

Mitigating the Resource Curse through Legal Empowerment

*Innovations Case Narrative:
Protimos*

Communities that are marginalized or impoverished by the development process often occupy the very space where the “resource curse” falls. Such communities, frequently indigenous, are not protected in law against ruthless commercial ambition, or the adverse consequences of government policy. They find themselves legally inarticulate, excluded from the legal process, and therefore prevented from engaging in the legal endgames that will determine their futures. I realized that fully trained, culturally appropriate lawyers, instructed by client communities that sought assistance, could transform the outcomes for all those involved in negotiations.

I came to the law as a second career, specializing in environmental and economic law. At the start, I resolved to broaden my legal perspective. In 2000, armed with a new master’s degree, I volunteered to evaluate the existing legal mechanisms that enabled communities to protect and assert their rights to their own biodiversity. Of the world’s biodiversity, 80 percent remains in the Global South, managed by communities that have substantial long-term knowledge of the biodiverse treasures in their environment. I was astonished to discover that, globally, very few laws were in place to protect the interests of the primary knowledge holders: no clear legal framework existed to accommodate equitable negotiations over the use of resources. Worse, the available legislation took (and still takes) little or no account of the customary or traditional laws that govern such communities.

In 2002, I founded a not-for-profit organization of such lawyers. I chose the name Protimos, an ancient Greek word that means “honoring value.” Protimos lawyers work on selected community legal issues that have transformative legal potential for communities within emerging economies by leveling the field upon which the players negotiate. Thus they provide legal empowerment.

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LEGAL EMPOWERMENT

Legal empowerment, in all its forms, is increasingly recognized as an essential feature of empowerment in general, particularly in a rights-based development world, where social, economic, and, more recently, environmental rights have achieved widespread, if not yet universal, acceptance in the diaspora of rights. In truth, however, legal empowerment is a very complex and unclear concept. Legal empowerment is regularly used as an aspirational umbrella phrase to cover a colossal range of quasi-legal activities, all allegedly for the purpose of promoting and maintaining the rule of law. Typically, in real life, these activities include legal education, legal awareness, and a new profusion of paralegal advice centers, as well as widespread support for a range of methods of alternative dispute resolution (ADR).

Yet, if the term “legal empowerment” is to have real meaning, axiomatically it must include the opportunity to litigate, which itself requires the capacity to conduct litigation. Any practicing lawyer with the slightest experience of ADR, or of the “inequality of arms” between two parties in a legal dispute, will acknowledge that if one party does not, in fact, have the capacity to litigate, then any negotiating process is flawed and ultimately can be neither balanced nor fair, as a foregone conclusion is either likely or inevitable. Those with the legal capacity just wait until the others fall away, as they simply have no incentive to negotiate; litigation is out of the picture from the start.

The poor, even in fully developed and powerful economies, do not have a systemic right of access to law, although their legal options are generally greater than in resource-rich emerging economies, where access to the legal process for the impoverished, the marginalized, often indigenous communities is an option that remains far removed from any sort of reality.

Legal Empowerment: An International View

Early in the 21st century, international advocacy for legal empowerment found a substantial new voice in the establishment of the United Nations Development Program Commission for Legal Empowerment of the Poor, which produced a report entitled, “Making the Law Work for Everyone.” It describes legal empowerment as “a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests.”¹

The commission’s final report identified three areas of rights of the poor that, properly supported and asserted at law, should ultimately reduce poverty. They chose property rights (ownership of physical property), labor rights (the commissioners aver that the ability to work is the greatest asset of the poor), and the rights to self-employment and business (which in practice refers to the world of microfinance), together with the overarching consideration of access to justice. In response, the international community is beginning to recognize the vital role played by the law, but it has yet to articulate the benefits of incorporating its use, if this statement from the UN secretary general is any indication:

Mitigating the Resource Curse through Legal Empowerment

By its very nature, legal empowerment of the poor has the potential to threaten some vested interests. There will be winners and losers, particularly as mutual payoff from legal empowerment is often not evident... Persuading those who feel threatened by legal empowerment of its benefits is a challenge that must be overcome, for example, by building alliances with stake holders and seeking ways to overcome cultural impediments to legal empowerment of the poor.²

Currently, the international movement on legal empowerment seems to be focused on the use of particular legal methodologies to strengthen the assertion of particular sets of legal rights that the commissioners identified as being the most relevant to reducing poverty. Protimos sees a potential risk in this focus; we respectfully suggest that it has yet to be fully articulated and understood by those who are keen to encourage the broad development of legal empowerment. The potential risk, which is in fact a primary concern, arises where a human right, by definition, occludes or subsumes other rights in ways that may be, albeit unwittingly, deeply culturally destructive or socially inappropriate.

For example, traditional knowledge, which is found in indigenous groups, is generally communally owned. It may have spiritual significance at its core and may define the culture of the community in which it resides. The community also owns the intellectual property associated with this traditional knowledge. The rights of the individual, such as they may be, are subsumed by the rights of the community. Intellectual property regimes, in which the rights of the individual are paramount, fail to recognize community ownership or the importance of the spiritual component of traditional knowledge. The law protects the rights of identified individual artists, authors, and inventors in a way that is unrecognizable by the indigenous group that has developed these traditional knowledge systems over many years. Traditional knowledge does not always meet the criteria set for the protection of intellectual property: that it is novel, not obvious, and industrially useful.³ As a result, traditional knowledge can be misappropriated, sometimes unwittingly, or the rights may be wrongly awarded.⁴ Traditional rights may be mistakenly treated as being within the public domain, and therefore incapable of protection.⁵ Imposing modern, conventional concepts of property law, particularly as part of the promotion of property rights as a human or constitutional right, undermines the integrity of indigenous legal systems, leading ultimately to unforeseen human rights abuses.

