a political, economic and social paradigm that is unable to grasp the ethic of stewardship. This paradigm stems from the very foundations of the market economy, which views land as a universally commensurable, commodifiable and alienable resource – a view which has had a determining effect on discourses about private property as well as the nature and role of the associated human beings.⁶

The aim of this article, therefore, is to show that communities that are empowered to maintain their traditional modes of land tenure can and do preserve the environment.

2. Ibid.

3. When the term 'community' is used in this work, it should be taken to include indigenous, tribal and traditional communities whose ways of life are predominantly land based and who have strong cultural and spiritual bonds with their traditional lands and its resources. While communities are fluid and are organized along various lines including ethnicity, shared resources, common interest and political structure, the term 'community' is used here to denote groups of people with a way of life that is determined by the ecosystem.

4. Kabir Bavikatte and Daniel Robinson, 'Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing' (2011) 7(1) Law, Environment and Development Journal, 39–51 at 50, <<http://www.lead-journal.org/content/11035.pdf>>. See further: Mikey Salter and Johanna Von Braun, 'Biocultural Community Protocols: Bridging the Gap Between Customary, National and International Law', Effectius Publications at <<http://www.effectius.com/publications>>, accessed 1 July 2014; Kabir Bavikatte, 'Stewarding the Commons: Rethinking Property and the Emergence of Biocultural Rights' (2011) 7 Common Voices 20.

5. Harry Jonas and Holly Shrumm, 'Recalling Traditional Resource Rights: An Integrated Approach to Biocultural Diversity' Natural Justice publication, May 2012, <<http://naturaljustice.org/wp-content/uploads/pdf/TRR-HH.pdf>>.

6. Margaret Jane Radin, 'Property and Personhood' (May 1982) 34(5) Stanford Law Review 957–1015; see also, Margaret Jane Radin, 'Market-Inalienability' (June 1987) 100(8) Harvard Law Review 1849–1937.

In order to establish this proposition, the article will examine examples of effect being given to biocultural rights, at both international and national levels. These examples provide evidence of a distinct trend that, however dimly realized at present, shows that law- and policy-makers are at last taking cognizance of solutions that communities have developed – often over long periods of time – to preserve the environment.

This assertion is supported by four interrelated movements: a post development discourse; a third generation of human rights; a gathering body of indigenous (or aboriginal) rights; and the refutation of the ‘tragedy of the commons’. By referring to tendencies in international law and various systems of domestic law supporting these four movements, the article seeks to show that their confluence indicates an emerging general acceptance of biocultural rights.

Definite *empirical* proof that recognition and enforcement of biocultural rights promotes better environmental protection remains elusive. Indeed, the interplay between norm and fact in the four movements mentioned above is complex, but, by drawing attention to global tendencies in the normative sphere, the article contends that a norm may endorse, if not influence, social practices.⁷ This it can do in many ways, notably by its powerful legitimating effect on practice and by channelling major sources of finance and social power into new incentive and enforcement schemes.

2 THE CONFLUENCE OF MOVEMENTS

Biocultural rights have emerged largely because of the disappointing social and ecological results of the dominant development paradigm. Hence, the first movement to be discussed is the post-development response. This has both a normative and a factual basis. It is factual in the sense that it is grounded in clear empirical evidence that top-down development paradigms have failed to protect the environment. It is normative in its call to heed the voice of communities actually working and living in the environments concerned.⁸

The second movement is that of ‘the commons’. Theorists working in this area have claimed that state control or privatization of common resources has caused degradation, rather than an improved ecology. Initially, the movement was concerned with the production of actual evidence that would disprove a generalized supposition about the beneficial effect of state and private action on the commons. Later, its agenda became normative, actively campaigning for the rights of local communities to govern and manage local ecosystems as a more effective way of ensuring conservation.⁹

The third movement is the development, over the last two decades, of a third-generation of human rights.¹⁰ Although this development was obviously normative

7. Hilary Putnam, *The Collapse of Fact/Value Dichotomy and Other Essays* (Harvard University Press, Cambridge, MA 2004).

8. Knut Nustad, ‘Development: The Devil We Know’ (2001) 22(4) *Third World Quarterly* 479–489.

9. David Bollier, *Think Like a Commoner: A Short Introduction to the Life of the Commons* (New Society Publishers, British Columbia 2014).

10. As opposed to the first-generation civil and political rights, and the second-generation social and economic rights, codified in the International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966), respectively.

in character, it is still not fully accepted in international law (or indeed in most systems of domestic law). The rights concerned include everything needed for the survival and flourishing of humankind, especially prosperity and a healthy environment. Unlike first-generation civil and political rights, which generally benefit individuals, third-generation rights benefit groups, and, as a result, the rights are usually called 'group' or 'collective' rights.¹¹

Finally, a specific category of minority rights has developed over the last four decades, those of indigenous (or aboriginal) peoples.¹² These are groups – usually disadvantaged minorities – who have demanded various rights, notably, free expression of culture, restoration of land and, more radically, full political self-determination. Any assertion of indigenous rights requires proof of the claimant's status of indigeneity, the core meaning of which denotes habitation of land before the arrival of colonists,¹³ together with social and cultural subordination, and, what is important for the purposes of this article, a long historical association with particular tracts of land.¹⁴

Biocultural rights¹⁵ emerged contemporaneously with the appearance of environmental and indigenous rights, but almost unnoticed. These rights differ from the general category of indigenous rights because they presuppose an explicit link to the conservation and the sustainable use of biological diversity, and because the group need not necessarily be indigenous.

The word 'biocultural' is a catchall term that connects communities, land and its resources, its tenure systems and its ecosystems. Although this connection is realized through the rights to property, biocultural rights are not a simple property claim, which would imply a hitherto excluded group demanding property in the

11. See Karel Vasak, 'Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' (1977) UNESCO Courier 30, 29. Lucienne Zohadi, 'The Generations of Human Rights' (2004) 1 International Studies Journal, 95–114 at 112–13.

12. These rights were first explicitly recognized by treaty in 1957, when the International Labour Organization sponsored Convention No 107 on the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries. Because this Convention was not widely accepted, the ILO sponsored a second Convention No 169 (1989) on Indigenous and Tribal Peoples, which was aimed at revising the earlier treaty, although it did no more than fix general goals, leaving the appropriate methods for achieving them to the states concerned.

13. An investigation of 21 municipal legal systems by James Crawford, 'The Aborigine in Comparative Law' (1987) 2 Law & Anthropology 5ff., showed that 'aboriginal' always takes its meaning from a relationship with a non-aboriginal group. See, too, Natan Lerner, *Group Rights and Discrimination in International Law* (Martinus Nijhoff, Dordrecht 1991) 100–3.

14. Crawford op. cit. 7–10. See article 1(1)(b) of the Indigenous and Tribal Peoples Convention (1989), which defines peoples as 'indigenous' 'on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation ... and who, irrespective of their legal status, retain some or all of their social, economic, cultural and political institutions'.

15. 'Biocultural' is a term used here to distinguish this set of rights from the more general 'group rights'. At present, the term does not enjoy common usage. Regarding the three generations of human rights, see generally, Karel Vasak, 'Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights', UNESCO Courier 30: 11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

typical market sense of property, i.e., a universally commensurable, commodifiable and alienable thing.¹⁶ On the contrary, biocultural rights are derived from a traditional tenure of land implicit in which is an obligation of stewardship.

3 SELF-DETERMINATION AS POLITICAL ECOLOGY

As noted above, environmental legal solutions can either be technocratic in nature or draw upon approaches devised by local communities themselves. Technocratic interventions obviously recognize the need to prevent the abuse of natural resources, and they put forward expert solutions for rational management of air, water and land. Such solutions are generally based on scientific reports about the carrying capacity and pollution thresholds of the ecosystem in question, and are usually supported by studies on the possibility of industrialization keeping step with the regenerative capacity of the ecosystem.¹⁷

Although technocratic solutions are implemented through a variety of sticks and carrots methods, such as tax benefits, subsidies and penalties, their enforceability depends ultimately on a class of experts and bureaucrats who are given the task of managing the environment in the interests of humanity.¹⁸ The demarcation and administration of protected areas is operationalized by the exercise of techno-bureaucratic power. However, this power is often at odds with the decision-making authority of local communities.

