



Challenging power from the bottom up? Community protocols, benefit-sharing, and the challenge of dominant discourses

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ARTICLE INFO

Keywords:

Community protocols
Local communities and indigenous peoples
Benefit-sharing
Convention on Biological Diversity

ABSTRACT

This article discusses the ways in which community protocols might challenge the dominant discourses that guide environmental law and policy at the local, national and international levels and makes suggestions about the conditions that need to be fulfilled if such a challenge is to be effective. Community protocols have attracted the attention of many scholars as they are recognised in the Convention on Biological Diversity's Nagoya Protocol. They are argued to hold the potential to achieve fair and equitable benefit-sharing by allowing local community voices to express their customary law, worldviews, and ideas of benefit and development among other things. While much of the existing literature discusses community protocols as legal tools, they are also tools that may challenge the dominant discourses argued to guide environmental law and policy. The article takes up this question on the basis of findings from five original case studies. It is argued that community protocols may challenge dominant discourses by: facilitating and articulating the recognition of local communities and indigenous peoples; providing a source for understanding their worldviews; and by empowering them in the long term. In order to achieve these outcomes, community protocol must be understood as processes and pay attention to legal and political contexts, how communities organise, the role of supporting actors, and the articulation of benefits.

1. Introduction

A group of traditional healers in South Africa talk about how to harvest medicinal plants that grow nearby but behind the fences of protected areas; traditional pastoralists in Greece consider how their work contributes to their local culture, economy and ecology; villagers in Namibia debate how to protect their knowledge of wildlife stewardship and pass it to future generations; a community association in Malaysia moves to rejuvenate rice farming in a remote area; 33 indigenous communities in Argentina describe how anyone who wishes to access their land should go about asking their permission. These rather different situations are drawn together through the idea of benefit-sharing. How, for example, should the benefits of the plants and animals within protected areas in South Africa and Namibia be shared with communities? How might the benefits of traditional pastoralism be recognised in present day Greece? How should the proceeds from state subsidised rice cultivation feed back into the community in Malaysia? How should extractives companies in Argentina engage with communities and develop ways of working that benefit communities and respect their land (or learn to take no for an answer)? Benefit-sharing, a relatively recent term coined in international law, seeks to deal with such situations. It refers to the idea that indigenous peoples and local

communities that protect and sustain natural resources should share in benefits produced on the basis of their knowledge and resources.

In many cases benefit-sharing is nothing but a new label for what has long taken place, albeit under a different name (such as the commons). More recently however, the longstanding goods or benefits that local communities provide have been explicitly recognised as key in the fight to tackle environmental problems. Benefit-sharing and the recognition of the contributions of indigenous peoples and local communities is brought up in a number of international texts ranging from plant genetic resources to human rights and climate change (Morgera, 2016). The best known and developed source of international law and policy on benefit-sharing, however, is the Convention on Biological Diversity (CBD). The fair and equitable sharing of benefits from the use of traditional knowledge held by local communities and indigenous peoples is a central aim of the CBD, and its Nagoya Protocol on Access and Benefit-Sharing (the Nagoya Protocol) contains the most specific rules in existence for benefit-sharing from bioprospecting. Nevertheless, questions about what exactly benefits are and how they should be shared in fair and equitable ways remain unanswered - even in the Nagoya Protocol (Morgera, 2016).

One way of addressing these questions is through community protocols - documents developed by local communities to record, among

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other things, information on their practices, institutions, customary law, rights and visions of development. Community protocols have attracted attention among policymakers (Jukic and Collings, 2013) as well as scholars and practitioners of international law (for example Bavikatte, 2014; Bavikatte et al., 2015; Jonas et al., 2010; Tobin, 2013).¹ The Nagoya Protocol explicitly recognised community protocols following the efforts of representatives of indigenous peoples and local communities. Inspired by work by, among others, Darrell Posey (2004), community protocols seek to help uphold the rights of indigenous peoples and other communities by filling a space at the nexus of international, national and customary law and policy. They are based on processes that aim to allow communities to act both defensively, codifying existing practices and underlining their rights, as well as proactively, by outlining future visions (Jonas et al., 2010). Following Bavikatte et al. (2015), a community protocol:

is a convivial legal tool that is collectively developed by a community. It is aimed at those who want to engage the community and it seeks to articulate the community's way of life, history, customs, and decision-making processes. It begins a dialogue that goes beyond a purely instrumentalist or use-value interaction and embarks on building a relationship. Through its community protocol, a community says to the listener: if you want to access our lands, biodiversity, and knowledge, then you need to hear our story, you need to understand what these things mean to us, what our values are, and how we make decisions. (Bavikatte et al.: 20)

