

ENVIRONMENTAL LAW AS POLITICAL ECOLOGY: THE ROOTS OF BIOCULTURAL RIGHTS

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Abstract:

This paper examines the phenomenon of 'biocultural rights' that have arisen through multilateral environmental agreements since the coming into force of the Convention on Biological Diversity in 1993. The paper identifies biocultural rights as emerging from the confluence of three of the most significant social movements of the last two decades i.e. the political ecology, the commons and the indigenous peoples movements. The paper concludes with a short history of biocultural rights and its future trajectory.

Key words: Biocultural rights, indigenous peoples, political ecology, post-development, commons

Introduction:

Environmental law is at a political crossroads. It presents an optical illusion that on the face of it seems like a clear-eyed response by governments to stem the environmental crisis that confronts the planet. But beneath the surface a furious battle is being fought. The terrain of this battle is law itself and the battle is around the nature of solutions to solve environmental problems. The kind of solutions that seek to be implemented through environmental law are either technocratic in nature or those that engender local self-determination. Herein lies the heart of the conflict that is also a fault line within the environment movement itself.

This paper will examine the emergence of biocultural rights as an aspect of environmental law- an aspect that seeks to resolve our current environmental predicament through affirming the stewardship rights of indigenous peoples and local communities towards their lands and waters. In doing so this paper will also trace the origins of biocultural jurisprudence to the convergence of three of the most significant social movements of our times, all of which have a direct bearing on the fate of our planet- the political ecology movement, the commons movement and the movement for the rights of indigenous peoples and local communities.

Political Ecology: Local Affirmation versus Techno-Bureaucracy

Technocratic solutions are generally based on scientific reports about the ecosystem's carrying capacity and pollution thresholds along with economic

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studies around ensuring industrialization keeps step with the regenerative capacity of the ecosystem. They recognize the need to prevent the abuse of natural resources and seek to put forward expert solutions for the rational management of air, water and land. They also propose policies for reducing waste and recycling along with the development of environment friendly technologies.

States implement technocratic solutions developed by experts through a variety of carrots and sticks such as taxes, subsidies and penalties. The enforceability of technocratic solutions ultimately depends on a class of experts and bureaucrats who are tasked with the role of rationally managing the environment in the interests of humanity². The demarcation and management of protected areas to method to conserve forests is an example of the exercise of techno-bureaucratic power through environmental law. Often however this exercise of techno-bureaucratic power involves a usurpation of decision-making authority from local communities by an expertocracy. 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 by the Indian Central Empowered Committee is a classic example of the use of environmental law by an expertocracy that denies community conservation practices and undermines community decision making in the name of environmental protection³.

Social movements of indigenous peoples and local communities however insist that communities who have historically conserved ecosystems and are most affected by any adverse environmental impact are best suited to make decisions about these ecosystems. These social movements argue that the current ecological crisis is an outcome of an expertocracy imposing non-consultative top-down solutions resulting in the delegitimization of local knowledge and decision-making. Such social movements represent a break in the environmental movement from a techno-bureaucratic approach to ecology to a political ecology. The proponents of political ecology trace the origins of the environmental movement to a time before the current environmental crisis when it manifested as a protest against the usurpation of the rights of communities to their lands and waters by the administrative and economic apparatus of colonial and settler states⁴.

The Nature that these communities sought to protect was not the Nature of the technocrats and bureaucrats nor the Nature of the naturalists but Nature that was so integrally intertwined with community life that it represented an entire way of being and knowing. The defense of nature for these communities represented a

² Gorz, Andre, "Political Ecology: Between Expertocracy and Self-Limitation", in *Ecologica*, Calcutta: Seagull Books, 2008, pp. 43-76; the ideas in this section owe a considerable debt to the work on foundational work on political ecology by the French social philosopher Andre Gorz.

³ Ilse Kohler-Rollefson "Biocultural Community Protocols: A Tool for Pastoralists to Secure Customary Rights to the Commons", FES, 2010, *Common Voices*, Issue 2, pp 16-18.

⁴ *supra* n.1, p.50

defense of a 'cosmovision'⁵. Nature was not something 'out there' that needed to be protected by scientists and administrators through 'command and cope' mechanisms but the very notions of self and community were constructed through an intimate and historical interaction with the ecosystem.