The case of the Raika pastoralists of Rajasthan and the denial of their historical monsoon grazing rights in the Kumbalgarh sanctuary by a 2003 decision of the Indian Central Empowered Committee is an example of this kind of dynamic. The Raika's centuries-old grazing tradition in the Kumbalgarh sanctuary was abruptly halted when the Indian Central Empowered Committee prohibited grazing in the forest. This prohibition was issued without an understanding of the co-evolution of the Kumbalgarh ecosystem along with the grazing practices of the Raika pastoralists. Moreover, the prohibition rendered the forest vulnerable to fires, illegal logging and poachers, which the Raika had always guarded against.¹⁹

Indigenous peoples and other communities seeking recognition of their traditional land rights are clearly the most directly affected by any adverse environmental impact. It is often claimed that such communities have historically conserved ecosystems, and are best suited to make decisions about those ecosystems. In fact, it can be argued that the current ecological crisis is the consequence of an expertocracy imposing non-consultative, top-down solutions resulting in the delegitimation of local knowledge and decision-making.²⁰ Several of these arguments rely on growing evidence of

16. Robert Ellickson, 'Property in Land' (1992–1993) 102 Yale L.J. 1315.

17. They also propose policies for reducing waste and for recycling, along with the development of environmentally friendly technologies. See generally, Howard P Segal, *Technological Utopianism in American Culture* (Syracuse University Press, New York 2005).

18. Andre Gorz, 'Political Ecology: Between Expertocracy and Self-Limitation', in *Ecologica* (Seagull Books, Calcutta 2008) 43–76.

19. Ilse Kohler-Rollefson, 'Biocultural Community Protocols: A Tool for Pastoralists to Secure Customary Rights to the Commons' FES (2010) 2 Common Voices 16–18.

20. See generally, Frank Fischer, *Citizens, Experts and the Environment: The Politics of Local Knowledge* (Duke University Press, Durham, NC 2000).

community conservation practices that have sustained ecosystems for generations. And much of this evidence, as we shall see later, has come to the fore over the last two decades. In some cases, it contradicts established wisdom that communities – and their interests – are in open conflict with conservation.²¹ An example of this would be ‘slash and burn’ farming or the *swidden* system of farming practised by communities the world over, which under certain conditions is considered ecologically sustainable and mimics the growth of the natural forest pattern.²²

The top-down solutions imposed by experts are what Andre Gorz terms ‘locking’ as opposed to ‘open’ technologies.²³ The latter facilitate sharing, communication and local autonomy. They rely on the personal and creative energies of the proposed beneficiaries of a technology, thereby making them both users and creators. Locking technologies, on the other hand, are those that come pre-set: they work on a principle of command and control. Their development and deployment is therefore centralized, and they allow their beneficiaries little or no freedom to adapt the imposed methods to local needs and context. Community activism around environmental issues can be seen, in this light, to represent a break from a techno-bureaucratic approach to political ecology.

Proponents of a bottom-up approach trace the origins of the environmental movement back to a time before the current crisis, when communities began to protest against colonial states usurping the rights to their lands and waters.²⁴ The Nature that these communities sought to protect was not the Nature of the technocrats and bureaucrats, nor was it the ‘unspoiled wilderness’ of the naturalists.²⁵ Rather, it was a Nature that was so entwined with community life that it represented an entire way of being and knowing.²⁶ In fact, the defence of Nature for these communities was the defence of a ‘cosmovision’.²⁷ For them, Nature was not something ‘out there’, which had to be protected by scientists and administrators through ‘command and cope’ mechanisms. Instead, Nature was the basis upon which they constructed their very notions of self and community through an intimate and historical interaction with the ecosystem.²⁸

21. See generally, Bio-cultural diversity conserved by indigenous peoples and local communities – examples and analysis, Companion document to the IUCN/CEESP Briefing Note No.10, Tehran: CENESTA, 2010. Available at <<https://portals.iucn.org/library/efiles/documents/2010-048.pdf>> accessed 18 September 2014.

22. Michael R Dove, ‘Theories of Swidden Agriculture and the Political Economy of Ignorance’ (1983) 1(2) *Agroforestry Systems* 85–99.

23. *Supra* n 18, at 8–9.

24. *Supra* n 18, at 50.

25. Ramachandra Guha, ‘Radical American Environmentalism and Wilderness Preservation: A Third World Critique’ (Spring 1989) 11(1) *Environmental Ethics* 71–83.

26. *Supra* n 21.

27. ‘[T]he term cosmovision has to do with basic forms of seeing, feeling and perceiving the world. It is made manifest by the forms in which a people acts and expresses itself. This means that a cosmovision does not necessarily correspond to an ordered and unique discourse (cosmology) through which it can be described/explained and understood. In some cases the only way to understand a cosmovision is through living it – by sharing experiences with people who sustain that mode of living and that life-world.’ See Ishizawa, Jorge, ‘Affirmation of Cultural Diversity – Learning with Communities in the Central Andes’ (August 2009) 2 *Development Dialogue* 105–39 at 118.

28. Marshall Sahlins, *The Western Illusion of Human Nature* (Prickly Paradigm Press, Chicago 2008).

It is this understanding of political ecology that forms the backdrop to the discussion of the four social movements contributing to the emergence of biocultural rights.

3.1 Post-development: a people-centred ecology

The post-development movement²⁹ was born of the work of thinkers and activists such as EF Schumacher,³⁰ Ivan Illich,³¹ Arturo Escobar and Gustavo Esteva.³² In his pivotal work, *Encountering Development: The Making and the Unmaking of the Third World*, Escobar sums up the post-development turn:

Development was – and continues to be for the most part – a top down, ethnocentric and technocratic approach, which treated people and cultures as abstract concepts, statistical figures to be moved up and down in the charts of ‘progress’. Development was conceived not as a cultural process (culture was a residual variable, to disappear with the advance of modernization) but instead as a system of more or less universally applicable technical interventions intended to deliver some ‘badly needed’ goods to a ‘target’ population. It comes as no surprise that development became a force so destructive to the Third World cultures, ironically in the name of people’s interests.³³

Post-development scholars presented a radical critique of the large development projects of the 1970s and 1980s, arguing that they had contributed to the destabilizing of communities, the creation of poverty and the destruction of the environment.³⁴ In the 1980s and 90s, with a looming ecological crisis in view, post-development activists began to highlight local community conservation systems and the need to affirm them.³⁵ The work of organizations such as PRATEC (Andean Project for Peasant Technologies)³⁶

29. Post-development theories gained momentum in the 1990s as a critique of the ecological and social fallouts of dominant development paradigms, which had ranged from neo-liberalism to the Green Revolution. Post-development theorists critiqued these development paradigms as top down, techno-bureaucratic solutions that were bound to fail due to their inability to engage genuinely with community needs and experiences.

30. EF Schumacher, *Small is Beautiful: Economics as if People Mattered* (Blond and Briggs, London 1973).

31. Ivan Illich, *Tools of Conviviality* (Boyers, London 1973) argued that politics is no longer about choosing between Left and Right. The real choice is between ‘vernacular values’ and ‘industrial values’ or between ‘conviviality’ and ‘technofascism’.

32. Gustavo Esteva and Madhu Suri Prakash, *Grassroots Post-modernism: Remaking the Soil of Cultures* (Zed Books, London 1998).

33. Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press, Princeton 2012) 44.