Within the diaspora of the rights-based approach that is now widely advocated by the main international institutions in their pursuit of the Millennium Development Goals, several other complex bundles of legal rights risk being ignored completely or dissolved or forgotten, either by governments themselves, by corporate entities, or by any of a wide range of other actors engaged ultimately in the pursuit of commercial success.

Such complex sets of rights often lie at the very heart of established and sustainable community structures, where a Western, individually focused, human

rights approach is likely to be greeted with incredulity by a simple pastoral/rural/everyman community that has hitherto existed sustainably, with no appreciable reference to the Western legal concept of an individual's rights in land ownership, or any individual ownership of traditional knowledge of plant species. Frequently, the social and economic balance of labor and responsibility within such communities had been satisfactory and undisturbed until the arrival of a development initiative related in some way to the exploitation of community natural resources, which brings with it a set of legal approaches that are arguably analogous to the Spanish introduction of the common cold to indigenous South Americans in the 16th century.⁶

Collective rights, successfully asserted at law, may be the best, if not the only, opportunity a community will have to secure a decent future for itself, while others capitalize on its natural resources. For example, the San Bushmen of South Africa have been acknowledged as the primary holders of knowledge about specific plants, the properties of which can be described as their only real capital asset. Critically, a community is unlikely to be able to make that legal assertion without sustained and sustainable access to its legal team. In our view, such access to competent, culturally appropriate, development lawyers is the most powerful and effective and essential definition of legal empowerment for the poorest communities or communities living in the least developed parts of the world. These constituencies do not necessarily coincide.

Collective rights are not easily codified, understood, or calibrated in legal terms. Protimos has identified five groups of legal rights as critically significant:

- Intellectual property rights to community-owned biodiversity
- Community resettlement rights in the wake of major infrastructure projects
- Free, prior, and informed consent. This legal norm, which is increasingly a lender's requirement, encompasses a community's right to understand, discuss, negotiate, and, if it so chooses, withhold its consent to a project.
- The community's legal right to exist in a nontoxic environment
- Governance and accountability: a community's right of access to competent legal process in the courts

These rights are the roots and branches of our work. Where they can be identified and asserted successfully by a competent legal team, potentially transformative valuable consequences may follow.

Legal Empowerment and the Third Sector

In addition to the UNDP Commission and the wealth of satellite initiatives that have flowed from the work of the commissioners, it is clear that the third sector has begun to understand the potential and powerful impact of using the law actively, by litigating, to bring about change. Legal challenges have become increasingly attractive, particularly to single-issue organizations. Over the last half of the 20th century, a number of well-established NGOs historically recognized the critical importance of improving and pushing for better legislation in the environmental

sphere. They advocated for its enactment, continually and quite successfully, at the international, regional, and domestic levels. The set of conventions enacted at Rio de Janeiro in 1992, the culmination of many years of growing environmental awareness, coupled with an aspirational approach to international legislation now form the base of much modern environmental legislation. When other avenues have been exhausted, the implementation of modern environmental law can be expedited through litigation.

One unfortunate side effect of an NGO-based approach to litigation is that community members potentially sacrifice the beneficial impact of long-term, sustained legal access, to resolve a single issue in the short term.⁸ Essentially, the NGOs undertake such litigation themselves. Doing so may have merit in principle; however, when the authority for such legal activity is not vested in the affected community, for example, where the community's interests have not ultimately coincided with those of the NGO, then clearly they risk an abuse of process and a consequent loss of the community's faith in the legal system. NGO-based approaches to litigation rely on several assumptions: that the affected community has faith in the national legal system; that it will perceive that other options (demonstrations, militant actions) are likely to be less effective than using the law to protect itself; and that lawyers and NGOs staffed by "outsiders" will be able to construct a relationship of trust and mutual respect with communities that have been abused and manipulated for centuries.

A second cause of concern is the wide range of third-sector organizations offering paralegal services. Communities are offered relevant legal advice in the guise of legal empowerment so they can be said to know and understand their rights concerning a particular issue. In fact, they are not so empowered, if they cannot assert those rights without the services of a lawyer and, critically, none is available. This current systemic failure reveals a dangerous aspect of legal empowerment: People learn about their rights at law but then cannot assert them. This can only increase a community's sense of frustration and exclusion from the legal process. These negative consequences flow inevitably from the absence of competent practicing lawyers available to a community seeking true legal empowerment. It is axiomatic that while legal advice is indeed a cornerstone of legal empowerment, it must accordingly be accompanied by available, and appropriate, legal assistance.

Legal Empowerment and the Professional Legal Community

From the perspective of practicing lawyers, within their partnerships, companies, and practices, a predictable range of options appears in response to the meaty questions raised by this new doctrine of legal empowerment. The pro bono concept is a familiar one but, while intrinsically valuable, that model has limitations. In general, it lends itself to comparatively short-term legal assistance for a particular single issue. Physical human rights violations are particularly amenable to this kind of assistance, as are negotiations with respect of one particular contract; the

supply of a particular module of legal education or training fits well into a genuinely altruistic professional attitude toward legal empowerment. Indeed, pro bono work is seen as a satisfying and appropriate professional exercise in some jurisdictions. In others, however, it is implicitly used as a marketing tool; projects are only adopted once they have been viewed through a carefully calibrated commercial lens. Where an issue requires the specialist skills of a certain kind of lawyer, conflict checks will regularly rule out a partnership's capacity to provide a pro bono service.

As observers watch Western lawyers make enthusiastic forays into resource-rich parts of the world through the establishment of scholarship schemes, training programs, and other client-free types of legal engagement, they might suppose that at least some of the motives for this kind of activity are as commercial as they are apparently altruistic, as new business opportunities are created and new pathways forged into emerging economies.

