

**APPLICATION OF A RIGHTS-BASED APPROACH TO CONSERVATION:
THE PROBLEM OF FRAGMENTATION AND THE NEED FOR A COORDINATED
RESPONSE**

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This analysis examines the emerging concept of a 'rights-based approach to conservation' as a process that aims to further the protection and realisation of human rights in the context of conservation measures. The author suggests a 'coordinated' method of applying a rights-based approach in response to situations where the human rights of indigenous and local communities might be marginalised by conservation efforts such as the management of forests as carbon sinks. It is suggested that components of a comprehensive approach, demarcated in this analysis, are to be addressed by the most appropriate actors given time and resource constraints, and that efforts, if distinct from one another, be coordinated synergistically.

I INTRODUCTION

In 1972, the *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)* recognised that 'man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights'.¹ In the 40 years since that time, the rapid development of the latter aspect has correlated with dramatic changes in the former, with the by-products of development having compromised the capacity of ecosystems to provide the services upon which human beings have traditionally relied.²

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¹ *Declaration of the United Nations Conference on the Human Environment*, 21st plen mtg, UN Doc. A/CONF.48/14/Rev.1 (16 June 1972) reprinted in 11 I.L.M. 1416 ('*Stockholm Declaration*').

² Anthony Janetos et al, 'Synthesis: Condition and Trends in Systems and Services, Trade-offs for Human Well-being, and Implications for the Future' in Rashid Hassan, Robert Scholes and Neville Ash

Examples of causative relationships between development processes and damaging corollaries include energy consumption and climate change,³ global free trade and invasive alien species,⁴ agricultural food production and soil and water pollution,⁵ and the harvesting of wood products for fuel, shelter and paper and the degradation of forest ecosystems.⁶ Depreciation of ecosystems' capacity to provide services has had social, cultural and economic ramifications,⁷ even to the extent of rights deprivation for reliant communities. But failure to recognise the externalities associated with development activities has also caused important market failures resulting from the cost of these ramifications not being incorporated into the products and services produced.⁸ As a result, remediation, adaptation and mitigation strategies are gracing both political and fiscal agendas.

Perhaps one of the greatest market failures associated with externalities to date is that which has resulted from failure to factor the cost of climate change into emissions-intensive activities. The costs of climate change to local and global economies, environments and communities are not completely understood and no doubt are far from being fully realised. But recognition of the potential of forests to sequester carbon and offset emissions has heightened the attractiveness of conservation measures in light of policy instruments that mandate or incentivise emissions reductions.

This analysis focuses on conservation as a strategic response to environmental, social and economic harm. The simple theory behind conservation is that if degradation causes harm, then preventing degradation should in turn prevent harm. At times, then, a rights-based approach (RBA) to conservation will require that rights be protected by employing conservation measures. Sometimes, however, conservation measures themselves will pose threats to human rights. The classic example of this which will inform this analysis is where attempts to conserve an ecosystem (such as a forest system) result in the marginalisation of the indigenous and local communities that relied upon that ecosystem for survival.⁹ In effect, although the conservation initiative

(eds), *Ecosystems and Human Well-being: Current State and Trends, Volume I – Findings of the Conditions and Trends Working Group of the Millennium Ecosystem Assessment* (Island Press, 2005) 829.

³ Rajendra K Pachauri, Andy Reisinger and the Core Writing Team (eds), *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, 2007) 2.2.

⁴ Jeffrey McNeely, 'The Great Reshuffling: How Alien Species Help Feed the Global Economy' in Odd Sandlund, Peter Schei and Åslaug Viken (eds), *Invasive Species and Biodiversity Management* (1999) 11, 13.

⁵ Meena Palaniappa et al, *Clearing the Waters – a Focus on Water Quality Solutions* (UNEP, 2010) 16.

⁶ FAO, *Global Forest Resources Assessment 2010* (2010), 85; FAO, *Global Forest Resources Assessment 2000* (2001) ch 9.

⁷ Gerald C Nelson, 'Drivers of Ecosystem Change: Summary Chapter' in Rashid Hassan, Robert Scholes and Neville Ash (eds), *Ecosystems and Human Well-being: Current State and Trends, Volume I – Findings of the Conditions and Trends Working Group of the Millennium Ecosystem Assessment* (Island Press, 2005) 74.

⁸ Stern, Sir Nicholas, 'Climate Change, Ethics and the Global Deal' (Speech delivered at the Royal Economic Society Annual Public Lecture, University of Manchester, 29 November 2007).

⁹ See Grazia Borrini-Feyerabend, Ashish Kothari and Gonzalo Oviedo, *Indigenous and Local Communities and Protected Areas - Towards Equity and Enhanced Conservation* (IUCN, 2004).

may have benefits to the broader community by protecting provisioning services, it may at the same time deprive the local community of its source of food, shelter and fresh water. In the first scenario, differing value sets become mutually reinforcing in the search for a positive outcome. In the second, a balancing act may need to be performed in order to reach a just solution.

This paper addresses the question of how the emerging concept of a RBA to conservation should proceed in practice. In Section II, conservation is discussed in relation to human rights, and the theory behind the RBA to conservation is introduced. Section III then looks at practical application and identifies challenges associated with translating a RBA from theory into practice. Ultimately and throughout this analysis it is contended that the crucial components for a comprehensive RBA are strengthening the structural rights framework, empowering the local community, employing informed and adaptive management strategies, and ensuring that rights are associated with relevant accountability mechanisms. In the face of resource constraints, whether they be time, information or funding, it is argued that RBAs may be applied in a disjointed fashion, so long as the overall response is coordinated.