34. See generally, Wolfgang Sachs (ed.), *The Development Dictionary* (Zed Books, New York 2010) and Majid Rahnema *et al.* (eds), *The Post-Development Reader* (Zed Books, New York 1997).

35. One of the most famous examples of this is the work of Vandana Shiva that critiqued the cultural and ecological devastation caused by the Green Revolution in India, stressing the importance of affirming traditional agricultural practices, and recognizing their ability adequately to respond to increased demand for food. Vandana Shiva, *Monocultures of the Mind* (Third World Network, Penang 1993).

36. ‘The “Andean Project for Peasant Technologies” (Proyecto Andino para las Tecnologías Campesinas, PRATEC) is a Peruvian NGO founded in 1988 and devoted to the recovery and valorization of traditional agricultural practices and associated knowledge. PRATEC

and COMPAS-ED (Comparing and Supporting Endogenous Development),³⁷ epitomized the best of post-development thinking in action.

PRATEC is based in the central Andes (covering parts of Peru, Bolivia and Ecuador). It has worked extensively on cultural affirmation through the valorization of traditional agricultural practices. As Jorge Ishizawa from PRATEC points out:

In our understanding, cultural affirmation is the process by which people who live in a place remember and regenerate their traditional practices, nurturing their *pacha* (local world) and letting themselves be nurtured by it. Since in the case of the central Andes, this local world is agrocentric, nurturance is the mode of being in the Andean *pacha*. Andean cultural affirmation is the continuous affirmation of this mode of being ... Cultural affirmation, then, is not an intellectual matter. For the people of the central Andes, it is the sustained regeneration of biocultural diversity through the activities of mutual nurturance undertaken by the *campesinos* and the entities that make up their *pacha*.³⁸

A statement by Julia Pacoricona Aliaga from Conima in Peru exemplifies the kind of culture that PRATEC seeks to affirm:

The potato is our mother because when it produces fruits it is feeding us, clothing us and giving us happiness, but we also nurture her. When the plants are small, we call them *wawas* (children) because we have to look after them, delouse (weed) them, clothe (hill) them, dance and feast them. This has always been done. My parents taught me to nurture them with affection and good will as we do with our children.³⁹

Over the last 16 years, COMPAS-ED has maintained a sustained project on endogenous development in partnership with organizations in Asia, Latin America and Africa. Endogenous development encapsulates the essence of post-development thinking,

participates in the efforts of Andean Amazonian peasant communities to counter the socially and ecologically destructive effects of industrial agriculture and governmental agrarian policies. By using local knowledge and the practice of traditional “ritual agriculture” and through adopting a non-dualistic, eco-centric worldview, PRATEC supports the resurgence of local approaches to agriculture, which it sees as radically opposed to Western industrial agriculture. The Andean peasant practice of ritual agriculture embraces kinship-oriented visions of the land and encourages empathetic actions that illustrate respect for all living entities of the biosphere.’ Agricultural activities include ritual actions, utterances, and offerings that express both a deep respect for Pachamama (Mother Earth) and communitarian aspects that characterize the worldview of the Andean people, <<http://www.terralingua.org/bcdconservation/?p=244>> accessed 14 March 2014.

37. The COMPAS network supports field programmes of Community Based Organizations (CBOs) and Non-Governmental Organizations (NGOs) to develop, test and improve the endogenous development approach in dialogue with modern western-based science. COMPAS systematizes the experiences in such a way that other NGOs and government agencies can make use of the endogenous development approach. COMPAS facilitates intercultural dialogues amongst CBOs, NGOs, universities and research centres across countries and continents to enable systematization beyond the national level. According to COMPAS, endogenous development revitalizes ancestral and local knowledge and integrates external knowledge and resources that fit the local context. It leads to increased bio-cultural diversity, reduced environmental degradation, and a self-sustaining local and regional exchange of goods and services, <http://www.compasnet.org/?page_id=22> accessed 14 March 2014.

38. *Supra* n 27, at 111.

39. *Ibid.*, quote from *Terre des homes – Germany, Children and Biodiversity in the Andes* (Lima, 2001) 23.

because it bases itself on local peoples' own criteria of development, taking into account their material, social and spiritual well-being. In an effort to avoid techno-bureaucratic, top-down solutions, COMPAS-ED seeks to make local peoples' worldviews and livelihood strategies the starting point for development. The work of its partners in Guatemala, India and Ghana⁴⁰ provides evidence that these worldviews and strategies promote a particular conception of sustainable development as a balance between material, social and spiritual well-being.⁴¹

Post-development, as a discipline that valorizes community ecological practices, arose as a result of the critique launched by the political ecology of techno-bureaucratic solutions to development and conservation. In this sense, it broke from sections of established environmental thinking by insisting on a clear link between environmental conservation and community rights in the management of that community's lands and waters.⁴²

3.2 (Un)common wisdom of the commons

The post-development movement found a natural ally in the movement for the commons. The latter had, through empirical data, begun to turn the 'tragedy of the commons' theory on its head.⁴³ This theory was based on an assumption that, when the community as a whole has to bear the consequences of dealing with commonly held resources, individuals seek to maximize their own interests, a process that works to the detriment of both the community and the sustainability of a common resource. Hence, the tragedy of the commons is an argument that long-term sustainability of common pool resources is best ensured when such resources are privatized or state controlled.⁴⁴

Extensive research on governance of the commons by political scientists and economists, such as Elinor Ostrom⁴⁵ and Arun Agarwal,⁴⁶ has established, unequivocally, that state control or privatization of common pool resources is not necessarily the best way of ensuring conservation. In many cases, these solutions are counter-productive. Contrary to the tragedy of the commons theory, which contends, *inter alia*, that mismanagement by a community leads to the destruction of common resources,⁴⁷

40. *Community Well-being and Biocultural Diversity through Endogenous Development, COMPAS Network: Outcomes, Impact and New Initiatives*, by request <www.compasnet.org> accessed 14 March 2014.

41. See generally, <www.compasnet.org> accessed 14 March 2014.

42. Arturo Escobar, 'Imagining a Post-Development Era? Critical Thought, Development and Social Movements' (1992) 31/32 *Social Text* 20–56.

43. John Tierny, 'The Non-Tragedy of the Commons' *The New York Times*, 15 October 2009, <<http://tierneylab.blogs.nytimes.com/2009/10/15/the-non-tragedy-of-the-commons/>> accessed 14 March 2014.

44. Garrett Hardin, 'The Tragedy of the Commons' (1968) *Science* 1243–8.

45. Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, New York 1990).

46. Ashwini Chhatre and Arun Agrawal, 'Forest Commons and Local Enforcement' (2008) 105(36) *Proceedings of the National Academy of Sciences* 13286–91.

47. The problem of the 'free-rider' in economic theory arises when individuals who do not contribute to its maintenance consume public goods/resources thereby free riding on the contributions of the rest of the community for the upkeep of the goods/resources. See also Stanford Encyclopedia of Philosophy, <<http://plato.stanford.edu/entries/free-rider/>> accessed 14 March 2014.

researchers have established that, under certain conditions,⁴⁸ conservation of ecosystems is best ensured by communities.