THE GOVERNMENT'S OBLIGATION TO PROVIDE ACCESS TO THE LAW

Much current thinking identifies and articulates a state's obligation to provide effective legal empowerment for the poor. Indeed, the UNDP Commission describes governments as playing crucial roles in the provision of legal services.⁷ However, it is our view that a government's role inevitably bifurcates. It does so, in general, well before any legal services are provided, as of right, for the poor.

The starting point in a stable and reasonably democratic society where the law is in effective supply, and used as a fundamental vehicle for the governance of that society is this: where a government has been democratically elected, it is responsible for enacting the laws it promised to enact. The laws, once enacted, must then be implemented if they are to have the intended effect.

The central plank of administrative legal work is to ensure that such laws are properly understood and then implemented. Where necessary, a citizen can use the court to hold its government to account in a manner that depends on the domestic jurisprudence.⁹

However, where laws are already in place and questions arise concerning their effective implementation on behalf of a particular community, complex conflicts of interest may arise between different echelons of government, different corporate entities, relevant third-sector organizations, the international community, and those whose interests are most directly affected. This is of greatest concern in administrative litigation where a law is either not being correctly implemented or is, in fact, not being implemented at all.

Conflicts of interest may ultimately either cause or lead to potential conflicts of agenda, and then to the erosion of trust and an inevitable reduction in good governance. The Western-led scale of corporate corruption that afflicted the first phase of the Lesotho Highlands Water Project was born out of just such conflicts. Although prosecuted vigorously and successfully, those conflicts have still led to widespread and long-term corruption in many sectors of Lesotho society. Such



Figure 1. Hoodia plant

Photo: Orde Eliason (2006)

legal conflicts, left unresolved or ignored, will inevitably produce a wide range of adverse consequences in the short, medium, or long term, risking an increase in the democratic deficit, a recession in corporate confidence, and, ultimately, a systemic failure to achieve the goals of social, economic, and environmental empowerment that are among the benefits of a globalized world economy. Certainly, the hugely improved communications networks now used across impoverished sections of emerging economies ensure that social and environmental issues of legal concern can no longer be effectively concealed by those whose interests are not served by such issues being revealed. Some Protimos client communities are obliged to use solar power to ensure that they can communicate with their mobile phones where no other power source is available. For example, in the Mapeleng community, this situation made communications difficult, but it enabled the community to stay in touch with its legal team and provide the information and instructions that led to a successful court action, a day's travel away, in the high court in Maseru, Lesotho.

UNDERSTANDING AND MANAGING LEGAL CONFLICTS OF INTEREST

In the mainstream business of development, hundreds of lawyers are at work representing their governments, either internationally or domestically, at the negotiating table; they are employed throughout the business of government in various



Figure 2. Katse Dam

Source: Orde Eliason (2006)

departments, drafting and amending legislation or trying to ensure that it is implemented. In commercial and financial project generation in resource-rich areas of the globe, the extractive, seed, and biotech industries lead, employing lawyers to determine the extent to which the corporation is required to comply with—or may reasonably attempt to sidestep—the law in ways that will go unnoticed, **THUS** keeping the balance between its commercial *raison d'être* and its obligations under the enlarging doctrine of corporate social responsibility. For example, BP has taken the lead in this area.¹⁰ NGO lawyers write papers and, through other non-litigious forms of advocacy, they attempt to influence the development of a particular group of laws. Financial institutions employ in-house lawyers to contribute, *inter alia*, to the due diligence procedure that is now an essential feature in the financing of project development. In fact, none of them leave home without their lawyers.

The group that is most often omitted from the legal dialogue and goes largely unnoticed by the legal profession is the community that occupies the development space. It is unprotected in law against the commercial ambitions of others in operation in that same space, is legally inarticulate, and is excluded from the legal process. Thus it is prevented from engaging in the legal endgames that will determine its future.

PROTECTING COMMUNITY RIGHTS

Once Protimos took on the form of a nonprofit organization, its first action was to attend the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg. As a small, new organization made up of aspiring young lawyers, we began by focusing on providing legal assistance for communities that want to share in the process of capitalizing the value of their biodiversity. Traditional legal structures of intellectual property rights (patents, trademarks, geographical indications) are Western legal concepts, which can lie very uneasily beside a community's ownership of its knowledge of plant species, its art, and its medical skills. International laws contain legal space for *sui generis* agreements: a community and a commercial or academic entity coming to a complex but equitable agreement providing commercial certainty for both the commercial entity and the community.

Two kinds of community rights are important in our work: the intellectual property rights connected to biodiversity, and a community's rights to lawful resettlement.

Intellectual property rights in biodiversity

The Bushmen living in the central green Kalahari desert traditionally used *Hoodia gordonii*, a succulent plant, as an appetite suppressant in their journeys across the desert. The plant has been the focus of various commercial endeavors, all based on the intellectual property that was originally taken from the Bushmen. The plant is now scheduled to the Convention on International Trade in Endangered Species of Wild Fauna and Flora and cannot be legally traded without a license, but the Bushmen have yet to reap any substantial rewards from the huge volume of global trade around *Hoodia* products. Legal structures are in place to ensure that this asset—the original knowledge from which others now benefit—can represent economic empowerment for the Bushmen. However, it is impossible to implement the law to harvest that benefit without a legal team working for the Bushmen client community.

In the area of intellectual property in biodiversity, generally only a handful of lawyers are acting for client communities. Typically, in communities across the spectrum of resource-rich emerging economies, the representative of a major biotech company or academic institution that has its own economic empowerment in mind and a government license to do so, will come calling on a community in its quest for plant knowledge to be developed for commercial purposes. The community is invited to share its plant knowledge with the biotech company or academic institution to create opportunities to develop and market the plant's properties. It is therefore a community opportunity to engage in its own legal and economic empowerment.