Post-development: Developing a People Centered Ecology

Political ecology in this sense has its roots in the works of the post-development thinkers and activists ranging from E.F Schumacher⁶ and Leopold Kohr to Ivan Illich⁷ and Arturo Escobar. In his seminal work 'Encountering Development: The Making and the Unmaking of the Third World', Escobar best sums the post-development turn when he says:

"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."⁸

The post-development scholars presented a foundational critique of technocratic large development projects of the seventies and eighties as contributing to destabilizing communities, creating poverty and destroying the environment⁹. In the eighties and nineties, with the looming ecological crisis post-development activists began to highlight local community conservation systems and the importance of affirming such systems.¹⁰ The work of organizations such as the

⁵ "...the 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." From "Affirmation of cultural diversity- learning with communities in the central Andes", Ishizawa, Jorge, *Development Dialogue*, August 2009, Vol 2, p.118

⁶ Schumacher, E.F., *Small is Beautiful: Economics as if People Mattered*, London: Blond and Briggs, 1973.

⁷ Illich, Ivan, *Tools of Conviviality*, Boyars: London, 1973; Illich argues 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'.

⁸ See generally, *The Development Dictionary*, Wolfgang Sachs (ed.), NY: Zed Books, 2010 and *The Post-Development Reader*, Majid Rahnema et.al (eds.), NY: Zed Books, 1997

⁹ Escobar, Arturo, *Encountering Development: The Making and Unmaking of the Third World*, Princeton University Press; Princeton, 1997.

¹⁰ One of the most famous examples of this is the work of Vandana Shiva critiquing the cultural and ecological devastation caused by the Green Revolution in India and the importance of affirming traditional agricultural practices and recognizing their ability to adequately respond to

PRATEC (Andean Project for Peasant Technologies) and COMPAS-ED (Comparing and Supporting Endogenous Development) epitomized the best of post-development thinking in practice.

PRATEC working in the central Andes covering parts of Peru, Bolivia and Ecuador 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*”¹¹.

A statement by Julia Pacoricona Aliaga from Conima, Puno, best exemplifies the kind of culture that PARTEC 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”¹².

COMPAS-ED has worked on endogenous development in a sustained manner over the last 16 years with partner organizations in Asia, Latin America and Africa. Endogenous development encapsulates the essence of post-development thinking by basing itself on local peoples' own criteria of development, taking into account the material, social and spiritual wellbeing of peoples. In an effort to get over techno-bureaucratic top down solutions, COMPAS seeks to make local peoples' worldviews and livelihood strategies the starting point for development. Evidence from the work of COMPAS partners in Guatemala, India and Ghana¹³ shows that these worldviews and livelihood strategies reflect sustainable development as a balance between material, social and spiritual wellbeing¹⁴.

increased demand for food. Shiva, Vandana, *Monocultures of the Mind*, Third World Network: Penang, 1993.

¹¹ *supra* n. 4, p.111

¹² *Terre des homes-Germany, Children and Biodiversity in the Andes*, Lima, 2001, p.23, quoted in *supra* n.4

¹³ *Community well-being and biocultural diversity through endogenous development*, COMPAS network: outcomes, impact and new initiatives, request www.compasnet.org

¹⁴ www.compasnet.org

Political ecology as a discipline then arose from such a post-development impetus of valorizing community ecological practices as the only real alternative to techno-bureaucratic solutions to conservation. In this sense political ecology broke from sections of the environmental movement by insisting on the integral link between environmental conservation and community rights to biodiversity.

(Un) Common wisdom of political ecology:

Political ecology found a natural ally in the ‘commons movement’ that had through empirical data begun to turn the ‘tragedy of the commons’ argument on its head¹⁵. The theory of the ‘tragedy of the commons’ was based on an assumption that where consequences regarding commonly held resources are borne by the community as a whole, individuals would seek to maximize self-interest to the detriment of the community and the sustainability of the resource. The ‘tragedy of the commons’ therefore argued that long-term sustainability of common pool resources is best ensured when such resources are privatized or State controlled.

Extensive research on governance of the commons by political scientists and economists such as Elinor Ostrom¹⁶ and Arun Agarwal¹⁷ unequivocally established that State control or privatization of common pool resources are not necessarily the best solutions to ensure conservation and in many cases are counter productive. Contrary to the ‘tragedy of the commons’ assertion of the destruction of common pool resources due to mismanagement by communities and the free-rider problem, researchers working on the commons established that under certain conditions¹⁸ communities are able to best conserve ecosystems.