These findings are congruent with those of more recent research which has evaluated the effectiveness of protected areas under different kinds of management regimes in three different environments: the Chitwan District of Nepal, the Mahananda Wildlife Sanctuary in West Bengal in India, and the Tadoba-Andhari Tiger Reserve in Maharashtra, India. Research projects here found that a protectionist approach that excluded local communities was likely to fail unless governments were prepared to invest heavily in the initiative. The same projects also showed, on the one hand, that conservation was likely to fail if outsiders (or dominant insiders) imposed rules on a community's use of resources, and, on the other hand, that forest resources were more effectively managed if community members were genuinely involved in decision-making and developing rules for use of the resources.⁴⁹

The post-development and commons movements intersected in the sense that the latter empirically validated the postulates of the former, and highlighted the role that communities played in the conservation of ecosystems. This intersection was a politically significant marriage of strengths; it presented a new certainty that could not be ignored by policy-makers confronting a potential ecological catastrophe. Ostrom best summed this up when she responded to a question asking for her advice to state actors who had influence in formulating natural resource policy:

No panaceas! We [policy makers] tend to want simple formulas. We have two main prescriptions: privatize the resource or make it state property with uniform rules. But sometimes the people who are living on the resource are in the best position to figure out how to manage it as a commons.⁵⁰

3.3 Indigenous peoples and the right to ecological stewardship

International advocacy for indigenous peoples' rights goes back to 1923, when Levi General Deskahneh, chief of the Younger Bear Clan of the Cayuga Nation, a spokesperson of the Six Nations of the Grand River Land, Ontario, obtained a hearing at the League of Nations regarding a dispute with Canada over tribal self-government.⁵¹

48. These conditions are what Ostrom terms the eight design principles for effective common pool resource management. They are: (1) define clear group boundaries; (2) match rules governing use of common goods to local needs and conditions; (3) ensure that those affected by the rules can participate in modifying the rules; (4) make sure the rulemaking rights of community members are respected by outside authorities; (5) develop a system, carried out by community members, for monitoring members' behaviour; (6) use graduated sanctions for rule violators; (7) provide accessible, low-cost means for dispute resolution; (8) build responsibility for governing the common resource in nested tiers from the lowest level up to the entire interconnected system. *Supra* n 41, at 90.

49. Elinor Ostrom and Harini Nagendra, 'Insights on Linking Forests, Trees, and People from the Air, on the Ground, and in the Laboratory' (2006) 103(51) Proceedings of the National Academy of Sciences 19224–31; see also 'Elinor Ostrom: Taking Sustainability Research Mainstream', FES (2010) 1 Common Voices 6–9.

50. Fran Korten, 'Elinor Ostrom wins Nobel for Common(s) Sense', *yes! Magazine*, 2010, <<http://www.countercurrents.org/korten270210.htm>> accessed 14 March 2014.

51. Brian E Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (University of British Columbia Press, Vancouver 1986) 122.

It was only in the early 1980s, however, that the movement for indigenous peoples' rights, in both national and supra-national forums, really got underway.⁵²

The movement now speaks for an estimated 300 million indigenous peoples, claiming a primordial identity, from 4000 distinct societies.⁵³ Unlike the movements of the 1960s for recognition of ethnic minorities, the indigenous people's movement asserts itself not as a legal category or as an analytical concept but as a paradoxical expression of a global identity. Thus, the term 'indigenous' reaches for a unity amidst diversity, and the movement has, with remarkable success, used the United Nations as the key site for its struggle for recognition of indigenous peoples' rights.⁵⁴

While there is no universally agreed definition of who is indigenous, a broad consensus has grown around the definition proposed by Jose Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. In his *Study on the Problem of Discrimination against Indigenous Populations*, Martinez Cobo proposed the following:

Indigenous communities, peoples and nations [are] those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.⁵⁵

At the heart of the struggle for the rights of indigenous peoples lies a right to self-determination. As noted by James Anaya, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, self-determination in this context is not a claim for separate statehood but is rather a claim grounded on international human rights, namely, certain core principles of non-discrimination, protection of cultural integrity, self-government, title to lands and natural resources, together with social welfare for economic well-being.⁵⁶

Since the Convention on Biological Diversity (CBD) came into force in 1993, the nature of the indigenous 'self' that seeks the right to determine or actualize itself has extended beyond Martinez Cobo's 1987 definition. The idea of indigeneity that

52. As a result of persistent lobbying at the UN by indigenous peoples, the Working Group on Indigenous Populations (WGIP) was established pursuant to Economic and Social Council resolution 1982/34 as a subsidiary body of the Sub-Commission on the Promotion and Protection of Human Rights. The work of the WGIP finally led to the Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly in 2007. Since then the WGIP has been discontinued and replaced with the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) through Resolution 6/36 of the UN Human Rights Council. See <<http://www.2ohchr.org/english/issues/indigenous/groups/wgip.htm>> accessed 14 March 2014.

53. Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, Berkeley 2003) 4.

54. *Ibid.* at 5.

55. UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1–4. The report further states that: 'On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group)', paragraphs 379–82.

56. James Anaya, *Indigenous Peoples in International Law*, 2nd edn (Oxford University Press, New York 2004) 6.

has now captured public attention conceives of such peoples as the original trustees of the earth.⁵⁷ Strategically and steadfastly, indigenous peoples have begun to claim legal recognition for this role and to demand rights to ecological stewardship in negotiations towards multilateral environmental agreements, programmes of work, decisions and guidelines under the CBD (as will become apparent below). Riding on the momentum of the commons and post-development movements, indigenous peoples present recognition of their right to self-determination as both a practical and a moral solution to the ecological crisis.⁵⁸

Discourses around the strong cultural and spiritual links between indigenous peoples and their lands are not new. They stretch back to the beliefs of some of the oldest aboriginal peoples of the world, notably Aboriginals in Australia⁵⁹ and the San of Southern Africa. The common theme among the different San groups was:

the existence of a primal time, a mythic age in which beings and states were ontologically fluid and a certain state of inchoate amorphousness prevailed. ... The majority of the beings of primal time were beings, in which animal and human traits co-mingled. ... These therianthropic variants of the 'Early Race' bore animal names – Anteater, Lion, Hyena, Jackal, Springbok, Blue Crane, Tortoise. ... Yet they were also human, and were married, in a riotous mix of cross-species alliances, including with humans of the 'Early Race'. ... They behaved in all ways like humans; however now and again their actions took an animal twist, in line with the protagonist's specific faunal trait.⁶⁰

In a political climate where grand top-down development theories have been discredited and local systems of resource management affirmed, the indigenous peoples movement has begun to make a critical link between the right to self-determination and environmental conservation. And, as already noted, to do so, they have begun to highlight their role as guardians of ecosystems and the significance of their cultural and spiritual bonds with Nature. What is more, indigenous peoples point out that their territories are some of the richest in biodiversity, and that the collapse of such ecosystems began with their dispossession.⁶¹ The natural corollary of this view is that biodiversity conservation is integrally linked to securing the rights of indigenous peoples to their territories, their way of life, their culture and customary ways of decision-making, in short, to the securing of biocultural rights.

57. *Report of the World Summit on Sustainable Development* (Johannesburg, South Africa 2002) para 25; United Nations Declaration on the Rights of Indigenous Peoples, 2007, Preamble: 'Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment'.

58. Ashish Kothari with Colleen Corrigan, Harry Jonas, Aurélie Neumann and Holly Shrumm (eds), *Recognising and Supporting Territories and Areas Conserved by Indigenous Peoples and Local Communities: Global Overview and National Case Studies*, Secretariat of the Convention on Biological Diversity, ICCA Consortium, Kalpavriksh, and Natural Justice, Montreal, Canada (Technical Series no. 64, 2012).

59. Vicki Grieves, *Aboriginal Spirituality: Aboriginal Philosophy. The Basis of Aboriginal Social and Emotional Wellbeing*, Discussion Paper No. 9, Cooperative Research Centre for Aboriginal Health, Darwin, 2009.

60. Mathias Guenther, 'On /Xam San Folklore' in Miklos Szalay (ed), *The Moon as Shoe: Drawings of the San* (Scheidegger and Spiess, Zurich 2002) 92.

61. See generally, *supra* n 21.

3.4 Third-generation environmental rights

Under international law, the civil and political rights encoded in the Universal Declaration on Human Rights 1948 (UDHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR) are commonly taken to be the first generation of human rights. The second-generation rights are socio-economic and cultural rights. These too are mentioned in the UDHR, but they appear most prominently in the International Covenant on Economic, Social and Cultural Rights 1966 (ICESR).