Picturing that reality, the community's negotiating position is transformed if it has its own lawyer to represent it and act in its interests. Optimally, the lawyer will have a professional and profound understanding of the community's laws and customs, as well as a competent working knowledge of the relevant statutory laws at

the domestic, regional, and international levels. A practicing, remunerated lawyer authorized to negotiate on behalf of his or her client community and competent to use statutory and customary legal frameworks could determine, quantify, and negotiate effectively to ensure that an identifiable biodiverse resource in the community is transformed into an extended and equitably defined source of future economic empowerment.

Community rights to lawful resettlement

Following a radio interview at the 2002 WSSD, Protimos lawyers were approached by members of a community who had travelled down to the meeting from the mountains of Lesotho. The group members, both dignified and desperate in their demeanor, represented tens of thousands of Basutho people who had been moved from their homes and pastures to make way for the dams and transfer tunnels of phase one of the Lesotho Highlands water project. They had listened to our broadcast and they now came straight to the point: "We hear you are a lawyer, can you help us?" As we listened to the stories from these communities, we learned of the many substantial promises their own government had made to them, which were reflected in laws made by parliament in Lesotho and designed expressly to govern community resettlement. These promises had induced the communities to make way in the first place, but the government had not kept its promises to many communities and their post-dam lives were unsustainable. As the reservoirs covered their former homes, people became cold, hungry, landless, and jobless, and had no water. Their societies were fragmented, their villages submerged, and their complaints unheard. Hence their heartfelt request for legal assistance. The Protimos lawyers focused on the central point: a huge development project, implemented by the best construction and consultancy companies in the world, a small, relatively stable country with a sound legal system, a series of laws had been passed to protect community interests, but there had been a systemic failure to apply those laws. We undertook to try and help these communities. I tell their story below.

There in Johannesburg, in 2002, the vast challenge of inequity in development law revealed itself in the stories of those who had travelled to the WSSD. While governments, corporations, and, in fact, all other sectors confidently based their dealings on the law, either using or avoiding using it, the very communities that most require practical legal access economically, socially, and environmentally are those most frequently unable to gain access to it. We realized that we had identified a deep and endemic problem, at its most acute for the pastoral/rural communities living either among or adjacent to the natural resources so keenly sought by others: water, plants, and minerals.

Since our first visit to Johannesburg in 2002, we have been approached frequently by representatives of impoverished communities in South America, parts of Asia, and a range of African countries. All face the challenge of finding appropriate legal responses when others exploit their resources. Sadly, the thread common to each approach is that the marginalized community finds itself under some

sort of siege or duress because of its relationship with its natural resources. Legislation may provide legal structures to prevent this from happening, including environmental impact assessment procedures, access and benefit-sharing mechanisms, and resettlement programs. Normally, however, no appropriate legal expertise is available to such communities. Rarely do they have appropriately trained lawyers or legal resources; most such communities have no access to legal education and no mechanisms exist by which community legal awareness can be used to prevent inequitable exploitation.

OUR WORK: STRATEGY AND IMPACT

Our long-term strategy is to work in the field within simple partnerships between groups of client communities and their legal teams, facilitated by local organizations; each partnership focuses on a major legal issue that affects a very large number of people. For example, in Lesotho, our principal partner is the Transformation Resource Centre, although we work in a team with other civil society organizations, such as SOLD, or Survivors of the Lesotho Dam. Building such partnerships probably slows our obvious strike rate, but the process strengthens the legal sinews of the client-lawyer relationship and creates bonds that infuse the community with a longer-term sense of its legal resources. Communities have a clearly defined client status

in which they give us the authority to use the law. This takes extra time to establish and nurture, especially where people lack literacy and face other social issues. Of course, such clients have no previous experience of access to a lawyer. They will use the law to resolve an issue that has far wider application. The client community only litigates when negotiations have failed.

Client communities are offered legal awareness education to enable them to articulate the instructions they provide for the legal team, using the existing legal infrastructure and the relevant applicable law. As they learn about the use of the law, their own role in the legal process, and their rights under the law client communities can then manage their expectations. In developing the law either outside or inside the courtroom, field lawyers are themselves provided with continuing professional development.

Practicing lawyers inevitably measure their successes by reference to their legal victories. Obviously, success in field work is measured partially by reference to

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negotiated victories or courtroom triumphs, but in the relationship between legal empowerment and sustainable development, such victories or triumphs have greater implications, for which the impact measurement models are now being designed.

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There is a further, wider benefit to strategic litigation of this sort. Internationally, institutional, financial, and commercial/corporate constituencies are now obliged, through revised and improved standards, to improve their approach toward communities adversely affected by infrastructure projects.¹¹ This kind of litigation is intended to have the cumulative impact that turns such obligations into good practice as a matter of course.

THE MAPELENG WATER SUPPLY LITIGATION

Mapeleng is a small, very poor village set in the hills above the Katse Dam in the mountains of Lesotho, a landlocked country whose one border is with South Africa. Members of the Mapeleng community used to live sustainably in the river valley. When construction of the Katse Dam began, the villagers were asked to move, as their village would be one of many that now lie beneath the dam. They were promised that, in line with relevant international law and the laws of Lesotho that were specifically passed for the purpose, they would be resettled happily in good accommodation, receiving compensation of various kinds, etc.

In 1996, the villagers of Mapeleng lost their water supply through seismic activity when the Katse Dam began to fill. Now, through an out-of-court settlement, it will be restored, with profoundly beneficial effects for them. The brackish water that has dogged their children and old people with bad health and stomach and skin infection will be no more. Cooking, washing, and drinking will no longer be hazardous. Children will no longer have to walk miles a day to collect water. Animal husbandry will improve, and economic possibilities involving water usage can be considered.

