6

Environmental Democracy in Marine Protected Areas Management

The Role of Inshore Fisheries Conservation Authorities and Environmental NGOs

6.1 Introduction

Chapter 5 demonstrated, using the example of designation of MCZs, that participation in conservation decision-making is not straightforward and that 'thin' forms of proceduralisation can be damaging. It argued for a pluralisation of perspectives and a recognition of the multiple identities of each actor to help rendering participation experiments thicker and better contribute towards environmental democracy.

This chapter continues the discussion on environmental democracy focusing on two crucial actors in the institutional conservation landscape, environmental NGOs and IFCAs. These two actors have been selected because they both display democratic characteristics, but at the same time have different relationships to the state: one, allegedly, operates in a space external to the state and the other is a statutory regulator working at the local level. The legal and regulatory mapping in Chapter 2 showed that many actors and regulatory tools in marine conservation law conform to a command-and-control style of regulation. However, this chapter problematises the reading showcasing, critically, institutional examples of environmental democratisation.

Environmental NGOs are the 'usual suspects'[1] when discussing environmental democracy. They are the voice of the more-than human, operating as a proxy, or as a 'friend of the natural object' as Stone put it,[2] and they are defending the environmental rights of present and future generations through a variety of strategies, more or less confrontational. They are indeed afforded a special place in the Aarhus Convention. Thus, NGOs are an obvious subject in discussions of environmental democracy. For radical scholars, IFCAs may seem less interesting. After all, their transformative potential is tamed by the statutory obligations governing their behaviour; they are local arms of the state. However, the chapter will reveal that their set up and operation display

[1] M. Lee and C. Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 *Modern Law Review* 80–108.

[2] C. D. Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450–501, p. 464.

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important democratic aspects. Although both organisations contribute to the democratisation of regulation, they also experience some challenges and constraints, which will be discussed.

6.2 Environmental NGOs

Environmental NGOs are important actors in marine conservation in the UK. They are a broad church, of different sizes, with different funding availability, focus and expertise. Some specialise entirely in marine protection, such as the Marine Conservation Society, the Blue Marine Foundation and Oceana, others have a wider environmental remit, such as the Wildlife Trusts or Greenpeace and, finally, others primarily employ legal experts, such as Client Earth. Their strategies are also varied, from protests, to campaigns, to carrying out research, to engaging in policy-making to legal action. It is not the purpose here to discussing environmental NGOs comparatively or to provide a review of the extensive literature on NGOs in environmental management,[3] but to outline some general points regarding their role in democratising marine conservation regulation, participating in the commoning of MPAs.

Arguably, environmental NGOs fill the gaps left by the hollowing out of the state[4] and its institutions through monitoring sea-user activities, campaigning, carrying out scientific research and education activities, translating technical reports into more digestible formats for the public and, at the same time, holding the government to account, through lobbying, legal mobilisation as well as using nonviolent sensational confrontation tactics. To provide an example, environmental NGOs' tactics to push for the protection of a large offshore SAC (the Dogger Bank) from damaging bottom-towed fishing gear have consisted in a mixture of approaches ranging from the consultative and collaborative to the direct and combative. As an NGO representative put it:

> you got to have all approaches from NGOs: we did a technical report on trawling and climate change, Greenpeace was dropping blocks [in the sea], Blue Marine and Oceana were threatening judicial reviews […]because of these different tactics we saw a big statement [from the government] on trawling and MPAs so it has been a successful enterprise.[5]

Many scholars consider NGOs as democratic actors, guarding against command-and-control state regulation, encouraging wider citizen participation

[3] See, for example, C. Abbott and M. Lee, *Environmental Groups and Legal Expertise: Shaping the Brexit process* (University College London Press, 2021); P. B. Larsen and D. Brokington (eds.), *The Anthropology of Conservation NGOs: Rethinking the Boundaries* (Palgrave, 2018); S. Jasanoff, 'NGOs and the Environment: From Knowledge to Action' (1997) 18 *Third World Quarterly* 579–594.

[4] R. A. W. Rhodes, 'The Hollowing out of the State: The Changing Nature of the Public Service in Britain' (1994) 65 *Political Quarterly* 138–151.

[5] NGO representative n 1, online Interview, May 2021.

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and facilitating public understanding of environmental matters, contributing to the public scrutiny of the state, speaking for the voiceless environment and future generations and increasing transparency of expert decision-making.[6] Citing Jasanoff:

> standing outside the peripheries of official, usually state-sponsored, knowledge production, NGOs are particularly well-situated to observe the limitations of dominant expert framings, to question unexplained assumptions, to expose tacit value choices, and to offer alternative interpretations of ambiguous data.[7]

For Jasanoff, environmental NGOs sit at the knowledge-action nexus, criticising accepted framework of environmental knowledge and policy, creating more inclusive epistemic networks, bridging lay-expert knowledges, disseminating information, supplementing existing, and often poor, monitoring and enforcement approaches.[8] It follows that NGOs can be seen as vehicles for commoning MPAs regulation, pluralising the institutional arena, pressing for radical alternatives and paving the ground towards greater inclusiveness and cooperation in conservation discourses and practice.

Environmental law has followed suit affording environmental NGOs important rights. The main instrument remains the Aarhus Convention that has conferred a wide range of environmental rights on the public and especially the 'public concerned', which includes NGOs promoting environmental protection and meeting certain thresholds.[9] There has been substantial academic commentary on the Aarhus Convention so suffice to write here that rights include access to environmental information under article 4, rights to participate in environmental decision-making under articles 6–8 and access to justice under article 9.[10] NGOs are thus key actors in mitigating the democratic deficit and providing legitimacy in environmental decision-making.