Third-generation rights are usually described as solidarity, collective or group rights, since they are designed to benefit groups of people rather than individuals. And, in this context, it is irrelevant whether the group is a minority or whether it is defined in ethnic, religious or linguistic terms.⁶² These rights go beyond the merely civil and social, and aim to secure rights to self-determination, economic and social development, cultural heritage, natural resources and, most importantly for current purposes, a satisfactory environment.

Third-generation rights are not codified in a single instrument. Instead, they are largely the work of international organizations, which have been successful in producing a series of declarations, conventions and codes of conduct. In this regard, the Organisation of African Unity deserves special mention,⁶³ since it was responsible for the African Charter on Human and Peoples' Rights (1986), which protects most of the main third-generation rights, namely, self-determination, development, natural resources and a satisfactory environment.⁶⁴

Other bodies involved with collective rights were established by the General Assembly of the United Nations: the UN Development Programme; the UN Environmental Programme and the UN Commission on Sustainable Development. The latter body was set up after a major UN Conference on Environment and Development, also known as the 'Rio' or 'Earth' Summit (1992). The Declaration produced by this conference was intended to be the environmental equivalent of the UDHR, but was undermined by a division of opinion between developed and developing nations.⁶⁵ The Rio Summit nonetheless recorded some substantial achievements, notably an increase in public awareness and a political commitment by states to respect environmental issues.

62. Which are dealt with in article 27 of the ICCPR. In 1992, this article was supplemented by a General Assembly Declaration 47/135 on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Karel Vasak, 'Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights', UNESCO Courier 30: 11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

63. The AU has origins in the Organization of African Unity (OAU) established in 1963 and the African Economic Community (AEC) of 1981. In 1999, at an annual meeting of heads of state of the OAU, the Libyan President, Muammar Gaddafi, proposed a more comprehensive institution with greater supranational powers than the OAU. See Magliveras Konstantinos and Gino Naldi, 'The African Union – A New Dawn for Africa' (2002) 51 ICLQ 415–26. This idea captured popular imagination, and members of the Organization issued a declaration calling for the creation of an African Union. This declaration was followed by a summit in 2000, at Lomé, when a Constitutive Act was adopted. See Corinne Packer and Donald Rukare 'The New African Union and Its Constitutive Act' (2002) 96 The American Journal of International Law 365–79.

64. Articles 20, 21, 22 and 24.

65. Chee Yoke Ling, *The Rio Declaration on Environment and Development: An Assessment* (Third World Network, Penang 2012) 7.

More concrete products of the Summit were the Rio Declaration on Environment and Development (a list of non-binding principles intended to guide other Earth Summit documents); Agenda 21 (a non-binding plan of action for sustainable development, committing states to a more balanced form of development by requiring them to minimize harmful effects on the environment);⁶⁶ the UN Framework Convention on Climate Change 1992 and, significantly for this article, the Convention on Biological Diversity 1993 (CBD).⁶⁷

The origins of the CBD – the very need for it – as Bragdon argues, had much to do with the emergence of *homo economicus* and the consequent desacralizing of Nature.⁶⁸ An alarming report issued seven years after adoption of the Convention (in 2000) by the CBD Secretariat stated that species were then disappearing 50–100 times faster than the natural rate, and that this rate was predicted to continue rising exponentially. An estimated 34,000 plant and 5200 animal species, including one in eight of the world's bird species, faced extinction. About 45 per cent of the Earth's original forests had gone and would continue to shrink. Up to 10 per cent of coral reefs, which are among the most biologically diverse ecosystems in the world, had been destroyed and one-third of those remaining would face collapse over the next 10 to 20 years. Coastal mangroves, a vital nursery habitat for countless species, were also vulnerable; half had already gone.⁶⁹

4 THE GENESIS OF BIOCULTURAL RIGHTS: THE CONFLUENCE OF THE FOUR MOVEMENTS

The justification for wider recognition of the efficacy of biocultural rights arises at the confluence of the movements described above. Despite their differences, these movements converge in a common goal: to protect local ecosystems and to accept that this goal is best achieved by securing the rights of communities who live in them. As we shall see below, this understanding has provided the necessary impetus for a swathe of environmental laws and policies explicitly and implicitly recognizing rights of communities to steward their territories, rights we refer to as biocultural rights.

Biocultural rights therefore denote all the rights required to secure community stewardship over their lands and waters. This role reflects a way of life, whereby a

66. This instrument consisted of more than 2500 plans, embracing all parts of the environment, from the outermost limits of the atmosphere to the depths of the oceans, and it was intended to guide all human activities. Developed countries agreed to contribute 0.7 per cent of their gross domestic product towards implementing Agenda 21, but these commitments have yet to be honoured.

67. The Convention has 193 states parties and aims to ensure the conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising from its commercial and research utilization. Many developing countries view the CBD as a way to redefine historical benefit flows from the use of genetic resources. See generally, Lyle Glowka *et al.*, *A Guide to the Convention on Biological Diversity* (IUCN, Gland 1994). See also, Lyle Glowka, 'Emerging Legislative Approaches to Implement Article 15 of the Convention on Biological Diversity' (1997) 6(3) *RECIEL* 249–62.

68. SH Bragdon, 'The Evolution and the Future of Law of Sustainable Development: Lessons from the Convention on Biological Diversity' (1996) VIII(3) *Georgetown International Environmental Law Review* 389–513.

69. *Sustaining Life on Earth: How the Convention on Biological Diversity Promotes Nature and Well-Being* (Secretariat of the Convention on Biological Diversity, Montreal 2000) 5.

community's identity, its culture, spirituality and system of governance are inseparable from its lands and waters. Biocultural rights do not denote exercise of ownership in the western legal sense but rather a duty of care and protection.

This proposition is endorsed by mounting evidence of sophisticated methods for conservation and sustainable use in community systems of land management found in various parts of the world. Examples have emerged from action-research projects that have been run since 2005 by the International Institute for Environment and Development (IIED) to compare the conservation practices of indigenous peoples and local communities in India, China, Peru, Panama and Kenya.⁷⁰ One of the most interesting findings of these projects was the identification of a set of ecological ethics common to all the communities studied, notwithstanding their diverse cultures and vastly different terrains. These ethical systems were initially identified as customary laws through the pioneering work of Alejandro Argumedo of the Asociación ANDES with the Quechua communities of Peru, who had set up a Potato Park as an *in situ* gene bank and a biocultural territory to conserve their traditional potato varieties. The IIED summed up these ethics as: reciprocity (what is taken from Nature is given back in equal measure), duality (everything in Nature has a complementary opposite, and these opposites must be balanced) and equilibrium (everything in Nature is in a state of dynamic equilibrium or harmony and this harmony must not be disrupted).⁷¹

Further evidence of the acceptance and implementation of biocultural rights can be found in advocacy for and recognition of community systems of customary law. The implementation of such systems demonstrates, if not an empirical endorsement of the effectiveness of community tenures, at least an official acceptance of their utility. Recognition exists in various forms. To start at the soft law level, the Declaration on Indigenous Peoples' Rights to Genetic Resources and Indigenous Knowledge was issued by 44 indigenous peoples' groups in May 2007. The document reaffirmed the spiritual and cultural relationship of indigenous peoples with all life forms existing in their traditional territories, and their fundamental role and responsibility as the guardians of their territories, lands and natural resources. Other examples are the August 1997 Heart of the People Declaration and the February 1995 Declaration of Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project. The Heart of the People Declaration best captures the essence of the stewardship role of indigenous peoples vis-à-vis their territories by stating:

Mother Earth and all human, plant and animal relatives are sacred, sovereign, respected, unique living beings with their own right to survive, and each plays an essential role in the survival and health of the natural world. Human beings are not separate from the rest of the natural world, but are created to live in relationship and harmony with it and with all life. The Creator has given us a sacred responsibility to protect and care for the land and all of life, as well as to safeguard its well being for future generations to come.⁷²

70. K Swiderska *et al.*, *Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices: Key Findings and Recommendations 2005–2009* (IIED, London 2009), <<http://pubs.iied.org/14591IIED.html?c=biocon>> accessed 14 March 2014.