Recent research evaluating the effectiveness of protected areas under different kinds of management regimes traced forest change in three diverse landscapes: the Chitwan District of Nepal, the Mahananda Wildlife Sanctuary in West Bengal, India and the Tadoba-Andhari Tiger Reserve in Maharashtra, India. The research found that a protectionist approach that excludes local communities is likely to fail

¹⁵ Hardin, Garrett, “The Tragedy of the Commons,” 1968, *Science*, 162, 1243–1248

¹⁶ Ostrom, Elinor, *Governing the Commons: The Evolution of Institutions for Collective Action*, New York: Cambridge University Press, 1990.

¹⁷ Chhatre, Ashwini and Arun Agrawal, “Forest Commons and Local Enforcement,” *Proceedings of the National Academy of Sciences*, 2008, 105(36), 13286–13291.

¹⁸ These conditions are what Ostrom terms as the eight design principles for effective common pool resource management. The 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’ behavior; 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.16

without expensive government inputs. Conservation is also likely to fail in cases where outsiders or dominant insiders impose rules on the community for use of resources. However the research also proved that effective management of forest resources occurs when community members are genuinely involved in decision-making and in developing rules for the use of these resources¹⁹.

Political ecology's intersection with the commons movement, the latter empirically validating the postulates of post-development theorists further highlighted the role that communities played in conservation of ecosystems. This was a politically significant marriage of strengths and represented a new certainty that could no longer be ignored by policy makers in the face of the ecological catastrophe surrounding them. Ostrom best summed up this certainty when she responded to a question that asked her advice to State actors who influence on 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”²⁰.

Indigenous Peoples and the Right to Ecological Stewardship:

International efforts for indigenous peoples rights go back to 1923. It began with the efforts of Levi General Deskaheh, chief of the Younger Bear Clan of the Cayuga Nation as a spokesperson of the Six nations of the Grand River Land near Brantford, Ontario to obtain a hearing at the League of Nations regarding a dispute with Canada over tribal self-government. However a global movement for indigenous peoples rights and the increasing use of supra-national forums by indigenous peoples groups to claim their rights has catapulted since the 1980s.

This global movement though a distinctly modern phenomenon presents itself as a primordial identity that unifies the estimated 300 million indigenous peoples from 4000 distinct societies. Unlike the 1960s movements for the recognition of ethnicity, the indigenous peoples movement asserts itself not as a legal category or an analytical concept but an expression of a global identity. This global identity of 'indigenous' harks to a unity amidst diversity and has, with remarkable success, used the United Nations as the key site of struggle for indigenous peoples rights²¹.

While there is no universally agreed definition of who is indigenous, the definition around which there is a broad consensus was given by Jose R. Martinez Cobo,

¹⁹ Ostrom, Elinor and Harini Nagendra, “Insights on Linking Forests, Trees, and People from the Air, on the Ground, and in the Laboratory,” 2006, *Proceedings of the National Academy of Sciences*, 103(51): 19224–19231; see also ‘Elinor Ostrom: Taking Sustainability Research Mainstream’, FES, 2010, *Common Voices*, Issue 1, pp 6-9.

²⁰ Elinor Ostrom wins Nobel for common(s) sense, www.yesmagazine.org

²¹ Niezen, Ronald, *The Origins of Indigenism: Human Rights and the Politics of Identity*, University of California Press: Berkely, 2003.

the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his seminal 'Study on the Problem of Discrimination against Indigenous Populations':

“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”.²²

At the heart of the struggle for the rights of indigenous peoples is the 'right to self-determination'. As James Anaya, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples notes, self-determination here is not a claim for separate statehood but a self-determination that is grounded in international human rights. Such a self-determination has certain core values which are: non-discrimination, protection of cultural integrity, rights over lands and natural resources, social welfare for economic well-being and self-government²³.

Since the coming into force of the Convention on Biological Diversity (CBD) 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 definition of indigenous that has captured the public imagination now includes the role of indigenous peoples the original trustees of the earth. Indigenous peoples have begun to strategically and steadfastly hold up their role as guardians of the ecosystem and demand for the rights to ecological stewardship in negotiations towards multilateral environmental agreements, programs of work, decisions and guidelines under the CBD. Riding on the momentum of the commons and political ecology movement, indigenous peoples present the recognition of their rights to self-determination as both a real and a moral solution to the ecological crisis.

