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Innehåll/Content

Gabriel Michanek: **Introduction** … 5

Lia Helena Monteiro de Lima Demange: **The Principle of Resilience: Concept and Foundation** … 7

Ingela Lindqvist: **Privilegiebrev och urminnes hävd – Vilken ställning har de enligt miljöbalken?** … 39

Hans Morten Haugen: **What Role for Human Rights in Clean Development Mechanism, REDD+ and Green Climate Fund Projects?** … 51

Liz-Helen Løchen: **Norges første marine nasjonalpark – gir den det ønskede vern?** … 71

Carmen Butler och Jennie Wiederholm: **Ett nytt energieffektiviseringsdirektiv i EU – Vad betyder det för svensk lagstiftning?** … 87

Introduction

Gabriel Michanek, editor

The eighth issue of Nordic Environmental Law Journal includes five articles. The first – *The Principle of Resilience: Concept and Foundation* – is written by Lia Helena Monteiro de Lima Demange. She concludes that the principle of resilience is aimed at providing moral and ecological foundation for sustainable development and a green economy; to require judges, administrators and operators of law to consider the long-term consequences of their actions on nature and on future generations, thereby achieving better conservation patterns on a case by case basis; to enlighten legislators on how domestic environmental legislation can be improved; to impose an individual and societal moral obligation to respect and improve nature, and to live in harmony with it. The article proposes a legal framework for implementation of the principle in domestic and international environmental law.

Ingela Lindqvist is the author of the second article: *Privilegiebrev och urminnes hävd – Vilken ställning har de enligt miljöbalken?* Only a few of the Swedish water operations, inter alia hydropower installations, have been subject to a permit procedure under the 1999 Environmental Code. In fact, a significant number of the water operations today rely upon very old water rights, e.g. immemorial prescription. Lindqvist analyses the significance of these older rights in relation to permit obligations and modern environmental protection requirements under the Environmental Code. The topic is of significant importance not least in relation to the implementation of the EU Water Framework Directive.

The third article is named *What Role for Human Rights in Clean Development Mechanism, REDD+ and Green Climate Fund Projects?* Hans Morten Haugen analyzes whether and how human rights are integrated in the approval of projects under the Clean Development Mechanism (CDM), REDD+ (United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries) and projects funded by the Green Climate Fund and other adaptation mechanisms under the UN Framework Convention on Climate Change.

In the paper *Norges første marine nasjonalpark – gir den det ønskede vern?*, Liz-Helen Løchen asks if Ytre Hvaler nasjonalpark is in compliance with the Norwegian Nature Management Act of 19 June 2009 no. 100 and fulfils the regulation that

creates the protected area. Furthermore, the author examines if there is compliance between law, regulation and practice, especially in situations where the decisions of the authority may directly affect the unique nature of the national park. These aspects are of great interest, especially since the challenges and conflicts one may meet for marine protected areas may be quite different from the ones met for terrestrial habitats and protected areas.

Finally, Carmen Butler and Jennie Wiederholm analyses the new EU energy efficiency directive 2012/27/EU. In the article *Ett nytt energieffektiviseringsdirektiv i EU – Vad betyder det för svensk lagstiftning?*, the new directive is compared with its predecessor, directive 2006/32/EC, which was intended to be a starting point for increasingly ambitious and specific policy towards energy savings in the EU. The central question in the article is how Sweden has transposed the 2006 directive to achieve the levels of energy savings envisioned, and how well Sweden is positioned to meet the provisions of the directive from 2012. The article provides a technical analysis of Sweden's legislative achievements with respect to the public sector and energy companies.

The Principle of Resilience: Concept and Foundation

Lia Helena Monteiro de Lima Demange[1]

Abstract

This article departs from the observation of accentuated degradation of ecosystems worldwide to stress the urgency in changing the patterns of occupation of the land, production, consumption and the ecological and ethical goals of environmental conservation. Aiming to achieve these ends, this article proposes the acknowledgement of the principle of resilience in international environmental law. The principle of resilience is articulated herein based on the concept of ecological resilience; the values of *land ethic*; and the existing principles of international environmental law. Later, the article explains how the principle can be applied to environmental impact assessment. The article concludes that the principle of resilience is aimed at providing moral and ecological foundation for sustainable development and a green economy; to require judges, administrators and operators of law to consider the long-term consequences of their actions on nature and on future generations, thereby achieving better conservation patterns on a case by case basis; to enlighten legislators on how domestic environmental legislation can be improved; to impose an individual and societal moral obligation to respect and improve nature, and to live in harmony with it. Finally, the article proposes a legal framework for implementation of the principle in domestic and international environmental law.

I. Introduction

Since humankind started to get concerned about the degradation of nature, we focused our attention on the preservation of specific species of fauna and flora that, for whatever reason, inspired our attraction. Environmental laws also focused on the preservation of landscapes that distinguished themselves by their exceptional beauty, by their importance, or because they were the remains of an almost extinct ecosystem or the habitat of some almost extinct species.[2] By those means, humankind thought that, by preserving at least samples of each ecosystem and its inhabitant species, they were conserving biodiversity. However, those samples continued to suffer degradation, despite the efforts to guarantee stability and to keep their original state. By studying the causes of this phenomenon, ecologists concluded that ecosystems preserved in only a few restricted areas were collapsing because they were too vulnerable to disturbances. They noticed that this increase in vulnerability has been occurring since human occupation of land around the world increased in extension and intensity, as a result of the expansion of industrialization.

But why did ecosystems get more vulnerable? Because, by preserving ecosystems in tight geographical limits, by eradicating species, by polluting the environment, and by changing environmental features humankind has reduced

[1] Master of Laws in Environmental Law, Pace Law School, United States. Law Degree – JD equivalent, Law School at the University of São Paulo, Brazil. This article was originally published in 30 Pace Envtl. Law Rev. 2013.

[2] In the United States, the preservation of specific ecosystems due to the presence of almost extinct species started in 1972, when the Endangered Species Act was enacted.

ecosystem resilience[3], which is understood as the capacity of an ecosystem to absorb disturbance and persist. The increased vulnerability of ecosystems causes them to suffer unpredictable changes, and, depending on the intensity of the alteration suffered by an ecosystem, those changes may turn out to be irreversible.

The concept of ecosystem resilience has been giving rise to much discussion because, if ecosystems are currently vulnerable, how are they going to resist disturbances such as climate change and the rise in sea level? Considering that ecosystems will be seriously damaged[4] and that human inaction will only exacerbate such negative impacts, discussions on what should be done to restore ecosystem resilience and to avoid dreadful consequences started to emerge.

Scientists concluded that, in order to restore ecosystem resilience, it is not enough to preserve the ecosystem in limited tracts of land: it is necessary to preserve the *ecosystem functions*, that is, the few natural mechanisms that continuously occur within an ecosystem and that are responsible for maintaining the subsistence of its inhabitant species and the function of the ecosystem as a whole.

The enhancement of ecosystem resilience requires the conservation of biodiversity[5] and the preservation of ecosystems everywhere[6].
The specialized literature states that the objective of preserving nature everywhere[7] could be enforced by conservation institutions that apply adaptive governance and adaptive management techniques in order to respond more effectively to the changing needs of ecosystems' management.

Adaptive governance enhances an institution's capability to deal flexibly with new situations, thus preparing managers for uncertainty and surprise[8]. Adaptive management is the process of learning from experience by monitoring ecosystem responses to actions taken by institutions that manage ecosystems[9].

Although adaptive governance and adaptive management can be useful tools to address resilience, they are not sufficient. The achievement of resilience requires a substantial change in the way humankind relates to nature because humans are not used to compromise their activities according to the capacity of the ecosystem to support them. Humankind is used to dominate, not to coexist with, nature. The inversion of this setting cannot possibly be achieved by a simple change in management methodology: it requires a change of values.

According to Aldo Leopold, nature conservation should start by understanding nature and by setting the values we want conservation to have[10]. As the Law expresses, systematizes and implements the values of organized societies, it has a role to play in associating the concept of ecological resilience with ethical values for conservation, and applying these values to regulate activities that impact nature, in such a way as to reduce their negative effects on the environment.

The principle of resilience developed here is envisioned as one alternative to current practices, which has proven to be ineffective to fulfill

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[3] Carl Folke et al., *Regime Shifts, Resilience, and Biodiversity in Ecosystem Management*, *in* Foundations of Ecological Resilience 119, 142 (Lance H. Gunderson et al. eds., 2009).

[4] *See* Will Steffen et al., Global Change and the Earth System: A Planet Under Pressure (2004).

[5] Carl Folke et al., *Biological Diversity, Ecosystems, and the Human Scale, in* Foundations of Ecological Resilience, *supra* note 3, at 151, 154–158.

[6] Folke et al., *supra* note 3, at 160; Aldo Leopold, A Sand County Almanac 190–94 (Ballantine Books 1970) (1949).

[7] Folke et al, *supra* note 3, at 160.

[8] Carl Folke et al., *Adaptive Governance of Social-Ecological Systems*, 30 Ann. Rev. Env't & Resources 441, 447 (2005).

[9] Barbara Cosens, *Transboundary River Governance in the Face of Uncertainty*, 30 J. Land Resources & Envtl. L. 229, 238 (2010).

[10] Leopold, *supra* note 6, at 210.

the environmental quality targets set in the last 40 years[11].

The concept of ecosystem resilience may be a new opportunity to achieve sustainability – which has been pursued without great success since 1987, when the Brundtland Commission popularized the term and the definition of "sustainable development"[12].

The "Rio+20 World Environmental Jurists Event" highlighted the importance of environmental law principles, as the mere creation and implementation of well-designed environmental instruments and institutions – that are not guided by legal principles – has proved to be insufficient to change business as usual. In this context, the principle of resilience was mentioned among the set of environmental law principles underlying practices contributing to the enhancement of environmental quality[13]. The discussion on how the law can enforce new values of conservation is expected to continue after Rio+20, influencing domestic law-making and decision-making in public and private institutions alike.

This work seeks to develop the role law could play in contributing to the achievement of ecosystem resilience. Therefore, adopting Aldo Leopold's view of conservation, by which the first step should be to understand nature, this article will begin with a brief explanation of the ecological background to the concept of ecosystem resilience. Next, the article will consider Aldo Leopold's land ethic in order to discuss the values we should look for when implementing conservation for resilience. Regarding those values and concepts, the article consolidates and contextualizes the legal principle.

This work undertakes a more detailed analysis of how the principle of resilience can be developed, presenting its foundations and suggesting ways of applying it to Environmental Impact Assessment.

II. Ecological Concept of Ecosystem Resilience

Resilience is the capacity of a system to absorb disturbance, to reorganize itself, and persist.[14] A system is resilient when, even under impacts, it is able to retain essentially the same initial conditions, tending towards a state of equilibrium. This stable state of a system is called the "basin of attraction,"[15] "domain of attraction," or "stability domain."[16]

Ecological systems have more than one stable state or basin of attraction.[17] The group of basins of attraction related to the same ecosystem is called the "stability landscape."[18] When the ecosystem is already vulnerable to disruptions, and therefore less resilient, and those disruptions force the ecosystem towards the boundaries of its current basin of attraction, the ecosystem may cross a threshold, after which the ecosystem will

[11] "Rio+20 needs to review 40 years of unfulfilled commitments and explore genuine alternatives to current practices" (quoting IUCN President Ashok Khosla). Keith Ripley et al., *Summary of the Nineteenth Session of the Commission on Sustainable Development*, 5 Earth Negotiations Bull. 1 (2011), *available at* http://www.iisd.ca/vol05/enb05304e.html.

[12] U.N. World Comm'n on Env't & Dev., *Our Common Future*, U.N. Doc. A/42/427 (Aug. 4, 1987) [hereinafter *Our Common Future*].

[13] *Lia Demange*, Messages from World Environmental Jurists, GreenLaw, available at *http://greenlaw.blogs.law.pace.edu/2012/06/20/lia-demange-messages-from-world-environmental-jurists/ (last visited Mar. 6, 2013).*

[14] Folke et al., *supra* note 3, at 121.

[15] Brian Walker et al., *Resilience, Adaptability and Transformability in Social-Ecological Systems*, 9 Ecology & Soc'y (2004), *available at* http://www.ecologyandsociety.org/vol9/iss2/art5/.

[16] Folke et al., *supra* note 3, at 119, 121.

[17] Walker et al., *supra* note 15; Craig R. Allen et al., *Commentary on Part One Articles*, *in* Foundations of Ecological Resilience, *supra* note 3, at 3, 4.

[18] Walker et al., *supra* note 15.

present a new basin of attraction.[19] When the ecosystem changes from one basin of attraction to another, or when the ecosystem moves towards the edge of one basin of attraction, it is understood that a "change in the stability landscape" has occurred.[20]

In the case of change in the stability landscape, the resilience of the system can be considered the amount of disturbance the system can absorb before shifting into a different configuration, in other words, shifting to a new stability domain.[21]

Instead of moving to another basin of attraction, the ecosystem can also remain in a dynamic disequilibrium in which there is no global equilibrium condition and the system moves in a catastrophic manner between stability domains.[22]

Some basins of attraction are more desirable than others and, in view of this, human actors may be willing to influence the ecosystem's movement from one basin to another by reinforcing the resilience of the desirable ones–and thus preventing the ecosystem from reaching the threshold of change–or by reducing the resilience of the undesirable basin of attraction. This collective capacity of the human actors in the system to manage resilience is called "adaptability."[23] There are some circumstances in which the ecosystem will not be able to return to a basin of attraction, even with aid from human interference. These cases of *irreversibility* of the ecosystem status may occur because of changes in the composition of soil or air.[24]

Human management of natural elements is traditionally directed towards the maintenance of the ecosystem's stability.[25] This view of human interactions with the natural world focuses on equilibrium states, on "maintaining a degree of constancy by reducing natural variability."[26]

The relationship between stability and resilience represents the natural cycle of any ecosystem: the movement from a stage of slow accumulation of natural capital (stability) towards sudden changes, and releases and reorganization of that released capital (resilience).[27] Like two sides of a coin, both stability and resilience are essential to maintain the ecosystem. Besides providing the accumulation of capital, stability allows the different elements of the ecosystem (i.e. species of fauna and flora) to enhance their organization and connectedness. On the other hand, resilience reduces the connectedness and organization of the elements of the ecosystem and releases the stored capital, thereby providing opportunities for change, whereby species can reorganize themselves and find new connections among each other, resulting in the evolution of the ecosystem as a whole.