However, over the years, a body of work has emerged problematising the link between democracy and NGOs.[11] Drawing on this literature, it will be

[6] See for example, M. Bratton, 'Beyond the State: Civil Society and Associational Life in Africa' (1989) 41 *World Politics* 407–430; J. S. Dryzek, 'Global Civil Society: The Progress of Post-Westphalian Politics' (2012) 15 *Annual Review of Political Science* 101–119.

[7] Jasanoff, 'NGOs and the Environment', p. 582.

[8] Ibid. [9] Article 2(5) of the Aarhus Convention.

[10] For commentary, see Lee and Abbott, 'The Usual Suspects'.

[11] See, for instance, M. Edwards and D. Hulme (eds.), 1995. *Non-Governmental Organisations: Performance and Accountability. Beyond the Magic Bullet* (Earthscan, 1995); C. Mercer, 'NGOs, Civil Society and Democratization: A Critical Review of the Literature' (2002) 2 *Progress in Development Studies* 5–22; M. Edwards, *Civil Society* (Polity Press, 2004); E. Swyngedouw, 'Governance Innovation and the Citizen: The Janus Face of Governance-beyond-the-State' (2005) 42 *Urban Studies* 1991–2006; P. Jepson, 'Governance and Accountability of Environmental NGOs' (2005) 8 *Environmental Science and Policy* 515–524; F. R. Baumgartner et al., *Lobbying and Policy Change: Who Wins, Who Loses and Why* (University of Chicago Press, 2009); T. Bernauer and C. Betzold, 'Civil Society in Global Environmental Governance' (2012) 21 *The Journal of Environment and Development* 62–66; N. Berny and C. Rootes, 'Environmental Politics Environmental NGOs at a Crossroads?' (2018) 7 *Environmental Politics* 947–972.

showed here how too favourable a reading of NGOs as vehicles for commoning and environmental democracy may be overly simplistic. As Swyngedouw has pointed out, NGOs have a Janus-face:[12] on the one hand, they contribute to the empowerment of the public and nature, democratising environmental decision-making; on the other hand, they may contribute to the democratic deficit. This is because only certain, bigger and well-resourced NGOs end up emerging and consolidating their position, excluding other actors. The exercise of procedural rights guaranteed by the Aarhus Convention as well as by administrative law at the national level may be only a theoretical possibility for smaller, under-funded NGOs. This may in turn legitimise existing power relations rather than facilitate a move towards democratisation of environmental decision-making.

The expansion of NGOs in environmental decision-making is not socially neutral, and NGOs are far from representing the public interest in the environment, but they represent a particular view of the public interest, especially single-issue campaigning groups. As Lee and Abbott wrote a long time ago, even if there are powerful and legitimate incentives to empower NGOs, we must not mistake their involvement for improved democracy.[13] Moreover, the democratic deficit is evident in the lack of formal accountability of NGOs. Although a key role of NGOs is holding the government to account, their own accountability is more open to question. Given that many environmental NGOs receive funding from private parties and enter into strategic partnerships with corporations, the transparency and accountability of their operation become opaque.

The question of accountability is also a question of accountable to whom. NGOs can be deemed to be accountable to many constituencies: donors for carrying out a particular project, staff and members, scientific communities when working in partnerships but, given the lack of formal accountability lines, they may direct their accountability structures towards powerful stakeholders, rather than members from the public.[14] This is possibly more acutely the case of NGOs operating in the global South, where cooperative games between NGOs and states and corporations often take place. By receiving funding from states in the global North, turning big and siding with powerful interests, NGOs operating in the global South may distance themselves from local communities and participate in what has been called 'green grabbing'.[15]

[12] Swyngedouw, 'Governance Innovation and the Citizen'.

[13] Lee and Abbott, 'The Usual Suspects', p. 108.

[14] Jepson, 'Governance and Accountability of Environmental NGOs', p. 521.

[15] C. Corson and K. I. MacDonald, 'Enclosing the Global Commons: The Convention on Biological Diversity and Green Grabbing' (2012) 39 *The Journal of Peasant Studies* 263–283; A. Escobar, 'Whose Knowledge, Whose Nature? Biodiversity Conservation, and the Political Ecology of Social Movements' (1998) 5 *Journal of Political Ecology* 53–82; J. Fairhead, M. Leach and I. Scoones, 'Green Grabbing: A New Appropriation of Nature?' (2012) 39 *The Journal of Peasant Studies* 237–261; J. Igoe and D. Brockington, 'Neoliberal Conservation: A Brief Introduction' (2007) 5 *Conservation and Society* 432–449; C. Corson, 'Shifting Environmental Governance in a Neoliberal World: US AID for Conservation' (2010) 42 *Antipode* 576–602.

Although this issue is less relevant for NGOs concerned with marine conservation in the global North, nevertheless, the portrayal of NGOs as participating in the commoning of environmental issues, highlighting the shortcomings of state regulation and offering alternatives to top-down models of conservation, risks being too naive.

