

## **New Forms of Law and Governance for and from the Arctic**

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With climate change and increasing complexity of natural resources management, various forms of reflexive governance are emerging as new fashionable terms. Arctic Centre of the University of Lapland will organize a seminar, which will look at research approaches developed and applied elsewhere, which could provide useful intellectual tools to explore the role of law and other institutions in adaptive governance of natural resources in the Arctic. At the same time, we explore how institutions coping with Arctic challenges have evolved, how changes in Arctic law and governance influence Arctic residents' life and Arctic societies as collectives, and whether these developments and Arctic governance experiences could provide lessons for other regions.

### **Challenges**

The Arctic is experiencing a profound transformation. The climate is changing more rapidly in the Arctic than anywhere else in the world. Observed and predicted consequences of warming Arctic include diminishing sea ice, retreating glaciers, extreme weather events, sea level rise and storm surges, thawing permafrost, changing weather and seasonal patterns. This has profound implications for Arctic environment, with Arctic greening or changes in habitats being observed (Arctic Biodiversity Assessment 2013), as well as for human activities and Arctic communities. This affects in distinctive way Arctic indigenous peoples, already affected by socio-economic pressures on their livelihoods and still suffering from assimilation and cultural challenges (Larsen and Fondahl 2014). However, climate change is but one of numerous drivers of Arctic transformation, with global and regional economy, resource extraction and rising economic opportunities being among the most critical (Stepien, Koivurova and Kankaanpää 2016). The excessive expectations for Arctic boom prevalent five-six years ago (Zellen 2009) are now largely a thing of the past but the long-term gradual developments do take place (Wilson & Stammler 2016). A recent report by an expert committee identifies sustainable mining, tourism and renewable energy as key opportunities for the Scandinavian Arctic (Husebekk et al. 2015). Fluctuating prices of minerals and energy resources are central to how Arctic economies develop. However, regulatory frameworks are crucial for managing arising conflicts over land use (Latola et al. 2016) and development priorities as well as for encouraging or discouraging certain developments. For instance, Finland has been identified as the most attractive jurisdiction for investment in mineral exploration and mine development in the 2014 survey of Fraser Institute (Jackson 2015).

Global economic and environmental change affects Arctic economies and societies and calls for governance systems that are flexible enough to adapt to the transformation. Many communities have been historically fairly resilient (Forbes and Stammler 2009; Larsen and Fondahl 2014), but there are limits to their adaptive capacity (Arctic Resilience Report 2013; Stepien et al. 2014). The direction and pace of changes are still not well understood: one aspect that climate change and globalization for sure bring to the Arctic is rising uncertainty. The challenge is not only adjusting to new climate realities, especially for sectors greatly dependent on weather conditions such as terrestrial and maritime transport, tourism, hydropower, reindeer herding, or forestry (e.g. the use of winter roads). Also the arrival of major industrial projects (e.g. mining, oil, gas and infrastructure developments related to these industries) requires adaptive approaches – both to general change and to the fluctuating nature of these sectors (van Dam et al. 2016). Should governance systems be equipped in built-in mechanisms for

supporting resilience in a changing world or allow for flexibility local public and private actors need for adaptation?

## Responses

In political terms, there are indications that inhabitants in the Arctic are becoming increasingly empowered to respond to the changes and challenges. They insist to have a say in decision-making concerning investments and require governments to take action to prevent and mitigate adverse effects of the development. Indigenous peoples have not only become empowered, but also achieved some sort of self-determination in many areas in the Arctic.