The dynamics of ecosystem organization are very similar to the dynamics of technological development, as pointed out by Brooks, "as a particular technology matures, it tends to become more homogenous and less innovative and adaptive. Its very success tends to freeze it into a mold dictated by the fear of departing from a successful formula …"[28] The sudden change that

[19] C. S. Holling, *Resilience and Stability of Ecological Systems*, *in* Foundations of Ecological Resilience, *supra* note 3, at 19, 29, 30.
[20] Walker et al., *supra* note 15.
[21] Lance H. Gunderson et al., *The Evolution of an Idea – the Past, Present, and Future of Ecological Resilience*, *in* Foundations of Ecological Resilience, *supra* note 3, at 423, 425.
[22] C. S. Holling, *The Resilience of Terrestrial Ecosystems*, *in* Foundations of Ecological Resilience, *supra* note 3, at 67, 92.
[23] Walker et al., *supra* note 15.
[24] C. S. Holling, *Engineering Resilience versus Ecological Resilience*, *in* Foundations of Ecological Resilience, *supra* note 3, at 58; Folke et al., *supra* note 3, at 51, 132.
[25] Holling calls this tendency "engineering resilience." Holling, *supra* note 24.
[26] Allen et al., *supra* note 17, at 3.
[27] Holling, *supra* note 24, at 52.
[28] Holling, *supra* note 22, at 105.

occurs during resilience stimulates the ecosystem to "break the inertia" and to innovate.

As the interchanges between stability and resilience play such an important role in the maintenance of ecosystems, human management of ecosystems, which tends towards the abolition of disturbances, is greatly disadvantageous. By trying to avoid disruptions such as floods or fires, humans contribute to the construction of more vulnerable ecosystems, which are expected to suffer even greater crisis after longer periods of time. Holling mentions an enlightening example about the fire-combat in national parks in the United States.[29] According to him, the "suppression of forest fire has been remarkably successful in reducing the probability of fire (…) but the consequence has been the accumulation of fuel to produce fires of an extent and cost never experienced before."[30]

Along the same line of reasoning, it is also recognized by Leopold that human control over the health of the land has not been successful.[31] Leopold understands *land* as the community that includes soil, water, plants, and animals,[32] and *health* as the capacity of the land for internal self-renewal;[33] therefore, very similar to the current meaning of *resilience*. According to Leopold, the land is sick when soil loses its fertility, or washes away faster than it forms, and when water systems exhibit abnormal floods and shortages.[34] The disappearance of plants and animal species without visible cause despite efforts to protect them, and the irruption of others as pests despite efforts to control them[35] are symptoms of the illness of the land.

The loss of biodiversity is both a symptom and a cause of land sickness. Every ecosystem contains a few functions which are essential for the maintenance of the ecosystem's main characteristics. Those few functions are developed by a wide range of species. Therefore, each function is developed concomitantly by several species, and this is called *redundancy*.[36] Redundancy of function adds to the stability of systems because, even if the system loses one or a few species, it may keep functioning if at least one of the species responsible for that function remains. However, although the function remains and the ecosystem maintains its main characteristics, the ecosystem has lost resilience, because it is relying on one species only to develop that function. This phenomenon explains why the ecosystem keeps working although it is very vulnerable to disturbances. It also explains why an ecosystem that has survived the extinction of several species suddenly collapses when the last species developing a certain function becomes extinct.

The system also loses resilience by the loss of species because the range of possible connections among species is diminished as are the possible ways the system can reorganize after disturbance.[37] By presenting fewer possibilities to innovate, the system loses much of its capacity to adapt to changing circumstances.

Therefore, it is possible to conclude that humans reduce ecosystem resilience by removing whole functional groups of species; by altering the magnitude, frequency, and duration of disturbance regimes to which the biota is adapted; and by polluting the environment, thereby changing the dynamics of climate and the composition of water, soil, and air.[38]

[29] *Id.* at 83.
[30] Id.
[31] Leopold, *supra* note 6, at 272.
[32] *Id.* at 239.
[33] *Id.* at 258.
[34] *Id.* at 272.
[35] *Id.* at 273.

[36] Allen et al., *supra* note 17, at 14, 15.
[37] Garry Peterson et al., *Ecological Resilience, Biodiversity, and Scale*, *in* Foundations of Ecological Resilience, *supra* note 3, at 167, 187.
[38] Folke et al., *supra* note 3, at 142.

However, just as human actors can interfere in ecosystems and reduce their resilience, in the same way they can contribute to the preservation of resilience by adopting a conservationist approach towards nature. According to Leopold, *conservation*

> is a state of harmony between men and land (…) Harmony with the land is like harmony with a friend; you cannot cherish his right hand and chop off his left. (…) The land is one organism. Its parts, like our own parts, compete with each other and co-operate with each other. (…) You can regulate them–cautiously–but not abolish them.[39]

Therefore, Leopold considers "the first principle of conservation" to be the preservation of all the parts of the land mechanism.[40] In this context, "parts of the land mechanism" may be interpreted as "functions of an ecosystem." As scientific evidence points out that those functions are assured by biodiversity, Folke, Holling, and Perrings affirm that the conservation of biodiversity cannot be restricted to limited protected areas; it should be addressed everywhere.[41] The authors explain that, although preserving biodiversity through nature reserves may be an important short-term step, it is not sufficient to solve the problem of biodiversity loss, because nature reserves are embedded in larger environments and species depend on the reserves' surrounding area to maintain themselves. According to Askins, "small reserves lose their distinctive species if they are surrounded by a hostile landscape."[42]

Ecologists highlight some measures they deem efficient for the preservation of ecosystems' resilience. Leopold considers that the first step towards preserving ecosystem resilience is the collection of data about how a healthy land maintains itself as an organism.[43] By having this base datum of normality, science may detect what is occurring otherwise which might provide the causes for such change.[44] The author points out some characteristics of healthy lands already abundantly proved by Paleontology: in healthy lands, wilderness maintains itself for immensely long periods; species are rarely lost; and soil is built by weather or water as fast as or faster than it is carried away to the sea.[45] The author also calls attention to the fact that each biotic province needs its own wilderness for comparative studies of used and unused land, as it is impossible to study the physiology of one landscape and apply those findings as a basis for comparison with the current status of a distinct landscape.[46]

Folke, Holling, and Perrings consider that, in order to conserve ecosystem resilience, it is necessary to identify the major social and economic forces that are currently driving the loss of functional diversity, and to create incentives to redirect those forces. They propose this to be done in two ways: by the creation of economic incentives that internalize the external costs of biodiversity loss; and by the adoption of measures that apply the idea of preserving biodiversity everywhere to economic analysis. According to them, "we should be stimulating the development of institutions, policies, and patterns of human consumption and production that work in synergy with ecosystem functions and processes."[47]

Referring especially to institutions, Folke, Holling, and Perrings consider the development of effective institutions for biodiversity conservation as a precondition for the creation of incen-

[39] Leopold, *supra* note 6, at 189, 190.
[40] Id.
[41] Folke et al., *supra* note 5, at 160.
[42] *Id.* (quoting R. A. Askins, *Hostile landscape and the decline of migratory songbirds*, 1957 Sci. 267).
[43] Leopold, *supra* note 6, at 274–75.
[44] Id.
[45] Id.
[46] Id.
[47] Folke et al., *supra* note 5, at 160–61.

tives to prevent the loss of functional diversity. Those institutions should be adaptive, which means that they should be able to respond to environmental feedback before those effects challenge the resilience of the resource base and the economic activities that depend on it.[48]

III. The Land Ethic

Aldo Leopold's *land ethic* opposes theories that consider nature as an object totally submitted to human scrutiny. The idea of nature as an object dates back to Modernity, when, due to the advance of science, humans became able to overcome obstacles to their development posed by nature[49]and they acquired the belief in their superiority over other species and over nature.

According to Christian belief, by altering the land, planting, fertilizing the soil and erecting buildings, humans are complementing God's creation and assuring prosperity[50]. It is by working the land that humans get title to property, both over the land and over the results of human work. According to this view, nature is no more than storage of resources[51], whose use by humans is unrestricted.

In the post-war world people became aware that the planet contains limited resources; and that those resources are showing signs of exhaustion. From then on, humans started to consider how vulnerable the planet they depend upon is and, consequently, how vulnerable is the continued existence of the human race[52].

Aldo Leopold represents a generation that became aware of the harm humans can cause to nature by willing to dominate it. Trying to combat the causes of human destructive behavior in relation to nature, Leopold advocates the adoption of an ethical treatment of nature, in which humans would express their love and respect for nature.

Leopold sees ethics as the "tendency of interdependent individuals or groups to evolve modes of co-operation", which ecologists call *symbiosis*[53]. This ethic started by being associated with the relationship between individuals. Later it evolved to include the relationship between individuals and human society. According to Leopold, a further extension of ethics to include the relationship between individuals and land, fauna and flora is "an evolutionary possibility and an ecological necessity"[54]. Land has been just a property to humans; their relationship has been strictly economic, entailing privileges but no obligations[55].

The extension of ethics to natural elements requires a change in the human position: from conqueror of the land-community to plain member and citizen of it[56]. The conqueror selects which species he deems relevant and which he does not, thereby eliminating species whose function within the ecosystem he does not fully understand. The result is usually catastrophic, because often the realization that certain species had a main role within the ecosystem often occurs when the species is already eliminated from that environment. By becoming members of the land-community, humans get in harmony with nature, and this is what Leopold considers to be the meaning of *conservation*[57].

Leopold acknowledges that we probably are

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[48] Id.

[49] François Ost, A Natureza às margens da lei 30 (Joana Chaves trans., Instituto Piaget ed. 1995).

[50] *Id.* at 64 (according to François Ost, when the biblical chapter *Genesis* says such statement, it is discretely authorizing humans to possess parts of nature).

[51] *Id.*, at 10.

[52] *Id.* at 277–387.

[53] Leopold, *supra* note 6, at 238; *see also* Ost, *supra* note 49, at 290 (stating that the land humans exploit and pollute is much more than an object, in fact, it is the mother-Earth, with which we live in symbiosis).

[54] Leopold, *supra* note 6, at 239.

[55] *Id.*

[56] *Id.* at 240.

[57] *Id.*, at 189, 190.

not going to achieve full harmony with the land. He places such a goal among other aspirations such as absolute justice or liberty for people, which are important to strive for, but not necessarily achievable[58].

The establishment of an ethical relationship with land requires love, respect and admiration and a high regard for land's value. A person cannot love, respect and admire something he or she does not know.[59] That is why the land ethic requires some understanding of ecology and of education for conservation, aimed at building ethical support for land economics.[60] The author believes that, if this is set in place, conservation will naturally follow.[61]

It also requires social approbation of right actions and social disapproval of wrong actions. According to Leopold, the path to determine the "right" and the "wrong" actions is the following:

> [Q]uit thinking about decent land-use as solely an economic problem. Examine each question in terms of what is ethically and esthetically right, as well as what is economically expedient. A thing is right when it tends to preserve integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.[62]

Without an ethical relationship with nature, conservationists are obliged to look for economic values to justify efforts to conserve natural elements.[63] Therefore, people strive to identify how a function developed by certain species can help human economic activities and how the loss of such service provided by nature would harm the economy.

According to Leopold, conservation directed by the market does not cover species that are not useful to the economy, either because their function is still unknown or because their function supports the ecosystem as a whole, but not a specific human activity. This can result in their extinction and therefore in increased vulnerability of an ecosystem.[64]

Another problem of conservation as driven by markets is that it does not provide an education for conservation or a sense of right and wrong. People take measures towards conservation as long as they are going to receive something in return. As soon as the economic incentive is withdrawn, the conservation measure is discontinued. The individual who receives a payment to contribute to conservation is driven by self-interest, not by a sense of obligation or by the sense that it is the right thing to do.[65]

Leopold believes that expecting that governments will be able to promote conservation everywhere through economic incentives or even with traditional regulation is to raise expectations to a level that exceeds governments' possibilities. In such a context, by internalizing in people the sense of right or wrong in relation to nature, the land ethic would promote conservation even where governments cannot reach[66].

IV. Ecosystem Resilience in the Law

The law is the system employed by organized societies to declare, systematize and implement the essential values of a society. As mentioned by François Ost, the law operates by systematically considering all relevant points of view, putting them in proportion and comparing them.[67] Most importantly, in an ideal situation, the law is capable of taking into account all pertinent facts and

[58] *Id.* at 210.
[59] Leopold, *supra* note 6, at 210.
[60] Id.
[61] Id.
[62] *Id.* at 262.
[63] Id.
[64] *Id.* at 246.
[65] *Id.* at 244–245.
[66] *Id.* at 251.
[67] Ost, *supra* note 49, at 19–22.

divergent interests, balancing them, and reaching a reasonable and desirably just decision.

