

Wildlife law and the empowerment of the poor



Wildlife law and the empowerment of the poor

by
Elisa Morgera

for the
Development Law Service
FAO Legal Office



The designations employed and the presentation of material in this information product do not imply the expression of any opinion whatsoever on the part of the Food and Agriculture Organization of the United Nations (FAO) concerning the legal or development status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. The mention of specific companies or products of manufacturers, whether or not these have been patented, does not imply that these have been endorsed or recommended by FAO in preference to others of a similar nature that are not mentioned.

ISBN 978-92-5-106710-9

All rights reserved. FAO encourages reproduction and dissemination of material in this information product. Non-commercial uses will be authorized free of charge, upon request. Reproduction for resale or other commercial purposes, including educational purposes, may incur fees. Applications for permission to reproduce or disseminate FAO copyright materials, and all other queries concerning rights and licences, should be addressed by e-mail to copyright@fao.org or to the Chief, Publishing Policy and Support Branch, Office of Knowledge Exchange, Research and Extension, FAO, Viale delle Terme di Caracalla, 00153 Rome, Italy.

© FAO 2011

PREFACE

There is a wide variety of interests to be balanced in wildlife management. These interests range from the conservation of biodiversity and specific endangered species and their habitats, to valuable opportunities in eco-tourism or hunting tourism, to the needs and traditions of the local population relating to hunting and collection of animals or their product for cultural/religious practices. Although revenues from the wildlife sector may be considered irrelevant as a contribution to the national gross domestic product, wildlife's influence on local economies can be significant. Some rural communities see wildlife as a source of food. Some see wildlife habitat as potential timber or farmland. And some see wildlife hunting or eco-tourism as a source of cash.

Good laws can provide a framework for good wildlife management. An appropriate legal framework can conserve wildlife while reducing poverty and increasing food security. Enacting effective legal reforms, though, remains challenging.

In 2007–2008, FAO and the International Council for Game and Wildlife Conservation (CIC) reviewed legislation on wildlife management in Western and Central Asia. This review launched a regional dialogue on international obligations and standards on wildlife management, based on current challenges at national and regional levels.

This regional initiative led to a set of design principles on how to develop effective national legislation on sustainable wildlife management (available at www.fao.org/legal). These principles sought to provide tools for the analysis of existing legal frameworks, as well as provide guidance for developing new legislation based on international standards and best practices. In addition, the principles aim to help decision-makers, legal drafters and resource managers to understand wildlife legislation, engage in participatory and interdisciplinary legislative drafting, and use legislation to support sustainable wildlife management for the empowerment of the poor and environmental sustainability.

In 2009, FAO undertook to further refine these principles, taking into account the challenges faced and lessons learnt by wildlife legislators in other regions of the world. To this end, a series of regional studies examined the legislation of selected countries in Africa, Latin America, South-east Asia and Oceania.¹ These studies analysed laws concerning wildlife tenure (ownership and use rights and obligations, links with land and forest tenure), public participation in wildlife decision-making and planning, and community-based wildlife management. The purpose was to identify legal tools that allow disadvantaged people to directly benefit from wildlife management, thereby improving food security, alleviating poverty, enhancing rural livelihoods and ultimately contributing to the legal empowerment of the poor.² The studies also considered the strengths and weaknesses of current legal frameworks in promoting environmental sustainability and socio-economic development.

The present study synthesizes and analyses the findings of the above-mentioned regional legal reviews, identifies current trends and shortcomings, and singles out innovative legal solutions. On this basis, it also refines the design principles to develop effective national legislation on sustainable wildlife management, emphasizing the legal tools that empower the poor, particularly local and indigenous communities.