Adopting a Gramscian view of civil society, the claim that environmental NGOs are autonomous actors, existing outside the periphery of the state, does not necessarily hold true. This is simply because civil society and state are mutually constitutive, rather than complete separate entities. Civil society is an arena in which hegemonic ideas concerning conservation are both reinforced and contested. Environmental NGOs as central civil society actors are not simply institutional vectors for democratic transformations, but, sometimes, they contribute to the reproduction of current hegemonic discourses regarding conservation. For example, much of the work of NGOs actively involved in marine conservation in the UK focuses on disclosing patterns of violations and legal non-compliance of sea-users or the state, rather than, let us say, questioning ontological assumptions at the basis of legal frameworks and envisaging alternatives to existing models of conservation. As an NGO representative put it, 'our role is to ensure that the laws are properly implemented and applied, and when not, there is a very compelling case in bringing legal action for non-compliance.'[16] Of course, much depends on the type and expertise of NGO as the example of the Dogger Bank demonstrated earlier, but arguably, marine conservation NGOs in England have been primarily preoccupied with making sure that conservation law is prioritised and properly implemented. Their critiques have been directed more at the poor implementation of conservation law by the government or local regulators than at the key concepts underpinning conservation law itself. As explained by the NGO representative just cited, the lack of environmental NGO advocacy for changing conservation laws is often based on pragmatic choice, as with the re-opening of these laws there is a significant concern that they will be watered down.[17]

However, regardless of the reasons, NGOs may rely quite heavily on scientific knowledge and on existing conservation law provisions and approaches, taking for granted certain concepts and targets set out in international or domestic law and policy. As Chapter 4 discussed, environmental NGOs had a key role in pushing for a revised approach to commercial fisheries in European Marine Sites, threatening legal action against the UK government for failure to comply with article 6 of the Habitats Directive in its management of fisheries. Again, NGOs have had an important role to play in the government announcements post-Brexit in relation to the introduction of byelaws in four offshore MPAs to mitigate impacts of damaging fisheries activities, using similar arguments to those for the revised approach. The examples shows that what the

[16] NGO representative n 2, online Interview May 2021. [17] Ibid.

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NGOs have been doing is pointing to the failure of the state to comply with EU legal standards, taken as a given by the NGOs. In this instance, as in many others, we see NGOs as opposed to the state not because they are disrupting existing frameworks of conservation but because they are operating as watchdogs of established legal frameworks. Critical scholars see the incremental institutionalisation of NGOs as problematic because it circumscribes the range of environmental issues deemed worthy of attention and risks excluding issues and perspectives that are more radical.[18] For such scholars, environmental NGO democratic potential is weakened by entering into partnerships with powerful actors and ideologies. An 'agonistic' approach to democracy, which emphasises, following Mouffe, the value of conflict in democracy,[19] is seen as more conducive to reclaiming alternative views, rejecting existing legal frameworks and state institutions to achieve profound transformation. Not dissimilarly, radical commoning scholars portray the struggle for the commons and democracy as a rejection of neoliberal capitalism and state law, which are seen as part of a controlling process inextricably linked to Western imperialism, victimising weaker actors and perspectives.[20] It seems that strategies for radical democracy must be adversarial and militant in character in order to be truly emancipatory.

However, it will be explained below that there are also cases in which environmental NGOs have questioned the hegemonic view of marine conservation, highlighting the limitations of existing management approaches, without embracing an agonistic approach and/or dismissing completely the existing legal frameworks. For example, research led by the Marine Conservation Society, in tandem with academics, proposes a move from a 'feature-based' towards a 'whole site approach' for effective MPAs management.[21] The 'whole site approach' is an innovative, comprehensive approach delivering ecosystem-based conservation across whole suites of habitats. Rather than focusing on individual features, the whole site approach better accounts for movement of species (e.g. crabs) associated with specific features (e.g. reefs or sandbanks) by ensuring their protection even when migrating temporarily outside the habitat feature. Besides, ecologically

[18] A. P. J. Mol, 'The Environmental Nation State in Decline' (2016) 25 *Environmental Politics* 48–68.

[19] C. Mouffe, 'Delibrative Democracy or Agonistic Pluralism' (2000) 72 *Political Science Series* 1–17; C. Mouffe, *On the Political* (Routledge, 2005). Mouffe moves beyond the search for consensus in democratic politics, and she urges to acknowledge the antagonism inherent in politics and claims that agonistic pluralism provides a better framework for expressing differences in democratic systems. Her position is in contrast with that of Habermas on deliberative democracy. See J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996, transl. by W. Rehg).

[20] U. Mattei and L. Nader. *Plunder: When the Rule of Law Is Illegal* (Blackwell, 2008); Federici, Re-enchanting the World.

[21] Solandt et al., 'Managing Marine Protected Areas in Europe: Moving from "Feature-Based" to "Whole-Site" Management of Sites', in J. Humphreys and R. Clark (eds.), *Marine Protected Areas: Science, Policy and Management* (Elsevier, 2019), pp. 157–182.

defining where a feature starts or stops is not always straightforward, for example it is not always clear where a biogenic structure is developed enough to be considered a reef. Thus, the whole site approach, by ensuring wider protection, permits a more precautionary strategy to habitats conservation. Interestingly, the approach advocated by the Marine Conservation Society does not require a complete re-writing of the legal framework but a different, more encompassing interpretation of broad scale feature protection for MCZs and of the 'site integrity' provision in the Habitats Regulations, allowing regulators to be ambitious within the existing legal parameters. The approach suggests a reframing of MPA management, exposing the weaknesses of accepted methods of conservation law and questioning its boundaries, thus proposing a counter-hegemonic discourse, following a more holistic interpretation of conservation law, which is also supported by case law from the CJEU. In the case of *Sweetman*, for instance, a more encompassing interpretation of site integrity was offered that can be used to reinforce the argument for the whole site approach.[22]

