

A Strong Role for Custom in International Wildlife Litigation

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1. INTRODUCTION

Two problems of wildlife law will be addressed in this article—one is spatial and the other is temporal. The first problem is the lack of identity with, and therefore support for, international wildlife law that local populations have. That leads to the second problem, which is the failure to apply the lessons learned from biodiversity law of fauna to the biodiversity problems of flora.

As to the spatial problem, if we make a simple comparison between a map of biodiversity hotspots and a world geopolitical map, we can see that the hotspots worldwide fall largely in developing¹ countries. In these countries, if law can provide solutions to biodiversity problems in general, and wildlife problems in particular, we must pause and consider which sources of law that could mean. That same comparison of maps would also correlate to a map of colonialism in Africa, Asia, and South America.² Studies have further demonstrated the relatively high correlations between colonialism and corruption.³ Cultures suffering under corrupt governments and societal corruption are understandably not prone to organize themselves according to the laws of the corrupt state,⁴ especially when the norms that those laws announce are colonial legacies.⁵ This sense of distrust of foreign law is not improved

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¹ The terms “developing” and “developed” are employed as commonly used names here and not as literal denotations. “First world” and “third world” are equally problematic, as are “northern hemisphere” and “southern hemisphere.”

² See Juan Carlos Botero et al., *The Rule of Law around the World*, in THE WORLD JUSTICE PROJECT: RULE OF LAW INDEX 2010, at 20 (Mark David Agrast et al. eds., 2010).

³ See generally JEAN-FRANÇOIS BAYART, *THE STATE IN AFRICA: THE POLITICS OF THE BELLY* (2d ed. 2009).

⁴ JAN STROMSEM, *AFRICA REGIONAL RULE OF LAW STATUS REVIEW* 9–11 (2009).

⁵ See Sandra Fullerton Joireman, *Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy*, 39 J. MOD. AFR. STUD. 571, 577–578 (2001) (noting that when colonial powers imposed legal systems on the occupied people, it is difficult to determine whether the custom used in

when the norm comes from international law.⁶ Citizens of developed countries are also skeptical about receiving norms from outside their borders. Within the European Union, for example, one needs only to unpack the reasoning found in the British media's Euroskeptic arguments to find a rejection of norms solely because they are imposed from "over in Europe," "Brussels," or "on the continent." In short, one can say that the less cultural connection a society feels to the laws under which it lives, the less likely those laws will be accepted as applying to the local population, and therefore the less effective they will be.

From the Western perspective, it is often the notion of "rule of law" rather than local identity that is said to make law effective:

The effectiveness of legal institutions is an issue of importance to legal scholars, academics, politicians and policy-makers because it has long been suggested (though only recently subjected to any rigorous test) that the rule of law is intricately connected to democracy and capitalist development.⁷

The goals sought to be achieved in Western systems might not suit those of developing countries, however,⁸ and litigation may be used for different reasons and produce different results in developing countries.⁹

court was also imposed on the locals). This, of course, raises an additional provocation and would-be comparison: how would the "rule of law" states map onto this geographic comparison? Given the many meanings of "rule of law state," the answers are many, depending on the agenda of the person asking.

⁶ See Sara de Wit, *Global Warning: An Ethnography of the Encounter of Global and Local Climate Change Discourses in the Bamenda Grassfields, Cameroon* (2011) (unpublished M.S. thesis, University of Leiden) (on file with author).

⁷ Joireman, *supra* note 6, at 572 (basing this conclusion on Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998); Sandra Coliver, *Rule of Law Is Crucial Ingredient in Democracy*, ELECTIONS TODAY, April 2000, at 14; Alan Dowty & Gil Loescher, *Refugee Flows as Grounds for International Action*, INT'L SEC., Summer 1996, at 43; Stanley L. Engerman & Kenneth L. Sokoloff, *Factor Endowments, Institutions and Differential Paths of Growth Among New World Economies*, in HOW LATIN AMERICA FELL BEHIND, 260 (Stephen. Haber ed., 1997); Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Measures*, 7 ECON. & POL. 207 (1995); Robert Mandel, *Perceived Security Threat and the Global Refugee Crisis*, 24 ARMED FORCES & SOC'Y, 77 (1997)). The World Justice Project, one of whose premises is that the rule of law is a foundation for communities of opportunity and equity, produces a Rule of Law index. According to Agrast, Botero, and Ponce, the index is a data source to, among other things, "[a]ssess a nation's adherence to the rule of law in practice[.]" rather than theory. Mark David Agrast, Juan Carlos Botero, & Alejandro Ponce, *Constructing the WJP Rule of Law Index*, in THE WORLD JUSTICE PROJECT: RULE OF LAW INDEX 2010, *supra* note 3, at 5, 13.

⁸ See, e.g., Makau Mutua, *What Is TWAIL?* 94 AM. SOC'Y INT'L L. PROC. 31 (2000); B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMTY. L. REV. 3 (2006); James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 (2011); Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOODE HALL L.J. 171 (2005).

⁹ Cf. REINHARD SLEPCEVIC, *LITIGATING FOR THE ENVIRONMENT: EU LAW, NATIONAL COURTS AND SOCIO-LEGAL REALITY* (Dorothee Koch & Anita Wilke eds., 2009).

Ghanaian philosopher of language Kwame Anthony Appiah explains that:

The African teacher of literature teaches students who are, overwhelmingly, the products of an educational system that enforces a system of values that ensures that, in the realm of culture, the West in which they do not live is *the* term of value; the American teacher of literature, by contrast, has students for whom the very same West is the term of value but for whom that West is, of course, fully conceived of as their own. While American students have largely internalized a system of values that prohibits them from seeing the cultures of Africa as sources of value for them—despite ritualized celebrations of the richness of the life of savages—they have also acquired a relativist rhetoric that allows them, at least in theory, to grant that, “for the Other,” his or her world is a source of value. American students would thus expect African students to value African culture, *because it is African*, while African students, raised without relativism, expect Americans to value their own culture because it is, by some objective standard, superior. (Obviously these generalizations admit many exceptions.)

These sociological facts, reflexes of asymmetries of cultural power, have profound consequences for reading.¹⁰

These sociological facts also have profound consequences for a culture’s comportment toward the law. Yet it is precisely in wildlife that we find an area of the law that is heavily influenced by, if not dominated by, international law.¹¹ This lack of connection may not bode well for solving wildlife problems through law. Thus we see more clearly a nuance of the first of two problems to be addressed here—wildlife problems are often local, but wildlife law is often international. In addressing the problem, it then comes to us rather ironically that it is international law that most explicitly makes use of custom in the famous Article 38 of the Statute of the International Court of Justice, annexed to the United Nations Charter,¹² as a source of law in conflict resolution. Custom is a source of law that can be local in nature, and it could even be said that it develops inductively from observing local behavior rather than deductively by legislating norms. But international law is not easily accessible for local populations. As is commonly known, “international law” was originally called the “law of nations” because only states can be parties to international public law, such as in multilateral environmental agreements (MEAs) and wildlife conventions. Thus, the access of all legal persons who are not states (including individuals, business organizations, married couples, NGOs, etc.) to international law must be mediated through their own domestic

¹⁰ KWAME ANTHONY APPIAH, *IN MY FATHER’S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE* 69 (1992).

¹¹ *See generally* THE INTERNATIONALIZATION OF ENVIRONMENTAL PROTECTION (Miranda A. Schreurs & Elizabeth C. Economy eds., 1997) [hereinafter INTERNATIONALIZATION] (considering the internationalization trend for environmental law).

¹² Statute of the International Court of Justice art. 38, 26 June 1945, 33 U.N.T.S. 993.

state. A state may further delegate international duties to subdivisions of the state, but one's recourse remains filtered through the state.

Internationally recognized custom has an additional problem. Among the three Article 38 sources, custom is often stated to conflict with another of the sources—principle—in wildlife law. Goble and Freyfogle summarize the issue as follows:

The fundamental principle of international wildlife law is that a nation-State is sovereign over the resources within its borders. . . . Note that the 'sovereign right to exploit' is matched against, and is in tension with, the clearest customary rule of international law: the prohibition on transboundary harm.¹³

The principle of the sovereign right to exploit is incorporated into the Stockholm Declaration of the United Nations Conference on the Human Environment (1972) and reiterated as Article 3 of the Convention on Biological Diversity (1993).

The notion of using custom as a source of law can return a sense of connection with legal norms to a local population, even if those norms are made official in a far-off capital city or even a foreign country. True, no matter what source of law is used, if the state is the arbiter of the conflict, one will not have escaped the problems of distrust of the state. But both international law and domestic law have multiple sources of law at their disposal for the resolution of conflict. When one examines both international and domestic law, one can find places in both the creation and implementation of norms where local values and persons have roles to play.

We have come so far in the evolution of Western legal systems into positive law that we may indeed need to remind ourselves just why the concept of "custom" is recognized as a source of law¹⁴ and what its benefits can be. Some language comparison may help to remove unnecessary connotations to the word "custom" in English. In the German language, one refers to *Gewohnheitsrecht*; when in English, one would say customary law. But, literally, to be *gewohnt* is to be accustomed. This slight difference—"accustomed" rather than "custom"—reminds us that our customary rules arise from that which we are used to doing. And, absent a better idea from a legislative body, a conservative institution such as law is quite happy to continue to do what we are used to doing and even protect it as though there is a rational norm at its base.

¹³ DALE D. GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW: CASES AND MATERIALS* 593–594 (2d ed. 2010).

¹⁴ As a result, one might assume that customary law is only a temporary state of affairs until the customary norm becomes enacted in positive legislation. G.N. Sinha persuasively argues for the advantages of customary law over codified legislation. See generally G.N. Sinha, *Is Codification of Customary Law Desirable?*, ARUNACHAL TIMES, 31 January 2006, available at http://www.sfri.org/images/general/codification.customary_law.pdf.