71. *Ibid.* See also Alejandro Argumedo, *Community Biocultural Protocols: Building Mechanisms for Access and Benefit Sharing Amongst the Communities of the Potato Park Based on Quechua Customary Norms* (IIED, London 2011).

72. See <http://www.ipcb.org/resolutions/htmls/dec_heartopeoples.html> accessed 14 March 2014.

Regarding hard law at the global level, conceptions of the relationship between indigenous peoples, ancestral lands and the preservation of biodiversity are visible within the normative structure of international law itself, particularly as a result of the indigenous legal engagement indicated above. For example, the CBD was the first international treaty that explicitly recognized the link between traditional ways of life of communities and biodiversity conservation. More importantly, in articles 8(j)⁷³ and 10(c),⁷⁴ the CBD obliges its 193 state parties to safeguard these traditional ways of life by ensuring the integrity of traditional cultures, encouraging customary use of biological resources and upholding local decision-making structures.

The CBD rights have been underscored by various indigenous peoples' declarations and statements that have called for the recognition of the right of indigenous peoples to maintain and strengthen their distinctive relationship with their traditionally owned or occupied territories. Most important in this regard is the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP).⁷⁵ Article 25 provides that:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.⁷⁶

Although the UNDRIP is a UN General Assembly resolution, which makes it a non-binding recommendation to states, it carries significant normative weight for states that voted in its favour. The UNDRIP goes on to recognize indigenous peoples' rights to use and develop lands they traditionally owned or occupied, without state interference, and to uphold their responsibilities to future generations.⁷⁷ Specific reference is made to the right of indigenous peoples to conserve and protect the environment, including a right to determine the capacity of production of indigenous lands.⁷⁸

Further evidence of inter-generational conservation by indigenous peoples of their territories has been marshalled by studies conducted by the Forest Peoples Program (FPP) in Bangladesh, Suriname, Guyana, Cameroon and Thailand.⁷⁹

73. Article 8(j) of the Convention on Biological Diversity (CBD) reads: Each Contracting Party shall, as far as possible and appropriate (chapeau) subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices', <<http://www.cbd.int/convention/text/>> accessed 14 March 2014.

74. Article 10(c) of the CBD reads: Each Contracting Party shall, as far as possible and appropriate protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements', <<http://www.cbd.int/convention/text/>> accessed 14 March 2014.

75. 61st plenary GA 10612, <<http://www.un.org/esa/socdev/unpfii/en/drip.html>> accessed 14 March 2014.

76. <<http://www.un.org/esa/socdev/unpfii/en/drip.html>> accessed 14 March 2014.

77. Article 26.

78. Article 29. In addition, article 31 recognizes indigenous peoples' right to determine their own priorities and strategies for the development of their lands and resources.

79. Customary Sustainable Use of Biodiversity by Indigenous Peoples and Local Communities: Examples, Challenges, Community Initiatives and Recommendations Relating to CBD

This evidence has played a key role in the emerging discourse on Indigenous Peoples and Community Conserved Areas (ICCAs) under the Program of Work on Protected Areas (PoWPA) within the CBD framework.⁸⁰ The PoWPA discussions are an example of the battle between a state-led technocratic approach of fencing off ‘protected areas’ for conservation purposes and the response by community organizations and NGOs led by the ICCA Consortium⁸¹ demanding legal recognition of local conservation practices in the tradition of political ecology.⁸²

Pastoralists and livestock keepers across the world are also supported by organizations advocating biocultural rights. The LIFE Network,⁸³ for instance, has sought legal recognition of their role as creators of livestock breeds and custodians of local ecosystems,⁸⁴ which involves advocating rights as livestock keepers and pastoralists both under the CBD and the Food and Agriculture Organization (FAO).⁸⁵ These rights, outlined in the LIFE Network, facilitated the 2009 Declaration on Livestock Keepers Rights,⁸⁶ and are endorsed by a number of pastoralist and livestock keepers’ organizations. The principles underlying such rights are based on recognition of the integral links between the keepers, their breeds, the ecosystem and the conservation cycles that these links engender.

The emergence of farmers’ rights under the International Treaty on Plant Genetic Resources for Food and Agriculture (2004) (ITPGRFA) is a further example of the emergence of biocultural rights.⁸⁷ Under article 9 of the Treaty, states are obliged to recognize farmers’ rights, in particular the contributions farmers make to conserving and developing crop genetic resources. Although governments must protect and

Article 10(c), A Synthesis Paper by the FPP and Partner Organizations, October 2010, <<http://www.forestpeoples.org/topics/convention-biological-diversity-cbd/publication/2010/synthesis-paper-10c-case-studies>> accessed 14 March 2014.

80. The Programme of Work on Protected Areas (PoWPA) of the CBD was adopted in 2004 at the Seventh Conference of the Parties. It enshrines the development of participatory, ecologically representative and effectively managed national and regional systems of protected areas, where necessary, stretching across national boundaries. PoWPA consists of four interlinked elements: Element 1: Direct Actions for Planning, Selecting, Establishing, Strengthening, and Managing, Protected Area Systems and Sites; Element 2: Governance, Participation, Equity and Benefit Sharing; Element 3: Enabling Activities; Element 4: Standards, Assessment, and Monitoring. See also, Stan Stevens, ‘Implementing the UN Declaration on the Rights of Indigenous Peoples and the International Human Rights Law through the Recognition of ICCAs’ (October 2010) 17 Policy Matters 181–94.

81. The ICCA Consortium is a global network of CBOs and NGOs working towards securing the rights of indigenous peoples and local communities to govern and maintain their community conserved areas, <<http://www.iccaworld.com/>> accessed 13 September 2011.

82. See generally, Holly Shrumm *et al.*, ‘Exploring the Right to Diversity in Conservation Law, Policy and Practice’ (October 2010) 17 Policy Matters, 10–14.

83. The LIFE Network is a global network of organizations and individuals that support community conservation of livestock breeds.

84. See generally, the declarations and decisions of pastoral peoples at <www.pastoralpeoples.org> accessed 14 March 2014.

85. The FAO is an inter-governmental organization with 191 Member Nations, two associate members and one member organization – the European Union. The FAO was set up with the mandate to raise levels of nutrition, improve agricultural productivity, better the lives of rural populations and contribute to the growth of the world economy. See <www.fao.org> accessed 14 March 2014.

86. See <<http://www.pastoralpeoples.org/>> accessed 14 March 2014.

87. The ITPGRFA currently has 127 state parties.

promote farmers' rights, they can choose a variety of locally relevant measures to do so, which makes the modalities for implementation nebulous. The Governing Body of the ITPGRFA, however, is attempting to realize these rights. While the ITPGRFA does not define them, the generally agreed definition underscores their biocultural nature, notably, the customary rights of farmers to save, use, exchange and sell farm-saved seed and propagating material; their rights to be recognized, rewarded and supported for their contribution to the global pool of genetic resources as well as to the development of commercial varieties of plants; and their right to participate in decision making on issues related to crop genetic resources.⁸⁸

Drawing on these treaties, and reading them in the light of the CBD, it is possible to argue that a new legal landscape has emerged in which biocultural rights are being developed as a people-led alternative to state-led solutions to the environmental crisis.⁸⁹ Nearly every CBD body, including the Working Group on article 8(j), the Working Group on Access and Benefit Sharing (ABS), the Working Group on Protected Areas and the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA), has become fertile ground for developing and refining biocultural rights. In many ways, therefore, we can say that these rights have begun to crystallize as a sub-set of third-generation group or solidarity rights.

