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Garmestani, Ahjonid; Ruhl, J. B.; Chaffin, Brian C.; Craig, Robin K.; van Rijswijk, Helena F.M.W.; Angeler, David G.; Folke, Carl; Gunderson, Lance; Twidwell, Dirac; and Allen, Craig R., "Untapped capacity for resilience in environmental law" (2019). *Papers in Natural Resources*. 1043.

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Untapped capacity for resilience in environmental law

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Edited by Arild Underdal, University of Oslo, Oslo, Norway, and approved August 6, 2019 (received for review April 11, 2019)

Over the past several decades, environmental governance has made substantial progress in addressing environmental change, but emerging environmental problems require new innovations in law, policy, and governance. While expansive legal reform is unlikely to occur soon, there is untapped potential in existing laws to address environmental change, both by leveraging adaptive and transformative capacities within the law itself to enhance social-ecological resilience and by using those laws to allow social-ecological systems to adapt and transform. Legal and policy research to date has largely overlooked this potential, even though it offers a more expedient approach to addressing environmental change than waiting for full-scale environmental law reform. We highlight examples from the United States and the European Union of untapped capacity in existing laws for fostering resilience in social-ecological systems. We show that governments and other governance agents can make substantial advances in addressing environmental change in the short term—without major legal reform—by exploiting those untapped capacities, and we offer principles and strategies to guide such initiatives.

resilience | law | social-ecological systems | environmental governance

Environmental governance has made significant progress in addressing many of the challenges facing humankind, but it has not stemmed the tide of accelerating environmental change, nationally or internationally. This fact is perhaps most obvious in the limited international agreements to address climate change as both greenhouse gas emissions and atmospheric concentrations of carbon dioxide continue to increase, and biodiversity loss, nutrient pollution, and ocean acidification also signal increasing needs for reform (1). As a result, subsidiary governments (e.g., US states, provinces, regions, cities) and other governance actors [e.g., private industry, nongovernmental organizations (NGOs)] have become critical innovators (2). Nevertheless, rapidly accelerating environmental change demands further attention to national and international environmental law, particularly the need to identify and leverage the untapped capacity to enhance resilience that already exists in these laws.

Adaptive and transformative capacities are inherent characteristics of social-ecological systems that collectively influence the resilience of these systems. We use “resilience” in the sense of ecological resilience (3)—the ability of a social-ecological system to absorb change without shifting to a new regime with a different set of processes and structures. Adaptive capacity describes the potential a social-ecological system has to alter resilience in response to change and maintain the current social-ecological regime; a system with high adaptive capacity is more likely to remain resilient given substantial episodes of change (4). Transformative capacity describes the potential of a social-ecological system to shift to a different, but still productive and socially desirable, regime that is again resilient to disturbance (5). Systems with low adaptive or transformative capacity, like the Newfoundland cod fishing communities of the 1980s and 1990s, collapse in

the face of change (6). Not all social-ecological systems fully leverage their adaptive and transformative capacities, nor do they need to at all times. However, in an era of intense, novel, and disruptive environmental change, no latent capacity to adapt to change or to transform productively should remain unexplored.

Environmental law, and its ability to influence environmental governance more generally, provides 1 source of such latent capacity. Environmental governance is composed of law, policy, governance organizations, and individuals. “Law” refers to formal prescriptions, duties, prohibitions, rights, and requirements—constitutions, statutes, regulations, court decisions, rules, charters—that governmental bodies create (7). “Policy,” in turn, describes less formal goals, aspirations, and intentions (8). Finally, “governance organizations” are all of the entities that implement various kinds of law and policy from formal governmental entities (government officials, agencies, courts) to NGOs such as trade associations, corporate boards, or neighborhood associations (9).

Emerging research indicates that a key source of adaptive and transformative capacity in governance is likely to be informal, realized through networks, social processes, and cultural knowledge (5). However, researchers so far have generally overlooked the potential for more formal environmental governance components as sources of adaptive and transformative capacity, despite the fact that the United States (US) and nations of the European Union (EU) repeatedly experience some of this capacity when new US presidents or European national leaders redirect existing laws to further new government policy agendas.

Significance

International and national law have not stemmed the tide of rapidly accelerating environmental change. In response to this challenge, we highlight examples from the United States and the European Union of the untapped capacity of existing laws to enhance social-ecological resilience to these continual changes. The recommendations we advance regarding how to mine existing legal instruments to enhance resilience are agenda-setting, and they represent a far more feasible approach to addressing emerging environmental challenges than proposing politically untenable new laws or major amendments to existing laws. We show that governance can make substantial advances in addressing environmental change in the short term by exploiting those existing untapped capacities, and we offer principles and strategies to guide such initiatives.

Author contributions: A.G., J.B.R., B.C.C., R.K.C., H.F.M.W.v.R., D.G.A., C.F., L.G., D.T., and C.R.A. wrote the paper.

The authors declare no conflict of interest.

This article is a PNAS Direct Submission.

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First published September 16, 2019.

not only to promote agriculture, but also to include protection of ecosystems and ecosystem services (21).

These examples suggest that a more concerted effort should be devoted to leveraging untapped adaptive and transformative capacity in existing environmental law. The question is how to do so in a manner guided by resilience principles responding to accelerating environmental change.

Adapting Environmental Governance

Many aspects of environmental governance help to shape adaptive and transformative capacity, including budgets, leadership, and politics (5, 7). We focus here on the untapped adaptive and transformative capacity that exists within law (as defined above) and the law's ability to shape environmental governance more generally. As noted above, the acceleration of familiar and new environmental disruptions demands legal reform, but new national and international legislation is unlikely. However, governance organizations and actors can prime the pump through creative interpretations and applications of existing laws, provided there is political will to shift policies in a new direction.