Another example of environmental NGOs pushing for alternative methods of conservation and, in doing so, enlarging the epistemic community is the work conducted by the Blue Marine Foundation in relation to Lyme Bay, an MPA in south-west England with reef habitats and pink sea fans of international conservation importance. The area became a de facto MPA when bottom-towed fishing gear was prohibited in 2008, and in 2011, a large part became a candidate SAC, with designation as the Lyme Bay and Torbay SAC in 2017. The banning of bottom-towed gear had the consequence of substantially increasing static gear fishing and, to manage changes, the Blue Marine Foundation set up the Lyme Bay Fisheries and Conservation Reserve Working Group in 2011 to provide a forum for discussion and develop a series of voluntary best practices management measures. Fishers adhere to a voluntary code of conduct on fishing and under the guidance of the Blue Marine Foundation, the Working Group has undertaken many initiatives towards sustainable fishing. The Blue Marine Foundation also established a Consultative Committee for Lyme Bay in 2013 bringing together fishers, regulators, local councils as well as scientists, with other organisations such as charities and fish merchants providing advice. The environmental NGO in this instance has been seminal in proposing a collaborative model of governance that put the fishers at the centre of management. Such a project supplements the management under statutory legislation, and although the group has not legal powers, it has promoted

[22] Para 39 of the *Sweetman* judgement reads as follows:
Consequently, it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54–56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.

discussions and initiatives, broadening interpretations and practices of conservation and offering a complementary avenue to top-down knowledge making and management.[23]

Both these examples show that environmental NGOs are not necessarily participating in the reproduction of the current conservation hegemonic practices and discourses but are in fact challenging existing approaches to conservation, proposing alternatives and pluralising knowledges. In this way, they are commoning marine conservation, deepening the possibilities for re-thinking the boundaries of conservation policy. This, however, does not result in an agonistic approach to the state or to science, but often is based on a creative interpretation of the law and on collaboration. Collaborative forms of governance can work and do not necessarily imply a depoliticisation and the silencing of expressions of dissent. Thus, in thinking about the democratisation of decision-making, it is important to not only to consider actors' strategies that directly attack key institutions and legal frameworks of conservation but also to consider ways in which alternative discourses and practices are put in a dialogue with more orthodox discourse and practices, it is to be hoped constructively, as democratic politics requires a commitment to engagement with pluralism and the encounter with the other.

Another example of this sort is the Start Point to Plymouth Sound and Eddystone SAC that lies in inshore Cornish waters. There, a partnership between MCS, Cornwall IFCA and the University of Exeter has been established to monitor the impacts of demersal trawl closures in the Eddystone Reef. If, historically, there had been conflict between the Marine Conservation Society and the Cornwall SFC over management measures in the area, the evolution of the SFC into a IFCA with an explicit requirement to consider fisheries and conservation measures has facilitated the current partnership and it is one of the few examples of UK MPAs where close monitoring takes place to test the ecological impact of closing an area to bottom-towed gear.[24] This last example offers a good way of introducing the second actor discussed in this chapter, the IFCAs. Evidently, IFCAs are institutions even more closely linked to the state than NGOs, but it will be argued that they can be considered, to a certain extent, commoning experiments with the capacity to contribute to the development of the democratisation of conservation regulation.

6.3 An Historical Contextualisation: Sea Fisheries Committees (SFCs)

As mentioned in Chapter 2, IFCAs have been established under Part 6 of the MCAA and been given responsibilities regarding fisheries and conservation between 0 and 6 nm. They became fully operational in 2011. IFCAs are an

[23] R. Singer and P. J. S. Jones, 'Lyme Bay Marine Protected Area: A Governance Analysis' (2021) 127 *Marine Policy* 103201. See also Blue Marine Foundation, 'Lyme Bay: Project Overview' at: www.lymebayreserve.co.uk/about/overview.php.

[24] Solandt et al., 'Revisiting UK Marine Protected Area Governance'.

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interesting example of statutory authorities that operate at the local level and rooted in local representation, displaying many characteristics of local communal management institutions proposed by commons scholarship.[25] Local management of inshore fisheries has a longer history than the IFCAs in England. Prior to the IFCAs, SFCs existed, which were established originally under the Sea Fisheries Regulation Act 1988, consolidated by the Sea Fisheries Regulation Act 1996. When initially established, the SFCs did not have any powers in relation to conservation matters. Their powers related exclusively to fisheries management and included the powers to make byelaws,[26] subject to confirmation by the Minister.[27] Byelaws could be made for various purposes including the restriction or prohibition of the fisheries for taking sea fish during specific periods, or using specific gears, for regulating fisheries for shellfish, etc.

The members of the SFCs were split in two: half were elected council members by the constituent local authorities and the other half comprised one person representing the national river authority and persons 'acquainted with the needs and opinions of the fishing interests' of that district, appointed by the Minister.[28] Fishing interests meant persons interested in fisheries as owners of fisheries or interests therein but were not to represent any sectorial fishing interests, though commercial fishers were the dominant appointees. Ministerial appointment, compared to appointment by or including fisheries organisations themselves, reduced the possibility for the Committees to be highly politicised and be subject to regulatory capture, though it was unpopular with fishers as considered to fall short of co-management principles.[29]

The Environment Act 1995 made a number of environmental amendments to the Sea Fisheries Act 1966.[30] The representative of the National Rivers Authority became a representative of the newly constituted Environment Agency, and together with persons acquainted with fishing interests, Committee's membership could include persons having knowledge of, or expertise in, marine environmental matters.[31] Powers to make byelaws to control fisheries were also extended to marine environmental purposes, which included conservation of flora and fauna dependent on, or associated with, a marine or coastal environment.[32] Prior to making such byelaws, the SFC was required to consult with the SNCB and it could appoint other marine