Moreover, this settlement achieves part of a key longer-term objective. Over the course of 15 years, the Mapeleng community had repeatedly asked the responsible statutory agency, the Lesotho Highlands Development Authority (LHDA), to restore its water supply. Its requests were ignored until the moment when 78 Mapeleng families issued their application to the court for an order that the water supply be restored.¹² The LHDA conceded the point at court within four months after the application was issued. It has paid some of the costs of the application, and it has already begun to reinstate the water supply at Mapeleng. The LHDA has therefore learned, for the first time, through the use of litigation, that it can no longer ignore a community's requests when they are made lawfully. It must take them seriously and comply with such requests, or risk litigation.

THE SEINOLI PROJECT

The Seinoli Project, established jointly in 2009 by Protimos and the Transformation Resource Centre (TRC) in Lesotho, is a unique undertaking in public interest litigation that brings together law and development. The project has two primary goals: to assist those marginalized communities adversely affected by the LHWP in securing compensation, and to ensure that relocation and resettlement take place in accordance with the law. The project also focuses on legal education, training, and legal empowerment workshops that teach people about their rights and how they can access them. In addition to two project lawyers and two senior South African lawyers acting as legal consultants, we employ a liaison officer to collect and analyze demographic data and connect the lawyers with communities, the LHDA, and other stakeholders.

Since 1989, when the first large dam was constructed in the first phase of the LHWP, almost a quarter of Lesotho's population has been affected. Communities have suffered the elimination of water supplies, water contamination, the loss of suitable gardening and grazing areas, and forced relocation. The LHDA has ignored their grievances for years, causing apathy and despair. In response, we designed the Seinoli Project to provide affected communities with a sustained and robust legal approach to these issues, and to ensure that for them, legal empowerment becomes a meaningful reality, not simply an ideal.

Our first step was to find a suitable home for the project. We originally intended to set up a specialist legal clinic in Maseru, as part of the University of Lesotho Campus Law Clinic, to deal specifically with LHWP cases. The rules of the Lesotho High Court require litigating attorneys to practice within a short distance of the court. After some months of negotiation, however, it became clear that, even if only informally, we might need permission from the management of the clinic before a case would proceed to court. This introduced an additional potential conflict of interest, as the university might develop its own interest in whether or not a case would be taken. Having already decided that the independence of the project should be paramount and seeing the potential for further delays, we decided to change direction.

We decided to form a partnership with a well-respected local development organization based in Maseru: the TRC. It advocates for justice, peace, and participatory development. Both organizations decided that we would house the Seinoli project independently within the TRC offices. TRC has a long and deep understanding of the miseries and corruption of the LHWP. Our partnership would, we thought, create a legal/development nexus that could work optimally for the communities that are benefiting from this project. This has taken some time. In an established development organization with its own settled approaches and defined methodologies, introducing the practice of law has made occasionally uncomfortable demands of both lawyers and development practitioners. Many factors have created challenges, including the intangibility of legal thought; the flexibility of approach where either a case settles, or a whole new issue arises; and questions of

client confidentiality and the absolute requirement for organizational consistency in its approach toward a common problem. We have overcome these challenges in the main by our mutual respect and commitment to the partnership. In turn, we have had to manage our own expectations of client community relationships; we have had to recognize, and continually learn about, the cultural aspects of life within our client communities, and accommodate them in our planning. Lack of capacity to communicate efficiently is one continuing drawback facing many rural communities, a direct consequence of deep poverty. Our latest legal successes have undoubtedly validated what is, as far as we know, a unique kind of partnership.

By 2008, Protimos had gathered sufficient interest and support from the donor community to implement the Seinoli legal empowerment project in Lesotho. This project was designed to ensure that the term “legal empowerment” becomes a meaningful reality for those communities that stand to benefit from a sustained and robust legal approach to the social, economic, and administrative issues that have adversely affected so many in the first phase of LHWP. By 2008, we had met many, although surely not all, of the substantial challenges we had encountered in the design of the project. I will now point out some of the more significant ones before recounting the substantial successes that are now beginning to characterize our work.

OUR WORKING MODEL

Our shared commitment is reflected in a memorandum of understanding with TRC, which we discuss and renew each year. Monthly project management meetings, weekly Skype calls, quarterly project visits by UK staff, and regular briefings of donors and other partners all ensure that the fieldwork is coordinated and disseminated to a wide international audience. Indeed, as the fieldwork progresses and the project lawyers and liaison officer gather more data, we are able to provide an increasingly detailed socioeconomic analysis of how effective the law, and a court case, have been in producing measurable social improvements. We also maintain resources on our website, and we know that interest in our work—and probably our determination to do it—has grown internationally, particularly since we joined the Clinton Global Initiative. Hundreds of people now express interest in and support for our programs.

We employ three project staff members in Maseru: two young, incidentally female, Basutho lawyers who draft, conduct research, and advise on the legal work, plus our liaison officer, who supervises and facilitates the relationships between the legal staff and those communities that are benefiting from the work. We also employ two senior South African lawyers as legal consultants, who visit and provide continuing professional development for our lawyers. We instruct appropriately qualified counsel to draft court applications, which are chosen with strategic clarity to derive maximum benefit for other communities affected by the same issues.

Community legal awareness

Some of the communities adversely affected by the Dams Project in Lesotho have been left forgotten and neglected for many years. Thousands of them have been left without the compensation and practical benefits to which they are lawfully entitled. Our lawyers face many challenges in bringing cases to court, such as the following:

- Loss of evidence that has sometimes occurred over a decade
- Community lack of understanding of their legal rights
- Community illiteracy
- The apathy and despair that come from being ignored for years as suffering continues.