In discussing both arithmetic and traffic rules:

[philosopher Ludwig] Wittgenstein argues that it is habit or custom that produces the appearance that a rule can be continued indefinitely.¹⁵ [As Jonathan Langseth notes,] [i]n doing so, [Wittgenstein] is arguing against the idea of rules having an objective nature. The rules of arithmetic, just as the rule for driving on the right side of the road, are contingently dependent upon our continuing to act in a certain way that is in agreement within a given community, i.e. a habit or custom—a norm.¹⁶

Wittgenstein goes on to say “[i]f I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: ‘This is simply what I do.’”¹⁷ When custom is accepted as a source of law, the practice of using custom can and should be regarded as local persons telling judges “this is how we have traditionally decided disputes around here—it is simply what we do.”

There is both historical precedent and rational source for the inclusion of custom among sources of law. In addition to the Article 38 sense from international law, a second use of custom is systematized in the common law. Common law, as we know it in practice today, began at a definite place and time in history. Upon claiming the crown over England from Harold the Saxon, William the Norman did not simply impose Norman law on the Saxon tribes but instead sent his representatives around the island to observe the resolutions of tribal conflict.¹⁸ That process served to recognize that law is a cultural construct and its values must be accepted, if not consciously generated, by the populace. It is an old lesson that somehow needs to be relearned with each new generation—even if a state has enough soldiers and police to impose its will, deference to the gun does not mean a self-governing society, and therefore not a “legitimate” state in contemporary public law theory.¹⁹ The late Chief Justice Ismail Mahomed of South Africa and Namibia noted that:

[t]o survive meaningfully, the values of the constitution and the rule of law must be emotionally internalized within the psyche of the citizens. The active participation of the organs of civil society outside of the constitution in the articulation and dissemination of these values is a logistical necessity for the survival and perpetuation of the rule of law. Without it, the law and the ruler become alienated from the ruled. In

¹⁵ Jonathan Langseth, *Wittgenstein’s Account of Rule-Following and Its Implications*, 1 *STANCE* 38, 40 (2008), available at http://www.bsu.edu/libraries/virtualpress/stance/2008_spring/12Wittgenstein.pdf (citing LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶¶ 99–100, 190 (G.E.M. ANSCOMBE trans., 1953)).

¹⁶ *Id.*

¹⁷ WITTGENSTEIN, *supra* note 16, ¶ 217.

¹⁸ DANIEL R. COUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS* 57 (1999).

¹⁹ ANGELIKA NUSSBERGER, *DAS VÖLKERRECHT: GESCHICHTE, INSTITUTIONEN, PERSPEKTIVEN* (2009).

a dangerously sterile sense the law itself becomes a series of mechanical commands to the citizen²⁰

Yet with wildlife law, as with environmental law, the pattern has been increasingly toward international legal solutions to local, colonized, wildlife hotspot problems.²¹

There is often a debate about whether the common law approach or the civil law approach is better, but to make any real sense of the debate, one must ask “better to achieve what goals?”²² At least one comparison of common law and civil law states in Africa²³ that attempted to use outcome assessments concluded that “common law countries in Africa are generally better at providing ‘rule of law’ than are civil law countries.”²⁴ Accepting the conclusion of this study, which was based on a composite analysis of the International Country Risk Guide political risk ratings and “the Freedom House Civil Liberties rating,”²⁵ one would then need to find an association between conceptions of a rule of law and the trust in litigation, with the ultimate goal being to use litigation to introduce local custom into wildlife conflict determinations. By analogy, if one follows the development of environmental law, it is generally agreed that the first statutes dedicated to environmental law occurred in the latter half of the twentieth century, coincidentally arising in Asia, Europe, and the United States in the late 1960s and early 1970s. Prior

²⁰ Peter Shivute, *The Rule of Law in Sub-Saharan Africa—An Overview*, in HUMAN RIGHTS AND THE RULE OF LAW IN NAMIBIA 213, 215 (Nico Horn & Anton Bösl eds., 2d ed. 2009), available at http://www.kas.de/wf/doc/kas_16045-1522-2-30.pdf?091123204331 (quoting Ismail Mahomed, Former Chief Justice of South Africa and Namibia, Address at a Conference on the Rule of Law and Its Constitutional Organs (2 October 1994)).

²¹ INTERNATIONALIZATION, *supra* note 12, *passim*.

²² See, for example, Stefan Voigt, *The Interplay Between National and International Law—Its Economic Effects Drawing on Four New Indicators* (August 2006) (unpublished comment) for an examination on how international law interacts with either civil or common law with the goal of economy, available at SSRN: <http://ssrn.com/abstract=925796> or <http://dx.doi.org/10.2139/ssrn.925796>.

²³ When it comes to labeling common law and civil law states in Africa:

[a] crucial point—which many Western writers tend to overlook or ignore altogether in the case of former colonies—is the fact that Namibian law was “received” from South Africa, which in turn was based on Roman-Dutch law and English common law. Therefore, like South Africa, Zimbabwe, Lesotho, Botswana and Swaziland, Namibia is a hybrid or mixed legal system, standing midway between Roman-Dutch law and English common law, and perforated at many points by indigenous law.

Dunia P. Zongwe, *Equality Has No Mother but Sisters: The Preference for Comparative Law over International Law in the Equality Jurisprudence in Namibia*, in INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA 123, 137 (Magnus Killander ed., 2010) (footnotes omitted).

²⁴ Joireman, *supra* note 6, at 571; see *id.* at 788 (noting that in Africa the “common law systems appear to be better at providing the rule of law than are civil law systems”).

²⁵ *Id.* at 583.

to those statutes, the norms were developed through litigation, often using custom, through common law or otherwise, as the basis.

Coincidentally, two of the big world hotspots for biodiversity—India and sub-Saharan Africa, are common law jurisdictions. So what? We are all familiar with what one may call the oversimplified schoolchild's version of a democratic rule of law state, effected by a popular political process. It is precisely this process of non-transparent dealings of political parties, lobbying influence, distant capitals, and foreign influences in international law that leaves locals feeling as though they have no voice in law. That is why it may be of advantage to shift focus from law-making to conflict resolution. Doing so treats conflict resolution as the opportunity to insert local values through custom, as a source of law, into the structure of the society. We see this sort of thing in practice even in a country such as the United States, which likes to pride itself as having relatively transparent government and access for the people to law making. Still, in the tort of medical or legal malpractice, when a physician or lawyer testifies as to what the correct procedure in medicine or law would have been in the subject case, the answer comes from local practice, not nationalized or internationalized legislative norms.²⁶

In a common law jurisdiction such as the United States, the transition from no environmental law to a body of sources recognizable as environmental law transpired through the accretion of case decisions of courts:

In the 1960's, lawyers had to create the subject of environmental law from whole cloth and, as a result, lawyers followed the great common law tradition of marginal groups and pursued a "rule of law" litigation strategy.²⁷

Between domestic and international law, society historically solved its problems at the domestic level, with states turning to international law only when common problems could be solved only by international law, or could be better solved by international law than by domestic law. But in areas such as environmental law, it has often been the case that the norms are set internationally first, then applied domestically, such as with the principle of sustainable development and the precautionary principle. So it is with biodiversity. And with biodiversity, the implementation of the law goes one step further in localization. Indeed, in the United Nations Environmental Programme (UNEP)

²⁶ See RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 13 (2010) (explaining that compliance with community custom "is evidence that the actor's conduct is not negligent."); RESTATEMENT (SECOND) OF TORTS § 295A (1965) (NOTING THAT "[I]N DETERMINING WHETHER CONDUCT IS NEGLIGENT, THE CUSTOMS OF THE COMMUNITY . . . [IS A] FACTOR[] TO BE TAKEN INTO ACCOUNT."); see generally Kenneth S. Abraham, *Custom, Non-Customary Practice, and Negligence* (April 2009) (unpublished comment) (on file with the Author), available at <http://tortsymposium.law.wfu.edu/papers/abraham.pdf>.

²⁷ A. Dan Tarlock, *The Future of Environmental Rule of Law Litigation*, 17 PACE ENVTL. L. REV. 237, 241 (2000).

Handbook on the Implementation of Conventions Related to Biodiversity in Africa, it is stated: “As a basis for legislation to protect traditional knowledge, States Parties will need to determine the available conservation methods among traditional communities.”²⁸

Thus, given that custom is a source of law both internationally and domestically in many wildlife hotspot countries, it is worth remembering the often forgotten source of law—custom—as we look for ways in which to enable local populations not only to feel some sort of connection to law-making through the political process in a far-off capital city, but rather also law-making through conflict resolution right at home where they live. Custom as a source of law acknowledges that there exist human behaviors that need not be held up against a matrix of objectively acceptable behaviors but are rather, as Wittgenstein describes it, “what we do.” They are the markers of the demos—the *is* practices of the local many, accepted therefore as the foundation for the *ought* pronounced by judges.

This brings one, then, to a third and distinct use of custom—the use of custom as a source of law with local and tribal courts, just as William’s men observed in England nearly a millennium ago. A problem that remains with custom as a source of law in any of the three senses (Article 38, common law, or local norms) is not its level of legal potency in comparison with other sources, but the fact that until and unless a court recognizes a custom as such, one may not rely on it. Therefore, in order to have custom acknowledged as a source of law, there must be conflict that is resolved through litigation, and the resolution of that conflict must be recorded by a court. This requirement of having litigation—either to resolve one’s own conflict or to record the resolution of prior similar conflicts—is not an insignificant hurdle that one must clear in order to make use of custom as a local source of law. When it comes to MEAs, there is not a large amount of litigation in general,²⁹ and when we limit the MEAs to wildlife and to the states on the African continent, we find ourselves with a tiny list. Nevertheless, to thoroughly consider custom as a source of law in practice in any jurisdiction, one must investigate the actual litigation that has occurred.