[25] Ostrom, Governing the Commons.
[26] Section 5 of the Sea Fisheries Regulation Act 1996.
[27] Section 7 of the Sea Fisheries Regulation Act 1996.
[28] Section 2 of the Sea Fisheries Regulation Act 1966.
[29] D. Symes and J. Phillipson, 'Inshore Fisheries Management in the UK: Sea Fisheries Committees and the Challenge of Marine Environmental Management' (1997) 21 *Marine Policy* 207–224.
[30] Section 102 of the Environment Act 1995.
[31] Section 102(2) of the Environment Act 1995. The section was repealed by the MCAA.
[32] Section 5A inserted by the Environment Act 1995.

environmental experts at its discretion.[33] Thus, the Environment Act 1995 was significant in bringing environmental concerns into fisheries management, locating part of the responsibility to conserve the marine environment in the hands of SFCs that, to date, had responsibilities concerning fishing only (except for the Devon and North Eastern SFC that had appointed members with conservation interests prior to the Environment Act 1995).[34] However, it should be noted that the byelaws for environmental reasons were confined only to the regulation of fishing activities, that is to cases in which fishing was likely to have an adverse environmental impact, keeping fisheries management central to the SFCs' duties.

It is only with the MCAA that a more substantial conservation turn in inshore management has been made, with the establishment of the IFCAs under Section 149, as explained below.

6.4 Part 6 of the MCAA and the IFCAs

There are ten IFCAs in England covering districts of various sizes and geographies, with different types and numbers of protected areas, structure of the fishing fleet, ports' size, etc. There is also an Association of the IFCAs, tasked with assisting IFCAs in their role and promoting them. Like their predecessors, the IFCAs have inshore fisheries management duties under Section 153 of the MCAA, but they have also explicit duties concerning the conservation of MCZs under Section 154. This is perhaps the most notable addition and change brought in by the MCAA on inshore fisheries management. Section 154 of the MCAA requires IFCAs to ensure that the conservation objectives of any MCZ in their district are furthered, and the performance of this duty cannot be affected by their parallel duty to ensure sustainable exploitation of sea fisheries activities, balancing social and economic interests with environmental ones, under Section 153(2) of the MCAA.

For the purpose of performing the fisheries and conservation duties imposed by Sections 153 and 154, IFCAs can make byelaws for their district that must be confirmed by the Secretary of State before having effect.[35] More specifically, byelaws can be made, inter alia, for permitting, monitoring of sea fisheries, for prohibiting or restricting the exploitation of sea fisheries resources and for requesting information from people involved in sea fisheries exploitation.[36]

[33] Section 5A(3)(a) of the Environment Act 1995.

[34] It should be noted also that domestic and EU conservation legislation had already imposed some environmental duties on the SFCs. More specifically, Section 1(1)(a) of the Sea Fisheries (Wildlife Conservation) Act 1992 imposed a duty on SFCs to have regard to the conservation of marine flora and fauna when exercising their functions and the Regulations transposing the Habitats and Birds Directives required regulatory authorities, including the SFCs, to exercise their function as to secure compliance with EU-derived conservation law.

[35] Section 155 of the MCAA. [36] Ibid.

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DEFRA issued guidance on the byelaw making powers of the IFCAs.[37] The guidance stresses that, in line with Better Regulation principles, byelaws should be a last resort when considering options for regulation, and indeed, there are many examples of voluntary codes of conduct introduced by the IFCAs to close areas to fishing, resolve conflicts between commercial and recreational fishers, etc.[38] Interestingly for the present purposes, the guidance includes the requirement for the MMO to act as a policy and legal advisor on the process of making IFCA byelaws and quality assure IFCA byelaws, before they are submitted to the Secretary of State for confirmation. The Secretary of State has also powers to amend or revoke byelaws if it is satisfied that any byelaw provision is unnecessary, inadequate or disproportionate.[39] These powers and duties do not apply in the case of emergency byelaws, which can be made by the IFCAs without confirmation by the Secretary of State if there is a urgent need to make a byelaw and the need to make it could not reasonably have been foreseen.[40] The IFCA must notify the Secretary of State within 24 hours of making the emergency byelaw.[41] Emergency byelaws can remain in force for a period not exceeding 12 months,[42] unless the Secretary of State gives written approval for their extension.[43]

Natural England has a duty to provide guidance and conservation advice on byelaws, and this also explains why a Natural England representative sits in each IFCA committee, as discussed below. But, as highlighted in Chapter 2, the regulators are not under an obligation to follow the SNCB advice, but merely to 'have regard to it' when deciding on management measures for MCZs. Other actors, including Natural England, fishers, other sea-users and any other with an interest in the marine environment, can provide evidence to IFCAs to improve the quality of IAs and can have their voice heard through consultations on byelaws and supporting IAs. These mechanisms render the decisions more democratically accountable both upwards due to the role of the MMO and the Secretary of State and downwards due to public consultation for draft byelaws and accompanying IAs that can also be subject to judicial review. The shortcomings identified in Chapter 3 in regard to IAs still apply but to a lesser extent because the level of knowledge is generally higher, hence with less necessity to rely on assumptions, rendering the documents more accurate. Accountability of IFCAs activities is also reinforced by the provisions in

[37] DEFRA, 'IFCA Byelaw Guidance: Guidance on the Byelaw Making Powers and General Offences under Part 6, Chapter 1, Section 155–164 of the Marine and Coastal Access Act (2011)', at: www.association-ifca.org.uk/Upload/About/ifca-byelaw-guidance.pdf.