The capacity to balance divergent interests in the formulation of policies and decisions by agencies has been enhanced by *public participation in decision making*. Although public participation is necessary for democratic governance and for preventing social and environmental damage caused by the implementation of ill-planned policies, mechanisms for public participation are mostly not binding and are restricted to the procedural obligation of hearing divergent interests. Therefore, the agency usually is obliged to hear the interested parties, but not to take their concerns into account when reaching a decision; this obligation remains exclusively reserved to the Judicial branch.

Even when substantive public participation in agency decision making is provided, it does not guarantee the defense of interests of those who are not present in the process: nature itself and the future generations. The law can ensure representation of those interests during its weighing and balancing process, if so directed by a legal principle.

Due to the need to enforce consideration of all the interests at stake and the interest of nature itself and of future generations, management for resilience cannot be implemented solely by agencies and executive planning and procedures; it requires the guidance of a legal principle and enforcement by the Judicial branch.

a) The origins and content of the principle of resilience

The concept of ecological resilience radically changes the manner by which humankind manages natural resources because it annuls the premise that management should seek stability. In order to guide the public administration and individuals in dealing with this change of mindset, this article proposes consolidation of the principle of resilience as a new principle of international law.

The foundations of the principle of resilience already exist in International Environmental Law: they lie within binding and non-binding international instruments. However, the principle of resilience must be acknowledged and must become an independent principle in order to guide humankind on how to stop degradation of global nature and how to attend to growing population needs in the context of climate change and other natural disturbances in a manner that will stop degradation and strengthen global nature.

Systematizing a new principle to address ecosystem resilience is important because principles of international law designate fundamental legal norms and values that should be pursued by the whole international environmental law system.[68] Principles also indicate essential characteristics of legal institutions, and provide the rationale for the law and the general orientation to which positive law must conform[69]. The principle may be included in States' practices and in national laws, and may be referenced by judges as guidance for interpreting or filling the gaps in national or subnational law.[70] It provides a framework for negotiating and implementing new and existing agreements and may be incorporated in legally binding international instruments. Moreover, it provides the rules of decision for resolving transboundary environmental disputes. Finally, the principle may assist the integration of international environmental law into other fields of international law.[71]

But what would be the meaning of the principle of resilience?

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[68] *See* Alexandre Kiss & Dinah Shelton, Guide to International Environmental Law 89 (2007).

[69] *See id.*

[70] Id.

[71] David Hunter et al., International Environmental Policy 469, 470 (2007).

The ecological concept of resilience mandates the preservation of biodiversity and the preservation of nature everywhere. Preserving biodiversity for resilience is necessary in order to keep the functions of the ecosystem working with their original quality. Therefore, resilience requires biodiversity to be preserved in its original habitat by a sufficient number of individuals of each species to ensure the execution of the ecosystem function they are responsible for.[72]

The goal of preserving nature everywhere does not mean the maintenance of *some* natural resources everywhere; it means the preservation of the *whole* land mechanism everywhere. The concept of resilience is based on the idea that every land mechanism – which includes fauna, flora and inanimate elements – is important to keep the ecosystem resilience. Therefore, such thinking requires a much more complex and broader view of conservation than the one currently applied to non-reserve-protected areas, where environmental law is very segmentally applied to preserve some individual endangered species or just the inanimate elements of the environment (soil, water and air). As conservation seeks to preserve very complex structures such as ecosystems, it is not possible to attribute to conservation a simplistic or segmented view. Conservation for resilience must consider the interconnections between the various components of an ecosystem and it must include in the concept of "land" not only the forests and preserved landscapes, but also the landscapes intensely modified by humans.

The dichotomy that determines a place for nature, where conservation is needed, and a place for humans, where conservation is not needed, must be abolished. Humans are part of nature and nature must be preserved everywhere, keeping the ecosystem functions alive. If the garden of every house in a city contains individuals of native species, the fauna and flora present in each garden may interconnect with each other and keep the functions which make that ecosystem unique. The wider the area where nature is conserved and the more connections with fauna and flora are kept, the more resilient the ecosystem will be.

This work adopts the values promoted in *land ethic* as the guiding values for conservation for resilience. Therefore, the principle of resilience is guided by the aspiration of getting in harmony with the land – *all* the land, not just some elements of it. This principle also includes social approbation of actions that tend to preserve the integrity, stability, and beauty of the biotic community, and social disapproval for actions that tend otherwise. The principle refuses to address land-use as a solely economic issue and to rely only on the government or on the market to take conservation measures.

The principle of resilience recognizes humans as members of the land-community – not conquerors of it – who should get to know the land mechanism as much as possible, in order to respect and love the land.[73] This article interprets the land ethic as requiring humans to *enhance* the land mechanism the maximum they can, and not to merely *prevent and mitigate* the aggressions imposed upon nature that the law mandates individuals to address.

By improving the environment wherever possible, we humans demonstrate that we are conscious of the burden we inflict on the land

[72] Referring to the preservation of biodiversity, it is interesting to read a passage of Aldo Leopold speaking about the extinction of species: "When the species is gone we have a good cry and repeat the performance. … We console ourselves with the comfortable fallacy that a single museum-piece will do, ignoring the clear dictum of history that a species must be saved *in many places* if it is to be saved at all." Leopold, *supra* note 6, at 194.

[73] *Id.* at 261.

mechanism; we respect the land mechanism that supports our existence; and we assume our ethical responsibility to aid the land mechanism in any way we can in return for what it provides us. This duty is not only individual, but also societal. That means that besides the legal obligation to do no harm to the environment, humans have the ethical obligation to improve environmental quality.

The ethical obligation to live in harmony with the environment and to improve environmental resilience can be characterized as an ethical principle because:[74] it is general in form, meaning that its applicability is not restricted to a limited group of people, rather, it is addressed to the global audience; it is universally applicable to all moral agents, meaning that the rule cannot defeat itself if everyone attempts to comply with it; it is intended to be applied disinterestedly, meaning that compliance with the principle is required even when it is against the moral agent's interest; it is advocated as a principle for all to adopt, meaning that whoever adopts it approves its adoption by all others; it overrides all non-moral norms or concerns.

One of the major aims of the principle of resilience is to provide guidelines for a governmental policy pursuant of the maxim: "Do not solely mitigate: improve". In order to improve the environment and at the same time ensure essential economic activities, the principle of resilience will push governments towards innovative environmental management solutions that proportionately balance environmental and economic activities, in order to do not prioritize one interest and suffocate the other. Such solutions provide new guidelines for the operation of the law.

Incorporating the background provided by ecology and ethics, the principle of resilience can be established as follows:

- The land mechanism has inherent value.
- Every person has the right to use natural resources as long as such use does not impair the use by others or the persistence of the original setting of mutually reinforcing processes and structures of an ecosystem.
- Every person has the moral duty to respect nature and to pursue a way of living in harmony with the land mechanism.
- In order to ensure ecosystem resilience to natural or human-made disturbances, the human management of natural or urban landscapes shall preserve ecosystem functions through:
  - the preservation of all species everywhere;
  - the preservation of natural cycles;
  - and the preservation of chemical composition of soil, air and water.
- The lack of scientific understanding regarding the function of land mechanisms and the role developed by single species in such mechanisms shall not be used as a reason for postponing cost-effective measures to enhance ecosystem resilience.
- States shall ensure that the younger generation receives education on the function of natural mechanisms and that the government officials receive training in identifying human activities and natural phenomena that may impact ecosystem resilience.
- Governments are responsible for identifying the factors that put ecosystem resilience at risk and addressing such factors.
- Management for resilience requires the adoption of adaptive management techniques, or other techniques that comprise monitoring of results, evaluation of policy performance and review of policy measures according to the assessment of results and changes of circumstances.

[74] Paul W. Taylor, Respect for Nature 25–33 (Princeton Univ. Press Publ. 1986).

- Patterns of production and consumption in synergy with ecosystem function shall be stimulated.
- The resilience of ecosystems shall be considered in the assessment of costs and benefits of any activity or policy that affects the environment.

b) The principle of resilience in International Environmental Law

Basic elements of the principle of resilience are already present in international environmental law.

The Preamble of the Stockholm Declaration of the United Nations Conference on the Human Environment, 1972, recognizes that protection and improvement of the human environment is the duty of all Governments.[75] The enhancement of resilience is a matter of protecting and improving the environment and that is why Governments have the duty to consider resilience when managing natural resources.

Principle 1 of the Stockholm Declaration declares that "[m]an … bears a solemn responsibility to protect and improve the environment for present and future generations".[76] Therefore, the duty to improve the environment is not solely governmental, but also individual.

The first part of Principle 19[77] of the Stockholm Declaration highlights the role education for conservation has to play in protecting and improving the environment.

The World Charter for Nature, 1982,[78] contains several elements of the principle of resilience. Among the principles of conservation, it proclaims that:

Preamble: every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action

1. Nature shall be respected and its essential processes shall not be impaired…
4. Ecosystems and organisms … shall be managed to achieve and maintain optimum sustainable productivity, but not in such a way as to endanger the integrity of those other ecosystems or species with which they coexist…
6. In the decision-making process it shall be recognized that man's needs can be met only by ensuring the proper functioning of natural systems …
9. The allocation of areas of the earth to various uses shall be planned, and due account shall be taken of the physical constraints, the biological productivity and diversity and the natural beauty of the areas concerned.
10. (d) Non-renewable resources which are consumed as they are used shall be exploited with restraint, taking into account … the compatibility of their exploitation with the functioning of natural systems.
11. (d) Agriculture, grazing, forestry and fisheries practices shall be adapted to the natural characteristics and constraints of given areas;
11. (e) Areas degraded by human activities shall be rehabilitated for purposes in accord with

[75] United Nations Conference on the Human Environment, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment Preamble*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972), *available at* http://www.unep.org/Documents.Multilingual/Default.asp? documentid=97&articleid=1503 [hereinafter *Stockholm Declaration*].

[76] Id.

[77] *Id*. ("Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension.").

[78] World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/RES/37/7 (Oct. 28, 1982).

their natural potential and compatible with the well-being of affected populations.

15. Knowledge of nature shall be broadly disseminated by all possible means, particularly by ecological education as an integral part of general education.
19. The status of natural processes, ecosystems and species shall be closely monitored to enable early detection of degradation or threat, ensure timely intervention and facilitate the evaluation of conservation policies and methods.[79]

The Rio Declaration on Environment and Development, 1992, recognizes that human beings are entitled to a healthy and productive life in harmony with nature.[80] At Principle 4, the Declaration determines that environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. At Principle 8, the Declaration guides States to reduce and eliminate unsustainable patterns of production and consumption.[81]

The need to build ecosystem resilience not only to reduce the risk of disaster, but also due to its importance in providing sustainable livelihoods, flow of goods and services and reducing vulnerability to climate change is expressed in the United Nations, 2009 Global Assessment Report on Disaster Risk Reduction.[82]

The principle of sustainable development requires the current generation to meet its needs "without compromising the ability of future generations to meet their own needs."[83] This idea requires humankind to stop exploiting natural resources at a rate greater than their capacity for regeneration, the so called sustainable yield. However, despite the recognition of sustainable development as a basic principle of environmental protection and national planning, humans still consider that they have the right to take from nature a little more than the sustainable yield threshold, thereby gambling with nature.

The sustainable development movement did not fully succeed in inserting in people's minds the idea that ensuring continuity of natural resources is more important than individual comfort and short-term profit. Neither has it yet convinced people that personal ambition has to yield in face of environmental limitations, or else the survival of future generations will be at risk.

By trying to please all concurring interests at once, the sustainable development movement did not make it clear that, in order to keep the "health of the land", humans often need to prioritize values and goals, which not so rarely will result in restricting economic activities and economic growth where the land mechanism cannot support it any longer. The implicit meaning commonly attributed to "sustainable development" by business and even by countries is that private initiative will protect the environment as long as such protection does not impair economic activity. While the sustainable development movement succeeds on raising awareness about the need to conciliate environmental protection and development, it fails to provide guidance on the following ethical questions: when economic activity and environmental protection cannot be conciliated, which interest should be prioritized and under what circumstances? The vacuum left by the concept of sustainable development is repeatedly filled by business interests, whose

[79] Id.

[80] United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*].

[81] Id.

[82] U.N. Int'l Strategy for Disaster Reduction Secretariat, 2009 Global Assessment Report on Disaster Risk Reduction (2009).

[83] *Our Common Future*, *supra* note 12.

answer to the above mentioned question is: economic growth ALWAYS has priority over environmental protection concerns.

Such an omission leaves the establishment of priorities to be determined on a case by case basis, with no overarching directive guideline. Thereby, the legal framework has assigned an equal treatment both to environmental and economic interests. However, such equal treatment hides a fundamental injustice when one considers that environmental and economic interests are not balanced because the latter counts on much greater political power. Therefore, following the lesson given by Aristotle, the aspiration for justice requires the law to treat equally the equals and unequally whoever is in an unequal position.[84] The promotion of justice – a primary function of the legal system – can be enhanced by the principle of resilience, which fills the vacuum of the sustainable development concept by advocating that ecosystem resilience and continual provision of ecological functions must be preserved even if it requires a reduction of economic growth and profits. Thus, the principle of resilience prioritizes environmental protection, artificially balancing a naturally unbalanced situation. By correcting an ongoing injustice in the management of natural resources and planning for development, the principle of resilience improves the legal system as a whole.