Daniel Bodansky reminds us that:

Too many people assume, generally without having given any serious thought to its

²⁸ UNEP/UNDP JOINT PROJECT ON ENVTL. LAW & INST. IN AFR., UNITED NATIONS ENVTL. PROGRAMME (UNEP), HANDBOOK ON THE IMPLEMENTATION OF CONVENTIONS RELATED TO BIOLOGICAL DIVERSITY IN AFRICA (1999).

²⁹ There are almost no cases before the International Court of Justice, for example, with an exception being the pending litigation “under the International Convention for the Regulation of Whaling . . . as well as . . . other . . . obligations for the preservation of marine mammals and the marine environment.” Antarctic Whaling (*Austl. v. Japan*: N.Z. intervening), Verbatim Record, 15 (26 June 2013, 10 a.m.), at <http://www.icj-cij.org/docket/files/148/17390.pdf#FitH&page=none&search=%22australia%22>. New Zealand filed its Declaration of Intervention on the side of Australia on 20 November 2012. *Id.* at 16.

character or its history, that international law is and always has been a sham. Others seem to think that it is a force with inherent strength of its own, and that if only we had the sense to set the lawyers to work to draft a comprehensive code for the nations, we might live together in peace and all would be well with the world. Whether the cynic or the sciolist is the less helpful is hard to say, but both of them make the same mistake. They both assume that international law is a subject on which anyone can form his opinions intuitively, without taking the trouble, as one has to do with other subjects, to inquire into the relevant facts.³⁰

Before “taking the trouble” to inquire into the relevant facts of the use of custom in litigation in a sample of biodiversity hotspots, there is one more nuance to be recognized, and that is the relationship of common law to dualism. Magnus Killander and Horace Adjolohoun note that:

[t]he relationship between international law and domestic law is often portrayed in terms of the monism-dualism dichotomy. African civil law countries have traditionally been seen as monist and common law countries as dualist.³¹

Killander and Adjolohoun go on to note, however, that “courts in many traditionally dualist countries in Africa use international law to a larger degree than explicitly monist countries such as those of Francophone Africa.”³² They go so far as to conclude that (not only in Africa) “courts in most civil law countries oppose the direct applicability of international law”³³ So although the dualist nature of common law countries might, at first glance, tend to lead

³⁰ DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* (2010) (quoting JAMES LESLIE BRIERLY, *THE OUTLOOK OF INTERNATIONAL LAW* 1 (1944)).

³¹ Magnus Killander & Horace Adjolohoun, *International Law and Domestic Human Rights Litigation in Africa: An Introduction*, in *INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA*, *supra* note 24, at 3, 4. The authors include with common law countries:

those with a Roman Dutch common law heritage (South Africa, Namibia, Botswana, Lesotho, Swaziland and Zimbabwe). [They also note] that Mauritius and the Seychelles have mixed legal systems based on French civil law and English common law.

Id. at 4 n.5. They further note that in addition to countries colonized with civil law by France, Belgium, or Portugal:

Italy [had] colonized Eritrea, Libya and Somalia and has influence the legal systems of these countries, though Islamic law dominates Libya and Somalia and the Eritrean legal system has been heavily influence by Ethiopia which, though occupied by Italy, was not colonized.

Id. at 10.

³² *Id.* at 4.

³³ *Id.*

toward apathetic failure to implement international custom, in fact it provides the courts, rather than the legislature, the opportunity to bring custom into the sphere of domestic norms. And courts can do so through litigation in which the local citizens take an active and direct role.

In discussing law on the African continent, one is immediately confronted with the extensive number of native cultures and languages and the differences among the precolonial, colonial, and postcolonial legal systems that, to varying degrees, line up with those cultures and languages. But Africa is not alone in this respect. The Indian subcontinent (and South America, in fact) also contends with creating and maintaining legal systems that have large colonial fingerprints on them. In the following discussion, I will consider the role of litigation in these systems, and whether litigation serves to carry out any of the stated goals of various societies concerning wildlife. Specifically, two questions will be addressed:

1. Do the common law cultures of Africa use litigation the same as Indian culture?
2. Does the notion of international law in general, and the various conventions to protect wildlife in particular, suit African or Indian cultures, or is it a further product of colonialism and therefore likely to be culturally rejected?

2. CUSTOM, IDENTITY, AND WILDLIFE LAW IN AFRICAN STATES

To talk about the role of international agreements from a law enforcement perspective, one must look to domestic implementation and enforcement of those international agreements. Insofar as one looks to domestic implementation under the rubric of “Africa,”³⁴ one is necessarily conducting comparative law. Magnus Killander and Horace Adjlohoun remind us, however, that:

[t]he status of customary international law in the legal order is not set out in the constitutions of Francophone African countries. We are not aware of any cases in which courts from these countries have relied on customary international law.³⁵

³⁴ E.g., John Campbell, *Defining “Africa” through Geography or Regional Cooperation*, AFRICA IN TRANSITION (17 September 2012), at <http://blogs.cfr.org/campbell/2012/09/17/defining-africa-through-geography-or-regional-cooperation/> (pointing out that the definition of “Africa” changes depending on the purpose of the person or organization that makes the definition). For example, many definitions in politics do not include North African states, but definitions in geography usually do include North African states. *Id.*

³⁵ Killander & Adjlohoun, *supra* note 32, at 6 (citing Narcisse Mouelle Kombi, *Les dispositions relatives aux conventions internationales dans les nouvelles constitution des États d’Afrique francophone*, AFR. Y.B. INT’L L., 2000, at 223, 246). They further make the point that “[i]n France[,] international customary law is generally recognized as part of the law of the land.” *Id.* at 6 n.13 (citing NGUYEN QUOC DINH,

Since the Enlightenment, we take nearly as natural that the functions of the state are divided among making law, enforcing law, and interpreting law. Many disciplines, from political science to economics to psychology, can claim to contribute to the normative rule construction of law making. Unfortunately, there is often an implication in law-making that if only the “right” norm is legislated, then the results will be as intended, as predicted and anticipated by the law maker. Yet even the most basic rule of traffic is contested by drivers who claim the police did not see the situation accurately, or the needs of their particular situation are an exception to the proscription announced in the statute or regulation. So effective law cannot be accomplished simply by making the right norms.

One would be naïve to think that a statute, once promulgated, is successful because no one has openly challenged it. One can test outcomes by looking to the stated goals of a law, if they are clear and measurable, such as a reduction in measurable CO₂ by a certain amount in a given year, as required by the United Nations Framework Convention on Climate Change (and its Kyoto Protocol),³⁶ or the confiscation and penalization of trade in species under Article VIII of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1975) (CITES). But if that goal is not met, what might one conclude about the stated norm? Is it an impossible goal and should therefore be moved? In most states, statutes prohibit murder. Still, in most states there is some detectable level of murder happening. May we conclude the legislation has failed? Correlations may be tracked and graphed between the introduction of legislation and the achievement or failure to achieve the desired results. By comparison, recording and measuring the role of custom is far less neat and crisp. However, while it may be more difficult to research and record, the role and function of custom in law-making is nevertheless extremely important, especially if the goal to be achieved is to recognize local practices as law.

In 26 African countries, custom is an official source of law, either in its manifestation through the case decisions of pure common law³⁷ or through direct customary norms and procedures. International conventions as a source of wildlife law in Africa have been catalogued.³⁸ In researching wildlife litigation

PATRICK DAILLIER, & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 314 (3d ed., 1987)). That said, Killander and Adjoluhoun also say, however, that parties have raised customary international law before French courts. *Id.* at 6 n.14 (citing Emmanuel Decaux, *A Report on the Role of French Judges in the Enforcement of International Human Rights*, in *ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS* 111 (Benedetto Conforti & Francesco Francioni eds., 1997)).

³⁶ United Nations Framework Convention on Climate Change art. 2, *opened for signature* 4 June 1992, 1771 U.N.T.S. 107.

³⁷ Here I am using the term “pure common law” in the sense that the judicial decisions are not interpretations of statutes but rather the pronouncement of local norms, as observed in practice.

³⁸ MARIE TERESA CIPELLI & ELISA MORGERA, *WILDLIFE LAW IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY* 17 (CIC Technical Ser. Publ'n No. 9, 2010).

in Africa, however, one is likely to find mostly civil actions³⁹ or administrative actions, often in which wildlife and its trustees are defending,⁴⁰ although there have also been some criminal enforcement cases that have gone to trial.⁴¹ In the past, some of the more traditional issues that one would term “environmental law” have been litigated in African courts⁴² and that litigation has made use of custom, principle, or both as sources of law.⁴³ Much of the public law litigation that has occurred in recent years in the African states has concerned itself with human rights.⁴⁴ And in the area of human rights, one is also more likely to find recognized local tribunals and the use of custom as a source of law.⁴⁵ While this litigation in substance is not directly connected to wildlife, it does give one a platform from which to understand the possibilities of custom in public law litigation in Africa. The mechanics of taking local custom as a source of law could be extended to the same for environment or wildlife protection.⁴⁶

³⁹ E.g., *Laktar v. Bomas of Kenya Ltd. & Another* (2003) 1 K.L.R.(E&L) 547 (H.C.K.) (Kenya).

⁴⁰ E.g., *Sea Star Malindi Ltd. v. Kenya Wildlife Services* (2002) 1 K.L.R.(E&L) 512 (H.C.K.) (Kenya); *Hassan & Four Others v. Kenya Wildlife Service* (1996) 1 K.L.R.(E&L) 214 (H.C.K.) (Kenya).

⁴¹ E.g., *Wakitata v. Republic* (1977) 1 K.L.R.(E&L) 52 (H.C.K.) (Kenya).

⁴² See, e.g., MUHAMMED LADAN, TRENDS IN ENVIRONMENTAL LAW AND ACCESS TO JUSTICE IN NIGERIA 55 (2012) (litigation involving issues of *locus standi* and representative capacity in Nigeria).