Several experts have contributed in the past two years to this project: Maria Teresa Cirelli, James Wingard, Alessandro Fodella, Elsa Tsioumani and Soledad Aguilar (FAO international legal consultants); Jacqueline Alastra and Ileana Papadopoulou (FAO legal interns); Victor Mosoti (former Attaché du Cabinet, FAO); Ali Mekouar (Director of FAO Conference, Council and Protocol Affairs Division, former Chief of the FAO Development Law Service); René Czudek (FAO Sub-Regional Forestry Officer for Southern Africa); Edgar Kaeslin (FAO Wildlife and Protected Area Management Officer); Kai-Uwe Wollscheid (Director General, International Council for Game and Wildlife Conservation); Michel Laverdiere (FAO Sub-Regional Forestry Officer for Eastern Africa); Fernando Salinas (Sub-Regional Forestry Officer for Western Africa); Patrick Durst (FAO Senior Forestry Officer, Asia and Pacific); Tracy McCracken (FAO Deputy Wildlife

¹ All studies are available at www.fao.org/legal and are listed in the bibliography.

² This concept has been developed by the Commission on Legal Empowerment of the Poor, established under the aegis of the United Nations between 2005 and 2008. The commission completed its mandate in 2008. See www.undp.org/legalempowerment. At its sixty-third session on 11 December 2008, the UN General Assembly, in a brief resolution (63/142), took note of the final report of the commission, stressing the importance of sharing best national practices in the area of legal empowerment of the poor.

Coordinator, Infectious Disease Group); Margret Vidar and Patrice Talla (FAO Legal Officers). Editorial assistance was kindly provided by Jesse Bellam and Lin Hu (FAO legal interns) and by Riccardo Beltrame.

The present study was authored by Elisa Morgera (former FAO Legal Officer), with substantive inputs and editorial assistance from Ken Rosenbaum (FAO International Legal Consultant), as a joint project of the FAO Development Law Service and the Land Tenure and Management Unit.

Blaise Kuemlangan
Officer in charge
Development Law Service

Paul Munro-Faure
Chief
Land Tenure and Management Unit

CONTENTS

PREFACE	vii
PART I - OVERVIEW	
INTRODUCTION	3
1. INTERNATIONAL FRAMEWORK	7
1.1 Species-based international agreements	7
1.1.1 The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)	8
1.1.2 The Convention on the Conservation of Migratory Species of Wild Animals (CMS)	15
1.2 Area-based international agreements	17
1.3 The Convention on Biological Diversity	18
1.3.1 Relevant COP Decisions	21
1.3.2 Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity	24
1.4 The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)	26
1.5 Relevant human rights instruments	29
1.6 Guidance from IUCN	31
1.7 The European Union (EU) and wildlife law	34
1.7.1 The Birds Directive	35
1.7.2 The Habitats Directive	36
1.7.3 CITES Regulation	39
1.8 Regional instruments	41
1.8.1 European instruments	41
1.8.2 African instruments	43
1.8.3 Latin American agreements	48
1.8.4 Instruments in Asia and Oceania	49
1.8.5 An inter-regional initiative: the Agreement on International Humane Trapping Standards	51
1.9 Concluding remarks	51

PART II – ELEMENTS OF NATIONAL WILDLIFE LEGISLATION

2. METHODOLOGICAL ISSUES	55
2.1 Developing a wildlife policy or strategy	55
2.2 Drafting clear and understandable legislation	58
2.3 Adopting an integrated approach	62
2.4 Avoiding legislative overreaching	66
3. INSTITUTIONS AND PUBLIC PARTICIPATION	69
3.1 Ensuring clarity in the institutional set-up	70
3.2 Ensuring inter-institutional coordination	74
3.3 Guaranteeing public participation in wildlife-related decision-making	82
3.4 Public access to wildlife-related information	94
3.5 Public access to wildlife-related justice	96
3.6 Clarifying wildlife tenure and its legal consequences	101
3.7 Ensuring gender equity	108
3.8 Food security	110
4. MANAGEMENT PLANNING	112
4.1 Establishing a system for information-gathering and monitoring	115
4.1.1 Inter-disciplinary and participatory approach	119
4.2 Requiring management planning as a prerequisite to formal management	122
4.2.1 Coordination among multiple planning exercises	128
4.2.2 Public participation in management planning	130
4.3 Sharing management planning responsibilities between central and local authorities and with local communities	135
4.4 Providing for international cooperation where multinational decision-making and coordination are needed	140
5. CONSERVATION	141
5.1 Using a species-based approach in a participatory way	143
5.2 Using an area-based approach in a participatory way	153
5.3 Involving local stakeholders in wildlife conservation	163
5.4 Protecting wildlife from harmful processes and land uses	171
5.5 Wildlife health	177
5.6 Human-wildlife conflicts	179