These challenges are met by an innovative legal awareness program, in which communities adversely affected by the LHWP are drawn into role-playing in professional theatrical workshop performances to enable them to understand the legal process in an interactive, thought-provoking, way.¹³ They are also invited to provide accurate information through questionnaires and other information-gathering methods, such as video diaries. This is being used to provide some of the evidential basis that the lawyers use to assess the merits of proposed litigation; the information will also be used to construct a longer term understanding of the effectiveness of the legal intervention, both for the immediate community, and for others facing the same challenge. The staff, lawyers, and liaison officer in this work voice their own perspectives here.

Lawyering for Seinoli: Lerato Rabatho and Reitumetse Nkoti Mosae-Mabula

Since the launch of the Seinoli project in 2009, we have worked to foster the legal empowerment of marginalized communities seeking redress for the damaging effects of the LHWP. Faced with limited resources, we have focused on developing those individual and communal claims for compensation that we believe have the potential to set important legal precedent and offer the broadest benefits to the wider community. The substance of the 20 or so claims we have developed is varied, ranging from allegations of water deprivation and contamination to corruption and nonpayment of resettlement funds. With the assistance of senior counsel in Durban, our primary role is to facilitate and pursue litigation in these matters where adequate resolution is not otherwise forthcoming. We hope that our recent successful settlement at the high court of Lesotho, which compelled the LHDA to restore safe water supplies to the Mapeleng community, will catalyze the resolution of other such claims.

Yet the fact that we have already resolved four separate claims prior to litigation shows that success in these matters often depends as much on effective advocacy and mediation as on winning litigation. For this reason, we have also directed our efforts toward organizing community workshops to help sow the seeds of legal empowerment. Last year, we invited Nobulali Productions, a theater company based in Johannesburg, to lead an educational workshop for the eight coopera-

tive societies that represent their communities in these legal disputes. In addition to educating the cooperative societies about their rights and responsibilities and the remedies and procedures available to them in law, the workshop also gave participants the opportunity to act out their own advocacy and the processes involved in negotiating disputes. Given the ongoing challenges we face in pursuing litigation, including the LHDA's persistent unwillingness to cooperate, it becomes all the more necessary to help the community understand the legal process and develop effective strategies of alternative dispute resolution.

Liaison for Seinoli: Mothusi Seqhee

In this work, gathering data and maintaining lines of communication present constant challenges. Remoteness, lack of power supply, and poverty make it difficult to stay in regular contact with the affected communities. And since neither the government nor the LHDA has adequate demographic data about the local villages, we must gather much of our primary data using questionnaires, a process that is time-consuming, even if potentially more accurate. Indeed, even after we have gathered data and evidence, we sometimes wonder how to share that information. In addition to the affected communities and the LHDA, we also liaise with government departments and regional NGOs. Our ability to redress community grievances relies in part on our ability to make use of outside stakeholders in our negotiations and preparations for litigation. Now, and in the future, balancing the need for information sensitivity with our strategic need for outside partnerships will shape the success of the project.

Programmatic work

The evidence is that long-term sustainable success in connecting legal activity to social, economic, and environmental empowerment for the impoverished cannot be achieved by “parachute litigation,” or by writing opinions from a distance. Similarly, short-term pro bono support offered by the international legal community cannot be the means from which a local legal team derives its capacity to work for client communities on a particular set of issues. It generally takes a minimum of three to five years of fieldwork to make significant changes through a series of legal interventions over a particular issue.

Our fieldwork is based on the premise that the law is most effective when it is used as an instrument for development through which good governance and the rule of law become strengthened for the benefit of all sectors, not simply our client communities. In 2008, we changed to a programmatic structure to provide more obvious coherence to our work, which specifically encompasses three areas of law: public administrative, intellectual property rights in biodiversity, and governance.

Many resources are needed to provide effective access to the law and the opportunity for justice. The lack of skilled lawyers, of legal capacity, and of funding all play a part in blocking the route to justice of any sort. Furthermore, Protimos has identified a potential structural improvement to the use of the law,

which has been translated into a cross-disciplinary initiative, forming one of two commitments to President Bill Clinton, as part of the organization's membership in the Global Initiative.

THE GREEN LIGHT PROGRAM

One of the most complex legal encounters in resource-rich parts of the world is the one between the corporate entity and a client community, concerning the exploitation of natural resources. A corporation owes its first duty to its shareholders, but it is increasingly required to take account of the needs of those with whom it deals. When negotiating with communities in emerging economies, it must now consider, and in some circumstances adopt, the doctrine of Free Prior and Informed Consent (FPIC). This doctrine acknowledges the right of communities to "negotiate the terms of externally imposed policies, programs, and activities that directly affect their livelihoods or wellbeing, and to give or withhold their consent to them."¹⁴

A step beyond the idea of Broad Community Support, FPIC has now found its way to the heart of the financial community, and into the United Nations, and parts of international law. Corporations and communities express substantial if wildly contrasting frustrations, arising out of the uncertainties and legal vacuums that characterize their dealings with each other.

To address this challenge, using the law, Protimos is working to develop an international legal protocol that reflects its concerns for the implementation of FPIC and offers a predictable framework of engagement for communities and corporations alike. We are well aware of the magnitude of issues at stake and believe the protocol should be the result of a collaborative effort that involves all relevant stakeholders. If it is to succeed, it must be developed through a participative and inclusive methodology.

Protimos has drawn together a coalition of experts and representatives, to develop and trial this legal protocol, which provides a predictable framework of engagement, with provisions for its monitoring and implementation.¹⁵ Its objective is to address the challenges of accurately identifying communities, negotiating with appropriately appointed community leaders, observing existing customary laws, and ensuring the means by which equitable benefit sharing can become a reality. Further objectives are to identify the means by which a corporation can identify its liabilities, or articulate and adhere to the limits of its acquisitions of rights.