II HUMAN RIGHTS, CONSERVATION AND THE THEORY BEHIND A RBA

In order to understand the RBA to conservation and how it might be applied, it is essential to understand what rights are, and how rights interact with conservation measures. Rights in this context mean human rights. Conservation for the benefit of human rights is an anthropocentric goal, and tempering conservation objectives due to human rights concerns arguably even more so. Many proponents of conservation measures would argue that the environment's value is intrinsic, and that human beings are not the principal beneficiaries of a preserved environment. Leaving further debate for other fora, this analysis focuses on the preservation of human rights as one objective of conservation, noting that this does not mean that other concerns are mutually exclusive either to effective conservation or to a successful RBA.

A *Relevant Rights*

Which rights apply to conservation will be largely dependent upon the context of the particular conservation initiative. Common human rights litigated in the environmental arena include rights to life,¹⁰ health,¹¹ property,¹² private life and

¹⁰ See, eg, *Yanomami Community v Brazil* (Inter-American Court of Human Rights, Res No 12/85, Case 7615, 5 March 1985); *EHP v Canada* (Human Rights Committee, 17th sess, UN Doc CCPR/C/17/D/67/1980, 27 October 1982); *Bordes and Temeharo v France* (Human Rights Committee, 57th sess, UN Doc CCPR/C/57/D/645/1995, 30 July 1996); *Oneryildiz v Turkey* (European Court of Human Rights, 48939/99, ECHR 657, 30 November 2004).

¹¹ See, eg, *Clean Air Foundation Limited & Gordon David Oldham v The Government of the Hong Kong Special Administrative Region* (CAL 35/2007, Court of First Instance, Constitutional and Administrative Law List, No 35 of 2007, 26 July 2007).

¹² See, eg, *The Mayagana (Sumo) Awas Tingni Indigenous Community v Nicaragua* (Inter-American Court of Human Rights, Ser C, No 79, 31 August 2001); *Mateos e Silva Ltd and Others v Portugal*

home,¹³ information,¹⁴ and cultural integrity;¹⁵ additionally, there is increasing recognition in some jurisdictions of a specific right to the environment itself,¹⁶ although concerns do exist over inherent environmental variability precluding the possibility for justiciable standards needed to enforce such a right.¹⁷

The debate over a right to environment demonstrates that the qualitative nature of rights is not static. Nonetheless, a body of fundamental human rights has been solidified in international law for some time now. Crucial instruments include the *Universal Declaration of Human Rights (UDHR)*,¹⁸ the *International Covenant on Civil and Political Rights (ICCPR)*,¹⁹ and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.²⁰

Both questions of which rights are applicable in a given conservation context and whether redress will be available for breach depend primarily not upon what rights exist at an international level, but upon the particular implementing state's constitution and other national instruments, since it is through local avenues that breaches may be remedied. This concept is explored further in Section III.

B RBA Theory

The concept of the RBA to conservation and the dialogue related thereto is a recent outgrowth of the broader and more classical notion of the RBA to development. It is important to appreciate the fundamental principles behind the RBA to development and its *raison d'être* in order to understand the RBA to conservation. This is because the RBA to development translates crucial ideas from human-rights-based schools of thought into the context of an approach that can be applied practically to development

(European Court of Human Rights, 15777/89, 16 September 1996); *Pine Valley Developments Ltd. and Others v. Ireland* (European Court of Human Rights, 12742/87, 3 May 1989).

¹³ See, eg, *Lopez Ostra v Spain* (European Court of Human Rights, 16798/90, ECHR 46, 9 December 1994); *Guerra v Italy* (European Court of Human Rights, 14967/89, ECHR 7, 19 February 1998); *Taşkin and Others v Turkey* (European Court of Human Rights, 46117/99, ECHR 621, 10 November 2004); *Fadeyeva v Russia* (European Court of Human Rights, 55723/00, ECHR 376, 9 June 2005); *Öçkan and others v Turkey* (European Court of Human Rights, 46771/99, 28 March 2006).

¹⁴ See, eg, *Claude Reyes et al v Chile* (Inter-American Court of Human Rights, Ser C, No 151, 10 October 2003).

¹⁵ See, eg, *Ilmari Lansman et al v Finland* (Human Rights Committee, 52nd sess, UN Doc CCPR/C/49/D/511/1992, 8 November 1994).

¹⁶ A number of constitutions and charters recognise a right to the environment: see, eg, *Constitution of the Republic of Chile*, art 19; *Constitution of the Federal Republic of Brazil* art 225; *Constitution of Argentina* s 41; *Constitution of the Republic of Hungary* art 18; *Constitution of France*, Charter for the Environment art 1; *Quebec Charter of Human Rights and Freedoms*, RSQ, c C-12, s 46.1; *African Charter on Human and Peoples' Rights* art 24; *San Salvador Protocol to the American Convention on Human Rights* art 11.

¹⁷ Dinah Shelton, 'Developing Substantive Environmental Rights' (2010) 1 *Journal of Human Rights and the Environment* 89, 91.

¹⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

¹⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS171 (entered into force 23 March 1976).

²⁰ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 933 UNTS 3 (entered into force 3 January 1976).

activities,²¹ similar to the way that the RBA to conservation aspires to practically apply rights theory to conservation activities.