The changes in the Arctic areas are also reflected in the change of legal and other types of regulation. Various processes, on maritime transport (primarily Polar Code), Arctic fisheries, search and rescue, and oil spills for example, attempt to meet the challenges created by new economic operators entering the region. There are many varieties of regulations in the Arctic, of which most are traditional national (statutes) or international legal regulations (treaties), but there are also new types of hard and soft-law normative guidance, such as guidelines and best practice documents, as well as corporate social responsibility frameworks. So far, legal research in the Arctic has taken a fairly traditional approach, and tried to fit new forms of normative guidance under the frames of national, international, and European law. Traditional approaches do not necessary capture all features of change, particularly because Arctic regional cooperation has developed a relatively unique set of structural and operational characteristics. In fact, some experiences coming from Arctic regional cooperation may prove relevant for other regions and for global governance in general (Koivurova et al. 2015). New theories try to understand development of new forms of regulation that are used in the Arctic and elsewhere. One approach for this is *global administrative law*, where the focus is not on the status of an organization or a regulatory instrument, but whether it uses authoritative societal power. Also *transnational law* is something above domestic law but without being real international law, where states make agreements. Transnational institutions, networks and soft law instruments can influence the use of natural resources in the Arctic in various ways. Transnational law aims to examine non-state law that is also non-traditional law. In many cases it is also corporate codes of conduct, multi-sector agreements and individual contracts between operators and communities that influence Arctic inhabitants' life during industrial development most directly. In connection to the above-mentioned larger regulatory framework, our object of study can therefore be termed multiple governances and the interrelation of plural regulative frameworks.

Since the Arctic region is undergoing profound change, it is clear that also law and broader governance structures need to adapt. *Adaptive law theory* (Craig and Ruhl 2014; Ebbesson and Henley 2013) provides another attractive theoretical framework to seek for adequate legal response to the management of change, also in the Arctic. The very idea of adaptive law is based on trial-error-correction cycle, where regulatory processes are considered open-ended and based on a continuous series of new information and decisions, which take into account the results of experiments. Excessively rigid regulation may hamper experimenting and hence affect negatively on technological development (Similä 2002, Hildén et al. 2002). Adaptive law framework comes together with broader reflexive governance frameworks. *Transition management*, analyses socio-ecological and socio-technical systems to understand managing dynamic change. This theory, as adaptive law framework, stresses that the emphasis on governance structures should be on learning, reflection, and adaptation (Voss and Bornemann 2011). Legal pluralism and legal anthropology analyse how such regulative regimes have a

“social live” that gives them a different face in every society, regimes designed on a macro-level always meet with existing governance structures on a micro level, (Benda-Beckman et al 2009) for example traditional customary law in Arctic indigenous communities (Stammler & Ivanova 2016)

A critical aspect of the response is moving from knowledge to action when it comes to adaptation. The role of science and science-decision-making interaction is key to any form of adaptive governance (Brunner et al. 2005). Arctic regional governance has been capable to develop strong science component to the extent that Arctic Council could be called a boundary organizations – an organization bridging science and policy (Kankaanpää 2012). However, the actual influence of science on decision-making at regional or national level is unclear. Moreover, it is nowadays commonly acknowledged that knowledge-based decision-making requires involving other forms of knowledge, including traditional ecological knowledge. This requires enhancing more structured and sustained participation of wide variety of stakeholders in legal and governance decision-making.

While these developments are valuable and influential, they are not sufficient. The dynamics of social-ecological systems in the Arctic are so complex, that there is an urgent need to increase our understanding of which kind of institutions have capacities to cope with the challenges locally, regionally and internationally. The frameworks referred above provide an interesting intellectual basis for the further development of institutions.

### **Purposes of the seminar**

This seminar has two purposes. Firstly, it seeks to explore how institutions coping with environmental, social and economic challenges in the Arctic have evolved and what lessons-learned these developments could provide for other regions. Secondly, it looks for research approaches developed and applied elsewhere, which could provide useful intellectual tools to explore the role of law and other institutions in adaptive governance of natural resources in the Arctic.

With climate change and natural resources management, various forms of reflexive governance – with developing forms of normative guidance – are emerging as new fashionable terms in governance studies. But what is the real meaning, content and promise of reflexive governance? Law is considered one of the least flexible elements of governance systems. Thus, what sort of legal frameworks do we need in the age of change? Do we have examples of innovative adaptive or resilient governance frameworks suitable for the changing Arctic or at least instances of attempts to establish such frameworks? If yes, can Arctic regions serve as a testbed for innovative legal and governance solutions? At what level of governance is there most adaptive capacity, which level puts most constraints on adaptation and which is least flexible? How to integrate science into legal decision-making so that law and governance can faster respond to both changing reality as well as adjust to increasing scientific comprehension of the changes at hand?

Discussing these issues requires new theoretical approaches and models, both in political science/governance studies and in legal research. What theories and concepts could help us in assessing and devising adaptive or resilient qualities of legal and governance frameworks?

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