The growing discourse on biocultural rights is spilling over from the CBD to other UN and international fora, especially to environmental bodies such as the World Intellectual Property Organization – Intergovernmental Committee (WIPO-IGC),⁹⁰ the Commission on Genetic Resources for Food and Agriculture (FAO-CGRFA),⁹¹ the

88. See <<http://www.farmersrights.org/about/index.html>> for discussions on interpreting farmers' rights under the ITPGRFA. The website is an excellent resource on farmers' rights maintained by the Fridtjof Nansen Institute (accessed 13 September 2011). Article 9.2 of the ITPGRFA dealing with farmers' rights states: '9.2 The Contracting Parties agree that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including: (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture; (b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture'.

89. See generally, Brendan Tobin, "'Law Giveth and the Law Taketh Away": The Case for Recognition of Customary Law in International ABS and Traditional Knowledge Governance' (October 2010) 17 Policy Matters 16–24.

90. Established by the World Intellectual Property Organization (WIPO) General Assembly in October 2000 (document WO/GA/26/6), the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is undertaking text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of traditional knowledge (TK), traditional cultural expressions (TCEs)/folklore and genetic resources. See <<http://www.wipo.int/tk/en/igc/>> accessed 14 March 2014. For a spillover of biocultural rights into the WIPO-IGC negotiations, see generally, *Intellectual Property and Traditional Knowledge*, Booklet no. 2 (WIPO Publication, New York).

91. The Commission on Genetic Resources for Food and Agriculture (CGRFA) is a permanent forum where governments discuss and negotiate matters relevant to biodiversity for food and agriculture. The main objectives of the Commission are to ensure the conservation and sustainable utilization of genetic resources for food and agriculture, as well as the fair and equitable sharing of benefits derived from their use, for present and future generations. The Commission

UN Convention on Combating Desertification (UNCCD)⁹² and the UN Framework Convention on Climate Change (UNFCCC).⁹³

What is more, significant gains regarding biocultural rights have been made within the CBD through the Working Group on article 8(j)⁹⁴ and other related provisions. Article 8(j), which in 1993 seemed an anodyne provision, has been transformed into the cutting edge of political ecology and the rights of indigenous peoples and local communities. Examples of this include the *Akwé: Kon Guidelines on the conduct of social, cultural and environmental impact assessments on developments on the lands of indigenous and local communities*⁹⁵ and the recent *Tkarihwaï:ri Code*

on Genetic Resources for Food and Agriculture was established in 1983 to deal with issues related to plant genetic resources. In 1995, the FAO Conference broadened the Commission's mandate to cover all components of biodiversity of relevance to food and agriculture. Since its establishment, the Commission has overseen global assessments of the state of the world's plant and animal genetic resources for food and agriculture and has negotiated major international instruments, including the International Treaty on Plant Genetic Resources for Food and Agriculture. See, *Biodiversity for a World Without Hunger: The Commission on Genetic Resources for Food and Agriculture* (FAO, Rome), <www.fao.org/nr/cgrfa> accessed 14 March 2014. See also Ilse Köhler-Rollefson *et al.*, 'Livestock Keepers' Rights: A Rights-Based Approach to Invoking Justice for Pastoralists and Biodiversity Conserving Livestock Keepers' (October 2010) 17 *Policy Matters* 113–15.

92. The UNCCD (United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa) was adopted in 1994 and has 194 parties. The objective of the Convention is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, with a view to contributing to the achievement of sustainable development in affected areas. See Article 2 of the Convention for the objectives of the UNCCD. For a spillover of biocultural rights into the UNCCD, see generally, *Human Rights and Desertification: Exploring the Complementarity of International Human Rights Law and the United Nations Convention to Combat Desertification*, Issue paper 1, *Desertification, Land Degradation and Drought* (UNCCD, Bonn 2008).

93. In 1992, the United Nations Framework Convention on Climate Change (UNFCCC) was adopted as the basis for a global response to the problem of climate change. With 194 Parties, the ultimate objective of the Convention is to stabilize greenhouse gas concentrations in the atmosphere at a level that will prevent dangerous human interference with the climate system. The Convention is complemented by the 1997 Kyoto Protocol, which has 192 Parties. Under this treaty, 37 industrialized countries and the European Community have committed to reducing their emissions by an average of 5 per cent by 2012 against 1990 levels. Industrialized countries must first and foremost take domestic action against climate change. But the Protocol also allows them to meet their emission reduction commitments abroad through so-called 'market-based mechanisms'. See, *An Introduction to the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol*, Fact Sheet, UNFCCC, February 2011. For a spillover on biocultural rights into the UNFCCC, see generally, Peter Wood *et al.*, 'REDD Community Protocols: A Community Approach to Ensuring the Local Integrity of REDD', *Outreach*, Special Post-COP 15 Issue, 2010, p. 7.

94. See <www.cbd.int> for information about the Working Group on Article 8(j) and its work.

95. The *Akwé: Kon Guidelines* were developed pursuant to task 9 of the programme of work on Article 8(j) and adopted by the Conference of the Parties of the CBD at its 5th meeting 2000. The Guidelines state their purpose as providing a collaborative framework within which Governments, indigenous and local communities, decision-makers and managers of developments can: (a) support the full and effective participation and involvement of indigenous and local communities in screening, scoping and development planning exercises; (b) properly

of *Ethical Conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities*.⁹⁶ Section 2 of the *Code* identifies as one of its main aims the promotion of respect for the cultural and intellectual heritage of indigenous and local communities relevant for the conservation and sustainable use of biological diversity as a way of contributing to the achievement of the objectives of Article 8(j) of the CBD.⁹⁷

Finally, the most recent (and high profile) victory for biocultural rights is the adoption of the Nagoya Protocol on Access and Benefit Sharing⁹⁸ in October 2010 by 193 state parties to the CBD. Four pivotal biocultural rights are established which

take into account the cultural, environmental and social concerns and interests of indigenous and local communities, especially of women who often bear a disproportionately large share of negative development impacts; (c) take into account the traditional knowledge, innovations and practices of indigenous and local communities as part of environmental, social and cultural impact-assessment processes, with due regard to the ownership of and the need for the protection and safeguarding of traditional knowledge, innovations and practices; (d) promote the use of appropriate technologies; (e) identify and implement appropriate measures to prevent or mitigate any negative impacts of proposed developments; (f) take into consideration the interrelationships among cultural, environmental and social elements. See <www.cbd.int/doc/publications/akwe-brochure-en.pdf> accessed 14 March 2014.

96. The 10th meeting of the Conference of Parties to the CBD in 2010 adopted the *Tkarihwaï:ri Code of Ethical Conduct* in its decision X/42.

97. One of the main elements of the Code relevant for biocultural rights is Principle 20 dealing with traditional guardianship/custodianship. It states that '[t]raditional guardianship/custodianship recognizes the holistic interconnectedness of humanity with ecosystems and obligations and responsibilities of indigenous and local communities, to preserve and maintain their traditional role as traditional guardians and custodians of these ecosystems through the maintenance of their cultures, spiritual beliefs and customary practices. Because of this, cultural diversity, including linguistic diversity, ought to be recognized as key to the conservation and sustainable use of biological diversity. Indigenous and local communities should, where relevant, be actively involved in the management of lands and waters traditionally occupied or used by them, including sacred sites and protected areas. Indigenous and local communities may also view certain species of plants and animals as sacred and, as custodians of biological diversity, have responsibilities for their well-being and sustainability, and this should be respected and taken into account in all activities/interactions'. See <<http://www.cbd.int/decision/cop/?id=12308>> accessed 14 March 2014.