6.	SUSTAINABLE USE	185
6.1	Defining and regulating different types of wildlife use	186
6.2	Eco-tourism	189
6.3	Ranching and breeding	194
6.4	Wildlife trade	201
6.5	Hunting	204
	6.5.1 Accurately identifying game and non-game species	205
	6.5.2 Providing for an adaptive, science-based determination of hunting quotas	207
	6.5.3 Establishing procedural mechanisms for flexible and adaptive hunting seasons	210
	6.5.4 Clearly defining hunting areas	212
	6.5.5 Regulating hunting methods	216
	6.5.6 Ensuring a transparent and effective allocation of hunting rights	218
	6.5.7 Traditional hunting	225
	6.5.8 Regulating hunting tourism	232
6.6	Sharing of benefits	234
6.7	Community-based sustainable use of wildlife	241
6.8	Ensuring sustainable management of wildlife by the private sector	251
7.	IMPLEMENTATION AND LAW ENFORCEMENT	259
7.1	Providing incentives for complying with the law	260
7.2	Returning financial resources to improved wildlife management	263
7.3	Striking a balance between service provision and law enforcement mechanisms	271
7.4	Monitoring harvests and trade	278
8.	CONCLUSIONS	280
	BIBLIOGRAPHY	285
	LEGISLATION REVIEWED	291

PART I - OVERVIEW

INTRODUCTION

Wildlife¹ management is the process of keeping wildlife populations, including endangered species, at desirable levels using scientific, technical and traditional knowledge. **Sustainable** wildlife management adds the aim of balancing the economic, ecological and social values of wildlife, to protect the interests of present and future generations. Thus, this concept looks beyond hunting and protection of individual species and focuses holistically on wildlife as a renewable resource.

Law is a key tool to achieve sustainable wildlife management. It sets the parameters for protection and use of wild animals.

Over time, both the approach and the aims of law have broadened. Approaches have grown from simple property notions (who owns the animals or holds the rights to hunt them) to include more detailed regulatory, procedural and economic provisions. Aims have shifted from single-species management to more comprehensive goals including sustainable use of biodiversity. A number of ideas have informed these trends, among them, first the recognition of the interdependence among different species and the direct and indirect threats to wildlife, and second the broad appeal of a people-centred approach to wildlife management – meaning, the participation of concerned individuals in wildlife-related decision-making, the involvement of indigenous and local communities in wildlife management and the sharing of its benefits.

Legislation may allow all members of society and particularly, disadvantaged people, to directly benefit from wildlife management, improving food security, alleviating poverty, enhancing rural livelihoods and ultimately contributing to the legal empowerment of the poor. This concept has been developed by the Commission on Legal Empowerment of the Poor, established under the aegis of the United Nations between 2005 and 2008. According to the commission,² four pillars sustain the concept of legal empowerment of the poor: access to justice and the rule of law; property rights; labour rights; and business rights. Adequate wildlife management

¹ In the present study, wildlife is referred to as including terrestrial and avian wild animal species.

² The commission completed its mandate in 2008. See www.undp.org/legalempowerment. At its sixty-third session on 11 December 2008, the UN General Assembly, in a brief resolution (63/142), took note of the final report of the commission, stressing the importance of sharing best national practices in the area of legal empowerment of the poor.

legislation may contribute to the implementation of at least three of these pillars. For the first pillar, it may set out measures to promote equality under the law, clarity of rights and obligations, and access to justice. For the second pillar, it may allocate property rights, or related use rights over wildlife and its products, so that benefits are equitably shared, taking into account subsistence requirements, traditional titles and practices and disadvantages faced. For the fourth pillar, it may regulate contracts and other arrangements for wildlife use so that income-generating opportunities are available for all. This study identifies ownership of wildlife resources and other management rights and their tenure security as particularly critical for the empowerment of the poor.

