

Institutional innovation in fisheries governance: adaptive co-management in situations of legal pluralism

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In fisheries management, social and institutional sustainability factors have proven difficult to incorporate into planning and are often traded off in support of ecological and economic factors. Thus, there has been little support for institutional innovation such as adaptive co-management. The literature on legal pluralism indicates one constraint on innovative institutions. In response, Bavinck and Gupta suggest ‘institutional bricolage’ to bridge underlying value differences. However, value conflicts may prevent institutions from moving towards ‘mutual support’.

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Introduction

Multiple levels of governance and regulation are aimed at promoting sustainability of the world’s fisheries and oceans. Many nations have divided jurisdictional control [1^{*},2,3], while regional bodies, industrial associations, local communities, environmental and non-profit organizations are also involved in governance processes. This diversity has resulted in the recognition that true sustainability in marine management requires addressing four criteria: environmental, economic, social and institutional. Of these, the social and institutional components have proven difficult to incorporate into sustainability planning and are thus often traded off in favour of ecological and economic criteria [4^{**},5^{*},6]. We argue here that without institutional innovation that can deliver on

all four sustainability objectives, sustainable outcomes will not be achieved [7].

Adaptive co-management is promoted as one institutional innovation that can respond to rapid change by learning through experimental management actions to further sustainability [8^{*},9]. The role of law in adaptive co-management has recently received attention [10,11], as has the challenge of legal pluralism [1^{*},2,13^{*},12^{**}]. ‘Hybrid institutions’ or ‘institutional bricolage’ may enable actors affected by multiple legal systems to bridge differences in the values that underlie those different normative orders [12^{**}]. But social values may also play an important role in tethering institutional innovation [14] so that management experiments do not unintentionally change valued social objectives [15]. In this paper we examine the underexplored role of values in institutional innovation for marine governance. In doing so, the paper addresses the power structures that enable or hinder institutional innovations such as adaptive co-management from developing.

We begin by surveying two interrelated bodies of literature. The literature on legal pluralism focuses on issues related to jurisdiction, administrative competence, predictability, regularity, and access to governance [1^{*},2,3,13^{*},16–19]. The second body of literature emerged after the 1987 Brundtland Commission and focuses on sustainability. It employs the language of innovative institutions, social–ecological systems, resilience and adaptability [7,8^{*},9–11,12^{**},21,22^{*},23–25]. Both share a concern with governance [26]. Based on the literature review and supportive findings from eastern Canada, we draw conclusions about how value conflicts challenge innovative institutions from moving beyond ‘accommodation’ towards ‘mutual support’ [12^{**},27].

Legal pluralism in marine governance and management

Legal pluralism exists when different legal ideas, principles and systems are applied to the same situation [19:21]. The many legal orders steering marine management provide an example [4^{**}]. The state is not the only legislator; law is not unique to state societies; and other forms of law exist in the absence or in addition to state law [16,17]. Further, civil society is not a passive recipient of rules and regulations; rather, different sectors are often involved in shaping rules [17,28]. As a sensitizing analytical category, legal pluralism is premised on exploring legal and political configurations without any bias towards

a particular source of law (i.e., the state) [16:13]. The legal pluralism literature thus theorizes from the impacts of varying normative orders on specific situations such as fisheries management [13*,27].

Competing marine spatial claims, stakeholder conflicts and cumulative impacts further challenge ocean governance [2,7,12**,18]. These challenges require both effective regulation and management institutions [2]. However, as in Canada, management planning is largely top-down and on a sector-by-sector basis while decision-making remains ad hoc, problem driven, short-term and highly political [2,7]. This leads to fragmented, uncoordinated decision-making [20] with a multitude of rules and policies formulated and implemented at different levels and stages in time. These variously affect multiple sectoral activities with their different spatial distribution, ranging from static, place-bound structures (e.g., aquaculture, wharves, herring weirs) to movable, temporary activities (e.g., fishing) [18]. Bavinck and Gupta [12**] refer to such situations as a ‘continuing state of legal pluralism’, creating conditions for social conflict over values and effectively blocking sustainable governance through institutional innovation. Both value conflicts and resistance to institutional innovation were found in our own research in eastern Canada, which is touched on briefly in this article.

Legal pluralism is a source and a consequence of characteristics such as complexity, diversity, dynamics and scale of social and ecological systems [13:159]. Further, legal systems are never closed but permeable and dynamic. The management system brings all these differences into one place [17], as multiple regulatory orders are pulled in by each set of social actors as they see fit. Fisheries and coastal management will inevitably end up practicing hybrid, sub-divided, compartmentalized and incongruent law. Therefore the question is not how do we reduce such legal pluralism, but how do we sustainably manage activities within it?

Sustainability through innovative hybrid institutions

The adaptive co-management literature links the resolution of multi-scale social–ecological dilemmas to innovative, flexible, adaptive and inclusive governance institutions [21,22*,23–25]. Adaptive co-management draws on experiential and experimental learning as well as horizontal and vertical collaboration [23] to further adaptability for both governance systems and local communities [29]. It relies on the concept of resilience, or: ‘the ability of a system to persist, to absorb recurrent natural and human perturbations and continue to regenerate without slowly degrading or unexpectedly flipping into alternate states’ [20:352]. Adaptive capacity must address environmental, social, economic or institutional

risk [20,30] and thus adaptive co-management is likely to take many hybrid forms [8*].

Such innovative institutions must pursue multiple objectives, cognizant of social, cultural, and historical aspects of marine management, and of meanings, values and norms [22*,23]. In fact, effective adaptive co-management must address legal pluralism and conflicting value sets [2,12**,31]. People affected by multiple legal systems have choices, including: forum shopping, protest, indifference or attempts to hybridize law [12**]. Four types of relationships between legal systems and governance patterns have been identified, including: indifference/co-existence, competition, accommodation, and mutual support [12**]. ‘Accommodation’ involves recognition of other systems and some reciprocal adaptation, but no real institutional or jurisdictional integration. ‘Mutual support’ involves competing institutional or jurisdictional bodies acting in mutually supportive ways. Adaptive co-management theoretically appears closest to ‘mutual support’, as it typically divides responsibility between government and local level organizations. Co-management does not itself resolve legal differences or conflicts, but does establish an arena for stakeholders to be innovative about how law can be made more effective and socially just [17].

Adaptive co-management is a potential tool in changing unsustainable governance approaches [8*]. Current advice on ‘good governance’ places value on shared decision-making, ecosystem-oriented management, and institutions that resolve value conflict while offering suitable environmental protection [9,10,20]. As such, several essential aspects of governance should be emphasized. First, it must start with knowledge of and appreciation for values and visions — that is, what variable sets of people care about and in what direction they wish to move. Second, because governance, like ecosystem, is multi-scalar, decisions that affect the local level should take place at that level; however, such decisions must be made with reference to decisions that are taken at higher levels of organization. Third, governance of social–ecological systems must be dynamic and interactive, recognizing that impacts on marine ecosystems will also impact human communities. Communities are also rooted within larger social and governance structures [20,22*]. Finally, given natural and anthropomorphic impacts, governance must integrate multiple sources of knowledge [9,30].

Despite progress in the contribution of natural sciences to the management of marine resources, social science has not been engaged to the same extent, especially given social and institutional sustainability goals [5*,22*]. This in turn has led to insufficient attention paid to power — its many sources and manifestations and its influence on collaboration and learning [8*,26,31]. Two further power issues are the impacts of categorization and representation. An example of the former is the categorization of

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