Communities will thus have the opportunity to benefit, if they choose to, from appropriately skilled support to enable them to engage fully and equitably in corporate negotiations. The proposed protocol will provide for independent and impartial verification, monitoring mechanisms, and alternative dispute resolution methods, together with a tribunal structure for the final adjudication of a dispute. It will establish an institutional framework whose running costs will be factored into the business plan of any project requiring FPIC. These costs for establishing

and running the protocol appear meager when compared to the current losses that corporations experience when they fail to garner community support.¹⁶

Protimos lawyers conclude that FPIC requires the full acknowledgement of communities' customary rules to understand the social rules and conventions that underpin the communities' positions and interests. Only then can negotiation result in agreements that can effectively be implemented with the least disturbance to communities' way of living.

FPIC has been spelled out in international instruments¹⁷ and has timidly made its way into legislation.¹⁸ It has been promoted by NGOs¹⁹ and international organizations²⁰ and hesitantly attempted by some corporations.²¹ In practice, however, "consent" has been replaced by mere nonbinding "consultations," and its implementation has encountered conceptual and practical obstacles.²²

Protimos believes that FPIC benefits more than the communities involved. It is also likely to be in the interests of project sponsors, financial backers, and corporations to acknowledge and work together effectively to implement FPIC by using a consistent and measurable set of elements in an organized and quantifiable way. As the World Resources Institute observes,

Although the challenges of gaining consent can be considerable, the business case for not imposing a project on an unsupportive community is compelling. For one thing, the business risks of community opposition can be much greater, in both magnitude and likelihood, than many of the other project risks that project sponsors and financiers routinely seek to shift, mitigate, or insure against.²³

Protimos lawyers are certain that for FPIC to work successfully, a level playing field is essential, one on which communities have access to expert knowledge, as well as culturally appropriate lawyers of a caliber comparable to those used by their corporate counterparts. In fact, FPIC is now required with respect to a variety of major and complex projects involving highly specialized expertise in areas such as engineering, the environment, project finance, and law. Communities generally lack this expertise, which makes it virtually impossible for them to evaluate the information provided by project developers, to consider the real impact of the project, or to consider the alternatives put forward at the negotiation table.

As our work in the domestic courts proceeds, we gather qualitative and quantitative data from our client communities. We are creating models that will enable economists, international development experts, and professionals in a range of other intellectual disciplines to make use of it by reference to triple bottom line indicators (environmental, social, and economic), and the sustainability indices in a range of corporate social responsibility matrices. Over time, this will enable us to determine the substantial long-term benefits and potential hazards associated with the use of legal interventions as the effective and measurably successful tools for development that they are currently proving to be.

LOOKING TO THE FUTURE

The ethos that underpins our work is a conviction that indigenous, marginalized, and impoverished communities in resource-rich parts of emerging economies should have access to the full armory of the law, when they need it. We are equally convinced that when the law is available and used strategically, a wide range of consequential benefits accrue, and not only to the client community. The potential for communities “lawyering up,” that is, working with appropriately trained professionals, who are skilled and able to work across a wide range of cultural contexts, is almost unlimited. It presents challenges, naturally, but it also creates a huge range of opportunities for communities, and also for corporations, lenders, and others who are prepared to engage with the law in a proactive way. In measuring the impact of our work, we consider two questions:

- When customary/collective/community laws are construed beside modern statutory provisions, how can we accurately measure the real range of socioeconomic consequences of legal activities?
- What data can accurately show the impact of a precedent created by judicial intervention? Moreover, This is a long-term exercise. Those investing in our work, either as donors or impact investors, look for scalability, which is exactly what a legal precedent can provide.

Over the next ten years, we expect to see the establishment of several legal hubs in resource-rich emerging economies that are structurally similar to the Seinoli project described above. The bank of strategic community litigation generated by lawyers working from within those hubs will have far-reaching effects in the local environment.²⁴ Our long-term goal is to ensure that lawyering up will become a normal community process that is anticipated by those with whom the community is doing business.

Decisions that acknowledge collective rights are already emerging in some courts; an example is the Mayan community of Agua Caliente in Guatemala.²⁵ Still, the need for strategic transboundary use of the law increases exponentially with economic expansion.²⁶ Our network of legal hubs will develop and coordinate the strategy. The hubs create the career paths for many lawyers who have expressed a wish to practice in development law, with communities as their clients. These hubs are the professional structures that will allow them to do so.

Over the next decade, membership in our Green Light Program will expand as the Protimos Protocol is successfully trialled and implemented and monitored, and its provisions enforced. The protocol is intended to resolve some of the complex challenges that FPIC currently poses to communities, as well as those doing business, those financing the work, etc. For example:

- Who is the community?
- What is the nature of the consent required?
- How does the requesting company determine whether it has that consent?
- What is the position when consent is withheld or the community divided?

The ethos that underpins our work is paramount, but it is clear that we are not alone in our conviction that use of the law has a transformative potential. The international legal community, the NGO sector, and the legal profession all now acknowledge its crucial importance in poverty reduction. In Protimos, we have gone a little further by identifying particular areas where strategic legal interventions made by client communities will have benefits that extend far beyond those we are currently able to measure.