The RBA to development has been recognised by the United Nations (UN) in a Common Understanding adopted in 2003,²² to facilitate consistency in application by the UN of development programmes. Central to the UN RBA is the aim of capacity-building to assist both the holders of rights (rights-holders) as well as those responsible for their recognition (duty-bearers) realise their entitlements and fulfil their obligations respectively. Although it is otherwise fairly non-prescriptive, the UN RBA also underscores the need for collaboration, target-setting, and monitoring and evaluation mechanisms, and emphasises the use of both top-down and bottom-up approaches in synergy.²³ These facets have been important components of the RBA to development in practice²⁴ and are translatable across contexts such that they are equally important to the RBA to conservation.

The application of certain human-rights-oriented principles to development processes has been identified as fundamental to applying an RBA.²⁵ Namely, these are the principles of:

- (1) inalienability, indivisibility and interdependence of human rights;
- (2) empowerment and participation;
- (3) equality and non-discrimination; and
- (4) accountability.

The first means that every person is entitled to enjoy human rights, each equally important and interdependent, that cannot be taken away. The second, that rights-holders are involved in the realisation of their rights and are given the ability to further and enforce them. The third, that all humans are equal and entitled to their rights without discrimination on grounds such as physical characteristics or status in law or society, and the fourth, that those who have a duty towards rights-holders are answerable in respect of that duty, with appropriate redress available for breach.²⁶ Together, these principles comprise a theoretical human rights ideal once again applicable not only to development processes but to any processes that influence human rights.

²¹ See, eg, Peter Uvin, 'From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development' (2007) 17 *Development in Practice* 597.

²² UN, Report on the Second Interagency Workshop on Implementing a Human Rights Based Approach in the Context of UN Reform, Attachment 1: The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies (Stamford, CT, USA, 5-7 May 2003).

²³ Ibid 19.

²⁴ See, eg, Sarah Winter, *How Human rights-based Approaches are Achieving the MDGs - Case-studies From the Australian Aid and Development Sector* (Australian Council for International Development, 2009); United Nations System Staff College, *Experiences in Applying Human Rights Based Approaches* (2009) <<http://hrbportal.org>>; Jude Rand and Gabrielle Watson, *Rights-Based Approaches – Learning Project* (Oxfam America, 2007).

²⁵ Jakob Kirkemann Boesen and Tomas Martin, *Applying a Rights-Based Approach – An Inspirational Guide for Civil Society* (Danish Institute for Human Rights, 2007) 15.

²⁶ UN, above n 21, 18; see generally Kirkemann Boesen and Martin, above n 24.

III APPLYING A RIGHTS-BASED APPROACH IN PRACTICE

Rights can, of course, be enjoyed in the absence of any causative approach. An approach to conservation could protect rights without intending to do so, and for this reason it can be difficult to attribute the success of RBAs applied on the ground. The danger of attempting to apply a RBA without normative guidance or, more simply, ‘a plan’, however, is that salient rights concerns might remain latent or be dismissed by one particular actor if beyond the scope or capacity of its work. A comprehensive RBA, such as the step-wise approach introduced in Subsection A, addresses this problem. A coordinated response, presented as a new approach in Subsection C, allows a comprehensive RBA to be effected even where resource constraints and practical limitations may exist.

A *A Step-Wise Approach*

The International Union for Conservation of Nature (IUCN), which has noted ‘[i]t could be argued that there are as many RBAs as implementing agencies, groups and organisations on the ground’,²⁷ has promulgated what it terms a “step-wise approach”²⁸ which has six major steps:

- (1) undertake a situation analysis;
- (2) disseminate relevant information;
- (3) ensure participation through consultation and obtaining prior informed consent
- (4) make a decision that is reasoned, compatible with rights and obligations, and based on proper information and participation; give reasons for the decision and communicate these effectively to stakeholders;
- (5) monitor and evaluate the application of the RBA; and
- (6) enforce rights.

Following these steps forces focus to be split between pre-decision information and consent-gathering, and post-decision learning, feedback and enforcement mechanisms. It therefore ensures an encompassing approach that furthers the actual realisation of rights (step five will tell whether rights have been breached and step six will afford a remedy if they have), and is also self-evaluative (through step five monitoring and evaluation mechanisms). This ensures against the tendency to merely consider and discuss rights without seeing to it that they are actively respected.

B *Issues and Practical Difficulties*

1 *Fragmentation*

It is submitted that the greatest challenge in transferring theory into practice that is apparent from an examination of RBAs to conservation worldwide appears to be the practical discord between top-down and bottom-up approaches, and between initial

²⁷ IUCN, *Implementing a Rights-Based Approach to Conservation in Honduras* (16 February 2011) RBA to Conservation Portal <www.rights-based-approach.org>.

²⁸ Thomas Greiber et al, *Conservation with Justice – A Rights-Based Approach* (IUCN, 2009) 23–35.

and final steps in the step-wise approach. Recall that the UN advocated the application of top-down and bottom-up approaches in synergy. The reason that approaches have tended to be fragmented in practice could be due to a lack of appreciation for the need for a holistic response, or because funding, time and other resource constraints have rendered multifaceted responses unviable.

A fragmentation between top-down and bottom-up approaches means that grassroots and community-based efforts are not being matched with attempts to strengthen the legislative framework, or vice versa. A fragmentation between initial and final steps in the step-wise approach is different in that it means that initial scoping and consultation steps are not being matched with final monitoring and evaluation steps. If a comprehensive approach is necessary to ensure rights protection, then the problem with fragmentation is that it runs the risk of leaving important rights concerns unaddressed.