The principle of resilience does not acknowledge rules for prioritizing concurring interests solely because it is necessary to enforce sustainable development under an ethical and legal point of view: it does so also because it is a factual necessity. Human society has to learn how to develop socially and manage natural resources without relying on economic growth.[85] Considering the green economy's goal to generate wealth through sustainable exploitation aiming to eradicate poverty,[86] the idea of developing without growth should apply to developed countries and countries that have already accumulated enough wealth to combat poverty. The green economy cannot be green if deprived of the understanding that the economy should be kept in a steady state if economic growth cannot be achieved within the limits imposed by the sustainable yield of natural resources.

The concept of intergenerational equity focuses on future generations as rightful beneficiaries of environmental protection. It encloses the notion of fairness both among individuals of the present generation and between present and future generations. The concept of intergenerational equity is composed of three elements: conservation of the diversity of natural and cultural resources by maintaining alternative resources within each category; conservation of environmental quality by preventing the exhaustion of higher quality resources; and equitable or non-discriminatory access to Earth's resources.[87] As for the conservation of diversity and the quality of resources, the aim is to implement equitable access to resources so as to guarantee to future

[84] José Afonso da Silva, Curso de Direito Constitucional Positivo 213 (25th ed. 2005) (quoting Aristotle, *Éthique à Nicomaque*, *in* 6 Politique 1131a (Marcel Prélot trans., PUF Publ., 1950)).

[85] *See generally* Peter A. Victor, Managing Without Growth: Slower by Design, Not Disaster (2008); Tim Jackson, Sustainable Development Commission, Prosperity Without Growth? The Transition to a Sustainable Economy (2009); Andrew Simms & Victoria Johnson, New Economics Foundation, Growth Isn't Possible (2010), *available at* http://neweconomics. org/publications/growth-isnt-possible.

[86] U.N. Envtl. Programme, Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication 548 (2011), *available at* http://www.unep.org/greeneconomy/GreenEconomyReport/tabid/29846/Default.aspx.

[87] Edith Brown Weiss, *Implementing Intergenerational Equity*, *in* Research Handbook on International Environmental Law 100, 100 (Malgosia Fitzmaurice et al. eds., 2010).

generations the possibility of choice among alternative resources, and access to resources of the same quality as the resources exploited by present generations. Furthermore, the principle of resilience contributes to the conservation of environmental quality by requiring the preservation of integrity, stability, and beauty of the biotic community.

This concept requires that present generations use the resources sustainably and avoid irreversible environmental damage.[88] In this context, the principle of resilience increases the applicability of the concept of intergenerational equity by restraining the present generation from weakening further a non-resilient ecosystem, because the passage of such an ecosystem to a new basin of attraction may be irreversible and the regeneration of the original features of an ecosystem may become impossible.

The precautionary principle prescribes the need for taking anticipatory actions in order to avoid environmental harms, even when the scientific understanding of a specific threat is not yet complete. The principle of resilience also contributes to the implementation of the precautionary principle: first, because it seeks to enhance the resilience of ecosystems in order to prevent their vulnerability and degradation; and, second, because it proposes the conservation of all ecosystem functions, even those that are not yet fully understood.

The principle of non-regression determines that the creation of norms that contribute to the degradation of the environment is considered a violation of several international instruments whose aim is to protect the environment.[89]

The principle of non-regression is based, first, on the assumption that environmental law seeks to prevent the degradation of the environment by constantly improving environmental quality. Second, it is based on the premise that the present generation cannot impose its laws on future generations – if present generations gradually adopt less protective environmental laws, they will prevent future generations from fully exercising their right to a healthy life.[90] Third, it relies on the application of the concept of intangibility of human rights to environmental regulation. It is transposed to environmental law because of the effect that the degradation of environmental laws may have on the exercise of human rights.

The principle of non-regression, in national law, guides the creation of norms by both the Legislative and the Executive branches and is enforced by adjudicatory authorities, which are responsible for the control of the legitimacy of acts perpetrated by the other Powers.

The principle of resilience can assist the application of the principle of non-regression, by providing guidelines to assist judges in determining whether a norm represents regression of environmental conservation. These guidelines encompass not only the ecological concept of resilience, but also the connection of the ecological concept to the law and to the ethics that govern the relationship between humankind and nature. The principle of resilience commits the ecological concept of resilience to the protection of future generations' interests and to the ethical goal of living in harmony with nature. This principle also introduces to the legal framework the concept of ecological resilience not as a mere judicial finding based on scientific data provided by an expert testimony, but as a full legal principle of

[88] Hunter et al., *supra* note 71, at 491.

[89] *See* Michel Prieur, *De L'urgente Nécessité de Reconnaître le Principe de "Non Régression" en Droit de L'Environnement*, 1 IUCN Acad. Envtl. L. 26 (2011), *available at http*://www.iucnael.org/en/documents/doc_details/663-de-lurgente-necessite-de-reconnaitre-le-principe-de-non-regression-en-droit-de-lenvironnement.html.

[90] *See id*. at 33, 34.

environmental law, which, as such, must be used to guide the creation and the interpretation of any environmental norms or any policies or norms that generate environmental consequences.

The principle of non-regression is truly effective in achieving improvement of environmental quality if it is applied to *all* norms that generate consequences to the environment. In other words, the principle of non-regression should be applied not only to environmental, but also to economic, policies and norms that affect the environment, and the same applies to the principle of resilience.

The principle of resilience is also strongly influenced by principles that guide governance for conservation: the subsidiarity principle; the public participation principle; and the principle of good neighborliness and duty to cooperate. These three principles guarantee the participation of local levels of government, the affected public and the international community in the decision-making process related to environmental issues.[91]

The subsidiarity principle reflects a preference for making decisions at the lowest level of government or social organization where the issue can be effectively managed. Besides allowing the participation of all concerned citizens, the principle of public participation requires public access to relevant information held by public authorities regarding the environment, and equal access to justice, through the judicial and administrative proceedings provided by the State.

The principle of good neighborliness and duty to cooperate determines that international environmental issues be handled in a cooperative spirit by all countries.[92]

The three above mentioned principles for environmental governance are very relevant for the achievement of ecosystem resilience especially because they expand the range of stakeholders involved in conservation efforts. Such principles abolish the idea that environmental conservation is to be promoted only by national governments, as criticized by Aldo Leopold.[93]

The principle of resilience is also part of the duty to assess the environmental impact of proposed activities, policies, or programs to integrate environmental issues into development planning. Before implementing activities or policies, the State has the duty to fully identify and consider their environmental effects – which must include any impact the project may cause to the resilience of the ecosystem. That is why governmental entities must understand the concept of ecological resilience and must be trained to include assessment of impacts on ecosystem resilience in the environmental impact assessment. Individuals should also understand the meaning of ecosystem resilience to identify how a proposed project can affect it and to verify whether agencies are taking the concept of resilience into consideration.

c) The principle of resilience in Domestic Environmental Law

The applicability of the principle to sectors of a country's legal system requires the prior development of a conceptual framework for decision-making based on the principle of resilience.

Any country seeking to apply the principle of resilience needs, first of all, to recognize it as a moral principle. Therefore, the country must recognize the inherent value of nature and guide its decisions towards the accomplishment of the goal to live in harmony with nature.

As noted by Aldo Leopold, the goal to live in harmony with nature is not necessarily achiev-

[91] Hunter et al., *supra* note 71, at 521, 525, 534, 535.
[92] *Stockholm Declaration*, *supra* note 75.
[93] Leopold, *supra* note 6, at 243–51.

able, but it is something we should strive for.[94] Also, it is useful to remember that the acceptance of the goal to live in harmony with the land mechanism as a moral principle presupposes that compliance with this duty is required even when it is against the moral agent interest.[95]

Employing the principle of resilience in decision-making requires that it be recognized as a legal principle, after it has been recognized as a moral principle. In order to ensure enforceability of the legal principle, it is important to incorporate it into a Code or into a country's framework environmental legislation. A country's framework environmental legislation represents "an integrated, ecosystem-oriented legal regime that permits a holistic view of the ecosystem, the synergies and interactions within it, and the linkages in environmental stresses and administrative institutions",[96] which is precisely what the implementation of the principle of resilience requires.

After being acknowledged in a statute, the legislature or the resource management institutions should create a procedure for the implementation of the principle of resilience. It is recommended that the government analyze where the principle of resilience can be incorporated into existing procedures related to legal protection of the environment. The recommendations addressed below, in the section dedicated to Environmental Impact Assessment, are good examples of how this can be done.

In other circumstances, the fulfillment of the principle of resilience's aims will require the creation of new procedures, such as the organization of workshops for adaptive management.

Besides incorporating the principle of resilience into procedural rules, the government should set penalties for lack of compliance with these rules. As for penalties for noncompliance with the principle of resilience, it is interesting to note that the concept of ecological resilience reveals another level of environmental degradation: the destruction of ecosystem resilience. When the action perpetrated by a project is responsible for eliminating the resilience of an already vulnerable ecosystem, the damage this project caused to the environment is much graver than the damage produced by the same action in a resilient ecosystem. For example, if a project is responsible for eradicating one single pollinizer species, the consequence of this impact will be much graver for an ecosystem that counts on no other species to fulfill the pollination function than in an ecosystem that has many other species providing this service.

In this context, a pertinent question for the legislator would be: should the penalty for whoever destroys the resilience of a certain ecosystem be greater than the penalty applied to whoever perpetrates the same action, but does not produce this result?

In setting the penalties, legislators should seek to employ the penalty as a means to achieve concrete results in improving environmental quality through measures of education for environmental conservation; restoration of an ecosystem's resilience; collection of information for adaptive management; enhancement of sustainable consumption and production patterns[97].

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[94] *Id.*, at 210.

[95] Taylor, *supra* note 74, at 25–33.

[96] U.N. ENVTL. PROGRAMME, TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW 16 (Lal Kurukulasuriya & Nicholas A. Robinson eds., 2006) *available at* http://www.unep.org/law/Publications_multimedia/index.asp [hereinafter UNEP TRAINING MANUAL].

[97] These kinds of goals are found in the *Writ of Kalikasan*, in the Philippines. This writ was created to enforce the individual constitutional right to a "balanced and healthful ecology". The remedy can be claimed by any natural or judicial person acting on behalf of persons whose environmental right was or is in danger of being violated.

In order to ensure compliance with the principle, governments should establish who will enforce attainment to the principle guidance and to its procedural rules. The enforcement can be provided by citizen suit provisions, by environmental courts, or by a specific governmental institution vested with special rights to sue violators – such as the Brazilian *Ministério Público.*[98]

V. Applying the Principle of Resilience Into Environmental Impact Assessment

Due to the complexity of ecosystems, humans often lack a complete understanding about the processes that lead towards changes in stability domain. That is why resource managers usually have to deal with uncertainty.

Literature recognizes adaptive management as the most suitable approach for dealing with ecosystem complexity and the uncertainty generated by unknown threats.[99] Adaptive management is a result-based approach to management by agencies; its final goal is to continuously enhance environmental quality. The adaptive management process mainly deals with specifying objectives when addressing a management problem, articulating a policy, and evaluating the performance of the policy.[100] Adaptive management has great potential for dealing with ecosystem resilience because this method relies on the observation and interpretation of essential processes and variables in ecosystem dynamics,[101] constantly improving the understanding of such dynamics and using this knowledge to reevaluate and modify the management strategy. During the evaluation process, a critical understanding of the effects of the policy creates an experience platform upon which informed policy designs and meaningful choices can be based in the future.[102]

Adaptive management distinguishes itself from conventional management because it focuses on managing essential ecological processes that sustain the delivery of harvestable resources and ecosystem services on multiple temporal and spatial scales,[103] while the conventional approach focuses on the assessment of the maxi-

The writ awards no damages to individual petitioners; rather its reliefs include directing the respondent to permanently cease the action or activity that gave cause to the violation of environmental laws; and to restore the environment. *See* Rules of Procedure for Environmental Cases, No. 09-6-8-SC, pt. I, r. 1, § 3(a), (S.C., Apr. 29, 2010) (Phil.), *available at* http://sc.judiciary.gov.ph/Rules%20of%20Procedure%20for%20Environmental%20Cases.pdf (2010). In the State of Amazonas Environmental Court in Manaus, in Brazil, alternative penalties have been proposed by Judge Adalberto Carim Antonio to violators of environmental laws, according to the transgressions. Instead of jail or fines, respondents can opt to restore the environment and to bring additional benefits to the affected community, to take classes in environmental education, or to act as volunteers in environmental protection organizations, among many other innovative penalties. *See* George "Rock" Pring & Catherine "Kitty" Pring, Greening Justice 85, 86 (2009).

[98] *Ministério Público* is an institution created by the Brazilian Constitution to defend the legal order, the democratic regime, social interests, and inalienable individual interests. It is vested with rights to investigate and suit whoever violates these interests and values–be it an individual, a private organization, or a governmental organ. In order to ensure *Ministério Público*'s political freedom to control the legality of actions perpetrated by other branches of the government, the Constitution granted *Ministério Público* with functional freedom in relation to the Executive Power, where it is located. Therefore, the Executive Power has no interference on the development of *Ministério Público*'s functions, on its organization, or on the selection of its members. *See* Silva, *supra* note 84, at 598–99.

[99] Craig R. Allen et al., *Commentary on Part Three Articles, in* FOUNDATIONS OF ECOLOGICAL RESILIENCE, *supra* note 3, at 305; C. S. Holling et al., Adaptive Environmental Assessment and Management (1980).

[100] William C. Clark et al., *Lessons for Ecological Policy Design*, *in* FOUNDATIONS OF ECOLOGICAL RESILIENCE, *supra* note 3, at 364.