Discourses around the strong cultural and spiritual links between indigenous peoples and their lands are not new. They stretch back to the famous reply by the Dwamish Chief Sealth (Seattle) to President Franklin Pierce in 1854 when

²² 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 379-382.

²³ Anaya, James, *Indigenous Peoples in International Law*, 2nd ed., NY: Oxford University Press, 2004, p.6

the US government offered to buy two million acres of Indian land in the Northwest. Chief Sealth is reported to have said:

“Every part of this earth is sacred to my people. Every shining pine needle, every mist in the dark woods, every clearing, and every humming insect is holy in the memory and the experience of my people...this we know- All things are connected. Whatever befalls the earth befalls the sons of the earth. Man did not weave the web of life; he is merely a strand in it. Whatever he does to the web, he does to himself”.²⁴

The origins of the CBD had a lot to do with the coming to pass of Chief Sealth’s prophecy of ‘whatever befalls the earth befalls the sons of the earth’. An alarming report issued by the Secretariat of the CBD states that: species are now disappearing at 50-100 times the natural rate, and this is predicted to continue to rise exponentially. An estimated 34,000 plant and 5,200 animal species, including one in eight of the world’s bird species, face extinction. About 45 per cent of the Earth’s original forests are gone and continue to shrink. Up to 10 per cent of coral reefs, which among the most biologically diverse ecosystems, have been destroyed and one third of those remaining face collapse over the next 10 to 20 years. Coastal mangroves, a vital nursery habitat for countless species, are also vulnerable, with half already gone²⁵.

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 the critical link between their right to self-determination and environmental conservation. 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.

Indigenous peoples also point out that their territories are some of the most biodiversity rich and the collapse of local ecosystems began with the dispossession of indigenous peoples and local communities from the lands and waters they traditionally occupied. The natural corollary that follows from 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.

The genesis of biocultural rights: At the confluence of three streams

Biocultural rights arise at the confluence of the movement for the rights of indigenous peoples and local communities²⁶ and the political ecology and

²⁴ On file with author

²⁵ www.cbd.int

²⁶ Local communities here include the movement for livestock keepers’ and farmers’ rights. The movement for the rights of indigenous peoples and the movement for livestock keepers’ and farmers’ rights have mutually reinforced each other and collectively put engendered the discourse of community stewardship of ecosystems

commons movements. Despite their differences, the significant overlap between these three movements is their common goal to protect local ecosystems and an understanding that these ecosystems can be best protected by securing the rights of indigenous peoples and local communities who live in these ecosystems. Biocultural rights are therefore the gamut of rights required to secure the stewardship role of indigenous peoples and local communities over their lands and waters. This stewardship role encapsulates a way of life where the identity of a community, their culture, spirituality, systems of governance and traditional occupations are inseparable from their lands and waters. The relationship of the community to its territory is akin to a fiduciary duty of care and protection rather than an exercise of dominion.

The CBD was the first international treaty that explicitly recognized the link between traditional ways of life of indigenous peoples and local communities and biodiversity conservation. More importantly, in Articles 8(j) and 10(c) the CBD made it incumbent upon its 193 State parties to safeguard these traditional ways of life of indigenous peoples and local communities by ensuring the integrity of their cultures, encouraging customary use of biological resources and upholding their decision-making structures²⁷. These 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 spiritual relationship with their traditionally owned or occupied territories in accordance with Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)²⁸.

Examples include the May 2007, *Declaration on Indigenous Peoples' Rights to Genetic Resources and Indigenous Knowledge*- issued by 44 indigenous peoples groups which reaffirmed their spiritual and cultural relationship 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 comprise of the August 1997 *Heart of the People Declaration* and the February

²⁷ 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." Art 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."

²⁸ On 14th September 2007, the United Nations General Assembly adopted the '*Declaration on the Rights of Indigenous Peoples*'. Article 25 of the Declaration states 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"

1995 Declaration of Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project. The Heart of the People Declaration best captures the sentiment of the stewardship role of indigenous peoples vis-a-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.

The CBD has therefore engendered a new lawscape where biocultural rights are being hardfought as a people centered alternative to State led technocratic solutions to the environmental crisis. Nearly every CBD body including the Working Group on Art 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 a fertile ground for the conceptualization and the realizing of biocultural rights. In many ways biocultural rights have begun to define themselves as a subset of the third generation group or solidarity rights²⁹.