2 *Contextual Idiosyncrasies*

Another problem with applying RBAs in practice is that each jurisdiction can be associated not only with different rights but with a different contextual matrix within which these rights operate. Differences in laws, policies, and political frameworks coupled with differences in level of development, industry composition and economic structure complicated further by differences in population demographics, biomes and ecological nuances undoubtedly render each rights context as unique.

As an example, the nature of the predominant political discourse in the relevant jurisdiction may affect the suitability and effective potential of a RBA.²⁹ Administrative rationalism, with an emphasis on the role of authority and expertise, may for example not be as conducive to an effective RBA as democratic pragmatism, which emphasises community-driven governance styles and gives greater recognition to rights-holders in their own governance.³⁰ The shift in governmental regimes toward more democratic and participatory models³¹ should improve capacity for RBAs by diffusing decision-making powers and by greater empowering the holders of rights in decisions that might compromise those rights.

The existence of complex and unique contextual matrices is not prohibitive to the application of successful RBAs and indeed there is no way around it. The practical effect is to escalate the level of due diligence that must be applied before an RBA is undertaken. Local confounding influences should be taken into account when attempting to forecast likely outcomes from abstract or dissimilar contexts. Difficulties may be managed by ensuring that the most appropriate actors are engaged in the parts of the approach relevant to them and their expertise. This could mean that no overarching body is best placed to attempt to apply an RBA in its entirety from

²⁹ For an analysis of environmental discourses, see John S Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford University Press, 2005).

³⁰ Lee Godden and Jacqueline Peel, *Environmental Law – Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010) 66.

³¹ See Meredith Edwards, 'Participatory Governance into the Future: Roles of the Government and Community Sectors' (2001) 60 *Australian Journal of Public Administration* 78.

start to finish without at least engaging others. Again this supports an approach that is comprehensive by being coordinated rather than by being all-encompassing.

C *A New Approach*

The difficulty with a step-wise approach is that the disjointed nature of executive governments, multiplicity of relevant actors and limited capacity to employ an overarching management body means that in reality, a project will not proceed in neat stages. Those engaging with the community may have no power to change the law, nor to enforce it. The responsibilities of duty-bearers and the entitlements of rights-holders are limited by the structural framework over which neither may have control. Likewise those who write the laws, like those who enforce them, may be entirely distinct from those who have obligations under them. This disintegration carries the danger that the response applied will be incomplete and hence inadequate to secure rights effectively. Therefore, a more practical RBA application should be thought of as a multifaceted response whose components can either be synchronised contemporaneously or at different stages.

The author submits that the following components or pillars need to be addressed in any comprehensive RBA: (i) the structural framework within which the rights-holders and duty-bearers operate; (ii) the participation and empowerment of the community of rights-holders in decisions that affect their rights; (iii) the role of information fed from prior stages of the project and lessons learned from similar projects; and (iv) the mechanisms through which duty-bearers are held accountable to rights-holders.

Why does the approach need to be comprehensive in this way? The answer is that if the approach targets all these elements, it is far more likely to ensure rights. If there is no enforcement, rights cannot be ensured. Similarly, if there is no legislative framework that provides for enforcement remedies and deterrents for breaching rights, then once again rights cannot be ensured, at least in a long-term capacity. The reason for wanting to *ensure* rights is that rights can, as mentioned, be enjoyed in the absence of any causative approach. The aim of a good RBA is to ultimately *increase the likelihood* that rights are realised – ideally, to the level of certainty. What we are therefore looking at is the capacity of the RBA to ensure rights rather than merely a correlation between rights realisation and a RBA.

1 *Structural Framework*

The first component of a successful RBA is addressing the structural framework within which rights are created and enforced, and hence within which an RBA operates. This framework will include national and local laws and to some extent policies and other relevant soft law. The content of the laws can be expected to reflect the nature and extent of the relevant government's intention to protect rights. Laws set qualitative standards for the rights protection that can be anticipated by the community to which those laws apply. The way in which the laws and policies of a particular jurisdiction fit together to form a framework will then ultimately influence the capacity to ensure rights protection overall.

(a) *Consistency with International Principles*

The first important component of the structural framework is the content of the laws and policies that comprise it. This is a qualitative inquiry, and one that should be done by comparing for consistency with the principles demarcated and discussed in international fora. This is really the only appropriate way for one country to judge the laws of another objectively, since it is within a country's sovereign right to make laws as it chooses to the extent that these laws do not infringe on international commitments.

Like human rights themselves, conservation-related commitments in international law and principles in international policy have been agreed upon as being of importance by members of the international community. A number of important environmental conventions have afforded recognition of human rights and in particular the rights of indigenous and local communities. For example, the *Convention on Biological Diversity (Biodiversity Convention)*³² requires parties to respect, preserve and maintain the practices of indigenous and local communities for the conservation and sustainable use of biodiversity.³³ Its 'Programme of Work on Protected Areas' advocates that parties include indigenous and local communities in cost-benefit analyses relating to the establishment and maintenance of protected areas;³⁴ use legislation, policy and resources to promote an enabling environment for the involvement of these communities in decision-making and management;³⁵ and ensure that if the communities are resettled due to the establishment or management of protected areas, that this only happens with their prior informed consent.³⁶ In addition the *Ramsar Convention*³⁷ encourages the involvement of indigenous and local communities in wetland management,³⁸ the *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification in Particular Africa (Convention to Combat Desertification)* asks parties to involve communities in management of anti-desertification initiatives,³⁹ and the *United*

³² *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('*Biodiversity Convention*').