[38] See DEFRA, 'Inshore Fisheries and Conservation Authorities: Conduct and Operation Report 2014–2018' (2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919059/ifca-conduct-operation-2014-2018.pdf.

[39] Section 159(1) of the MCAA.

[40] Sections 157(1) and (2) of the MCAA.

[41] Section 157(7) of the MCAA.

[42] Section 157(3)(b) of the MCAA.

[43] Section 157(4) of the MCAA.

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Section 183 of the MCAA, which requires a quadrennial report by the Secretary of State to Parliament on IFCA conduct and operations as well as provisions under Sections 177 and 178 of the MCAA which require each IFCA to make, respectively, an annual plan before the commencement of the financial year and an annual report at the end of the financial year.

The IFCAs are relatively independent from one another in their decision-making. On the one hand, this independence risks regulatory fragmentation as ecological boundaries do not often equate with administrative ones. Indeed, divergent byelaws between neighbouring IFCAs have been noted to adding complexity to the regulatory landscape and rendering it more difficult to navigate for fishers.[44] On the other hand, individual IFCAs' high degree of independence is positive in enabling them to be more attuned to local conditions and to use the legal tools at their disposal creatively, going beyond the minimum national requirements. For example, Devon and Severn IFCA requires an Inshore-Vessel Monitoring System (I-VMS) unit on all registered commercial fishing vessels between 6.99 and 15.25 metres with a valid Mobile Fishing Permit. This requirement has been introduced as a permit condition under the Mobile Fishing Permit Byelaw.[45] This is an important step to ensure better monitoring of smaller vessels as currently the national requirement is that only fishing vessels with an overall length of twelve metres are required to have VMS units fitted on board.[46] Another notable example is the Sussex IFCA Nearshore Trawling Byelaw banning trawling with bottom-towed fishing gear around the coast of West Sussex to allow for the recovery of kelp forests. Such a byelaw permits large-scale protection of kelp and dependent species, enhancing fisheries and sequestering carbon in a district where the number of MPAs is low, rendering difficult habitat protection through place-based conservation. There are many other examples, ranging from the effective use of emergency byelaws by the North Eastern IFCA to deal with high levels of nomadic scallop dredging over the years to Kent and Essex IFCA whelk fishery permit byelaw that enables flexible management, having been amended to respond to new whelk stock information.[47]

The IFCAs score high also in terms of participation as they have an inclusive and broad membership, escaping the narrower commercial fisheries interest that was found predominant in the SFCs.[48] Besides, none of the IFCAs members are selected by existing IFCAs members, rendering selection more

[44] DEFRA, 'IFCA Conduct and Operation Report 2014–2018', p. 3.

[45] Devon and Severn IFCA Mobile Fishing Permit Byelaw, The Permit Conditions (Category 1 – At Sea), Section 2.5.

[46] For the rationale behind the decision, see Devon and Severn IFCA, 'Mobile Fishing Permit Byelaw: Development Report for Additional Changes to Permit Conditions' (2nd ed., 2017) at: https://secure.toolkitfiles.co.uk/clients/15340/sitedata/byep/consultation_/2nd-edit-Mob-fish-permit-devel-Sept-2017.pdf.

[47] DEFRA, 'IFCA Conduct and Operation Report 2014–2018', p. 43.

[48] J. Eagle, *Democracy and Natural Resources: British and American Approaches to Public Participation in Fisheries Management* (British Council, 2004) cited by T. Appleby and P. J. S. Jones, 'The Marine and Coastal Access Act', p. 75.

legitimate and less prone to regulatory capture. The number and members of individual IFCAs are described in Statutory Instruments that established the authority, so there are variations from district to district depending on the local environmental, social and economic circumstances. For all IFCAs, though, members include local councillors, persons appointed by the MMO and statutory members, comprising one representative from the Environment Agency, one from Natural England and one from the MMO. The Isle of Scilly is the only IFCA without a representative from the Environment Agency, for obvious reasons.

Having democratically appointed councillors on the IFCA committee is a powerful route for local accountability, enabling local interests to be represented. Having said so, the risk of councillors privileging their own political interests and displaying bias exists, as found in relation to the SFCs by Eagle,[49] where local councillors were primarily defending local commercial fisheries interests. Similarly, during an interview with an environmental NGO, I was told of a strong opposition towards an European Marine Site by an IFCA councillor because it had the word Europe in its title and the councillor was anti-European and needed to represent a far-right anti-European political party[50]. More generally, the second quadrennial report on the IFCAs found that, in certain IFCAs, councillors were viewed as being more concerned with the financial implications that IFCA work was presenting to their funding authorities than with marine policy and some conflict of interest existed. As Appleby and Jones discuss, bias is unconstitutional and incapacitates public ownership of marine resources.[51] At the same time, it would be idealistic to think that pure technical decision-making can exist in any setting. Although political considerations and bias cannot be removed, councillors are roughly one-third of the members on the IFCAs committee and the democratic voting system in place reduces the possibility for particular biases to prevail.