⁴³ 1 UNEP/UNDP/DUTCH GOV'T JOINT PROJECT ON ENVTL. LAW & INST. IN AFR., COMPENDIUM OF JUDICIAL DECISIONS ON MATTERS RELATED TO ENVIRONMENT NATIONAL DECISIONS at iii–v (1998) [hereinafter COMPENDIUM OF JUDICIAL DECISIONS] (compiling Africa judicial decisions relating to *locus standi*, the public trust doctrine, and the polluter pays principle). On the issue of *locus standi*: *Von Moliike v. Costa Aerosa (Pty) Ltd* 1075 (1) [C.P.D.] 255 (South Africa); *Van Huysteen & Others v. Minister of Environmental Affairs & Tourism & Others* 1996 (1) SA 283 (South Africa); *Verstappen v. Port Edward Town Board & Others v. Minister of Environmental Affairs & Tourism & Others* Case No. 1672/1995 (South Africa); *Minister of Health & Welfare v. Woodcarb (Pty) Ltd. & Antoher* 1996 (3) SA 155 (South Africa); *Wangari Maathai v. Kenya Times Media Trust* H.C.C.C. No. 5403 1989 (Kenya); *Wangari Maathai v. City Council of Nairobi* H.C.C.C. No. 72 of 1994 (Kenya); *Festo Balegede and 749 Others v. Minister of Environmental Affairs & Tourism & Others* Case no. 1672/1995 (South Africa); on the public trust doctrine: *Niaz Mohammed Jan Mohammed v. Commissioner of Lands & Others* H.C.C.C. No. 423 of 1996 (Kenya); *Commissioner of Lands v. Coastal Aquaculture Ltd.*, Civil Appeal No. 252 of 1996 (Kenya); on the polluter pays principle: *Natal Fresh Produce Growers Association v. Agroserve (Pty) Ltd.* 1990 (4) SA 749 (South Africa).

⁴⁴ Busingye Kabumba, *The Application of International Law in the Ugandan Judicial System: A Critical Enquiry*, in INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA, *supra* note 24, *passim*; see generally INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA, *supra* note 24.

⁴⁵ Zongwe, *supra* note 24, at 133–134 (discussing the Namibian High Court's use of custom). Zongwe provides the example that in Namibia:

[t]he [High] Court recognised the existence of the common law concept of a ‘universal partnership’ where parties agree to put in common all their present and future property, and which can be entered into expressly or tacitly where a man and woman live together as husband and wife but have not been married by a marriage officer.

Id.

⁴⁶ In South Africa, child law is another area of law that was developed by the courts, not by legislative bodies. See Ronaldah Lerato Karabo Ngidi, *The Role of International Law in the Development of Children's Rights in South Africa: A Children's Rights Litigator's Perspective*, 173, 178–190 INTERNATIONAL

Frans Viljoen, director of the Centre for Human Rights at the University of Pretoria, states that “the norms of customary international human rights law are by and large contained in the constitutions of African states.”⁴⁷ Killander explains that:

This is also, in general, the case with international human rights treaties. All African states have bills of rights in some form or another. Not all of these bills of rights cover all the rights recognised in the UN covenants and the African Charter. However, domestic courts do not often need to look to international treaties to find the right that have been violated in a specific case.⁴⁸

Instead, says Viljoen, these courts should look to see how norms were applied in other states. This preference for comparative law over international law is understandable. The central argument is that higher courts prefer comparative law in controversial equality cases because the values attributed to the international community cannot sustain judgments where they contradict local values⁴⁹

Here we have an example in which a brake is put on the imposition of top-down international standards that may or may not be appropriate for the culture or economics of a particular society.

It is worth noting that the foundational text on comparative law by Konrad Zweigert and Hein Kötz traces the history of the discipline to the International Congress of Comparative Law, which took place as part of the Paris World Exposition in 1900.⁵⁰ And it is worth noting because the protocol writer for the Congress, Professor Edouard Lambert of Lyon, had the following to say about comparativism. First of all, the *Zeitgeist* at the turn of that century was “progress.” The goal of the Congress, according to Lambert, was a *droit commun de l’humanité*. We may feel today that it was a bit naïve to think this was possible, but more importantly, after the disastrous wars of the twentieth century and the negative globalization impact of the twenty-first century, it should be clear that as a matter of choice, states should not necessarily even want a unified international system. Lambert also reported that for those involved in that project of essentially establishing comparative law as a discipline, comparative law was meant to resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development and to reduce the number of divergences in law,

LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA, *supra* note 24 (discussing the development of child law in the South African courts).

⁴⁷ KILLANDER, *supra* note 32, at 21 (internal citations omitted) (quoting FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 530 (2007)).

⁴⁸ *Id.* at 21.

⁴⁹ Zongwe, *supra* note 46, at 123. A contrary trend may be to pursue the international notion of “rule of law,” as is included in the African Union’s plan. See Olufemi Babarinde, *The EU as a Model for the African Union: The Limits of Imitation* 6–7 (JEAN MONNET/ROBERT SCHUMAN PAPER SER. NO. 2, 2007).

⁵⁰ KONRAD ZWIEGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 58 (Tony Weir trans., 1987) (1977).

attributable not to the political, moral, or social qualities of the different nations but to historical accident or to temporary or contingent circumstances.⁵¹ These criteria are alive and well today, if one considers how large the filters are that Lambert had proposed—things attributable to political, moral, or social differences among nations are not to be unified.

My point is not to review the mechanics of comparative law in the way that Zweigert and Kötz prescribe but to emphasize the conditions that Lambert puts on effective comparison. They are often ignored or regarded as trivial, but it would seem that even if the great proponents of comparativism such as Lambert saw limitations, then we who are not so beholden to the idea ought to really take the limitations seriously. Lambert's point, if taken seriously, would mean that in comparing various states' compliance with various wildlife treaties, such as CITES, we ought only to be comparing those of "peoples at similar stages of cultural and economic development." The meaning of economic development is probably more readily agreed upon⁵² than the meaning of "similar cultural development." That second phrase smacks of elitism, colonialism, and racism. And yet if we are to acknowledge that law is a cultural and not a natural phenomenon, we must acknowledge that it differs among cultures for different reasons and is not simply transferred like a piece of machine technology. Two legal aspects of culture come to mind, once the admonition to take comparativism seriously is respected. First is the more common discussion that the function of a legal norm in a rule of law state differs from a state that is not considered to be a rule of law state, especially among its own citizens. Second, and more important for the present discussion, the role of litigation differs among different states, and the various roles are worth testing against the rule of law concept to see if a causal connection can be identified and isolated.

3. COMPARISON THROUGH COMMON LAW—CUSTOM IN INDIA

Like much of Africa, India—another wildlife hotspot—uses custom in all three of the manifestations included above as a source of law. But in large part because India is a single national jurisdiction, the legal system of which was rather uniformly colonized by a common law state, the citizen's reception and use of litigation seems to be quite a bit more pronounced. Therefore, if

⁵¹ DAVID S. CLARK, *Nothing New in 2000? Comparative Law in 1900 and Today*, 75 Tul. L. Rev. 871, 879–883 (2001).

⁵² Indira Gandhi famously said that the greatest environmental problem is poverty, and as Olufemi Babarinde has pointed out, the GDP per capita of African states on average is less than five percent of that of US Americans. Babarinde, *supra* note 50, at 4. Therefore, the question must be raised as to whether an international norm can or should be applied the same to multiple states.

in fact the common law tradition does lend itself to local persons being able to express local norms through custom, recognized as law by common law judges, then India ought to be a jurisdiction in which one can find evidence of that trend. And, indeed, one can. Moreover, in consideration of the original comparative law point made by Edouard Lambert and institutionalized by Zweigert and Kötz, that only cultures in similar economic situations should be compared, India is indeed comparable to many African states.

Here, it would be helpful to stop and examine how custom works in domestic law. Professor K. B. Agrawal writes that local and family customs in India, if proved to exist, will supersede the general law and will in other respects govern the relations of the parties outside that custom. In India, the essential attributes of a custom are that it must be ancient, must be reasonable, must have continued or been observed without interruption, and must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons who it is alleged to affect. Furthermore, it must be uniform and obligatory. It must not be immoral or opposed to public policy and cannot derogate from any statute unless the statute saves any such custom. According to Agrawal, these essentials of a valid custom have been repeatedly affirmed by the Privy Council in a chain of cases.⁵³ For example, until 1914, customary law controlled marriage and succession in India, as well as other parts of daily life. English courts slowly integrated customary law into English legal practice in India, because they practiced common law. Thus, the English common law had structurally allowed custom to play a role in establishing rules of law without insisting that the content of the customs be native to English culture. Consequently the English understood what counted as “custom” from decisions of the Privy Council, having observed Indian custom in the areas of marriage and succession.

Wildlife protection in India through law can be traced as far back as the Order of King Asoka in the third century BC.⁵⁴ The modern era of environmental legislation began with the Wild Birds Protection Act of 1887. But also in our age, and consistent with the point made above that environmental legislation erupted worldwide in approximately the same decade, the Wildlife Protection Act became law in 1972, and, in fact, it preceded India’s entering into the CITES in 1976. Using this example, one might conclude that the relationship of humans to wildlife was expressed through domestic law before there was external influence on the cultures.

Furthermore, one must note the amount of litigation brought about under the domestic legislation of India as a result of some individuals resisting the norms made law in these various acts. As a common law system, these cases contribute to a more complete picture of the primary sources of wildlife law

⁵³ K.B. AGRAWAL, *Family and Succession Law in India*, INT’L. ENCYCLOPEDIA OF LAWS (2011).