³³ Article 8(j) requires parties to respect, preserve and maintain the practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity; art 10(c) to protect and encourage customary use of biological resources in accordance with traditional cultural practices. The Convention's Conference of the Parties (COP) continues to recognise the role of indigenous and local communities in conservation: see, eg, Decision X/40 (Mechanisms to Promote the Effective Participation of Indigenous and Local Communities in the Work of the Convention) and Decision X/42 (The Tkarihwaï:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities) (10th Conference of the Parties, Nagoya, October 2010).

³⁴ *Biodiversity Convention*, Programme of Work on Protected Areas, Programme Element 2: Governance, Equity, and Benefit Sharing, 2.1.1.

³⁵ Ibid 2.2.4.

³⁶ Ibid 2.2.5.

³⁷ *Convention on Wetlands of International Importance, Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245, (entered into force on 21 December 1975).

³⁸ See *Ramsar Strategic Plan 2009-2015*, goal 1; *Ramsar Strategic Plan 2003-2008*, Operational Objective 6.1; Ramsar Resolution VIII.2, 12; VIII.16, 18; VIII.19, 19; VIII.8, VIII.12 and VIII.13; Ramsar Recommendation 2.3, annex; 6.3, 9; 6.3, 11; 6.3, 15; and 6.18, 14.

³⁹ *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification in Particular Africa*, opened for signature 14 October 1994, 1954 UNTS 3 (entered into force 26 December 1996). Articles 3(a) and 3(c) state that parties should develop

Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Åarhus Convention), which recognises a right to an environment adequate for human well-being, asks parties to guarantee rights of access to information, public participation and access to justice in environmental matters.⁴⁰ Further, the *United Nations Declaration on the Rights of Indigenous Peoples* specifically recognises a right to the conservation and protection of the environment, but also to the productive capacity of land and resources.⁴¹

Soft (non-binding) law also recognises the rights of indigenous and local communities in conservation. The *Agenda 21: Programme of Action for Sustainable Development (Agenda 21)* asks governments to assist in indigenous and local communities' empowerment and active engagement in the formulation of laws and policies as well as resource management and conservation strategies.⁴² The *Akwé: Kon Voluntary Guidelines* suggest that the prior informed consent of indigenous and local communities be taken into account in environmental impact assessments, as well as the ownership, protection and control of traditional practices.⁴³ The IUCN's *Durban Action Plan* encourages international fora to ensure laws, policies and work programmes on protected areas 'guarantee, ensure and respect' indigenous peoples' needs and rights.⁴⁴ And at its World Conservation Congress in 2008, parties resolved to recognise principles linking human rights and conservation.⁴⁵ These principles emphasise proper planning and evaluation of conservation projects that consider rights, management which obliges differing actors to respect rights, and evaluation and improvement of governance frameworks and procedures to greater secure rights.

International laws are not strictly given practical effect until adopted by governments. The extent to which a jurisdiction's structural framework reflects the tenets of international law will be dependent not merely upon the country's adoption of international treaties and policies, but on how successfully they have been translated into law. The principal environmental and rights instruments mentioned above have been broadly subscribed to by individual countries – the *Biodiversity Convention* has

cooperation among government and communities, and ensure that populations and local communities participate in programmes to combat desertification or mitigate the effects of drought, which would include conservation programmes.

⁴⁰ *United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 450 (entered into force 30 October 2001) art 1. This Convention not only recognises a right to an environment adequate for human wellbeing, but also asks parties to guarantee rights of access to information, public participation in decision-making, and access to justice in environmental matters.

⁴¹ The *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 29, specifically recognises the right of indigenous peoples to the 'conservation and protection of the environment and the productive capacity of their lands and resources.'

⁴² *Agenda 21: Programme of Action for Sustainable Development*, U.N. GAOR, 46th sess., Agenda Item 21, UN Doc A/Conf.151/26 (14 June 1992) ch 26.

⁴³ Secretariat of the Convention on Biological Diversity, *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* (2004), guideline 52.

⁴⁴ *The Durban Action Plan – Revised Version, March 2004* (IUCN, 2005) 249.

⁴⁵ Resolutions and Recommendations: World Conservation Congress, Barcelona, 5–14 October 2008 (IUCN, 2009), resolution 4.056, annex. See also resolutions 4.047–4.056 and recommendations 4.127 and 4.136.

193 parties,⁴⁶ the IUCN has 84 member states,⁴⁷ and the UN, 192.⁴⁸ But gaps between what countries have agreed to implement and what they have actually implemented can be significant. It is this that needs to be addressed when applying an RBA.

Additionally where rights are purportedly recognised by local laws, attention should be paid as to whether these rights are clearly defined. For this to be the case, rights should be associated with specific rights-holders, and also duty-bearers. In some cases it may not be enough to simply include a sweeping reference to rights in the objects or purposes of an act, for example.

(b) Consolidation

Ideally, the structural framework supporting the RBA to conservation should be as consolidated as possible. This is often not the case, as environmental law is a relatively new addition to countries' traditional domestic law. This means that there could be many instruments which need to be pieced together to understand the content of the structural framework as it applies to a potential RBA to conservation.

For example in Australia, there are multiple instruments governing indigenous rights. In part this could be due to the fact that there are no constitutionally enshrined human rights, nor is there any mention of the environment in Australia's constitution, an instrument that dates back to 1901 when the country was barely settled and far before environmental concerns adorned the political agenda. Instead the parliament derives its law-making powers on environmental matters from other powers such as external affairs.⁴⁹ The major piece of Australian environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), does take into account the rights of indigenous and local communities through various provisions. It also codifies principles of ecologically sustainable development,⁵⁰ but it does not draw together human rights and the environment. So whilst it would be fair to say that Australia has a relatively supportive structural framework for the realisation of human rights in conservation, the sources of applicable law are diverse, meaning that scoping and implementation stages of a RBA could be timely and costly. Gradually, countries should aim to bring together human rights and environmental law, for example by making reference to human rights instruments and laws governing indigenous and local communities in environmental legislation.