[101] Folke et al., *supra* note 8, at 445.

[102] Clark et al., *supra* note 100, at 381.

[103] *Adaptive Management*, Resilience Alliance, http://www.resalliance.org/ index.php/adaptive_management (last visited Oct. 22, 2012).

mum sustainable yield of an individual species on a single scale.[104]

Adaptive management requires transfer of information on the conservation status of an ecosystem among involved stakeholders in order to boost the understanding about ecosystem dynamics. The Environmental Impact Assessment (EIA) related tools can contribute to the transfer of such information between entrepreneurs and agencies, for example, by predicting the potential impacts of policies, assessing the alternatives, and ensuring public access to information and participation in the decision process.

Environmental Impact Assessment (EIA) is a procedure for "evaluating the likely impact of a proposed activity on the environment"[105] prior to the commencement of a project. This procedure is aimed at providing the necessary knowledge to decision makers to prevent environmental harm before it occurs.[106] Although the EIA aids informed decision making by identifying the environmental risks of an activity, it does not determine whether a project should proceed and how it should be regulated; such decisions are assigned to public authorities, who will balance the information provided by the EIA with other national or regional concerns.[107] An EIA is essentially procedural because public authorities' decision is not bound by the findings of the EIA.[108]

The EIA contributes to the implementation of national policies on sustainable development and precautionary action. The EIA procedure provides information on environmental risks to the public and offers the opportunity for public participation in decision-making regarding environmental issues.[109]

Both in the international and in the national sphere, the EIA provides governments with the information needed to evaluate whether the benefits of an activity exceed the activity's negative consequences to the environment. Depending on the result of this balancing process, the activity may be enjoined, restricted, or otherwise regulated in order to oblige the proponent to: change the initial project, mitigate the expected impacts, or pay for the environmental costs his activity will cause society.

The strongest and most comprehensive elaboration of the states' duty to promote EIA is stated in Rio Declaration Principle 17: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."[110]

However, this was not the only international document that required the elaboration of EIA: it is required under other non-binding instruments[111] and several binding international con-

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[104] Folke et al., *supra* note 8, at 443.

[105] Convention on Environmental Impact Assessment in a Transboundary Context art. 1(vi), Feb. 25, 1991, 1989 U.N.T.S. 309 [hereinafter Espoo Convention].

[106] Patricia Birnie et al., International Law and the Environment 165; Kiss & Shelton, *supra* note 68, at 98; ZYGMUNT J. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY 432–34 (4th ed. 2010), at 319–52.

[107] Birnie et al., *supra* note 106.

[108] Plater et al., *supra* note 106.

[109] According to Principle 17 of the UNEP Goals and Principles of Environmental Impact, the public, experts, and interested groups should be allowed appropriate opportunity to comment on the EIA. *See, e.g.*, UNEP Governing Council, *Environmental Impact Assessment*, U.N. Doc. UNEP/GC/Dec./14/25 (June 17, 1987) [hereinafter UNEP EIA]. The requirement of public participation in EIA procedures is also present in legally binding agreements; article 14(1)(a) of the Convention on Biological Diversity, for example, requires appropriate public participation in EIA procedures related to projects that can cause significant impact to biodiversity. Several national laws on EIA have similar provisions. *Convention on Biological Diversity* (June 5, vb1992), 1760 U.N.T.S. 79, 31 I.L.M. 818 (1992), *available at* http://www.cbd.int/ convention/text/ [hereinafter CBD].

[110] *Rio Declaration*, *supra* note 80.

[111] Stockholm Declaration, *supra* note 75, at principle 14 and 15; UNEP Goals and Principles of Environmental Impact, *supra* note 109; Agenda 21, Sep. 28, 1992, UN Doc.

ventions.[112] The EIA is required by multilateral financial institutions,[113] and the government's duty to elaborate the EIA has been referenced in international judicial decisions.[114] The EIA procedure is also considered an obligation imposed by the "do no-harm" or "good neighborliness" general principle of International Law to the State that is proposing an activity that can cause transboundary environmental harm.[115]

The duty to promote EIA is so well established in international environmental law that it can be regarded as a general principle of law or even a requirement of customary law.[116]

"The great majority of countries in the world have adopted" the EIA as mandatory regulations or, at least, informal guidelines.[117] Before project initiation, governments usually require a project proponent's elaboration of EIAs as a prerequisite to granting them the necessary permits.[118]

a) EIA Procedure Beneficial Characteristics

Although the principle of resilience is essentially substantive, this article proposes that the principle has a procedural facet in order to facilitate implementation. The application of the principle of resilience to the EIA procedure can comply with this need.

As EIA obliges the consideration of environmental issues prior to every project that can cause significant environmental harm, it is an important tool to include concerns regarding ecosystem resilience in activities that incidentally affect and are affected by the environment, but that are not directly focused on environmental management.

The introduction of the principle of resilience in EIA procedure recognizes the State's duty to identify the factors that put ecosystem resilience at risk and to address such factors in a way that creates greater resilience. In this duty is the implicit idea, also present in many international agreements, that States should seek to enhance environmental quality (not only to mitigate impacts). Also, a natural and procedural consequence of such a duty is that government officials should receive training in identifying human activities and natural phenomena that may impact ecosystem resilience.

A/CONF.151/26/Rev.1:volume 1; the European Commission Directive 85/337/EEC as amended by Directive 97/11/EC; and the Espoo Convention on Environmental Impact Assessment in a Transboundary Context. See Olufemi Elias, *Environmental impact assessment in* RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 227 (Malgosia Fitzmaurice et al. eds., 2010)

[112] Such as the U.N. Conference on Straddling Fish Stocks on Highly Migratory Fish Stocks Sixth Session, New York, U.S., July 24 –Aug. 4, 1995, *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,* U. N. Doc. A/CONF.164/37 (Sep. 8, 1995) [hereinafter Convention on Straddling Stocks]; the CBD, *supra* note 211; the United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U. N. T. S. 107 [hereinafter UNFCC]; Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, Feb. 17, 1978, 17 I.L.M. 546 (1978) [hereinafter MARPOL]; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]; the European Union law, see KISS & SHELTON, *supra* note 63, at 98–99.

[113] World Bank-funded projects have been screened for their potential domestic, transboundary, and global environmental impacts" since 1989, when the Bank issued its first Environmental Assessment Directive. See Birnie et al., *supra* note 106, at 131.

[114] *See* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 92, ¶ 140 (Sept. 25); Emilio Agustin Maffezini v. Kingdom of Spain, ICSD Case No. ARB/97/7, ¶ 67 (Jan. 25, 2000); Iron Rhine Railway (Belg. v. Neth.), Hague Ct. Rep. 2d (Scott) 59 (Perm. Ct. Arb. 2005).

[115] UNEP Training Manual, *supra* note 97, at 53; Elias, *supra* note 111, at 228.

[116] Elias, *supra* note 111, at 227 (quoting PATRICIA BIRNIE ET AL, INTERNATIONAL LAW AND THE ENVIRONMENT 131 (2002)).

[117] UNEP Training Manual, *supra* note 97, at 26.

[118] Id.

Since everybody has the right to use natural resources in a way that does not impair the perpetuation of ecosystem features, the EIA has an important role in predicting and preventing such impairment. Also, once a proposed activity could harm the environment solely by increasing the vulnerability of the ecosystem to disturbances, it is a logical conclusion that the assessment of ecosystem vulnerability and, therefore, ecosystem resilience should be included in every EIA. Thus, the inclusion of concerns about improving ecosystem resilience in EIA procedures would contribute to the completeness of the EIA and enhance its capacity to predict and prevent all possible impacts.

If the EIA identifies an activity that can impair the continuing exercise of an ecosystem function and the government authorizes this activity, the implementation of the activity can result not only in the collapse of the ecosystem as a whole, but also in the collapse of the economic activity itself, which depends on the regular functioning of the ecosystem to keep going. Therefore, the introduction of the evaluation of ecosystem resilience in EIAs is important not only to increase EIA's capacity to prevent environmental harm but also to increment EIA's value to society, by alerting officials and preventing ecological consequences that can result in loss of investments. In order to illustrate the kind of losses entrepreneurs can suffer due to ecological consequences of ill-planned human activity, it is possible to mention the case of the blueberry growers, Bridges Brothers Ltd., who claimed that spraying fenitrothion to control outbreaks of spruce budworm in the Canadian forest caused the death of pollinating bees and, consequently, damaged the blueberry crop. The loss of the crop over the period of 1970–71 resulted in an assessed loss of $1,331,693.14.[119]

[119] Bridges Brothers Ltd. v. Forest Protection Ltd. (1972). 5 N.B.R. (2d): 585–591.

The EIA can also stimulate the alteration of the project design in order to increase the adoption of patterns of production in synergy with ecosystem function. This goal can be achieved by using raw materials naturally provided by the ecosystem where the facility is located instead of introducing crops of alien species or importing raw materials from other places (disposal of which will introduce alien substances into the ecosystem, potentially causing disequilibrium in ecosystem function).

The fact that every EIA requires a background study of the ecosystem where the proposed activity will be located and the study of the impacts the activity can cause on species and on ecosystem functions provides environmental agencies a great quantity of information on the environmental status of a region and on the activities developed there. This information is necessary to assess the resilience of an ecosystem and would be too costly to be produced by the government alone. Also, the fact that the generation of such information is mandatory is an advantage to agencies because it makes this a secure source of information to agencies as it is, not subject to the lack of funding or other issues that can retard or disable the collection of data by public or private research programs.

The EIA also provides an opportunity for interdisciplinary discussion regarding a project during its elaboration and when decision-makers balance the environmental concerns presented in the EIA final report with other interests to decide whether a project should be implemented.

b) EIA Procedure Limitations and How to Address Them

1. Foreseeability of the Harm

The obligation to do an EIA is limited in scope in two ways. First, a threshold of foreseeability of harm must be met before the obligation arises. Under most treaties, the obligation to do one EIA

and to notify states endangered by the activity arises only once it is previously known that the harm is likely to occur.[120] This EIA limitation is negative for the implementation of the principle of resilience because most harmful consequences of weakened resilience are unpredictable and are noticed only after they have already occurred.

The need for a threshold of foreseeability of an activity's impacts on ecosystem resilience is particularly difficult to achieve due to the existing uncertainty regarding how ecosystem functions are distributed among the different species and which kind of disturbance would cause the ecosystem to collapse.

There are some possible solutions to this limitation of the scope of EIA obligation. One is to rely on the precautionary principle when interpreting references to the likelihood of harm in Principle 17 of the Rio Declaration, in order to lower the threshold of risk required for the EIA obligation to arise. One application of such an approach, adopted by the Antarctic Protocol, is to require for all activities, except in *de minimis* cases, an "initial environmental examination" to determine whether the expected impact is more than minor.[121]

Another solution is to distribute the requirement to assess environmental impacts between the prior impact assessment, which we regularly understand by EIA, and the post impact assessment, which is referred to as *post impact monitoring* or just *monitoring*. The prior impact assessment would be responsible for revealing predictable impacts and imposing measures to mitigate them, while the post impact assessment would identify and address unpredictable impacts and inefficiencies of the mitigation measures proposed by the prior assessment.

This approach, which is classified as adaptive, recognizes that prior assessment is not capable of predicting the totality of impacts and providing certainty.[122] Monitoring shifts the EIA procedure's priority from prediction and control to adaptability and responsiveness. Approaches to operating in chaotic and complex environments that evolve and change in parallel with the ecosystem are more likely to be effective in coping with uncertainty.[123] By managing ecosystems for uncertainty, the adaptive approach transforms the EIA procedure into an ongoing investigation rather than a one-time prediction of impacts.[124]

Monitoring provides the opportunity to determine the causes of change and whether such change is a consequence of the project or of another type of action.[125] This procedure also assesses a project's compliance with regulations, agreements, or legislation and provides agencies with proper information to assess the effects of the project's mitigation policy in order to determine if further action should be taken to prevent environmental harm.[126] The assessment of compliance with legislation coupled with the gathering of information about the progress of a particular project increase the transparency and accountability of proponents' mitigation actions, as the procedure assesses whether mitigation actions are actually reducing impacts.

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[120] Birnie et al., *supra* note 208, at 171.
[121] *Id*.

[122] Studies on environmental impact statements demonstrate that most of EIA are often wrong, failing "to accurately forecast the direction and magnitude of the actual harm." See Plater et al., *supra* note 106, at 346.
[123] David P. Lawrence, Environmental Impact Assessment 440 (2003).
[124] See Holling et al., *supra* note 99, at 1–25.
[125] See Keith Storey & Bram Noble, *Increasing the utility of follow-up in Canadian environmental assessment: a review of requirements, concepts and experience*, CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY (2004), http://www.ceaa.gc.ca/default.asp?lang=En&n=081671C7-1&offset=2&toc=show.
[126] *Id.*; Birnie et al, *supra* note 106, at 424.

Monitoring enables managers to identify potential negative trends at an early stage and to better understand the complex relationships between human actions, and environmental and social systems.[127] This understanding enables the construction of scientific knowledge about how to enhance the ecosystem's capability to recover rapidly from disturbances.

The greater transparency and oversight of the results of mitigation actions made possible by monitoring increases the likelihood of proportioning environmental improvements through human activities. Therefore, monitoring provides a tool for expanding the meaning of management beyond the mere mitigation of impacts towards the continuous improvement of environmental quality. The adoption of this broader perspective on management strategies is needed if sustainable development is truly a goal of EIA procedure.[128]

Therefore, the procedural background of the principle of resilience is enhanced by the recognition of the legal obligation to monitor environmental conditions and to employ the monitoring procedure to guide actions aimed at creating positive environmental effects by human activities.