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1. UNDP Commission, *Making the Law Work for Everyone* (New York, UNDP, 2008). Available at [http://web.undp.org/publications/Making_the_Law_Work_for_Everyone%20\(final%20rpt\).pdf](http://web.undp.org/publications/Making_the_Law_Work_for_Everyone%20(final%20rpt).pdf), p. 3.
 2. UN General Assembly, "Legal Empowerment of the Poor and Eradication of Poverty," report of the Secretary General, Report A/65/133, July 13th, 2009, paragraph 65. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/402/07/PDF/N0940207.pdf?OpenElement>.
 3. The notion of being industrially useful is unknown in some communities. For example, the Quechua Indians in Peru do not permit the commercial exploitation of their traditional knowledge but are powerless to prevent it.
 4. Note the contrast between the Convention on Biological Diversity, which recognizes traditional knowledge, and the global intellectual property rights regime administered under the World Intellectual Property Organization and the agreement on Trade-Related Aspects of Intellectual Property Rights, which do not.
 5. The Maori of New Zealand require that the use of traditional knowledge be collectively approved, even though it may be publicly disclosed.
 6. Karen Spalding, "The Crisis and Transformation of Invaded Societies in the Andean Area, 1500-1580," in *Cambridge History of Native Peoples of the Americas: South America*, vol. III, ed. Frank Salomon and Stuart B. Schwartz (Cambridge, England: Cambridge University Press, 1991), pp. 931-932.
 7. *Matsipane Mosehlhanyane and Ors v the Attorney General*, Court of Appeal Civil Appeal, no. CACLB-074-10. Available at http://www.ecolex.org/ecolex/ledge/view/RecordDetails;document_Matsipane%20Mosehlhanyane%20and%20Ors%20v%20The%20Attorney%20General.html?DIDPFDSIjsessionid=57A278BB4B88394E87C364393AC37FE6?id=COU-156296&index=courtdecisions.
 8. UNDP Commission, *Making the Law Work*.
 9. The Protimos project in Lesotho has initiated this type of litigation in a relatively new jurisprudence.
 10. Friederike Heine, "Norton Rose and Olswang Land BP Panel Roles after Six-Month Review,"

Mitigating the Resource Curse Through Legal Empowerment

- LegalWeek.com. Available at <http://www.legalweek.com/legal-week/news/2074182/norton-rose-olswang-land-bp-panel-roles-review>.
11. John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, March 21, 2011, available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>; International Finance Corporation, World Bank Group, IFC Sustainability Framework (Washington, DC: IFC, 2012), available at http://www1.ifc.org/wps/wcm/connect/b9dacb004a73e7a8a273fff998895a12/IFC_Sustainability_Framework.pdf?MOD=AJPERES; Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2011), available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.
 12. The case number is CIV/APN/623/2011.
 13. Nobulali Productions and the Shakexperience Theatre group currently work with us in designing a bespoke program of community legal theater focused on the cases being brought or considered.
 14. Karen Edwards and Ronnakorn Triraganon, *Free, Prior, and Informed Consent: Principles and Approaches for Policy and Project Development* (Bangkok: RECOFTC, the Center for People and Forests, 2011), p. 3. Available at <http://www.recoftc.org/site/uploads/wysiwyg/docs/FPIC%20Training%20Manual%20Introduction.pdf>.
 15. The coalition includes academics like Graham Dutfield; members of the third sector, such as Fauna and Flora International, Amnesty International, WIMSA (Working Group of Indigenous Communities in Southern Africa), and SASI (Southern Alliance for Indigenous Resources); along with specialist practitioners such as Mark Vanhegan; a special legal consultant; and commercial interests such as Phytotrade.
 16. One example should illustrate the huge potential for financial losses when communities are not content. The international law firm Foley Hoag, writing of Newmont, a U.S. company considered one of the world's largest gold producers, says that community protests in the Yanacocha mine in Peru cost it an estimated US\$1.69 billion because project delays finally forced the company to agree to never develop the Quilish Mine, worth an estimated US\$2.23 billion. A. Lehr and G. Smith, *Implementing a Corporate Free, Prior and Informed Consent Policy* (Boston and Washington, DC: Foley Hoag, 2010), p. 58. Available at www.foleyhoag.com.
 17. See, for example, UN Declaration on the Rights of Indigenous Peoples, Article 32(2); International Labor Organization Convention No. 169; UN Declaration on the Right to Development; and Convention on Biological Diversity 1992 Article 8(J).
 18. See, for example, the Philippines Indigenous Peoples Rights Act of 1997 and the Law of the Right to Prior Consultation with Indigenous or Tribal Peoples, Recognized in Convention 169 of the International Labor Organization adopted by Peru in September 2011.
 19. See, for example, Christina Hill, Serena Lillywhite and Michael Simon, *Guide to Free Prior and Informed Consent* (Victoria: Oxfam, 2010); Marcus Colchester and Maurizio Farhan Ferrari, *Challenges and Prospects for Indigenous Peoples* (Moreton-in-Marsh, England: Forest Peoples, 2007).
 20. Consider, among others, the efforts made by the United Nations Collaborative Program on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD), United Nations Development Program, the Inter-American Commission on Human Rights, and the World Bank.
 21. Lehr and Smith, *Implementing a Corporate Free, Prior and Informed Consent Policy*, p. 58.
 22. Areas where difficulties have arisen include defining communities, identifying communities' representatives, acknowledging relevant customary rules, determining the extent of engagement with communities (particularly the ambiguity between consultation and consent), extending FPIC beyond indigenous communities, implementing agreements between project developers and communities, resolving ensuing disputes, and establishing appropriate compensation when communities have suffered violation of their rights and damages.

23. World Resources Institute, *Development without Conflict: The Business Case for Community Consent* (Washington DC: WRI, 2007), p. 5.
24. The Mapeleng decision described above will ensure the provision of water in the district, but it will also have a far-reaching impact on the government agency in its future dealings with communities and their rights to potable water.
25. See Indian Law Resource Center, <http://www.indianlaw.org/content/guatemala-court-makes-landmark-ruling-indigenous-rights-case>.
26. For example, a community in the Global South could face illegal exploitation by a company registered in the South, opening the door to South/South litigation. This has not yet occurred in a domestic court.