(c) Actions

Application of the 'structural framework' pillar would necessitate a review of laws and policies presently in place. The review would involve identification of any gaps

⁴⁶ *List of Parties*, Convention on Biological Diversity <<http://www.cbd.int/convention/parties/list/>>

⁴⁷ *Members Database* (12 January 2011) IUCN

<http://www.iucn.org/about/union/members/who_members2/members_database/>

⁴⁸ Department of Public Information, News and Media Division, New York, 'United Nations Member States' (Press Release, ORG/1469, 3 July 2006).

⁴⁹ See *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

⁵⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3 ('EPBC Act').

in the law, and an analysis of whether the way in which the structural framework defines rights, rights-holders and duty-bearers is adequate to ensure that the relevant rights are meaningful. A comparative analysis looking to the structural frameworks applied in similar jurisdictions might help to ascertain the sufficiency of the framework under consideration. Once any deficiencies have been identified, alternative solutions may be devised. For example, a law might need to be repealed or amended, or it might require greater clarification. In some cases new provisions might need to be added to the existing framework to ensure that international commitments are properly reflected in domestic law. Relevant actions could include lobbying law reform bodies and governments, and running legal cases challenging the existing law.

Whilst scoping and analysing the law should not be prohibitively cumbersome, actually remedying a structural framework in this way is by contrast likely to be the most difficult component of effecting a RBA. Sometimes such measures will not be necessary. Indeed aggressive interference by external actors should not overbear respect for national sovereignty; it should instead be replaced or supplemented by efforts to empower citizens to defend their own rights. Fortunately, addressing the structural framework pillar does not need to precede actions to address the other components. Grassroots or ‘bottom-up’ efforts can still be successful even within a deficient legal context.

2 *Community Empowerment*

In literature and in practice there has been a heavy focus on community empowerment and engagement. As garnered from practice however, not all community engagement is meaningful in terms of rights realisation. There is a difference between having a say and being heard — this difference can be crucial in determining whether rights remain theoretical or are actually realised. Collaborative governance and participatory management regimes are to be favoured over those which simply call for input or suggestions which in the end may be subordinated by government policy. These regimes focus on empowerment rather than simply engagement.

One context in which attempts have been made at community empowerment is participatory forest management. A renewed interest in forest conservation has been sparked by economic incentives relating to the reduction of emissions from deforestation and degradation (REDD). REDD projects are a way in which parties have opted to mitigate their contribution towards climate change.⁵¹ Notably though, REDD is not a formalised mechanism under the Kyoto Protocol⁵² of the *United*

⁵¹ See, eg, Frances Seymour, *Forests, Climate Change, and Human Rights: Managing Risk and Trade-offs* (Center for International Forestry Research, 2008), 10-12; David Brown, Frances Seymour and Leo Peskett, ‘How Do We Achieve REDD Co-Benefits and Avoid Doing Harm?’ in Arild Angelsen (ed), *Moving Ahead with REDD: Issues, Options and Implications* (CIFOR, 2008); Forest Peoples Program, ‘REDD and Rights: Lost in Translation’ (ENewsletter, 18 February 2011) <www.forestpeoples.org>.

⁵² *Report of the Conference of the Parties on its Third Session, Held at Kyoto From 1 to 11 December 1997 – Addendum – Part 2: Action Taken by the Conference of the Parties at Its Third Session*, UN Doc FCCC/CP/1997/7/Add.1 (10 December 1997), annex (‘Kyoto Protocol’). The Kyoto Protocol in fact excluded forest conservation from being certified as ‘Clean Development Mechanisms’ (CDMs)

*Nations Framework Convention on Climate Change*⁵³ and neither the Convention nor the Protocol give explicit recognition to the contribution or involvement of indigenous and local communities.⁵⁴ Nonetheless, REDD has garnered increasing support from the global community and the Convention's Conference of the Parties (COP), culminating most recently at COP16 in Cancún with the adoption of a mechanism to create REDD incentives.⁵⁵

The two key components of community empowerment discussed below are communication of rights and entitlements, and participation in management and governance. Then as a corollary, benefit sharing is one way in which community engagement can be made more meaningful.

(a) Communication

It is not enough for a structural rights framework to be solid and comprehensive if it is not also communicated. Rights-holders should know their rights. Otherwise, there will be little to prompt challenge or change. The first step, then, in empowering the community is to ensure that they understand what they are entitled to expect from their executive and administrative institutions.

This may mean that laws and policies should be published in accessible media, and in local languages and dialects where appropriate.⁵⁶ Community members may have low levels of literacy and a lack of education may also mean limited comprehension of laws and rights other than in an abstract sense. In such cases it may be appropriate to organise for someone to engage verbally with designated community members. Ideally, these kinds of forums would be participatory. In addition to explaining rights, it is important that the nature and likely impacts of proposed conservation projects be explained to the communities that will be affected. This needs to happen prior to project implementation so that there is enough time to pursue relevant avenues for objections or at least prepare for possible impingements on life and livelihood.

(b) Participation

One of the keystones of an RBA is allowing community members to participate in the measures that will affect them. Collaborative governance allows communities to be consulted about the way in which laws operate and in which the community is

under its auspices: see William F Laurance, 'A New Initiative to Use Carbon Trading for Tropical Forest Conservation' (2007) 39 *Biotropica* 20, 21.