⁵⁴ P.B. SAHASRANAMAN, *THE OXFORD HANDBOOK OF ENVIRONMENTAL LAW* 220 (2009).

in India. In fact, litigation has helped to frame the general comportment of the Indian state to international law. In *Vishaka et al. v. State of Rajasthan et al.*,⁵⁵ the Supreme Court of India declared that in the absence of domestic law occupying the field, international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality and right to work with human dignity as specified in Articles 14, 15, 19 (1)(g) and 21 of the Constitution.⁵⁶

Two further cases were necessary in order to assert that India must observe international law. The Supreme Court of India has held that the court must interpret the language of the Constitution, if not traceable, which is after all a municipal law, in the light of the United Nations Charter and solemn declarations subscribed to by India.⁵⁷ It is the duty of the courts to construe the legislation so as to be in conformity with international law and not in conflict with it.⁵⁸

Although the present focus is on custom and litigation as the method through which to bring local values into wildlife law, it would be artificial not to acknowledge that India has also facilitated regional and local biodiversity initiatives, most recently taking things to the level of state biodiversity boards, such as those begun in the states of Maharashtra⁵⁹ and Goa in 2012 and 2011, respectively. Created in 2012, the Maharashtra Biodiversity Board is charged with implementing the Biological Diversity Act of 2002,⁶⁰ the Wildlife Protection Act of 1972,⁶¹ the Forest Rights Act of 2006,⁶² and the Forest

⁵⁵ *Vishaka and Others v. State of Rajasthan and Others* A.I.R. 1997 S.C. 3011 (India).

⁵⁶ *Id.*; Sahasranaman, *supra* note 55, at 101.

⁵⁷ Sahasranaman, *supra* note 55, at 100 (citing *Kesavananda Bharti v. State of Kerala* (1973) 4 S.C.C. 255).

⁵⁸ *Id.* (citing *Corocroft v. Ram American Airways* (1969) All E.R. 82 (Eng.)).

⁵⁹ The state of Maharashtra, with a population of roughly 112 million, is one of the largest administrative subdivisions worldwide. Office of the Registrar Gen. & Census Comm'r, Ministry of Home Affairs, *Primary Census Abstract*, CENSUS OF INDIA, at <http://www.censusindia.gov.in/pca/default.aspx> (follow "Select State" dropdown; then select "Maharashtra" category; then follow "Select District" dropdown; then select "All" category; then follow "submit" button) (last visited 4 April 2014). Its population is larger than many other countries in Asia, including Vietnam, Thailand, and the Philippines. *See, e.g., Philippines*, THE WORLD BANK, at <http://data.worldbank.org/country/philippines> (last visited 4 April 2014); *Thailand*, THE WORLD BANK, at <http://data.worldbank.org/country/thailand> (last visited 4 April 2014); *Vietnam*, THE WORLD BANK, at <http://data.worldbank.org/country/vietnam> (last visited 4 April 2014).

⁶⁰ The Biological Diversity Act of 2002, No. 18 of 2003, INDIA CODE (2003), available at <http://indiacode.nic.in/fullact1.asp?tfnm=200318>. The Biological Diversity Act 2002 is meant to achieve three main objectives: conservation of biodiversity; sustainable use of biological resources; and equity in sharing benefits from such use of resources.

⁶¹ The Indian Wildlife (Protection) Act, No. 53 of 1972, INDIA CODE (1972), available at <http://indiacode.nic.in/fullact1.asp?tfnm=197253>; *see also* The Wild Life (Protection) Amendment Act, No. 16 of 2002, INDIA CODE (2003), available at <http://indiacode.nic.in/fullact1.asp?tfnm=200316>.

⁶² The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, No. 2 of 2007, INDIA CODE (2007), available at <http://indiacode.nic.in/fullact1.asp?tfnm=200702>.

Conservation Act of 1980.⁶³ The power of declaring biodiversity heritage sites, for example, lies with the State Biodiversity Board.

Even an executive institution such as the Maharashtra Board, however, acting on a positive law model, noted the importance that the heritage sites should be designated only after consultation and consent of the affected communities. Furthermore, the Board recognized that these should be in the control and management of local communities.⁶⁴ If the function of law were so easy as to be the process of making norms that everyone would then follow, the work of local boards would be completed when the legislation was passed that dictated the norms to the public, the administration of which would be carried out by the Boards. But the norms recorded in law are first, not always known, second, are not always accepted, and third, may even be actively resisted. These points of resistance are not to be waived away as exceptions or statistical deviations—they are the most important points at which change occurs—the doors that are difficult to open, not the ones already open or easily opened.

Another tool whereby local citizens may get courts to recognize custom as a source of law through litigation is public interest litigation. In fact, courts themselves may initiate the litigation. The Nagpur bench of Bombay High Court (Maharashtra) issued notice to National Tiger Conservation Authority on a *suo motu* plea regarding relocation of villages inside core area of Tadoba Andhari Tiger Reserve in the Chandrapur district and depleting bamboo forest cover therein. Using the unique legal tool of public interest litigation in 2010, conservation activist Ajay Dubey filed a public interest litigation in the Madhya Pradesh High Court in September 2010 and asked that tourism be banned in “core” tiger areas. Pradesh High Court asked that tourism be banned in “core” tiger areas—zones where tiger density is particularly high—in line with the Wildlife Protection Act. On July 24, 2012, the Indian Supreme Court issued a restraining order banning tourism in the core areas of tiger reserves all across India.⁶⁵ After the National Tiger Conservation Authority framed guidelines for tiger tourism under the Wildlife Protection Act, the Supreme Court lifted the ban.⁶⁶ Furthermore, India Supreme Court lawyers have made frequent and effective use of the constitution’s provisions for public interest

⁶³ The Forest (Conservation) Act, 1980, No. 69 of 1980, INDIA CODE (2013), The Forest (Conservation) Amendment Act, No. 69 of 1988, INDIA CODE (1988), available at <http://indiacode.nic.in>.

⁶⁴ Interview with Dr. Erach Bharucha, Chair, Maharashtra State Biodiversity Bd., in Pune, India (17 March 2012).

⁶⁵ HT Correspondent, *SC Bans Tourist Entry into Core Tiger Areas*, HINDUSTAN TIMES (24 July 2012, 12:01 IST), at <http://www.hindustantimes.com/StoryPage/Print/894711.aspx>.

⁶⁶ Dhananjay Mahapatra, *Supreme Court Lifts Ban on Tourism in Core Areas of Tiger Reserves*, THE TIMES OF INDIA (17 October 2012, 2:58 AM IST), at http://articles.timesofindia.indiatimes.com/2012-10-17/india/34524581_1_areas-of-tiger-reserves-tourism-in-core-areas-interim-ban.

litigation as a means of permitting the court to announce environmental and wildlife norms not (yet) in legislation.

Recently, the Nagpur bench of Bombay High Court in the state of Maharashtra issued notice to National Tiger Conservation Authority on a *suo motu* plea regarding relocation of villages inside core area of Tadoba Andhari Tiger Reserve in the Chandrapur district and depleting bamboo forest cover therein. This litigation tests the possibilities of local norm implementation that theoretical norm discussions cannot foresee.

The greatest limitation on local persons relying on custom in conflict resolution as a method for investing legal proceedings with local values is that litigation needs to take place in the first place. Here we see a large difference among the wildlife hotspots of the world. In India, for example, not only is litigation possible but, due to the notion of public interest litigation, there is a sufficient amount of litigation to make the investment of custom plausible. As with African states, much of Indian litigation has been on matters of civil procedure.⁶⁷ But unlike Africa, there are also a number of cases on substantive law that made it to litigation and court decisions, a substantial number of which use common law as a customary source of law.⁶⁸ In fact, businesses are practically warned that custom plays such a large role:

A study of the legal system of India will reveal that it has been hugely influenced and developed by custom. A large portion of laws, especially the personal laws are still based on customary practices.⁶⁹

In *Indian Council for Enviro-Legal Action v. Union of India*,⁷⁰ the Indian Supreme Court applied the “polluter pays” standard, stating “we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country.”⁷¹ “Consequently[,] the polluting industries [were] ‘absolutely liable to compensate for the harm caused by them to villagers in the affected area’”⁷² According to Indian

⁶⁷ E.g., COMPENDIUM OF JUDICIAL DECISIONS, *supra* note 44, at iv (listing cases concerning choice of forum). On choice of forum: *Charan Lal Sahu v. Union of India*, AIR 1990 Supreme Court 1480; *Union Carbide Corp. v. Union of India & Others*, AIR 1990 Supreme Court 273.

⁶⁸ E.g., *id.* at iv—v (compiling cases concerning the public trust doctrine, the polluter pays principle, and water rights). On public trust doctrine: *M.C. Mehta v. Kamal Nath & Others* (1977) 1 SCC 388; *Rural Litigation and Entitlement Kendra Dehradun & Others, Petitions v. State of Uttar Pradesh & Others, Respondents* (1985) WP 8209 & 8821 of 1983; on polluter pays principle: *Indian Council for Enviro-Legal Action v. Union of India & Others* (1996) 3 SCC 212; on riparian rights to water: *M.C. Mehta v. Union of India* AIR 1988 Supreme Court 1115.

⁶⁹ Soumyajit Mitra, *Judicial System*, in CORPORATE COUNSEL’S GUIDE TO DOING BUSINESS IN INDIA § 9:20 (Kenneth A. Cutshaw et al. eds., 3d ed. 2013), available at Westlaw CCGINDIA.

⁷⁰ *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 S.C.C. 212 (India).

⁷¹ *Id.* at 246 ¶ 65.