The figure of MMO appointees is also very interesting from a democratic perspective. They are members of the public who must be acquainted with the needs and opinions of the fishing community of the district and have knowledge of, or expertise in, marine environmental matters.[52] The term 'fishing communities' is broadly defined comprising 'all persons with any sort of interest in the exploitation of sea fisheries resources or in fisheries for such resources'. Similarly broad is the definition of 'marine environmental matters', meaning either the conservation or enhancement of natural beauty or amenity of marine or coastal areas, or the conservation of flora or fauna of marine or coastal environment.[53] Balancing conservation and fisheries interests is at the core of the MMO appointees as the terms and conditions for MMO appointees stress that:

[49] Ibid. [50] NGO representative n 1, online Interview May 2021.
[51] Appleby and Jones, 'The Marine and Coastal Access Act'.
[52] Section 151(2) of the MCAA. [53] Section 151(8) of the MCAA.

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> Appointees to IFCAs are legally required to take into account all the local fishing and marine conservation interests in the waters of the IFCA district, in a balanced way, taking full account of all the economic, social and environmental needs of that district. Appointees should recognise that they are part of a committee and should not regard themselves as representing solely one particular interest within the IFCA district.[54]

This is of course in line with the government's vision for the IFCA, which is that they will 'lead, champion and manage a sustainable marine environment and inshore fisheries, by successfully securing the right balance between social, environmental and economic benefits to ensure healthy seas, sustainable fisheries and a viable industry'.[55]

The opportunity for any person with fisheries and conservation local knowledge to apply to becoming an MMO appointee aligns well with a pragmatic view of democracy in the Deweyan sense. Indeed, as Dewey points out, the public is not preformed but emerges around a particular problem to identify solutions.[56] The public interest that democratic systems should take into account is not a given but it is a contextual, specific occurrence emerging out of a specific problem. The task for democracy is then to ensure that the various emerging perspectives around an issue to be solved are well integrated in the decision-making. The public concerned is not always a pre-existing category of people, such as an environmental NGO with an established mandate to conserve the oceans, but it is an assembly of people called into being by being affected by a particular problem and spontaneously deciding to identify as concerned parties. As MMO appointees self-nominate to become part of the IFCA committee, they are a Deweyan public and an embodiment of a pragmatic view of democracy. By becoming MMO appointees, people are given opportunities to participate in collective action and environmental democracy that go beyond their role as voters, contributing to commoning practices. As Bollier writes, 'the real significance of commoning may be that is not ultimately about a fixed philosophical vision or policy agenda, but about engaged action in building successful commons.'[57]

To sum up, the IFCAs are locally accountable public decision-making bodies, they have a unique structure and their duties and powers span conservation to fisheries management, providing a basis for commoning, being rooted in local representation and knowledge. This view is also shared by the IFCA members themselves. An empirical study consisting of interviews with IFCA

[54] MMO, 'Appointment as an IFCA General Member Terms and Conditions' (2016), para 4, at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/637592/IFCA_General_Member_Terms_and_Conditions__updated_April_2016.pdf.

[55] Defra guidance to the IFCAs at: www.association-ifca.org.uk/about-us/defra-guidance-to-the-ifcas.

[56] J. Dewey, *The Public and Its problems* (Holt and Company, 1927).

[57] D. Bollier, 'Commoning as a Transformative Social Paradigm' (2018), p. 4 at: https://thenextsystem.org/node/187.

members found that the members themselves, on the whole, regard the IFCAs as a locus for democratic decision-making and inclusivity.[58] In this sense, IFCAs seem to fall into the category of the small scale, local, autonomous self-governing institutions that have been praised in the commons literature for supporting collective action and ensuring the sustainable governance of common-pool resources.[59] The emerging publics embodied in MMO appointees also confer on the IFCAs a dynamic quality and point to the commoning qualities of the IFCAs in the sense that they are not made up of fixed pre-given identities but that, through their membership, they take a problem-solving approach through joint action. Such evolving local management and democratic set up can facilitate ownership of decision-making and establish a basis for local environmental justice. It is not surprising then that in my various interviews with both local and national regulators over the years, SNCBs and NGOs, the IFCA model has always been celebrated.[60]

However, the picture is more complicated than this. As already explained, although the IFCAs have wide-ranging decision-making powers, they are not self-governing, having specific statutory duties they are required to fulfil and being subject to the MMO's supervisory functions and Secretary of State's bye-law confirmation, suspension and revocation powers. Secondly, as mentioned in relation to councillors, it is possible that political bias 'contaminates' decision-making. More generally, ensuring a balanced membership has always been regarded as a challenge. MMO appointees do not always reflect the full spectrum of interests in the marine environment, with some IFCAs left with an unbalanced membership, such as overrepresentation of commercial fisheries and an underrepresentation of recreational interests, or an overrepresentation of fishers from some geographical areas of the district compared to others. This is a recurrent problem identified in both the first[61] and second Secretary of State's quadrennial reports to Parliament on IFCAs conduct and operation, with the second report concluding with a recommendation to 'ensure Committee representation is balanced across all fisheries sectors, members are trained in local government procedures and they are clear on their roles, responsibilities and Code of Conduct, especially declaring conflicts of interest'.[62]

Moreover, although the expansion of IFCAs' conservation powers and duties with Section 154 of the MCAA is a welcome addition, it also creates tensions that IFCAs are required to manage. These include tensions between

[58] J. Lowther and L. D. Rodwell, 'IFCAs: Stakeholder Perception of Roles, and Legal Impact' (2013) 15 *Environmental Law Review* 11–26.

[59] Ostrom, 'Governing the Commons'.

[60] Face-to-face interviews carried as part of ESRC project (ES/K001043/1) between 2013 and 2015 in case study areas in the South-East and South-West England; elite interviews carried out with national representatives in May 2021.