⁵³ *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994); Conference of the Parties, United Nations Framework Convention on Climate Change.

⁵⁴ See, eg, Third International Forum of Indigenous Peoples and Local Communities on Climate Change, *Bonn Declaration of Indigenous Peoples on Climate Change* (15 July 2001). For an example of how to apply REDD incorporating indigenous and local communities, see Pro Natura, *Guidelines and Eligibility Criteria for REDD on Biodiversity and on Indigenous Peoples and Local Communities* <<http://unfccc.int/>>.

⁵⁵ Climate Focus, 'CP16/CMP 6: The Cancún Agreements – Summary and Analysis' (Briefing Note, January 2011) 1.

⁵⁶ The IUCN is working on a project to do this in Honduras. IUCN, above n 26.

governed. Participatory management allows communities to be involved in the management of relevant resources and conservation projects. Both of these together can lead to a successful bottom-up or grassroots approach. If collaborative governance is employed but community members are unable to be involved in management, it is particularly important to ensure that review mechanisms are in place to monitor project outcomes.

Joint forest management and community forestry programmes have been implemented with some success for many years now in India and Nepal.⁵⁷ Further, an example of participation in relation to REDD is the community carbon cooperative operating in Tanzania. This is in fact an excellent example of a comprehensive response. Indigenous and local communities are managing REDD forests via a bottom-up participatory forest management⁵⁸ initiative that was matched with initial reviews of laws, policies and institutions. Community members are not only engaged, but their ability to claim rights is strengthened through for example the establishment of conflict resolution mechanisms and the utilisation of communication facilitators.⁵⁹

Another example of successful local community participation is the 'I-Tracker' project in Northern Australia. It allows indigenous Australians to manage indigenous conservation areas,⁶⁰ protected by law and upheld through an indigenous management alliance, through the use of hand-held GPS tracking devices that are designed for low-literacy users to record observations and wildlife sightings in a way that they understand.⁶¹ Their observations are transmitted to centralised computing systems and used to inform decision-making regarding local area management. Due to various laws protecting Australian indigenous communities,⁶² this project operates both top-down and bottom-up. In addition, indigenous stakeholders are not only consulted about decisions but they are an active part of management and project review.

⁵⁷ See, eg, Kulbhushan Balloni, 'Participatory Forest Management in India – An Analysis of Policy Trends amid 'Management Change' (2002) *Policy Trend Report* 88; B K Singh and D P Chapagain, *Trends in Forest Ownership, Forest Resources Tenure and Institutional Arrangements: Are They Contributing to Better Forest Management and Poverty Reduction? Community and Leasehold Forestry for the Poor – Nepal Case Study* (FAO, 2005) vii; A P Gautam, G P Shivakoti and E L Webb, 'Forest cover change, physiography, local economy, and institutions in a mountain watershed in Nepal' (2004) 33 *Environmental Management* 48; Bhim Adhikari, 'Poverty, property rights and collective action: understanding the distributive aspects of common property resource management' (2005) 10 *Environment and Development Economics*, 7; Hemant Ojha, Lauren Persha and Ashwini Chhatre, *Community Forestry in Nepal – a Policy Innovation for Local Livelihoods* (International Food Policy Research Institute, 2009); Ram Prasad, 'Joint Forest Management in India and the Impact of State Control Over Non-Wood Forest Products' (1999) 50 *Unasylva* <www.fao.org>.

⁵⁸ Tanzania Forest Conservation Group, *Making REDD and the Carbon Market Work for Communities and Forest Conservation in Tanzania* <<http://www.tfcg.org>>.

⁵⁹ Jessica Campese, REDD & rights in Tanzania: A REDD Pilot Project Analysis From the Lens of Rights-based Approaches (22 June 2010) RBA to Conservation Portal <rights-based-approach.org>.

⁶⁰ For more information see Australian Government Department of Sustainability, Environment, Water, Population and Communities, *Indigenous Protected Areas* (8 February 2011) Indigenous Communities and the Environment <<http://www.environment.gov.au/indigenous/ipa/index.html>>

⁶¹ R Kennett, M Jackson, J Morrison, and J Kitchens, 'Indigenous Rights and Obligations to Manage Traditional Land and Sea Estates In North Australia' (2010) 17 *Policy Matters* 135, 141.

⁶² See *Native Title Act 1993 (Cth)*; *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*; EPBC Act.

(c) Benefit-Sharing

If profits are generated out of conservation projects, for example through ecotourism or the generation of tradeable carbon credits, benefit-sharing agreements should be entered into with local communities to ensure that they see some of the profits, whether this be through direct monetary payments, the establishment of a community trust, or other non-monetary community benefits. Guidance on these types of arrangements can be found in the *Bonn Guidelines* which supplement the benefit sharing provisions of the *Biodiversity Convention*.⁶³

Benefit sharing improves equitability, but it also provides financial incentives for communities to assist with management. If communities are forced off their traditional land or to change local practices, then benefit sharing could contribute to compensation payment for land that has effectively been acquired.

3 Informed and Adaptive Management

Implementation of RBAs should be a cumulative learning process, especially as the idea of applying an RBA in a structured way is relatively new. An RBA should be informed in that it should draw on prior knowledge via effective communication, and adaptive in that the implementation of management practices should be malleable enough to benefit from new knowledge as it is gained.