In order to provide the tools for environmental improvement, one important part of the post-impact analysis is auditing the information obtained through monitoring. While monitoring is the observation, measurement, and recording of information about specific aspects of the project,[129] auditing is a later stage of the process when accounts and records are examined and verified in order to show trends and compare the results to the targets, thereby assessing how close the actual situation comes to meeting the situation initially predicted.[130] "Auditing is effectively an evaluation of the EIA process: investigating whether or not predicted impacts have actually occurred; whether methods used to make these predictions were reliable, whether recommendations were followed; and whether safeguards were effective."[131]

In order to provide an impartial assessment of the environmental quality achieved by a project or by a policy, auditing is supposed to be done by a party not involved in the project or policy.[132]

In the international sphere, the regulation of monitoring is very limited. It is regulated under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), which was signed mostly by European countries.[133] At Article 7, the Convention recognizes the close relationship between prior EIA and subsequent monitoring but does not mandate the elaboration of monitoring for every likely significant transboundary impact. The concerned Parties are supposed to decide, upon request, if a post-project analysis will be carried out and under which conditions.

The monitoring of the implementation effects of plans and programs is required under Article 12 of the Kiev Protocol and article 10 of the European Commission 2001 Directive in order 'to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action'.

In summary, European regional law requires monitoring of plans and programs likely to cause significant adverse transboundary impacts, but it does not require monitoring at the project lev-

[127] Storey & Noble, *supra* note 125.
[128] Id.
[129] IAN THOMAS &PAUL MURFITT, ENVIRONMENTAL MANAGEMENT – PROCESSES AND PRACTICES FOR AUSTRALIA 185 (2nd ed., 2011)
[130] *Id.*, at 238.
[131] *Id.*, at 185.
[132] *Id.*, at 239.
[133] United States of America signed and Canada signed and ratified the Convention.

el, except when the concerned countries decide so.[134] At the international level, the obligation to promote monitoring is non-existent.

At the national level, statutes requiring the elaboration of a monitoring plan within the environmental assessment procedure are present in Canada and Brazil. In Brazil, every EIA is required to present a monitoring plan.[135] Federal regulation does not establish deadlines for project proponents to provide periodic monitoring reports.[136] Besides that, the presentation of monitoring reports is very commonly not taken as a prerequisite for the renewal of an environmental license because, if such renewal is requested within 120 (one hundred and twenty) days before the expiration of the previews license, it is automatically prorogated until a final pronouncement by the environmental agency.[137] In addition to the execution of the monitoring plan, the environmental agencies can require private entities to provide any kind of information regarding the potential or actual environmental impacts of their activities.[138] Therefore, the enforcement of the monitoring plan is left to the discretion of environmental agencies. As in most countries, Brazilian environmental agencies deal with the constant problem of excessive work load exercised by reduced personnel, which contributes to the lack of enforcement of monitoring provisions.

Additionally, monitoring in Brazil is also exercised by the government during frequent inspections of industrial and commercial facilities by environmental agents to identify environmental impacts not covered or predicted by the project's environmental license.[139] Therefore, the monitoring is usually limited to the assessment of compliance with permits and legislation. If environmental agencies learn of supervening grave risks to the environment or to human health[140] caused by the project, they are able to modify or cancel the environmental license.

The Canadian Environmental Assessment Act assigns to the environmental agencies the obligation to design and ensure the implementation of a follow-up program when a project is required to promote mitigation measures.[141] When a project is not likely to cause significant impact, the agency has discretion to decide whether a follow-up program is appropriate.[142] Follow-up requirements rarely are determined until after project approval is granted with the result that little attention is paid to specific arrangements for follow-up in the assessment or the EIA.[143]

In the United States, there is no obligation to monitor impacts at the federal level within the EIA procedure. Monitoring is utilized to assess compliance with permits and legislation, especially regarding the presence of contaminants in water and air.[144] Monitoring elaborated under an ecosystem approach is applied to National Parks[145] and to projects of restoration of

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134 As for Canada, the only non-European country to ratify the Espoo Convention, it is bound by the Convention, but not by the Protocol, which it did not sign. Therefore, it is not required to monitor plans and programs likely to cause significant transboundary impact.

135 Resolução CONAMA [Res. CONAMA] [Resolution] n. 001/1986, art. 6, IV (Braz.).

136 Id.

137 Resolução CONAMA [Res. CONAMA] [Resolution] n. 237/1997, art. 18, §4 (Braz.)

138 Lei n. 10650/2003, art. 3 (Braz.).

139 Ministério do Meio Ambiente [MMA], Programa Nacional de Capacitação de Gestores Ambientais: Licenciamento Ambiental 67, (2009) (Braz.).

140 Resolução CONAMA [Res. CONAMA] [Resolution] n. 237/1997, art. 19 (Braz.).

141 Canadian Environmental Assessment Act (S.C. 1992, c. 37) (Section 38) (2) (2011) (Can.).

142 *Id.*, Section 38(1).

143 Storey & Noble, *supra* note 125.

144 Air Pollution Prevention and Control, 42 U.S.C.A. § 7619 (2010); Safety of Public Water System, 42 U.S.C.A. § 300g-7 (2010).

145 National Park Service Management, 16 U.S.C. § 5934

wetlands.[146] The policy of wetlands mitigation banking allows developers to compensate for wetlands that will be destroyed through development by ensuring the restoration of wetlands in another location.[147] The monitoring is used to verify that the restoration actually occurred in order to permit the compensation.

The EIA effectiveness reviews demonstrate that monitoring is more the exception than the rule. The imposition of the obligation to reevaluate an activity's impacts and its mitigation measures during the license renewal process would be an effective way to implement adaptive management at the project level. Therefore, instead of renewing environmental licenses without further questioning, agencies could evaluate whether the mitigation measures that condition the license were efficient and whether new mitigation measures are needed.

2. Significant Impact on the Environment

The second limitation on EIA refers to the fact that the procedure is solely applied to activities that will probably have a significant impact on the environment. Therefore, the procedure is not required for activities whose impact is deemed small or transitory.[148] Ecosystem resilience can be threatened by activities that generate irrelevant impacts if considered separately, but that are capable of weakening ecosystem resilience if considered collectively. The process of loss of resilience is cumulative because the inability to replenish coping resources propels a region and its people to increasing criticality.[149] If the environmental evaluation scheme relies only on a project-based EIA, the detection of impoverishment of resilience can be seriously affected. That is why it is important to treat ecosystem resilience both as a direct and indirect impact on activities.

The evaluation of indirect impacts is not exempt from the EIA procedure. Direct impacts on the physical environment, as well as indirect impacts arising from other types of induced activity, the interrelatedness of environmental impacts, and cumulative impacts need to be assessed.[150]

However, due to their nature, indirect impacts are better detected through the use of differentiated methods able to link EIA to related projects and activities, such as legislative proposals, policies, programs and plans[151].

The link of EIA procedure with strategic environmental assessment, sectorial and spatial policies, area wide assessments, and EIA systems based on natural boundaries is an important means of enhancing the capacity for adaptive

[146] Navigation and Navigable Waters, 33 U.S.C. § 2330a

[147] Plater et al., *supra* note 106, at 610.

[148] Birnie et al., *supra* note 106, at 171.

[149] Folke et al., *supra* note 9.

[150] Christopher Wood, Environmental Impact Assessment 89 (1995).

[151] According to Lawrence, such a link can be established through the elaboration of strategic environmental assessments (SEAs), the grouping activities over space, the integration of EIA with sectorial and spatial policies, area wide assessments, and EIA systems based on natural boundaries. See Lawrence, *supra* note 123, at 48–50.This article supports all the actions proposed by Lawrence to link EIA with related activities in order to facilitate the detection of indirect impacts, except the "grouping of activities over space" technique, understood as the method to place together similar activities due to the similarity of their impacts. This technique seeks to easily detect indirect impacts of an activity and to reduce the uncertainty of predictions by excluding the occurrence of different impacts that may interact in unpredictable ways. The compromise to ecosystem resilience requires the repudiation of this idea because this technique increases the intensity of a single kind of impact, whose adverse effects will repeatedly concentrate on the same ecosystem function. If a certain ecosystem function is too frequently and intensely impacted by human activities, this function is likely to collapse, which can cause the entire system to collapse. On the other hand, if the ecosystem suffers impacts of lower intensity affecting different functions, the ecosystem is more likely to recover from such impacts and be more resilient. Therefore, instead of grouping similar activities in the same places, ecosystem managers should diversify the activities' zoning.

management, and therefore, for the enhancement of ecosystem resilience, because it provides the opportunity to cross-analyze the information gathered by these mechanisms of data collection. The importance of cross-analyzing such information arises from the fact that most of the surprises, classified as local and cross-scale,[152] could be predicted and monitored through the integration of information at local and regional scale.

Strategic environmental assessment is the process by which environmental considerations are required to be fully integrated into the preparation of governmental plans and programmes potentially harmful to the environment before their final adoption.[153] Because SEA is done prior to the elaboration of the overall policy, it is undertaken much earlier in the decision-making process than EIA, which is done at the project level.[154]

Although the Espoo Convention does not explicitly require the application of SEA procedure, it does require Parties to undertake EIA at the project level and to apply EIA principles to policies, plans, and programs.[155] In 2001, the European Commission adopted a Directive on SEA, according to which the SEA is to be undertaken 'during the preparation of a plan or programme and before its adoption or submission to the legislative procedure.'[156]

The EIA system can also link to corporate environmental management systems.[157] An Environmental Management System (EMS) is a set of processes and practices that enable an organization to reduce its environmental impacts and increase its operating efficiency.[158] EMS's benefits involve increased ability to differentiate the impacts of specific industries and individual producers in a region, and the capacity to measure environmental performance and impacts and to target responses.[159]

The elaboration of EMSs usually occurs due to the free choice of industries encouraged by the reduction of costs and the increase of efficiency and control over environmental impacts. However, governments can stimulate industries to adopt EMS by providing additional benefits, by leading by example with the development of EMS in agencies and departments, or by requiring EMS in legislation. The strategy of leading by example was adopted by Australia, where the procedure was adopted by the Australian Agency for International Development; by Canada, where the Canadian Ministry of the Environment is encouraging departments to adopt EMS;

[152] The concept of "scales" is very important when dealing with resilience, and especially when dealing with adaptive management. That is so because the same event that may cause uncertainty on one scale can be deemed a predictable event on another scale. According to Gunderson, uncertainty is usually caused by three types of surprise: local, cross-scale, and true novelty. Local surprises are created by broader scale processes for which there is little or no previous local knowledge. This kind of surprise can be resolved by a broader scale observation, and historical accumulation of knowledge. Cross-scale surprise occurs when a larger scale fluctuation intersects with slowly changing internal variables to create an alternative stable (local) system state. This is often the source of policy crises. True novelty occurs when new variables and processes transform the system into a new state. In these surprises, little or no experience exists for either understanding the transformation or structuring management actions. Lance Gunderson, *Resilience, flexibility and adaptive management – antidotes for spurious certitude?* CONSERVATION ECOLOGY vol. 3, n. 1, art. 7 (Jun.30, 1999), http://www.consecol.org/vol3/iss1/art7/

[153] *Strategic Environmental Assessment*, U.S. EPA (2011), http://www.epa.ie/whatwedo/advice/sea/.

[154] *Protocol on SEA,* U.N. ECONOMIC COMMISSION FOR EUROPE (2011), http://live.unece.org/env/eia/sea_protocol.html.

[155] Espoo Convention, *supra* note 105, art. 2(7).

[156] Council Directive 2001/42, 2001 O.J. (L 197) 30, 31 (EC); See Elias, *supra* note 111, at 227, 233.

[157] Lawrence, *supra* note 123, at 49.

[158] Thomas & Murfitt, *supra* note 129, at 191; *Environmental Management Systems*, EPA, http://www.epa.gov/EMS/ (last updated Nov. 27, 2012).

[159] Thomas & Murfitt, *supra* note 129, at 191.

and by the United States, which will require federal agencies to adopt EMS.[160]

The link of EIA procedure with strategic environmental assessment, area wide assessments, and corporate environmental management systems can be useful to provide adaptive management with additional information, especially if followed by the adoption of certain procedural measures.

First, environmental departments should unify the methodologies employed in the collection of ecosystem data within the several EIA related tools—such as the EIAs itself, the SEAs, and the EMSs—because lack of standardization is often a reason why available data cannot be used in modeling and why it has to be recollected by adaptive managers.[161] By these means, the environmental department can focus on managing and analyzing the available data rather than on collecting it. Second, the models developed by managers to aid in the understanding of the ecosystem's function must be kept as simple as possible, and the predictions of the need for new data should be constantly reviewed in order to prevent the collection of irrelevant data.[162]

Case Study: Spruce Budworm

The case of the management of the spruce budworm in Canada was abundantly analyzed in the specialized literature.[163] The analysis promoted by this article focuses on how the principle of resilience and, more specifically, the recommendations addressed in this section would apply to this case.

The spruce budworm is a defoliating insect that attack trees of the boreal forests in North America. The insect is constantly present in the forest in reduced numbers, except during periodic outbreaks as a consequence of these outbreaks, a large portion of the mature forest can die, causing an impact on the forest industry, which is the major economic activity of great part of the area covered by the forest[164] The tree species preferred by the budworm is the same species preferred by the pulp industry: the balsam fir.[165] Therefore, the budworm case represents a situation of direct competition between the insect and human activity.