Good wildlife law supports and is supported by good governance. Good administration of the recognition, allocation and possible revocation of wildlife rights provides legal certainty, which is essential to convince wildlife users and managers to operate responsibly with a long-term perspective. Public participation in decision-making and in planning, as well as access to justice, contribute to transparency, accountability, and balancing of the diverse interests of society – in particular of the poor, other disadvantaged groups and indigenous communities. Fair sharing of benefits, along with supportive business and lending frameworks, creates incentives for wildlife management. All these – good administration, public participation and fair benefit sharing – in turn lead to greater public respect for the law.

This study is a guide for those looking to improve national wildlife laws with a view to ensuring environmental sustainability and strengthening the role of disadvantaged people and increasing their participation in the sharing of benefits. In doing so, this study concentrates on legal tools for the empowerment of local and indigenous communities, as mandated by the Convention on Biological Diversity in recognition of their traditional knowledge, innovation and practices that contribute to the conservation and sustainable use of biological diversity. This also reflects the findings of the first State of the World's Indigenous Peoples' Report, released in 2010 by the UN Forum on Indigenous Issues,³ which underscored that the 370 million indigenous peoples worldwide comprise one-third of the world's extremely poor rural people.

³ The full text of the report is available at www.un.org/esa.

The study singles out trends, challenges and innovative legal solutions from national legislation in different regions of the world. It identifies both strengths and weaknesses of legal frameworks. It often highlights a menu of legal options, rather than just one solution, to allow each country to identify the ones most appropriate to local circumstances, policies and needs. It is a synthesis and further elaboration of the following regional studies:

- Morgera, E., Wingard, J. and Fodella A. 2009. "Developing Sustainable Wildlife Legislation in Central and Western Asia" FAO/CIC;
- Cirelli, M.T. and Morgera, E., 2009. "Wildlife law and the legal empowerment of the poor in Sub-Saharan Africa" FAO Legal Paper Online No. 77;
- Cirelli, M.T. and Morgera, E., 2009. "Wildlife law and the legal empowerment of the poor in Sub-Saharan Africa: additional case studies" FAO Legal Paper Online No. 79;
- Aguilar, S. and Morgera, E. 2009. "Wildlife law and the legal empowerment of the poor in Latin America" FAO Legal Paper Online No. 80; and
- Tsioumani, E. and Morgera E., 2010. "Wildlife law and the legal empowerment of the poor in South-East Asia and Oceania" FAO Legal Paper Online No. 83.⁴

Chapter 1 starts by describing the international legal framework related to biodiversity and environmental protection, as well as the key decisions and guidelines adopted by the parties to these agreements. In addition, it analyses guidance from the International Union for the Conservation of Nature, discusses wildlife-related legislation adopted by the European Union, and illustrates regional instruments in Europe, Africa, Asia, Oceania and Latin America.

The remaining chapters analyse trends in national wildlife management around the globe, singling out innovative legal solutions as well as common challenges to ensure environmental sustainability and the empowerment of the poor. They distil general recommendations and set out specific legal options for the improvement of national legislation on wildlife management. Chapter 2 addresses concerns about good legal drafting that are applicable to laws on renewable natural resources in general, with a view to providing

⁴ FAO Legal Papers Online are all available at www.fao.org/legal.

methodological guidance to wildlife law drafters. Chapter 3 then focuses on creating an effective institutional set-up for wildlife management – allowing coordination, public participation, as well as public access to information and justice – clarifying wildlife tenure and its legal consequences, and addressing gender and food security considerations. Chapter 4 discusses wildlife management planning as an overarching mechanism for wildlife conservation and sustainable use, investigating its legal implications. It pays specific attention to information gathering, planning processes, stakeholder involvement in planning and multinational planning. Chapter 5 discusses conservation issues: looking into species-based and area-based approaches in turn, protecting wildlife through environmental impact assessments and stakeholder participation in conservation – focusing specifically on participatory approaches to decision-making and community-based wildlife conservation initiatives. It also addresses questions related to human-wildlife conflicts. Chapter 6 is devoted to sustainable use, exploring different legal options for different uses (namely, hunting, eco-tourism, trade, ranching and breeding). It pays specific attention to the empowerment of the poor in relation to wildlife use, by analysing the regulation of traditional use, as well as legal tools for benefit-sharing, community-based wildlife use and communities' participation in wildlife management by the private sector. Chapter 7 turns to legal tools that facilitate implementation and enforcement, addressing specifically incentives, financial resources, enforcement powers and monitoring through the lenses of public participation. Each of these chapters draws attention to underlying international obligations and standards described in Chapter 1. The conclusions summarize the most significant recommendations for national decision-makers and legal drafters aiming to strengthen wildlife management legal frameworks to empower the poor and ensure environmental sustainability.