(a) Information-Sharing

Approaches taken in the past should be applied to inform future attempts. Although it has been acknowledged that each situation will bear its own unique contextual matrix, in many cases lessons learned from one project will be transferrable cross-contextually. So long as situational differences are flagged and understood, learning from prior experience should be encouraged.

Information-sharing is facilitated where those who apply an RBA document information relating to successes and challenges and make this information publically available.⁶⁴ Dissemination may be assisted through channels such as global not-for-profit organisations and platforms such as web portals.⁶⁵ The key step in applying an RBA is to utilise knowledge by conducting due diligence in planning stages. Not only will this exercise serve to decrease the likelihood of repeat mistakes, but constraints on time and resource commitments could be helpfully alleviated by the use of cooperative learning tools and the sharing of resources and experiences.

⁶³ *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (Secretariat of the Convention on Biological Diversity, 2002).

⁶⁴ Florence Daviet, *A Draft Framework for Sharing Approaches for Better Multi-Stakeholder Participation Practices* (Forest Carbon Partnership Facility and The UN-REDD Programme, 2011).

⁶⁵ See, eg, IUCN, <www.rights-based-approach.org>.

(b) Adaptive Management

If a rights-based conservation project is ongoing or phased, feedback from initial stages should be fed into later stages in the style of adaptive management. This recognises that sometimes (indeed in most cases), the information that can be garnered prior to a project's inception will be inadequate to contradict uncertainty. Adaptive management allows the results of a project to be translated into lessons that can then alter the nature of the continuing response. For adaptive management to be successful, continual monitoring is required. That is, outcomes must be judged at intervals throughout the life of the project and not just after its completion.

(c) Policy-Practice Loop

Finally, outcomes of projects — whether complete or continuing — should be made available to policymakers so that deficiencies in law or policy can be remedied. In turn, improved law and policy will filter top-down for the benefit of future projects. This is known as the policy-practice loop. It allows for policy to be moulded, shaped and refined dynamically as new lessons are learned, and for practice to be informed by continually updated policy. This requires a structural framework that is facilitative of law or policy reform and the participation of the public and relevant organisations in the development and alteration of law and policy.

4 Accountability

Perhaps the most important albeit least commonly discussed aspect of the RBA is accountability mechanisms. Ultimately, the extent to which rights can be and are in fact enforced is one of the key determinants of whether RBA theory leads to the realisation of rights in practice. There are a number of components that make up this aspect of the RBA.

Firstly, there must be clearly identified duty-bearers and clearly identified rights and obligations over which they have responsibility, in addition to clearly identified rights-holders who are given capacity to hold the duty-bearers to account. Ascertaining this is part of the structural framework enquiry. Secondly, there must be avenues for redress that are accessible to rights-holders in a meaningful way. This means that complaints are heard and responded to, and that they can be made through means accessible to vulnerable community members (who may not have high education or literacy skills). It may also mean that court procedures are not prohibitively costly, for example, through eliminating mandatory upfront provision of security for costs. In addition, standing rules should not be so stringent that rights-holders do not have effective access to justice. Finally, it means that redress is available. Redress might be in the form of compensation or through a remedy that requires a positive action such as that property status is clarified, or that land-use allowances are made.

Rights are not realisable unless someone is accountable for them, and unless the person whose rights have been breached has effective access to a justice system that

will hold that someone to account. Therefore the RBA cannot be fully comprehensive without addressing the final accountability pillar.

IV CONCLUDING REMARKS

One of the reasons that a renewed interest in human rights is being observed in the conservation context is that conservation is becoming a lucrative enterprise. Conservation is increasingly practiced for reasons not pertaining to either science or “green” ideals,⁶⁶ but rather, in pursuance of financial and political goals as the economy evolves to recognise the value of environmental resource capital, and as consumer (and shareholder) preferences shift in favour of ecological corporate social responsibility.

Although the theory behind the RBA to conservation is bolstered by discussions and lessons learned from the RBA to development, it is still a concept that is in its infancy. The need for RBAs is more prevalent in communities where rights are marginalised by other political goals. But it tends to be in such communities that the requisite cohesion of administrative governance and requisite funding is simply not available for an ideal approach to be applied.

Normative theories pertaining to the application of an RBA are especially lacking. This analysis has suggested a response that comes at rights concerns from various angles, employing different stakeholders and different components of the overall rights protection system in a coordinated fashion. It is acceptable that a response be segmented and its components run by, and funded from, multiple sources, if the response is ultimately coordinated. In fact this type of response may even be the most desirable, for its ability to utilise the most appropriate available resources and tools for the action at hand. If there are necessary gaps in the practical response, these should be flagged and identified particularly to those with responsibilities over the required action so that they may intervene as capacity is improved in future.

The questioning of human dominion over the environment has been a positive abatement on the quest for development of recent decades. However, this analysis and the growing notion of the RBA to conservation more broadly have demonstrated the importance of not rejecting anthropocentrism entirely, lest we forget the basic human rights upon which modern civility is grounded. Now perhaps more than ever, it is necessary to recognise the interplay between rights, development, and conservation, and to strive to harmonise the three as equitably as possible. Increasing recognition of the importance of the RBA to conservation in theory needs to be matched with greater attention devoted to how a RBA can be effectively put into practice, in light of the challenges that will inevitably divide the two.

⁶⁶ But see Kyle Van Houtan, ‘Conservation as a Virtue: a Scientific and Social Process for Conservation Ethics’ (2006) 20 *Conservation Biology* 1367; Stephen Trudgill, ‘Psychobiogeography: Meanings of Nature and Motivations for a Democratized Conservation Ethic’ (2001) 28 *Journal of Biogeography* 677.