The discourse on biocultural rights is spilling over from the CBD to other UN and international fora and environmental conventions such as the WIPO-IGC (the World Intellectual Property Organization-Intergovernmental Committee), the FAO-CGRFA (the Commission on Genetic Resources for Food and Agriculture), the UNCCD (the UN Convention on Combatting Desertification) and the UNFCCC (the UN Framework Convention on Climate Change).

Biocultural rights: Future Trajectories

Biocultural rights as the rights of indigenous peoples and local communities to fulfill their role as trustees of their cultures, lands, waters and resources are increasingly being recognized in international environmental law. Biocultural rights also include the rights of indigenous peoples and local communities to, in accordance with their customary laws, regulate access to their cultures and territories by third-parties outside their traditional circle. It is critical to distinguish biocultural rights from a pure property claim by a hitherto excluded group in the

²⁹ Under international law, the first generation of rights are commonly understood as civil and political rights attributed to the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The second generation of rights are socio-economic and cultural rights covered to some extent by the UDHR but enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESR). Solidarity rights or group rights which are considered as third generation rights have begun to gain increasing momentum through the Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly in 2007.

typical market sense of property being universally commensurable, commodifiable and alienable. On the contrary biocultural rights are collective rights to fulfill a fiduciary duty.

Mounting evidence of sophisticated systems of conservation and sustainable use of ecosystems by indigenous peoples and local communities in accordance with their customary laws and stewardship values has laid a firm foundation for biocultural rights. Examples include action-research projects by the IIED (International Institute for Environment and Development) since 2005, comparing conservation practices of indigenous peoples and local communities in India, China, Peru, Panama and Kenya. One of the most interesting findings of this project has been the discovery of a set of ecological ethics common to all these communities despite their diverse cultures and vastly different terrains. The IIED has 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)³⁰.

Further evidence of inter-generational conservation by indigenous peoples of their territories has been marshaled by studies conducted by the Forest Peoples Program (FPP) in Bangladesh, Suriname, Guyana, Cameroon and Thailand³¹. Much of this evidence has played a key role in the emerging discourse around Indigenous Peoples and Community Conserved Areas (ICCAs) under Element 2 of the Program of Work on Protected Areas (PoWPA) within the CBD framework. The discourse around ICCAs is emblematic of the battle lines between a State led technocratic approach of fencing off 'protected areas' for conservation purposes and the response by the ICCA Consortium³² demanding legal recognition of vernacular conservation practices in the tradition of political ecology³³.

Pastoralists and livestock keepers across the world are also advocating biocultural rights by seeking legal recognition of their role as creators of livestock breeds and custodians of local ecosystems. The LIFE Network³⁴ is advocating biocultural rights in the form of rights of livestock keepers and pastoralists both

³⁰ International Institute for Environment and Development (IIED) *Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Interim Report. (2005-2006)*, Downloaded from <http://www.iied.org/pubs/display.php?o=G01239>

³¹ Customary sustainable use of biodiversity by indigenous peoples and local communities: Examples, challenges, community initiatives and recommendations relating to CBD Article 10(c), A synthesis paper by the FPP and partner organizations, October 2010, on file with author.

³² The ICCA Consortium is an international network of organizations working to secure community rights to their ecosystems

³³ See generally 'Exploring the Right to Diversity in Conservation Law, Policy and Practice, *Policy Matters*, Issue 17, October 2010

³⁴ The LIFE Network is a global network of organizations and individuals who support community conservation of livestock breeds

under the CBD and the FAO. These rights articulated in the 2009 Declaration on Livestock Keepers Rights³⁵ are endorsed by a number of pastoralist and livestock keepers' organizations. The principles underlying livestock keepers' rights are based on recognition of the integral links between the livestock keepers, their breeds and the ecosystem and the virtuous conservation cycles that these links engender.

The emergence of farmers' rights under Article 9 of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) is further example of biocultural rights. The ITPGRFA came into force in June 2004 and currently has 127 State parties who are obliged under Article 9 to recognize farmers' rights. While the ITPGRFA does not define farmers' rights, the generally agreed definition of farmers' rights underscores their biocultural nature. Farmers' rights under this definition are said to consist of 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 to participate in decision making on issues related to crop genetic resources³⁶.