⁷² *M. C. Mehta v. Kamal Nath & Others* (1997) 1 S.C.C. 388 (India) (quoting *Indian Council for Enviro-Legal Action*, S.C.C. 246 ¶ 65).

environmental lawyer Shephali Mehra Birdi, once principles such as polluter pays or the precautionary:

principle[] are accepted as part of the customary international law, there is no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that the rules of customary international law that are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.⁷³

The Indian Supreme court cited custom as a source of law 118 times since 1950,⁷⁴ including to incorporate international customary law into Indian environmental law.⁷⁵ For example, in *Vellore Citizens' Welfare Forum v. Union of India*, A.I.R. 1996 S.C. 2715, Justice Kuldip Singh borrowed international law norms and applied them locally to set clean-up standards for leather tanneries of Tamil Nadu. In *M.C. Mehta v. Union of India and Ors.*, (1999) 6 S.C.C. 9, the Supreme court blamed diesel fuels for 90% of the NO_x in India, and cited (1) California Air Resources Board determination of particulates as toxics and (2) Euro I and Euro II vehicle emission standards, renaming them "Bharat Stage II standards," which were then enacted as Central Motor Vehicle Rules in 2000. This becomes ironically more possible because of the fact that India treats international obligations through a dualist interpretation.

The recognition of local norms has most recently taken the shape of state biodiversity boards, such as those begun in the states of Maharashtra and Goa in 2011 and 2012.⁷⁶ As mentioned previously, "the power of declaring biodiversity heritage sites[, for example,] lies with the [State Biodiversity Board]."⁷⁷ A member of the Maharashtra Board noted that:

[i]t's important that the heritage sites should be designated only after consultation and moreover consents of the affected communities. Further, these should be in the control/management of local communities, and the provision for compensation will be made in the state biodiversity fund.⁷⁸

⁷³ Shephali Mehra Birdi, *Environmental Law*, in CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN INDIA § 20:25 (Kenneth A. Cutshaw et al. eds., 3d ed. 2013), available at Westlaw CCGINDIA.

⁷⁴ Supreme Court of India, *International Custom in Domestic Indian Law*, at <http://judis.nic.in/supremecourt/fsrgqry2.aspx> (last visited 3 March 2013).

⁷⁵ Sunil Kumar Agarwal, *Implementation of International Law in India: Role of the Judiciary* (2010), available at SSRN: <http://ssrn.com/abstract=1864489> or <http://dx.doi.org/10.2139/ssrn.1864489>.

⁷⁶ See *State Biodiversity Board Needs Persons with Expertise*, THE TIMES OF INDIA (29 September 2011, 3:41 AM IST), at http://articles.timesofindia.indiatimes.com/2012-09-29/goa/34163114_1_biodiversity-board-celso-dias-forest-minister (noting "[t]he recent reconstitution of [Goa's] biodiversity board").

⁷⁷ Vijay Pinjarkar, *State Biodiversity Board Gets Four Members, Office*, THE TIMES OF INDIA (23 December 2011, 1:39AM IST), at <http://timesofindia.indiatimes.com/city/nagpur/State-biodiversity-board-gets-four-members-office/articleshow/11212777.cms>.

⁷⁸ *Id.*

4. EXPANDING WILDLIFE LITIGATION TO INCLUDE PLANTS

Legal translators and linguists are quick to point out that while treaties may have more than one official language and claim all to be the same, the difference in language dictates a difference in content. One might even go so far as to say that when a treaty presents itself in only one language, it does not mean the same for any two countries, and its meaning is categorically different between developing and developed countries. Moreover, is it not possible that the notion of a treaty, which helped to bring into being the notion of the state after the Peace of Westphalia (1648), is a European invention that inherently suits a European notion of statehood but perhaps not others? After all, it was even by treaty that some European states could actually make a legal agreement to give up their claims to Africa in 1884.

If we look to some of the states of India, which under the Zweigert-Kötz model of the science of comparative law might have a comparable cultural history and economic position to some of the states of Africa, we might see that the forward-looking concerns for biodiversity are plants and small animals, the weapons are economic and legal, the medium is digital information, and the agents are pharmaceutical companies and agro business. Thus, private actions that stop the market stop the poaching.⁷⁹ But instead, the law often treats the symptoms and not the disease.

If one reviews the literature on wildlife “litigation” in Africa, one is often transferred to “enforcement,” meaning criminal enforcement. While the facts change depending on the specific location and animal being trapped, hunted, or poached, legally the scenarios are quite similar—poor and often uneducated locals work for a middleman who arranges for the export of the animals or animal parts to foreigners. These are crimes, and one of the biggest hurdles to preventing or prosecuting the crimes is corruption. Much has been written on that, and much has fortunately been done to stop those practices. But from the practicing lawyer’s point of view, many of the legal issues and points of discussion here are known, and improving enforcement might just mean more resources to catch criminals. Force and corruption are the themes, not new norm creation or civil litigation. “Enforcement” means the state enforces criminal law that may or may not have a connection to an MEA for its norm and standards. But what about the role of the local public to begin prosecution or litigation in something like public interest litigation, or even to take a civil action privately?

Bodansky talks about the role of business as the object of environmental regulation and an actor in the process. He advocates that international law

⁷⁹ See also Phylis Mofson, *Zimbabwe and CITES: Illustrating the Reciprocal Relationship between the State and International Regime*, in *THE INTERNATIONALIZATION OF ENVIRONMENTAL PROTECTION*, *supra* note 12, at 164 (noting that “an NGO-driven campaign to change consumer attitudes about ivory, resulted in a significant drop in the worldwide demand for ivory”).

has been state-centric, but he does so suggesting that businesses should be leaders on this. It would seem that they already are, and they create the markets for the products of violation. Large, organized businesses may not create the markets for the animal products of wildlife law violations, but if we think about wildlife as plant life, agriculture, and pharmaceuticals, then we do see a clear connection between business markets and the products of environmental hotspots. Bodansky's justification for this conclusion, in part, is that environmental NGOs and businesses are "highly heterogeneous."⁸⁰ States may be just as heterogeneous.

As institutions go, law is rather conservative, and many have noted that law struggles to change as quickly as its societies need it to change in order to solve problems of conflict in society. Canadian media theorist Marshall McLuhan famously said that "[w]e look at the present through a rear-view mirror. We march backwards into the future."⁸¹ When it comes to wildlife law in those parts of the world with so-called exotic (big mammal) wildlife, the rearview mirror shows us poaching, hunting, trapping; big animals and bloody knives, and all around corrupt men, poor men, and foreigners.⁸² The actors are often uneducated, violent, and corrupt and work for middlemen who need not get their hands dirty but who skim most of the money from the purchasers at the market end.⁸³ The present? Well, that is always the most difficult. When one tries to get a hold of the problem in a forward-looking way, one finds one's self in a network of problems, not a series that can be approached seriatim. As Phylis Mofson has noted, if there is no market for the animal goods, there is less poaching, trapping, hunting, and so on.⁸⁴ And if we look to law for market control rather than chase after poachers, we will find that considerable measures for the market control of animals is in place.

The literature of wildlife law produced in wildlife hotspot regions of the world focuses on criminal law enforcement of the prohibitions on hunting, trapping, poaching, and trading in protected species. But wildlife law in the West is a matter of controlling the purchasing market. The animals

⁸⁰ SAHASRANAMAN, *supra* note 55, at 130.

⁸¹ MARSHALL McLUHAN & QUENTIN FIORE, *THE MEDIUM IS THE MESSAGE: AN INVENTORY OF EFFECTS* 73–74 (1967).

⁸² See, e.g., Joseph R. Berger, *The African Elephant, Human Economies, and International Law: Bridging a Great Rift for East and Southern Africa*, 13 *Geo. Int'l Env'tl. L. Rev.* 417 (2001); Ruth A. Braun, Comment, *Lions, Tigers and Bears [Oh My]: How to Stop Endangered Species Crime*, 11 *FORDHAM ENVTL. L.J.* 545 (2000).

⁸³ Alain Bernard Ononino, *Establishing Regional Wildlife Law Enforcement: Lessons from an Unusual Partnership NGOs-Governments in the Central African Subregion*, in *NINTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT CONFERENCE PROCEEDINGS* 576, 581 (Jo Gerardu et al. eds., 2011).

⁸⁴ See Mofson, *supra* note 80, at 166 (discussing the vanishing ivory markets after elephants were listed on CITES' Appendix I).

are not there. The American writer Daniel Bodansky provides the following illustrative story in his preface:

At home, my nine-year-old daughter refuses to eat tuna fish because she believes that doing so will harm dolphins. Recently she asked, in a worried tone, whether we have an ivory in the house. And when, to be provocative, I asked “Is Rhino horn okay?,” she answered emphatically, “No, it is not!”⁸⁵

By comparison, whether one is in Cameroon, India, or Peru, wildlife can either mean a domestic natural treasure or a domestic resource to be exploited or protected from exploitation. But what is clear from this thread in the net, one sense of international wildlife law cannot fit all countries.

When the goal is to protect biodiversity in general, we can trace some historical trends and developments that might help us to contemplate the trajectory of wildlife law for the future. So, for example, international wildlife law historically concerned itself with animals, and largely with protecting the big five⁸⁶ animals from threats of species extinction. Furthermore, these laws often grew from laws concerning hunting and fishing rights, and the sanctions for violation of these laws were criminal. And, indeed, the persons who were the targets of the prosecutions were violent, often uneducated men with guns, using networks of crime to poach animals and export them.

Those same problems and criminals remain with us and still must continue to be sanctioned and reduced. Thus we should say that under the umbrella concept of biodiversity protection, wildlife law concerns should be expanded, not changed. But if we are to think broadly about wildlife law today as working to protect biodiversity, then we must also adjust that which we consider to be the target problems, so as to find appropriate solutions. Today, that would mean that protecting wildlife is an activity that concerns animals and plants with the goal of preserving biodiversity. The protection of flora is not the same as the protection of fauna. The actors involved in plant activity to be regulated are not violent, uneducated criminals with guns, but rather multinational

⁸⁵ BODANSKY, *supra* note 31, at x.

⁸⁶ The animals that make up the big five are the:

lion, leopard, rhino, elephant and Cape Buffalo. Why not the hippo, gorilla or giraffe you may ask? Are they not large as well? How about the cheetah—that would be an animal you would probably like to see as much as a buffalo. Well, the term “big five” was actually coined by big game hunters (not safari tour operators). It refers to the difficulty in bagging these large animals, mostly due to their ferocity when cornered and shot at.