98. <<http://www.cbd.int/abs/text/>> accessed 14 March 2014. In the African context, biocultural rights preceded the Nagoya Protocol through the African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources prepared in 1997 by an Organization of African Unity (OAU) Task Force. The OAU Ministerial Session, followed by the OAU Summit of Heads of State and Government, adopted this Model Law in Ouagadougou in 1998, and recommended that it be the basis of African national law. Article 16 of the African Model Law states:

'The state recognizes the rights of communities over the following:

- i) their biological resources;
- ii) the right to collectively benefit from the use of their biological resources;
- iii) their innovations, practices, knowledge and technologies acquired through generations;
- iv) the right to collectively benefit from the utilisation of their innovations, practices, knowledge and technologies;
- v) their rights to use their innovations, practices, knowledge and technologies in the conservation and sustainable use of biological diversity;
- vi) the exercise of collective rights as legitimate custodians and users of their biological resources'.

significantly affirm the self-determination of indigenous peoples and local communities. They are rights to traditional knowledge, genetic resources, self-governance through their own laws and community protocols and benefit from the utilization of traditional knowledge and genetic resources by third parties outside the traditional circle.⁹⁹ While none of these rights is unqualified and all of them allow for limited state involvement, they should be seen as substantial gains in the direction of a political ecology.

5 CONCLUSION: FROM HUMBLE BEGINNINGS TO STEWARDSHIP OF THE PLANET

The evidence marshalled above suggests a discursive cross-engagement amongst both top and bottom level decision- and law-making institutions which points towards a growing level of acceptance of biocultural rights as a category of third generation rights in the international sphere. Even so, these rights have had an unsung arrival on the international legal stage.

This humble birth can be ascribed, primarily, to the following reasons. First, biocultural rights have responded less to third generation group rights in any overt manner, and more to the crisis of biodiversity loss and its ramifications for food, health and economic security. As a result of intensive lobbying by environmental groups and a growing body of empirical evidence, states have had to make a policy U-turn from the disastrous ‘fines and fences’ approach to conservation.¹⁰⁰ That approach had involved disenfranchising communities that had historically occupied common lands in favour of state control or private ownership. This policy U-turn meant, in essence, that in order to ensure conservation and sustainable use, states were obliged to affirm and secure the rights of communities that had been custodians of the relevant ecosystems for generations.

Second, unlike other third generation rights, biocultural rights carry no undertone of the political self-determination claims that inevitably make states nervous. Instead, biocultural rights have been advocated mainly under the Rio Conventions as the ‘environmental rights’ of communities. As a result, biocultural rights initially appeared in non-threatening forms such as ‘farmers rights’, ‘livestock keepers’ rights’ and rights to traditional knowledge, which, though hard won, were not seen as a threat to state sovereignty.¹⁰¹

Biocultural rights also differ significantly from other group rights in that the nature of the rights they seek to assert is not necessarily based on ethnicity, religion or minority status but instead on a history of stewardship. Hence, the nature of self-determination that has been asserted centres upon community management of natural resources with evidence of a conservation practice that, in most cases, has proved more effective than state management.¹⁰²

99. These conclusions have been drawn from our interpretation of specific articles of the Nagoya Protocol on Access and Benefit Sharing and Bavikatte’s work on the domestic law and policy of several countries implementing the Protocol.

100. See generally, Helene Suich *et al.* (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan, London 2009).

101. *Supra* n 4.

102. Theresa N McClenaghan, ‘Why Should Aboriginal Peoples Exercise Governance over Environmental Issues?’ (2002) 51 UNB Law Journal 211–30.

Third, biocultural rights were advocated in international environmental negotiations as a defence against ‘biopiracy’. Communities, in essence, demanded state protection from corporate theft of their knowledge and resources. Within the politically fraught TRIPS negotiations, developing countries supported biocultural rights as State assertions, using communities as proxies for the same kind of intellectual property rights that companies and individuals claimed, albeit in a *sui-generis* form.¹⁰³

As a shadow subset of third-generation and indigenous rights, biocultural rights possess elements of third-generation rights but differ from them in an explicit commitment to conservation and to the sustainable use of biodiversity. In many ways, these rights have been given greater recognition than mainstream third-generation rights, precisely because their politically unobjectionable nature acts as a bulwark against the more contentious group claims, most notably, of course, self-determination.

Biocultural rights can, therefore, be understood primarily as collective rights expressing the specific aim of affirming the stewardship of communities over their lands and waters. They differ from private property rights in that they refuse to conceive of Nature as only a fungible and alienable commodity with exchange value. Accordingly, biocultural rights seek to safeguard the stewarding relationship between a community and its ecosystem.

While, for the most part, biocultural rights are associated with communities that have strong cultural and spiritual ties to their lands, there is no reason why they should not also be claimed by urban communities aspiring to protect the destruction of their parks, wetlands, lakes and trees in the name of development. One possible future development, then, for biocultural rights could involve their translation into forms of urban popular stewardship. Further research must be conducted, however, in order to establish whether such communities are able to develop and assert the same kinds of biocultural relationship to their locations as traditional communities can to their ancestral lands.

The ethic of stewardship or care lies at the core of the seemingly disparate rights aiming to achieve the objective of conservation. Stewardship is critical for a discourse of biocultural rights, for it provides the ethical content of the rights, and thereby creates a paradigm shift whereby rights to land, to culture, to traditional knowledge, to self-governance, etc., are informed by a set of values that are not market based, and, what is more, are contained within the limitations of an overriding responsibility to protect the environment.

In 1999 the United Nations Environment Program published a pivotal collection of articles on the cultural and spiritual values of biodiversity.¹⁰⁴ This collection was edited by the late anthropologist Darrell Addison Posey. Posey inspired an entire generation of anthropologists and community activists to begin mapping the role of cultures of indigenous peoples and local communities in ensuring biodiversity. He was one of the first to highlight the need for a ‘bundle of rights’ approach to conservation that would reflect the integrated nature of community life. He called these rights ‘traditional resources rights’ (TRR) and described them as ‘the many “bundles of rights” that can be used for protection, compensation, and conservation’. He went on to say:

TRR is an integrated rights concept that recognizes the inextricable link between cultural and biological diversity and sees no contradiction between the human rights of indigenous and local communities, including the right to development and environmental conservation. Indeed,

103. *Supra* n 90.

104. Darrell Addison Posey, *Cultural and Spiritual Values of Biodiversity* (UNEP, Nairobi 1999).

they are mutually supportive since the destiny of traditional peoples largely determines, and is determined by, the state of the world's biological diversity. TRR includes overlapping and mutually supporting bundles of rights.¹⁰⁵

The concept of biocultural rights further nuances Posey's ideas on TRR by introducing stewardship as the fundamental ethos that binds together the different rights that communities need to protect their way of life. The powerful centrality of the stewardship ethic arguably provides useful clues for the future trajectories of biocultural rights discourse, which contains the potential to bring it into alignment with such well-established discourses as feminism and post-colonialism. While the much-criticized liberal rights discourse focuses on the juridical subject as an atomistic bearer of many separate rights, biocultural rights understand the juridical subject as a node in a web of biocultural relationships.

Biocultural rights are therefore a conception that can connect new discourses about modes of materialism and the shortcomings of traditional liberalism. Such rights focus less on the orthodox traditional conception of boundless autonomy and more on linkages between rights required by communities to care for their lands and resources. Indeed, within a biocultural rights framework, rights are meaningless on their own – as is the human being. These rights make sense only in relation to other rights, and in the larger context of the well-being of communities and Nature.

In the final analysis, the term biocultural right is best understood as a label for the variegated legal trends now moving towards securing the right to stewardship of Nature by indigenous peoples and local communities. This momentum is fuelled by the fact that such located, consciously eco-embedded communities can help humanity re-member its kinship with Nature and repair the dis-membering that is caused when Nature is treated as a mere exchange value.

105. Darrell Addison Posey and Graham Dutfield, 'Beyond Intellectual Property: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities' (International Development Research Centre, Ottawa 1996) 95.