The budworm outbreak is a natural event that contributes to forest renewal and the maintenance of species diversity. It has been occurring in the region over the last centuries without great disturbance to humans until the 1930, when the pulp industry found it had to compete with the budworm for fiber.[166]

An historical overview of the management of forests in Canada shows that since colonization there was a trend to harvest a specific species of tree at each time, thereby changing the composition of the forest[167]. This factor is relevant

[160] *Id.*, at 203; Exec. Order No. 13,148, "Greening the Government Through Leadership in Environmental Management" 65 Fed. Reg. 24,595 (Apr. 26, 2000).

[161] I.B. Marshall et al., *National and Regional Scale Measures of Canada's Ecosystem Health*, *in* Ecological Integrity and the Management of Ecosystems 117, 126 (Stephen Woodley et al. eds., 1993).

[162] Holling et al., *supra* note 99, at 50–51.

[163] A. D. Pickett, *A Critique on Insect Chemical Control Methods*, 81 Canadian Entomologist 67 (1949), *available at* http://pubs.esc-sec.ca/doi/abs/ 10.4039/Ent8167-3?journalCode=ent; William C. Clark et al., *Lessons for ecological policy design: A case study of ecosystem management*, Vol. 7 Issue 1 Ecological Modeling (1979), *available at* http://www.sciencedirect.com/science/ article/pii/0304380079900085; Holling et al., *supra* note 99; Asaf Rashid, *Compromising the Environment? – The Spruce Budworm, Aerial Insecticide Spraying, and the Pulp and Paper Industry in New Brunswick*, 3 FES OUTSTANDING GRADUATE STUDENT PAPER SERIES (2003), http://www.yorku.ca/fes/research/students/outstanding/docs/AsafRashid.pdf.

[164] Holling et al., *supra* note 99, at 143.

[165] *Id.*, at 149.

[166] *Id.*, at 147.

[167] From the late 1700s to mid-1800s there was heavy extraction of eastern white pine for ship masts; from the mid-1800s to early 1900s there was heavy extraction of large red spruce; and from colonial times to nowadays, the forest came to present low abundance of eastern hem-

because each species presents a different vulnerability to the spruce budworm. The eastern hemlock, for example, only experiences spruce budworm damage in very rare cases.[168] On the other hand, the balsam fir and the Dougles fir are the favorite targets of the insect[169] Therefore, it is possible to conclude that the original setting of the forest was more resistant to the insect, because the higher concentration of less vulnerable trees probably created a barrier to the physical dispersion of the insect.

Since the 1920's several authors have recommended the utilization of silvicultural practices to fight the recently frequent budworm outbreaks.[170] However, until 1995 knowledge of the effectiveness of silvicultural control was still deemed "fragmented" and the method was never tried as a means to address the spruce budworm outbreaks.[171] On the other hand, the tactic of spraying insecticides, employed since 1951,[172] was not abandoned even when fenitrothion, the substance used until 1998, was proved to cause human health problems[173] and a great mortality of songbirds[174] and bees.[175]

Thus, it is possible to conclude that, first, when the spraying was first adopted, the knowledge about the technique was not yet complete and the collateral effects of the substance employed by the management plan were not predicted. Therefore, if the managers had no complete understanding neither of silvicultural measures nor of spraying, why did they adopt the latter, which carried a greater risk of environmental impacts in case of failure?

Governmental protection of the pulp industry may explain such fact.

In fighting the budworm, the forest management plan and the pulp industry were seeking a "definitive" solution which could provide certainty for the economic activity. Besides that, the solution should provide the pulp industry the possibility to expand its forestry activities, which could not be provided by silvicultural techniques. That is why managers opted for the most aggressive option, spraying, neglecting silvicultural management, which was deemed an uncertain solution.

The use of spraying became such a tradition in forest management for fighting the budworm that the possibility of not using insecticides became non-existent. This situation can be seen in the "Environmental impact assessment of experimental spruce budworm adulticide trials". When discussing the effects of phosphamidon, the insecticide employed by the Program, on forest avifauna, the EIA simply compared the results of this insecticide with those produced by other kind of chemicals, the larvicides. The EIA analysis is exhausted by showing that phosphamidon is the chemical less harmful to birds.[176] However, the EIA does not discuss the alternative of *not* using chemicals at all.

The adopted management plan, which was supposed to provide certainty, inevitably creat-

lock, which was originally very abundant. See Rashid, *supra* note 163, at 25.

168 *Id.* at 20.

169 *Id.* at 19–21.

170 F.C. Craighead, *Relation between mortality of trees attacked by spruce budworm and previous growth*, 33 J. Agric. Res. 541, 547 (1925); Thomas F. McLintock, *Silvicultural Practices for Control of Spruce Budworm*, vol. 45 n.9 J. Forestry 655, 655–59 (1947); Pickett, *supra* note 163; J.D. Tothill, *Notes on the Outbreaks of Spruce Budworm, Forest Tent Caterpillar and Larch Sawfly in New Brunswick*, 8 Proc. Acadian Entomological Soc'y 173, 173–82 (1922).

171 Rashid, *supra* note 163, at 30.

172 Holling et al., *supra* note 99, at 143.

173 See Friesen v. Forest Prot. Ltd. (1978), 22 N.B.R. (2d) 146–71.

174 See Rashid, *supra* note 163, at 12.

175 See Bridges Brothers Ltd. v. Forest Protection Ltd. (1972). 5 N.B.R. (2d): 585–591.

176 B.B. McLeod & R.L. Millikin, *Environmental impact assessment of experimental spruce budworm adulticide trials: Effects on forest avifauna*, (1982), *available at* http://cfs.nrcan.gc.ca/publications/?id=8774.

ed unpredictable impacts, such as: the spread of outbreaks to areas previously not affected by the budworm because spraying expelled the survivor insects to the neighborhoods; dependence of the forest on the insecticide; and the risk of even greater outbreaks due to the increasing resilience of the budworm. It is possible to infer that this policy created a perverse final result which increased the resilience of the parasite and diminished the resilience of the forest.

The analysis of the budworm case through the perspective of the principle of resilience shows a sequence of management mistakes. First, the environmentally less aggressive option to address a management issue cannot be excluded from the EIA. The EIA provides decision makers with information about the alternatives to a management issue. If the less aggressive option is not assessed, decision makers hardly will be able to adequately weigh that option against the others available.

Second, decision makers must be guided by the principle of resilience to prioritize the environmentally less aggressive option of management. The priority can be set by imposing on the decision makers the obligation to publicly justify why a more aggressive management option is preferred to the less aggressive one. However, it is possible to notice that if this way of establishing the priority had been adopted in the case of the budworm, decision makers would simply state that the silvicultural technique was not yet sufficiently developed to be adopted. In this case, the imposition of another obligation on the decision makers would be recommended: if a less aggressive management option is not adopted as the main measure to address the problem, the technique should be employed in a limited area in order to test if the reason why this solution was neglected is observed in reality. The employment of monitoring would be essential to implement this recommendation.

Third, the ambition for greater profits from an economic activity that is already under way cannot be pursued to the detriment of the ecosystem where the economic activity is located. Every government and economic actor must internalize the idea that the capacity for growth of a certain activity is limited by the ecosystem's capacity to support this activity. In the budworm case, the pulp industry pushed the forest beyond its capacity to support the forestry activity. That is why the industry rejected the silvicultural techniques, which would have increased the concentration of tree species that are important for the health of the forest, but that are not interesting for the pulp industry. The industry wanted to keep the high concentrations of balsam fir and Douglas fir, which was the closest they could get to a monoculture for pulp extraction.

Fourth, under the principle of resilience, managers are required to analyze the long-term effects of their decisions, in order to protect the interests of future generations and of nature itself, which can be understood as the preservation of the ecosystem capacity to reorganize and maintain itself. This precept was not followed in the case of the budworm:

> The budworm analysis explicitly focuses on a time horizon determined by the slowest variable in the system, i.e., tree regeneration and growth. It does not consider long-term evolutionary changes that can trigger competitive shifts in tree species composition. Similarly, short-term benefits of a management policy might be followed later by unanticipated surprises that, being unanticipated, become crises.[177]

In order to enable decision makers to predict and to weigh the long-term effects of a decision, this article recommends the use of monitoring

[177] Holling et al., *supra* note 314, at 170.

techniques because long-term effects are hardly assessed by EIA. Therefore, the commitment to the preservation of nature and to future generations' interests requires constant assessment of the results obtained by management policies associated with adaptive management techniques.

VI. Conclusion

Sustainable development is essentially a means to implement the *land ethic.* Failure in doing so risks reducing the attainment of sustainable development to mere duplication of the old kind of development, the one that gives sole consideration to economic growth, not to environmental preservation.

The acknowledgement of the principle of resilience fills the vacuum existing in the operationalization of the principle of sustainable development regarding situations where environmental protection cannot be conciliated with economic growth.

The principle also enhances the enforcement of sustainable yield by acknowledging that economic growth must be restrained when deemed necessary to prevent total exhaustion of natural resources. In a broader sense, the principle acknowledges that humans must live in such a way as not to impair the maintenance of ecological functions that ensure the provision of resources and services which both society and the economy depend upon to continue existing. As the final result of this effort is the maintenance of subsidies for a balanced society and a stable economy, it is possible to affirm that the principle of resilience provides greater economic efficiency in the long term and a deeper understanding of economy.

The inclusion of ecological concepts in the functioning of the economy can accelerate the adoption of green economy and make it more resilient because the principle of resilience provides not only an ecological foundation, but also a moral background to the green economy, which is essential to prevent this concept from being sidetracked by traditional economic interests during implementation.

The use of the principle of resilience will have tangible and practical benefits for society. However, this article does not espouse the principle of resilience only for its utilitarian benefits, but also for its values and for the benefits it will generate to nature itself. Therefore, it is a basic premise of the principle of resilience that its ethical values be enforced even when no utilitarian benefits are expected to arise from it.

The principle of resilience obliges decision makers and operators of the law to consider the long term effects of their acts on nature and on present and future generations. However, because the principle of resilience addresses moral obligations vested with legal enforcement, it cannot be considered a sectoral principle, applied solely to conducts practiced by environment agencies; rather, it is a cross-cutting principle that must be applied at the highest level of private and public institutions in order to influence decision making in every sector.

This article demonstrated that the foundations of the principle of resilience are already present in International Environmental Law and, consequently, that this is already a general principle of International Law. Although the principle already exists buried within other principles, we can only enjoy its benefits and apply it to legal procedures when it becomes expressly recognized and systematized in the international level. Thus, the principle can be incorporated in future treaties and influence the interpretation of existing international agreements; it can also be recognized in domestic law, thereby shaping new regulations and influencing the interpretation of domestic law by judges and administrators.

Since the adoption of Agenda 21, States have come to understand and to apply sustainable

development[178]. In twenty years, environmental problems became worse. The patterns of deterioration show that conservation without resilience is not enough. That is why this article concludes that, after the recognition of the principle of resilience in the international legal system, the next step for ensuring implementation of the principle in the international sphere is to infuse Agenda 21 with the principle of resilience.

[178] *Agenda 21*, *supra* note 111.

Privilegiebrev och urminnes hävd – Vilken ställning har de enligt miljöbalken?

Ingela Lindqvist[1]

Abstract

A surprisingly small amount of the Swedish hydropower plants has actually been tried according to the Swedish Environmental Code. Most plants are operated according to permits issued under the 1918 year's Water Act. However, a significant number of facilities are operating with the support of rights older than that. In medieval times the Swedish kings in certain cases awarded i.e. farmers various rights such as the right to build and operate a mill. Nowadays these mills are since long replaced by small scale hydropower plants. Due to how the transposition provisions of the Environmental Code are formulated operators now claim that these old rights have the same legal consequences as permits issued according to the Environmental Code. The aim of this article is to examine the significance of older rights in the context of the need to implement stricter environmental protection measures.

Inledning[2]

I Sverige går den rättsliga regleringen av förfogande över vatten tillbaka ända till landskapslagarnas tid. Den svenska vattenrätten är, kanske delvis som en konsekvens av detta, ett traditionstungt rättsområde. Ända sedan medeltiden har enskilda kunnat utverka olika former av rättigheter att förfoga över vattnet i t.ex. en älv. Det kan röra sig om privilegiebrev som ger innehavaren rätt att bygga och driva kvarnar, dammar, stångjärnshammare eller liknande. En rätt att förfoga över vatten har dessutom länge ansetts kunna uppkomma genom urminnes hävd.

Det är dessa typer av äldre rättigheter, privilegiebrev, urminnes hävd och även tillstånd enligt 1880 års vattenrättsförordning och vilken ställning dessa rättigheter har enligt miljöbalken (1998:808, MB) som kommer att behandlas i denna artikel. Den stora frågan är om de har rättsverkan på samma sätt som tillstånd meddelade enligt MB har i den bemärkelsen att de omfattas av MB 24 kap. 1 § och utgör hinder mot ingripanden av tillsynsmyndigheter.

Här kan inledningsvis invändas att detta borde vara ett så gott som obefintligt problem, antalet stångjärnshammare i drift 2013 måste vara tämligen begränsat och detsamma torde gälla för skvaltekvarnar. Den typen av anläggningar är i de allra flesta fall där platsen fortfarande används för produktion i någon form ersatta av vattenkraftverk. Att så gamla rättigheter trots detta fortfarande kan ha relevans enligt MB är kopplat till tillståndspliktens omfattning och utformning i MB.

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[2] Jag vill här tacka samtliga seminariedeltagare för de givande synpunkter som framfördes under seminariet som hölls på Kammarkollegiet. Ett särskilt tack även till Gabriel Michanek för skarpsinniga kommentarer och inspirerande diskussioner.