Anouk Zijlma, *Africa's Big Five*, ABOUT.COM, at <http://goafrica.about.com/od/africanwildlife/ss/The-Big-5-Images-Facts-And-Information-About-Africas-Big-Five.htm> (last visited 30 January 2014). When the big five are considered for Asia, of course the tiger must be included.

corporations whose goal is to copy and patent the genetic pattern of plants for food and medicine, and then sell the same products back to those parts of the world who can claim to be home to the original. Thus, the protection of plant biodiversity concerns itself less with criminal processes and more with industrial processes, the law for which is private civil law, not criminal law.

In addition to expanding the notion of wildlife law to include civil litigation, and to include flora, the source of the norms would improve with a more inclusive use of all sources of law, especially those that lend themselves to local identity. We are all familiar with the adage of “thinking globally, acting locally” when it comes to the environment. What might that mean for wildlife law? Regarding the trade in animals, animal parts, and bush meat, it means expecting MEAs to be enforced against local poachers, corrupt foresters, and park guards, with evidence and implementation provided by other locals. For these local persons, the rule of law could not feel more distant, coming from some foreign source in some foreign place. Legal studies have shown historically that absent local support, complicity, and the feeling of interpolation, laws are not possible to implement. So although states may get together and make international norms through treaties when it comes to trade or some other areas, when it comes to wildlife law, the dependence on the local population for enforcement demands that the local population recognize the law as its own and help to enforce it. And for law to be a relevant category of social thought and action for the local population, it must lend itself to conflict resolution and not just the creation of distant legal norms.

When we shift focus from the big five animals to plants, we notice several important differences in what that would mean for law. Generally, animal conservation is marked by criminal law enforcement, the actors of concern are poachers in the traditional sense physically transporting animals.⁸⁷ Even with animals, it is becoming increasingly recommended that law enforcement focus on control at the source of the market⁸⁸ rather than where the animals are trapped or shot.⁸⁹ But on the whole, and by comparison, plant life conservation is marked by civil litigation, not criminal enforcement, the persons of concern are corporate users of civil property rights (patents).

Returning to Marshall McLuhan’s point about marching backward into the future, if we look through the windscreen, instead of in the rearview mirror as we approach the future, what would we see? Since states began recognizing the right of individuals to own the products of their intellect

⁸⁷ *But see* Ononino, *supra* note 84, at 581 (describing an alternative method of combating poaching that includes “investigations, field arrest operations, legal assistance and media promotion and reporting”).

⁸⁸ *See generally* Mofson, *supra* note 80 (using case study facts to conclude that market control in the US (African Elephant Conservation Act, 1998), Canada, EU, and Australia were more effective in Zimbabwe than CITES).

⁸⁹ Patricia Farnese, Presentation at the 14th International Wildlife Law Conference: Wildlife Health (6 December 2012) (notes on file with author).

and not just the products of their hands, moneymakers have pushed for the expansion of those rights through broad interpretations of the laws that enable them. Lawyers refer to this as “the expansion of statutory subject matter.”⁹⁰ In 1889, during the first great wave of industrialism, a patent claim for fiber found in the needle of a tree was rejected by the US patent office. The patent commissioner wrote that allowing such a patent would permit “patents [to] be obtained upon the trees of the forest and the plants of the earth, which of course would be unreasonable and impossible.”⁹¹ In his book-length study of the notions of permanence and change, rhetorical theorist Kenneth Burke concluded in the middle of the twentieth century that that which is biological is permanent, and that which is social is changeable.⁹² At approximately the same time, a US federal court concluded in 1940 that bacteria were not patentable.⁹³

Shortly thereafter, in 1948 the US Supreme Court wrote that discoveries that are “manifestations of . . . nature, [are] free to all men and reserved exclusively to no one.”⁹⁴ But then in 1952 the “statutory subject matter” of patents was changed for the first time by replacing the word “art” with “process,” thus resulting in the current language protecting “process, machine, manufacture or composition.”⁹⁵ Machine and manufacture are clearly industrial terms that do not seem to line up very tightly with the constitution’s protection of useful arts and sciences. Kenneth Burke may have had it wrong when he concluded that the biological was permanent, but he seems to have had keen insight when he concluded that the American constitution to be an occasion of “business in a mood of mild self-criticism.”⁹⁶ “The [Congressional] Committee Reports accompanying the 1952 Act [state] that Congress intended statutory subject

⁹⁰ Robert Greene Sterne & Lawrence B. Bugaisky, *The Expansion of Statutory Subject Matter under the 1952 Patent Act*, 37 AKRON L. REV. 217, 218 (2004).

⁹¹ *Ex parte Latimer*, 1889 Dec. Comm’r Pat. 123, 126.

⁹² KENNETH BURKE, *PERMANENCE AND CHANGE: AN ANATOMY OF PURPOSE* (3d ed. 1984). But then on 20 January 2012, the Karnataka State Biodiversity Board voted not to prosecute Monsanto, Mahyco, and the University of Agricultural Sciences, Dharwad, which support them, due to:

lack of staff and technical expertise to pursue the case The Act is new and our officers are not well versed with it. We don’t have the powers to prosecute anybody, it can be done only through the wildlife wing.

Imran Khan, *Monsanto Let off the Hook on Bt Brinjal*, TEHELKA MAG., 22 February 2012, in http://archive.tehelka.com/story_main51.asp?filename=Ne250212Monsanto.asp (quoting KSBB Member Secretary KS Sugara). After the Karnataka State Biodiversity Board took this decision, the National Biodiversity Authority was forced to take up the claim. *See id* (noting the task of prosecution has fallen to the National Biodiversity Authority).

⁹³ *In re Arzberger*, 112 F.2d 834, 838 (C.C.P.A. 1940).

⁹⁴ *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948).

⁹⁵ Act of 19 July 1952, ch. 950, 66 Stat. 797 (current version at 35 U.S.C. §101 (2013)).

⁹⁶ BURKE, *supra* note 93, at 362–363.

matter to ‘include anything under the sun that is made by man.’”⁹⁷ According to the United States Supreme Court, that does not mean that the US statute has no limits. The laws of nature, physical phenomena, and abstract ideas continued to be held during that era by US courts as being not patentable.

Up to 1980, in an effort to show that legal protection for property has a limit, that same Supreme Court cited cases in its own history to support the notion that “[t]he laws of nature, physical phenomena, and abstract ideas have been held not patentable”⁹⁸:

A new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise Einstein could not patent his celebrated law that $E = mc^2$; nor could Newton have patented the law of gravity.⁹⁹

But then in 1980, despite this language acknowledging limitations for private property rights over nature, the US Supreme Court went on to reverse its decision of 40 years earlier, and instead grant a patent for bacteria to microbiologist Anand Chakrabarty, thereby implying that it could be characterized as “a thing under the sun made by man.”¹⁰⁰ Specifically, the Court said that the “relevant distinction was not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions.”¹⁰¹ Shortly thereafter, in 1985, the US Patent and Trademark office granted a patent for multicellular plants.¹⁰² As the legal wall of limitations quickly tumbled, in 1987 the “Harvard Mouse” became the first patented mammal. It was the 1980s, and as historian Tony Judt points out, the cycle of history had returned us to the 1880s intoxication with industry.¹⁰³ As the Soviet Union collapsed, it was happy hour for bartenders Thatcher and Reagan, who were busily serving enough industrial cocktails that people were lining up to gain private property rights over everything, including living plants and animals.

By the end of the twentieth century, biologist-turned-sociologist Nikolas Rose made a striking observation at the annual meeting of the British Sociological Association. Rose noted that the social sciences historically had proceeded based on the notion that if we could understand the social world of the human, we could change them for the better, and the natural sciences had

⁹⁷ *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (quoting S. Rep. No. 1979, at 5 (1952); H.R. Rep. No. 1923, at 6 (1952)).

⁹⁸ *Id.* (citing *Parker v. Flook*, 437 U.S. 584 (1978); *Gottschalk v. Benson*, 409 U.S. 63 (1972); *Funk*, 333 U.S. at 127; *O’Reilly v. Morse*, 56 U.S. 62 (1853); *Le Roy v. Tatham*, 55 U.S. 156 (1852)).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 309–310.

¹⁰¹ *Id.* at 313.

¹⁰² *Ex Parte Hibberd*, No. 645-91, 1985 WL 71986 (B.P.A.I. Sept. 18, 1985); see also *Pioneer Hi-Bred, Int’l. v. J.E.M. AG Supply, Inc.*, 200 F.3d 1374 (Fed. Cir. 2000) (holding seeds and seed-grown plants are patentable subject matter).

¹⁰³ TONY JUDT, *ILL FARES THE LAND* 22–29 (2011).

proceeded based on the notion that we cannot change the physical world. But contrary to Burke's conclusions 60 years previously, when Dolly the sheep was cloned, Rose reflected on our apparent inability to change destructive social behavior and concluded that it might well be the case that the *physical* is changeable and the *social* is not changeable.¹⁰⁴

Where has that history and this legal standard left us in our relations to the world of other living beings? The legal standard is not living things but human inventions, even if living. They are classed as "commodities." The history now shows a catalogue of patents on entire species of microorganisms, genetically engineered mice, human genes, human cell lines, and human body tissues. The legal right to private intellectual property is usually referred to as protection of one's right. Yet concerning the right, one would be hard pressed to find a case in which an individual has taken a legal action to protect his right, if he could not prove that he had lost money due to another person's having made money. The industrialized nature of research means that corporations hold intellectual property rights, and they do so of course for profit, not because of some social desire to respect and promote rights. Furthermore, the right is styled as one in need of protection—that is, of defending. To investigate how our legal relationship to other beings works, one can ask the question whether intellectual property rights are exercised defensively, to foster the arts and sciences by protecting the rights of inventors, or are they exercised offensively, as economic weapons in the hands of artificial legal persons, such as corporations. The answer is the latter—they even have names like bioprospecting, biopiracy, and biocolonialism. As with traditional wildlife considerations, case studies will illustrate.