1. INTERNATIONAL FRAMEWORK

International law has long addressed wildlife management. Initially its focus was on the protection of certain species or habitats. More recently, its focus has shifted to more comprehensive approaches, epitomised by the innovative features of the Convention on Biological Diversity.

Two kinds of international legally binding agreements are primarily important for the review and drafting of effective national legislation on sustainable wildlife management. The first are agreements focusing on wildlife, which may either pose limits to national sovereignty or demand application of specific principles, methods and processes in national legislation. The second are agreements that address cross-cutting environmental issues, which implicitly cover wildlife management and may also require states to adopt certain provisions in their national wildlife laws. This is the case, for instance, of the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters.

Other international and regional conventions and initiatives may provide useful reference for national legal drafters. This chapter will in particular address relevant international instruments on human rights, guidance from the International Union for the Conservation of Nature (IUCN), as well as regional wildlife-related initiatives in Europe, Africa, Asia, Oceania and Latin America.

Many of these international instruments and initiatives not only address environmental matters but also legal empowerment of the poor, in particular with reference to community-based management and benefit-sharing. Accordingly, sustainable wildlife management can contribute to reaching not only **Millennium Development Goal** (MDG) 7 – ensuring environmental sustainability – but also MDG-1 – eradicating extreme poverty and hunger.⁵

1.1 Species-based international agreements

Endangered species legislation involves a specialized legal approach to wildlife management. It focuses exclusively on the identification and restoration of species that have reached critically low population levels, on

⁵ See www.un.org/millenniumgoals.

the basis of defined criteria and procedures for **listing** these species and at least two general mechanisms designed to ensure recovery of individual species. Listing criteria and procedures use science-based definitions of "threatened" and/or "endangered," both of which imply an assessment of the status of the species and the threats to their continued survival. The primary mechanism for recovery is the requirement that government agencies and private developers consider listed species in designing and constructing projects and include adequate protection measures to minimize or mitigate project impacts and ensure the species long-term survival or recovery. The second mechanism is the prohibition of direct and/or incidental "take" of the species in question. "Take" includes the killing of such species by whatever means (not just hunting), as well as any actions that remove a species from its habitat, destroy critical habitat, or otherwise harm, harass, or injure the species (see the definition provided by the Convention on Migratory Species in Box 1-2).

Two major international wildlife agreements are species-based and focus on the immediate protection of certain species by the adoption of lists, differentiating among listed species according to the degree of threat. These lists take the form of appendices to the convention, some of which cover the most endangered species for which the use is prohibited (albeit with certain exceptions), while others cover less endangered species, the use of which is allowed but should be controlled. The parties to the conventions regularly update these appendices in periodic meetings (usually those of Conferences of the Parties or COPs). International listings are usually combined with a permit system, thus requiring the enactment of national legislation to this effect (Birnie and Boyle, 2002).

1.1.1 The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)

CITES (Washington, 1973)⁶ aims to ensure that international trade in wild animals and plants does not threaten their survival. CITES therefore restricts their trade through export permit systems. For species threatened with extinction that are or may be affected by trade (listed in Appendix I to the convention), parties may grant export permits for non-commercial purposes only in exceptional circumstances and subject to strict requirements. The importation of these species also requires a permit, while trade for primarily

⁶ For the full text of the convention and information about its implementation, see www.cites.org.