Significant gains regarding biocultural rights have been made within the CBD through the Working Group on Article 8(j) and other related provisions. Article 8(j), which in 1993, seemed like a rather benign provision has morphed into the cutting edge of political ecology and indigenous peoples and local communities' rights. Examples of this include the Akwe:Kon Guidelines on the conduct of social, cultural and environmental impact assessments on developments on the lands of indigenous and local communities and the recent Takrihwaie:ri Ethical Code of Conduct for respecting the cultural and intellectual heritage of indigenous and local communities³⁷.

The most recent and highprofile victory for biocultural rights is the Nagoya Protocol on Access and Benefit Sharing³⁸ adopted in October 2010 by 193 State parties to the CBD. There are four pivotal biocultural rights that the Nagoya Protocol establishes which significantly affirm the self-determination of indigenous peoples and local communities. They are:

- 1) The right of indigenous peoples and local communities over their traditional knowledge
- 2) The right of indigenous peoples and local communities over their genetic resources
- 3) The right of indigenous peoples and local communities to self-governance

³⁵ <http://www.pastoralpeoples.org/>

³⁶ <http://www.farmersrights.org/about/index.html>

³⁷ <http://www.cbd.int/traditional/>

³⁸ www.cbd.int

- through respect for their customary laws and community protocols
- 4) The right to benefit from the utilization of their traditional knowledge and genetic resources by third parties outside their traditional circle

While none of these rights are absolutely unqualified and do allow for limited State involvement, they should be seen as substantial gains in the direction of a political ecology.

Towards a Biocultural Jurisprudence:

Biocultural rights have had an unsung arrival in the international legal landscape. This is primarily due to three important reasons:

- 1) The justificatory premise of biocultural rights had less to do with the third generation 'group or solidarity rights' and more to do with the crisis of biodiversity loss and its ramifications on food, health and economic security. As a result of intensive lobbying by environmental groups and a growing mountain of empirical evidence, States have had to make a policy U-turn from the disastrous 'fines and fences' approach to conservation – an approach that involved disenfranchising communities who had historically been stewards of common lands in favor of State control or private ownership. This policy U-turn essentially meant that to ensure conservation and sustainable use of biodiversity, States needed to affirm and secure the rights of communities who have been the custodians of ecosystems for generations.
- 2) Biocultural rights were born as the shadow twin of third generation 'group rights', but unlike 'group rights', which carried the undertone of self-determination that made States nervous, biocultural rights were predominantly lobbied for under the Rio Conventions as 'environmental rights' of communities to ensure biodiversity conservation. They initially appeared in benign forms like 'farmers rights', 'livestock keepers rights' and rights to traditional knowledge, which though were hard won, were not seen as a threat to State sovereignty.
- 3) Biocultural rights were advocated in international environmental negotiations as a defense against 'biopiracy', with communities essentially demanding State protection against corporate theft of their knowledge and resources. With the politically fraught legal landscape of the TRIPS negotiations, developing countries supported biocultural rights as State assertions using communities as proxies of the same kind of intellectual property rights that companies and individuals claimed, albeit in a *sui-generis* form.

As a subset of third generation rights, biocultural rights have elements of the third-generation group rights but differ from the latter in their explicit commitment to conservation and sustainable use of biodiversity. In many ways, biocultural rights through their innocuousness have achieved greater legal recognition than

group rights thereby acting as a bulwark for the more difficult third generation rights claims.

Currently there exists no research that has comprehensively mapped the nature and content of 'biocultural rights' that have emerged through international environmental law. Most approaches refer to isolated CBD Conference of Parties resolutions or reports of the Working Groups. What is worse is that the lack of an effective cartography of the biocultural tendency in international law has led to the issue based fragmentation of rights with similar content. For e.g. despite the seeming differences between livestock keepers rights, farmers rights and rights of communities over their forests, genetic resources and traditional knowledge, they all have the same pith and substance- i.e. they refer to the stewardship rights of indigenous peoples and local communities over their cultures, lands and waters

From a rights perspective, this is a crisis of significant proportions. Little or no effort has been made to consolidate this biocultural jurisprudence into a body of knowledge relating to biocultural rights that can be effectively used and implemented by the very indigenous peoples and local communities who struggled for it.

To begin this process of rights cartography is the task before us now. We need to begin telling and retelling the story of biocultural rights to make them real. It is only by repeated public affirmation and proactive use of these bio-cultural rights will they come alive. It is also the only way we will truly know how far we have come and where we need to go.