[61] DEFRA, 'Inshore Fisheries and Conservation Authorities Conduct and Operation 2010–2014' (DEFRA, 2015) at: www.association-ifca.org.uk/Upload/About/ifca-review-2010-2014.pdf.

[62] DEFRA, 'IFCA Conduct and Operation 2014–2018', p. 76.

local fishery priorities and centralised conservation goals as well as between so-called traditional ecological knowledge and scientific knowledge. As expressed by an Association of the IFCAs representative:

> conservation and fisheries, conceptually, they support one another but the policy origin of the MPAs designation process has been to achieve national level objectives but other rational interventions around fishers management locally have been more difficult because of stakeholders feeling of being put on the side by the focus on conservation […] that has caused a big tension particularly in certain sectors of the fleet, such as the mobile gear sector inshore feels that their interest have not been well served by the IFCAs as we have restricted their access in many areas.[63]

The process of designating MCZs, coupled with the new duties on the IFCAs since 2014 arising out of the revised approach to commercial fisheries management in European Marine Sites, discussed in Chapter 4, has meant that the IFCAs have been under much pressure and that much of their funding, already not particularly substantial, has been diverted to other fisheries management measures. Such scalar conflict, between local fisheries' needs and global environmental objectives, resonates with the distinction made in Chapter 1 of this book between MPAs as new commons and MPAs an enclosure depending on whether the point of view is that of global conservation or local sea-users. What is interesting in this specific case is that it is the same institution that needs to navigate such conflict, it is within the same institution that such conflict arises, making regulatory decisions complex. To a certain extent, the conflict is tamed by the transparency, openness and democratic character of the decision-making procedure, but, nevertheless, it is one that is ever present.

Relatedly, the other tension regards the relationship between systems of knowledge at play in IFCAs decision-making. On the one hand, there is, on the ground, pragmatic knowledge of local sea-users generated through practical experience and, on the other hand, the more technocratic approach to conservation informed by scientific principles. The ability to reconcile these forms of knowledges is a complex and inherent issue in most environmental regulation and one that has preoccupied environmental social scientists for a very long time.[64] The IFCAs draw extensively on SNCB advice to decide on management measures for MPAs in their district, while also listening to local sea-users' ecological knowledge, which sometimes conflicts with scientific knowledge. The Association of the IFCAs representative I interviewed discussed the protection of *Salmonidae* as an example, stating that the Environment Agency conservation advice is that coastal netting should be banned to protect salmon but long-standing IFCA members participating in these fisheries argue that in over thirty years of fishing in the area, they only caught few salmon, so it seems that

[63] Association for the IFCAs representative, online Interview, May 2021.
[64] See for example, Berkes, Sacred Ecology; Wynne, 'Should the Sheep Safely Graze?'

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fishing is the smallest threat to the feature. According to an Association of the IFCA representative, 'the IFCA model does allow that challenge and that goes both ways: conserve more and be more proportionate, so there is the system of sense checking in decision-making process.'[65] Difficult relationships between different epistemologies have already been discussed in Chapter 5, but what is different here, and arguably more positive, is that compared to the process of designation of MCZs, fishers' ecological knowledge is not neglected but internalised as part of decision-making. The fact that IFCA members are conceptualised as more than stakeholders is also facilitated by the law and policy itself. For example, as explained earlier, Section 151(2) defines MMO appointees as people with fisheries and environmental knowledge and the terms and conditions again stress that MMO appointees should not represent only one particular interest, balancing the economic, social and environmental needs of that district.

6.5 Conclusion: Reflections on Institutions, Commoning and Environmental Democracy

This chapter has tackled the question of environmental democracy in relation to MPA regulation from an institutional perspective. Two actors have been identified as conducive to democratisation and commoning of MPA regulation: environmental NGOs and IFCAs. The purpose of the chapter has not been to provide a comparison between the two very diverse institutions but to show that, despite their ties, albeit different, to the state and conservation law, they are contributing to the commoning of MPA regulation. Firstly, the institutionalisation of NGOs has been considered, observing that much of the work of environmental NGOs in relation to marine conservation is not to disrupt and attack state law, but it is actually to re-imagine the boundaries of established legal concepts, such as site integrity under the Habitats Regulations, to push for novel approaches to conservation as well as to collaborate with state institutions and other actors when promoting different management approaches to conservation. This point is significant because it refines the findings of certain radical NGOs and commonning scholarship, showing that the analytical dichotomy between domination and resistance is too simplistic to capture exhaustively what is involved in these relationships, that state law is not necessarily always tied to state domination and power and that NGO collaborations with other actors and creative engagement with the law do not necessarily imply subscribing to a hegemonic paradigm. Concisely, democracy does not have to be necessarily an agonistic practice.

The collaborative aspect at the basis of democracy has also been highlighted in the discussion of the IFCAs. The inclusive membership of the IFCAs shows

[65] Association of the IFCA, online Interview, May 2021.

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that MPAs regulation is not solely a choice of conservation technocrats or is dictated by economic priorities. Moreover, the fact that MMO appointees are legally required to consider both conservation and fisheries interest and must not represent a single stake shows that IFCAs call for a deliberative form of democracy, where individual interests are to be transcended through dialogue, moving beyond an understanding of democracy as a trade-off between different, pre-given stakes. Besides, the self-nomination aspect of MMO appointees adds to deliberation an element of pragmatism, as MMO appointees are an emergent public in the Deweyan sense.[66] Although tensions and challenges exist, the relational view of conservation and fisheries championed by IFCAs and the wide and inclusive membership is an important step in the building of environmental democracy.

[66] Dewey, *The Public and Its Problems*.

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