There is the celebrated case of Canadian farmer Percy Schmeiser, who has grown rapeseed on his farm in Saskatchewan for nearly 50 years, usually sowing each crop of plants with seeds saved from the previous harvest, just as his father and grandfather did before him. Schmeiser maintains that he has never purchased seed from the American agricultural and biotechnology corporation Monsanto. Even so, more than 320 hectares of Schmeiser's land is now contaminated by Monsanto's rapeseed, a dominating manmade variety produced by genetic engineering to resist Monsanto's own herbicide known by the brand name Roundup.¹⁰⁵ According to the rhetorical position in the law given to patent holders, they are to be "protected from" persons who would benefit from the research and labor put into the patent without having paid money for that benefit. In practice, however, in the case of Schmeiser, it was the patent holder Monsanto that went on the offensive, taking farmers to

¹⁰⁴ Nikolas Rose, Remarks at the British Sociological Association Annual Meeting (April 1998).

¹⁰⁵ *The Conflict*, PERCYSCHMEISER.COM, at <http://archive.is/www.percyschmeiser.com> (last visited 31 January 2014) [hereinafter Nichols] (quoting Mark Nichols, *Tampering with the Natural Order*, MACLEAN'S MAG., 17 May 1999) (accessed through <http://archive.is/EfeL>).

court, claiming they illegally planted Monsanto's rapeseed without paying a fee for the use of the patented material. Many of the farmers have settled the legal claims by paying Monsanto, claiming they did not have the resources to fight, regardless of the merit of their innocence defenses. According to Schmeiser, Monsanto's "seed could easily have blown on to his soil from passing canola-laden trucks."¹⁰⁶ "I never put those plants on my land," says Schmeiser.¹⁰⁷ Schmeiser filed his own legal actions against Monsanto, claiming that Monsanto's investigators trespassed on his land.¹⁰⁸ "The question is, where do Monsanto's rights end and mine begin?"¹⁰⁹ According to Schmeiser, if one were to compare whether patented bioengineered food crops have improved yield and used fewer pesticides and herbicides in the approximately ten years of popular use in North America, one would find a checkered response. By comparison, those patented foods have dramatically improved their profits for the patent holders in that same period of time, however. Yet as John Maynard Keynes once remarked, "[w]e are capable of shutting off the sun and the stars because they do not pay a dividend"¹¹⁰:

The world's biodiversity is down [thirty] percent since the 1970s . . . with tropical species taking the biggest hit. . . . Humanity is outstripping the Earth's resources by 50 percent—essentially using the resources of one and a half Earths every year, according to the [World Wildlife Fund in its] 2012 Living Planet Report . . .¹¹¹

Biopatenting has contributed to that life-threatening trend as well. We should take note of the benchmark years in which events converge—the Reagan-Thatcher economy was the background during which the legal system reversed itself from not allowing patents on life to allowing patents on life. And what have been the results in that time? A 30 percent drop in biodiversity, lower crop yield, lower-quality crops and more herbicides and pesticides, and more profit for the patent owners.

The case of Schmeiser and Monsanto has particular relevance for this discussion because Monsanto has a large presence in India as well. Before it legislated its own anti-biopiracy statute in 2002, India had prosecuted biopiracy cases in India involving turmeric, rice, and neem under international law in international courts. But it was a local NGO, the Environmental Support Group, that filed a complaint with the Karnataka state biodiversity

¹⁰⁶ *Id.* (internal quotations omitted).

¹⁰⁷ *Id.* (internal quotations omitted).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ JUDT, *supra* note 104, at 156 (quoting John Maynard Keynes, *National Self-sufficiency*, YALE REV., June 1933, at 755).

¹¹¹ Stephanie Pappas, *Report: Global Biodiversity down 30 Percent in 40 Years*, LIVESCIENCE (14 May 2012, 8:00 AM), at <http://www.livescience.com/20307-biodiversity-natural-resources.html>.

board in India in 2010 against Monsanto, its Indian subsidiary Mahyco, and University of Agricultural Sciences, Dharwad, for having taken six varieties of Indian brinjal (eggplant), which they then modified to become Bt Brinjal, “for commercial purposes.”¹¹² “This modification is similar to Monsanto’s other transgenic crops, including the infamous Bt cotton which has destroyed the lives of thousands of Indian farmers.”¹¹³

In January 2012, the Indian National Biodiversity Authority (NBA) decided to file a legal action against Monsanto and the Maharashtra Hybrid Seeds Company (Mahyco) for failing to acquire proper licenses before conducting field trials in six genetically modified varieties of brinjal before growing the plant. This would have been the first time the NBA had prosecuted a firm for violating the 2002 Biodiversity Act. The Act requires anyone who desires to use Indian-produced biological goods for commercial purposes to seek permission from the NBA. That permission is required, “even if, as in Monsanto’s case, the material has been modified by Indian universities.”¹¹⁴ The 2010 complaint filed by the Environmental Support Group, and NGO, influenced the NBA to take action. While the India’s GMO agency, the Genetic Engineering Approval Committee, looks on to the biochemistry of a proposed flora species, the Indian Biodiversity Act requires that commercial developers of GMOs take the additional step of negotiating with farmers for intellectual property rights.¹¹⁵

In April 2012, India filed its own suit against Monsanto for violation of India’s Biodiversity Act concerning the neem tree:

The neem tree, a native of the Indian subcontinent, has a myriad of applications in traditional Indian Ayurvedic and Tibetan medicine, agriculture, and household use, as well as being symbolic as “Gandhi’s favorite tree.” Its usefulness is known throughout India. The Latin name, *Azadirachta indica*, is derived from the Persian for “free tree,” as even the poorest families have access to its beneficial properties.¹¹⁶

The State Biodiversity Board is to ensure “[m]easures for sharing the benefits from the use of biodiversity, including transfer of technology, monetary returns, joint [r]esearch [and] [d]evelopment, joint [intellectual property rights]

¹¹² Anne Sewell, *Bt Brinjal Row: India to Now Sue Monsanto/Mahyco*, DIGITAL J. (23 April 2012), at <http://digitaljournal.com/article/323168>.

¹¹³ *Id.*

¹¹⁴ Savita Verma, *BT Brinjal Row: National Biodiversity Authority Decides to Prosecute Monsanto*, INDIA TODAY (17 April 2012), at <http://indiatoday.intoday.in/story/bt-brinjal-row-monsanto-to-pay-for-biodiversity-violation/1/184824.html>. See *About National Biodiversity Authority*, NAT’L BIODIVERSITY AUTH., at <http://nbaindia.org/content/22/2/1/aboutnba.html> (last visited 4 April 2014) for more about India’s National Biodiversity Authority.

¹¹⁵ Lucas Laursen, *Monsanto to Face Biopiracy Charges in India*, 30 NATURE BIOTECHNOLOGY 11, 11 (2012).

¹¹⁶ COUNCIL FOR RESPONSIBLE GENETICS (CRG), *DNA Patents Create Monopolies on Living Organisms*, ACTIONBIOSCIENCE (April 2000), at <http://www.actionbioscience.org/genomics/crg.html>.

ownership, etc.”¹¹⁷ A US company, W.R. Grace, has recently been granted a patent on azadirachtin for the production of a biopesticide. Azadirachtin is produced by the neem tree. It remains to be seen whether after it obtained this patent, W.R. Grace will attempt to force Indian citizens to pay royalties on neem products.¹¹⁸

5. CONCLUSIONS

In conclusion, one can see that the development of biodiversity law recognizes protection of both flora and fauna. Historically, however, most discussions of wildlife law have limited themselves to protection of large mammals. This protection is still necessary. The sources of law historically used to protect the large mammals have been positive law that often begins with international institutions. These external norms are helpful for standardization, if indeed standardization is desirable. There remains a large problem with these external norms, however, and that problem is the fact that local populations are less likely to accept external norms. Without the acceptance of the norms, there is relatively little support for the norms. That situation is precarious enough in the traditional problems of trapping, poaching, and trading in large mammals, prosecuted by criminal laws, and sometimes controlled by prosecuting the receiving market. But when it comes to plant life, the international use of patent protection makes that model of criminal biodiversity protection unworkable. Therefore, when it comes to plant life, it is that much more valuable in economic terms as well as biodiversity terms for a local population to be invested in the norms that not only protect the plant life but keep the economic value of the plant life with its local owners. In both situations—animals and plants—custom as a source of law can help to keep local interests recognized in the normative framework of the law. Custom plays a necessary role in both international and domestic sources of law. Custom is especially useful as a domestic source of law in the common law countries of Africa, and it is ironically powerful in dualist countries such as India.

Through public interest litigation and injured party litigation, catalogues of environmental custom need to be developed, just as catalogues of the laws of marriage and succession were developed in India. The catalogue should include fauna and flora and can and should be developed by local citizens for the benefit of local citizens. The work that needs to be done for local customs to be recognized as useful for biodiversity in general and wildlife law in particular is a multidisciplinary approach where anthropologists, sociologists, psychologists, and other social scientists work together to establish how one

¹¹⁷ KANCHI KOHLI, MASHQURA FAREEDI, & SHALINI BHUTANI, SIX YEARS OF THE BIOLOGICAL DIVERSITY ACT IN INDIA 2 (Aarthi Sridhar ed., 2008).

¹¹⁸ CRG, *supra* note 117.

can, in fact, describe local custom, and who has the authority to speak for local custom. If a community feels represented and invested in the law, then abstract international and Western enforcement ideas regarding protecting the intellectual property rights of plants might take root. Just as biodiversity requires cataloguing of natural species in order to prove their existence and protect them from extinction, patent, and other dangers, social custom regarding the environment can and should be catalogued in a way recognized to be the standard, so that a court may call on it as a source of law.