Three aspects of existing law are important in this regard. First, existing law can have untapped adaptive and transformative capacity to change itself—that is, capacity to create new requirements, standards, and prohibitions in order to adapt to changing social-ecological conditions or to pursue goals that reflect a transformed social-ecological system (22). For example, existing flexibility in the US Magnuson–Stevens Fishery Conservation and Management Act can allow regional Fishery Management Councils both to adjust catch allowances as ocean water warms and to require fishers to shift their permits to new species as marine fisheries migrate poleward (23). In both cases, managers use existing statutory provisions to change the law itself in ways that both exploit the statute's resilience to changing fish stocks and strengthen the fishing community's resilience to environmental change. Of course, such flexibility has limits: The Magnuson–Stevens Act is almost useless if the fishing community needs to transform into a completely different economic and cultural identity.

Second, existing law can have the capacity to open up legal space within a social-ecological system to allow that system to more effectively exercise its own adaptive and transformative capacities. For example, if law has forced managers to keep a protected area in an increasingly artificial regime [e.g., the landscape around a protected area maintained as grassland has already transformed to a woodland (24)], existing law might be able to remove those managerial constraints, freeing the protected ecosystem's transformative capacity to respond to the changing climate.

Finally, adaptive capacities and transformative capacities within existing laws are likely to derive from the same legal provisions. As a result, there will often be considerable overlap between sources of legal adaptive capacity and legal transformative capacity because both will often depend on substantive flexibility and procedural discretion.

A concerted effort to tap into environmental law's adaptive and transformative capacities will involve 3 overarching initiatives. First, where possible under existing higher-authority laws, adaptive and transformative law mechanisms should be leveraged. Second, these legal mechanisms must be operationalized pursuant to guidelines cognizant of social-ecological realities. Third, innovations in governance organizations should be embraced when they offer potential to facilitate the first 2 initiatives.

Leveraging Adaptive and Transformative Law Mechanisms. Both legal systems as a whole and particular legal regimes (e.g., species protection) vary in their capacities to promote innovative approaches to environmental problems, with factors such as cyclic planning, assessing monitoring results, enforcement mechanisms, flexibility in law, the rate of statutory change, and litigation all playing roles in legal adaptive and transformative capacity (25).

Both in the United States and the European Union, these legal capacities draw from both the substantive flexibility (i.e., the goals and standards of laws) and procedural discretion (i.e., process of rulemaking and adjudication) that is built into laws (26).

Substantive legal adaptive and transformative capacity reflect the ability of a legal regime to alter its requirements, standards, and goals—large and small—in response to changed conditions. For example, federal land management agencies in the United States operate under a variety of statutorily mandated management regimes, from preservation mandates (e.g., many national monuments) to mixed conservation-commodity goals, such as the National Park Service's and the US Fish and Wildlife Service's dominant-use mandates (conservation) or the US Forest Service's and Bureau of Land Management's multiple-use mandates (manage for multiple uses as specified in the applicable statutes). Agencies operating under single- or limited-focus mandates lag behind others in terms of substantive adaptive capacity because, in particular, preservation mandates limit management options. The dominant-use and multiple-use agencies thus have found it easier to integrate adaptive management and other approaches, such as provisioning of ecosystem services, into their decision making (26, 27).

Procedural legal adaptive capacity refers to a legal regime's agility to promulgate, amend, evolve, enact, and/or implement law in light of new substantive goals and standards articulated in adapted substantive laws (28). In general, the more process required and the more checkpoints or decision makers involved, the less procedural adaptive capacity a particular area of law has (7). Thus, the common law, relying initially on the judgment of single judges, with doctrines crafted and refined over time by successive judicial opinions, is more procedurally adaptive than the legislative process (28). Nevertheless, as the European Union Water Framework Directive approach demonstrates, a legislative process can also be adaptive.

A multitude of options available under existing environmental and natural resources laws can promote adaptive and transformative capacity when deployed wisely. First, several tools already exist that increase the law's own adaptive and transformative capacity. Laws can allow or require the use of standards that automatically adjust to changing ecological conditions, promoting flexibility in environmental governance. For example, in interstate water allocation in the American West, proportional allocation of a river based on the actual yearly flow allows the affected states to adapt more easily both to drought and to longer-term changes in climate than would fixed requirements to deliver a certain amount of water at a certain place downstream (28, 29). Legislatures can also creatively employ "sunset" provisions to increase the adaptive and transformative capacity of laws. While legal sunsets often simply terminate a statute or regulation on a certain date unless the legislature or agency re-enacts that provision, legislatures and agencies can also use sunset provisions to require a more detailed review of a law at a certain point in the future. The European Union Water Framework Directive, for example, schedules review and public input every 3 to 5 y, allowing agencies to implement adaptive approaches without subverting public participation (7). Even more comprehensive review in conjunction with a termination of the existing version of a law could allow the legislature or agency to completely overhaul a sunsetted statute or regulation either to reflect transformed conditions or to guide a transformation in progress toward a productive altered system.

Second, as noted, governance entities can use existing law to create conditions that allow social-ecological systems to exercise their own adaptive and transformative capacities. For example, instead of mandating that protected areas remain in defined regimes (24), the law enabling certain protected areas can instead preserve and strengthen inherent adaptive and transformative capacities latent in social-ecological systems (27) so that they can adapt or productively transform in response to changing

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