Bavikatte et al. (2015) focus on community protocols as legal tools, yet their definition moves beyond legal relations to encompass questions about how social actors interact. Other socio-legal authors have discussed community protocols and benefit-sharing from the perspective of legal pluralism in depth. Tobin (2013) outlines the need for the respect and recognition of customary law for the protection of indigenous peoples' knowledge and resource rights, and explores the obstacles and possibilities for this in different arenas. Regarding community protocols and legal pluralism, he finds that the 'adoption of such protocols would have the potential to significantly influence the design of national, regional and international law and policy' (Tobin, 2013: 159). Vermeylen (2013) points to the difficulties encountered at regional and national levels when legal pluralism comes to be practiced, underlining the rigidity of some legal systems with regards to oral histories as evidence and collectively held knowledge for example. Yet to imagine how legal pluralism might be achieved through community protocols requires more attention to be paid to how these documents act within social relations of power – how exactly might community protocols convey what Bavikatte et al. (2015) call a community's 'space within' to become 'convivial legal tools'? If they are tools for starting dialogues, community protocols must to some extent translate the customary law as well as the worldviews of communities to all the external actors that engage with them. As de Sousa Santos (2015) argues, existing institutions view the knowledge held by indigenous peoples and local communities as superstitions and thus not to be counted, necessitating the kind of 'intercultural translation' that community protocols might provide.

To discuss the possibilities of community protocols in these terms, this article aims to bring together insights from several bodies of literature through a political sociological lens of power. A focus on how community protocols might address the power relations that exist at the local, international and national levels brings to light issues that should be considered in the processes communities follow to produce protocols to make them effective. To better conceptualise power, the work of Steven Lukes (2004) is useful. Lukes (2004)

outlines three dimensions of power: the visible, the hidden and the invisible. The first points to clear arenas of power in a society – such as a parliament. The second concerns agenda-setting power and the power to define key actors in a debate. Finally, the third dimension is the most insidious form. Invisible power is exercised within individuals' minds, defining what is right, possible and believable. This form of power is exercised through self-discipline - socialising discourses are internalised by individuals and delimit their outlooks. It is this dimension of power that the article seeks to discuss with a view to how it might be challenged by community protocols. While the existing literature touched on briefly here is thorough in discussing the potential of community protocols to contribute to international, national and local processes in terms of promoting legal pluralism, there is no explicit discussion of the 'invisible' discursive power relations that need to be challenged if community protocols are to mount their most effective defence of communities' worldviews or 'spaces within' (Bavikatte et al., 2015).

Powerful discourses about environmental conservation and human rights – central elements in community protocols – are discussed in political ecology. Political ecology is a broad school, bringing together disciplines including geography, politics, socio-legal studies, political sociology and others. As the focus of this article is firmly on power, and due to the limits of the author, the emphasis here is on politics, political sociology and socio-legal literature discussing aspects of benefit-sharing: though the relevance of geography is clear, work from this discipline is only drawn on in a limited manner. What this literature communicates about invisible power and environmental protection is that a number of hegemonic discourses shape the outlooks of many groups and actors about how environmental protection should be achieved. By shaping outlooks, these discourses exclude others, such as those held by some local communities recognised as stewards of the environment. Their discourses, many scholars argue, are characterised by more inclusive views of the world that do not separate 'nature' from the community, but rather understand peoples' reciprocal relations with the earth to form part of a single community (Bavikatte, 2014; Bavikatte et al., 2015; Vermeylen, 2017). The dominant discourses, on the other hand, do not conceptualise the earth and people as part of a single community. The picture is a complex one, but an overview of this literature shows consensus on an overarching discourse about colonialism and capitalism (Bavikatte, 2014; Svarstad, 2004), with linked discourses around the separation of humans from 'nature' (Uggla, 2009), and the need for outside actors to impose solutions on different groups (Bixler et al., 2015; Nelson, 2010). These dominant discourses shape environmental policies at different levels, including the international, and are applied without attention to how local groups steward the environment. Despite statements recognising the importance of local groups in the fight to protect the environment, the argument goes, policies remain based on dominant discourses that threaten the very local groups they aim to protect.

There is some disagreement among scholars of benefit-sharing on this: some scholars argue that spaces for local voices and approaches at the international level exist within the CBD (Bavikatte et al., 2015; Reimerson, 2013). The aim of this article is thus to begin to investigate how community protocols face up to the different discourses that are argued to shape environmental policy at the international, national and local levels, and thus how they might help communities achieve fair and equitable benefit-sharing. The focus for the international level is the CBD – the most developed international regime for benefit-sharing as well as that argued to be the most open to representatives of indigenous peoples and local communities (Affolder, 2017). The basis for discussions of national and local levels is a series of five original case studies carried out in Greece, South Africa, Argentina, Namibia and Malaysia. These case studies do not seek to represent the realities lived by these communities or to speak for them. Rather, they aim to connect local experiences of benefit-sharing – including those outside the scope of the Nagoya Protocol - with international processes (Parks and

¹ Further publications on community protocols can be found at <http://www.community-protocols.org/toolkit/additional-resources/publications/books-booklets> accessed 1 December 2016.

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