Enligt MB 11 kap. 9 § är vattenverksamheter som huvudregel tillståndspliktiga. I MB 11 kap. 2 § definieras begreppet vattenverksamhet och det innefattar t.ex. åtgärder som syftar till att förändra vattnets djup eller läge såsom dämning eller avledning av vatten. Elproduktion i vatten är i sig däremot inte en tillståndspliktig verksamhet enligt MB. Att ett kvarnhjul som drivits med stöd av en äldre rättighet bytts ut mot en elproducerande turbin saknar därmed betydelse för rättighetens fortsatta giltighet enligt balken. Ombyggnationen av anläggningen ryms däremot inte under en sådan typ av rättighet men är i många fall möjlig att lagligförklara enligt miljöbalkens promulgationslag (1998:811, MBP) 17 §.

Miljöprocessutredningen gjorde 2009 en sammanställning av antalet vattenkraftverk och regleringsdammar. Av de enkätsvar som länsstyrelserna lämnade in uppgick antalet vattenkraftverk och regleringsdammar i Sverige till totalt sett 3727. Av dessa hade 3393 tillstånd enligt 1918 års vattenlag (1918:523, ÄVL) eller motsvarande äldre lagstiftning. I denna kategori ingick dock även de verksamheter som bedrevs med stöd av äldre rättigheter såsom urminnes hävd och privilegiebrev.[3] Detta indikerar att dessa äldre rättigheters ställning enligt MB är en fråga av väsentlig praktisk betydelse.

Privilegiebrev

Privilegiebrev har utdelats under flera hundra år. Det är ofta oklart enligt vilken lagstiftning de är utfärdade och de kan ge innehavaren vitt skilda rättigheter såsom rätt att bedriva mindre industrier, kvarnar eller tilldela en verksamhet smidesrätt. Fokus i privilegiebreven ligger inte sällan på det rent näringsrättsliga aspekterna och de innehåller sällan någon egentlig beskrivning av anläggningens utformning eller den verksamhet som ska bedrivas där.

[3] SOU 2009:42, s. 95 f.

År 1880 upphävdes 20 kap. i 1734 års byggningabalk och ersattes av vattenrättsförordningen (VRF).[4] VRF:s övergångsbestämmelse i 25 § stadgar att

> ”Genom denna förordning göres ej rubbning i den rätt och frihet, som bergverk, qvarnar och fiskeverk förunnad är, ej heller i annan rättighet att vattendrag stänga eller uppdämma eller i öfrigt öfver vattnet förfoga.”

VRF ersattes i sin tur 1918 års vattenlag (ÄVL). Ordalydelsen i ÄVL 2 kap. 41 § är i stort sett identisk med VRF 25 §. Här är det fortfarande tydligt att privilegier var en rättighet som hade en stark ställning. De kunde precis som verksamheter som drevs med stöd av tillstånd enligt ÄVL inskränkas genom de möjligheter till tvångsrätt som föreskrevs i ÄVL 2 kap. I övrigt var verksamhetsutövaren skyddad från inskränkningar i rätten att förfoga över vattnet.

1983 infördes en ny vattenlag (1983:291,VL). I promulgationslagen till den nya vattenlagen (1983:292, VP) 19 § anges att:

> ”Ett tillstånd enligt vattenlagen (1918:523) eller motsvarande äldre bestämmelser till ett vattenföretag eller någon annan åtgärd som avses i den nya vattenlagen, anses med avseende på vad som föreskrivs i 15 kap. nya vattenlagen som ett tillstånd enligt denna med de avvikelser som följer av 20 och 21 §.
>
> Första stycket gäller även en sådan särskild rättighet att förfoga över vattnet som avses i 2 kap. 41 § vattenlagen (1918:523)”

VL 15 kap. behandlar tillstånds giltighet och möjligheter till omprövning. En rättighet grundad på privilegiebrev hade samma giltighet enligt den

[4] Egentligen betecknad ”Förordning om jordegares rätt öfver vattnet å hans grund” men vanligtvis omnämnd som vattenrättsförordningen.

nya lagen som tillstånd meddelade med stöd av ÄVL. Dessa rättigheter hade därmed huvudsakligen samma rättsverkan som tillstånd meddelade enligt 1983 års VL. Det enda undantaget är att de äldre rättigheter som avses i ÄVL 2 kap. 41 § i vissa avseenden hade en starkare ställning än tillstånd enligt VL.

Skyldigheten att utan ersättning tåla en förlust vid omprövningar var t.ex. precis som enligt MB begränsad till 5 % av t.ex. produktionsvärdet jämfört med 5–20 % för de verksamheter som prövats enligt VL respektive MB.[5] VP 20 § angav även att omprövning av äldre tillstånd och rättigheter fick ske först 1992 och det måste då ha förflutit minst 30 år sedan verksamheten senast prövades. För nya tillstånd enligt VL gällde istället att domstolen i tillståndet skulle ange när omprövning tidigast kunde ske, som lägst 10 och högst 30 år.[6]

I propositionen till 1983 års VL behandlas frågan om den nya lagens betydelse för verksamheter som drivs med stöd av äldre tillstånd. I lagrådsremissens allmänna motivering förs en diskussion kring om det överhuvudtaget ska vara möjligt att införa vidgade omprövningsmöjligheter för tillstånd meddelade innan VL:s ikraftträdande. Rättssäkerhetsskäl och grundsatsen att en företagare i förväg ska kunna bedöma de rättsliga konsekvenserna av sitt handlande ansågs tala mot utökade möjligheter till omprövning i förhållande till vad som gällt enligt ÄVL. Eftersom behovet av omprövning ansågs vara särskilt stort just vid äldre vattenföretag infördes trots detta möjligheter till omprövning även för dessa.[7]

Även författningskommentaren i propositionen till VL talar för att VP 19 § närmast ska ses som ett förtydligande av att det enligt den nya lagen är faktiskt är möjligt att ompröva äldre rättigheter. Om VP 19 § 2 st. som föreskriver att rättigheter enligt ÄVL 2 kap. 41 § ska anses som tillstånd enligt VL uttalas att ”Det skall, som utredningen har föreslagit, alltså vara möjligt att ändra sådana rättigheter så att allmänna och även enskilda intressen kan tillgodoses.”.[8] Utgångspunkten förefaller annars vara att de gäller för all framtid.

Av detta framgår att privilegiebrev länge har haft en stark ställning inom vattenrätten. Den stora frågan blir då om detta förändrades genom införandet av MB. MBP 5 § behandlar frågan om äldre tillstånd m.m. Där anges att tillstånd, godkännanden osv. som meddelats enligt någon av de lagar som finns uppräknade i MBP 2 § eller enligt motsvarande bestämmelser i äldre lag ska fortsätta att gälla även efter balkens ikraftträdande. De ska då anses meddelade med stöd av motsvarande bestämmelser i MB. En av de lagar som nämns i MBP 2 § är 1983 års VL. Av miljöbalkspropositionen framgår även att MBP 5 § inte bara omfattar tillstånd meddelade med stöd av de lagar som upphävs genom MB utan även sådana som meddelats enligt äldre lagstiftning t.ex. ÄVL.[9]

En första invändning mot att privilegiebrev ska anses falla in under MBP 5 § är att de inte kan sägas vara meddelade ”med stöd av motsvarande bestämmelser”. MB är en modern miljölagstiftning och det kan därför förefalla orimligt att jämställa MB med 1734 års lag och dess kapitel om ”Qvarnar” som för övrigt är placerat precis innan kapitlet om ”Bi”. Att lagstiftningen inte tog hänsyn till miljön i samma utsträckning som MB är dock inte tillräckligt för att den inte ska anses vara äldre motsvarigheter till MB. Samma invändning kan riktas mot all äldre lagstiftning,

[5] Jfr VL 9 kap. 12–14 §§ och VP 12 § och MB 31 kap.
[6] VL 15 kap. 3 §.
[7] Prop. 1981/82:130, s. 118 f.
[8] Prop. 1981/82:130, s. 632.
[9] Prop. 1997/98:45 del 1, s. 383.

inte minst ÄVL som huvudsakligen var en ren exploateringslagstiftning.[10]

Här kan även tilläggas att den lagstiftning som gällde från 1734 till 1880 då VRF trädde ikraft trots allt innehöll generella föreskrifter med krav på olika skyddsåtgärder. Dessa skyddskrav som inte på något sätt syftade till att bevara den biologiska mångfalden utan istället var ämnade att säkra t.ex. samfärdsel och fiske var i många långtgående även i förhållande till vad som kan krävas enligt MB. Genom 1734 års byggningabalk 20 kap. 6 § förskrevs t.ex. att dammlucka skulle öppnas den första maj varje år, dämning fick återupptagas först till hösten. 1766 års fiskeristadga innehöll flera bestämmelser till skydd för fisket såsom ett ovillkorligt förbud mot att helt överbygga ett vattendrag.

Ett viktigt argument för att privilegiebrev ska anses falla in under MBP 5 § är MBP 34 §. Där anges att särskilda rättigheter som avses i ÄVL 2 kap. 41 § kan omprövas enligt MB. I miljöbalkspropositionen anges dessutom att 34 § delvis motsvarar VP 19 § 2 st.[11] Om de rättigheter som avses i ÄVL 2 kap. 41 § inte omfattas av MBP 5 § saknar en bestämmelse som anger att det går att ompröva dem enligt balken helt praktisk betydelse. Det är svårt att se behovet av att ompröva något som saknar rättskraft.

Här ska även uppmärksammas att det förslag till miljöbalk som gick ut på lagrådsremiss ändrades på inrådan av lagrådet. I förslaget till MBP fanns en paragraf som stadgade att balkens bestämmelser om återkallelse var tillämpliga även på vattenanläggningar som tillkommit innan balkens ikraftträdande även om något tillstånd eller godkännande inte behövts och inte heller lämnats.[12] Dessa anläggningar omfattades därmed inte av något tillstånd eller godkännande. Lagrådet konstaterade dock att det uppenbarligen inte går att återkalla tillstånd som inte finns. Den avsedda effekten att kunna meddela de villkor och förelägganden som behövs uppnås med stöd av tillsyn enligt MB 26 kap. 9 §. I de fall där tillstånd har meddelats följer det av MBP 5 § att återkallelse kan ske. På lagrådets inrådan utgick därför paragrafen.

Lagrådet hade inga invändningar mot MBP 34 § men samma resonemang kan föras här. Rimligtvis borde det vara lika omöjligt att tillämpa bestämmelserna om omprövning av tillstånd i MB 24 kap. 5 § på något som inte är ett tillstånd eller ens att anse som tillstånd enligt balken. På samma sätt borde i det fallet den avsedda effekten att genomföra krav på skyddsåtgärder och liknande kunna uppnås genom tillsyn med stöd av MB 26 kap. 9 §.

Det kan visserligen ifrågasättas om MBP 34 § verkligen kan sägas fylla en funktion även om man gör tolkningen att rättigheterna i ÄVL 2 kap. 41 § omfattas av MBP 5 § och därmed ska anses som tillstånd meddelade enligt balken. I det fallet har rättigheterna samma ställning som tillstånd meddelade enligt balken och att de då går att ompröva följer därmed direkt av MBP 5 § och omprövningsbestämmelserna i MB 24 kap. 5 §. I specialmotiveringen till MBP 34 § anges dock att paragrafen delvis motsvarar VP 19 § 2 st. VP 19 § 2 st. får enligt min mening närmast ses som ett klargörande av att VL:s rättskraftsregler och framförallt VL:s möjligheter till omprövning gäller även rättigheter enligt ÄVL 2 kap. 41 §.[13] Det är i så fall ett förtydligande som mot bakgrund av formuleringarna om meddelade tillstånd och beslut i MBP 5 § fortfarande får anses nödvändigt.

[10] SOU 2009:10, s. 230.
[11] Prop. 1997/98:45, del 2, s. 397.
[12] Prop. 1997/98:45, del 3, bilaga 9, s. 278.
[13] Jfr Strömberg, *Vattenlagen med kommentar*, Publica 1984, s. 369 och prop. 1981/82:130, s. 632.

I MBP 39–40 §§ behandlas verksamhetsutövarens rätt till ersättning vid omprövningar av tillstånd. Av 40 § rör uttryckligen rättigheter enligt ÄVL 2 kap. 41 §. Där stadgas att begränsningen i MBP 38 § av ersättningsrätten i de fall där det inskränkande beslutet fattats innan balkens ikraftträdande gäller även rättigheter enligt ÄVL 2 kap. 41 §. I miljöbalkspropositionen framhålls även att vid omprövningar enligt balkens regler av den typen av rättigheter tillämpas om inget annat anges reglerna om rätt till ersättning i MB 31 kap. I propositionen anges dessutom att MBP 38 § motsvarar VP 13 §.[14] I förarbetena till VP 13 § stadgas i sin tur att paragrafen jämställer den typen av rättigheter med tillstånd enligt VL.[15]

Lojalitet med lagstiftarens avsikter talar därmed för att privilegiebrev ska anses falla in under MBP 5 §. En given utgångspunkt vid all lagtolkning är att lagstiftningen är rationell och meningsfull. Bestämmelser ska läsas mot bakgrund av detta och resultatet blir då att MBP 5 § även omfattar rättigheter enligt ÄVL. Konsekvensen av tolkningen att rättigheterna enligt ÄVL 2 kap. 41 § inte skulle anses som tillstånd enligt balken blir i praktiken att MP 34 och 40 §§ var obsoleta och verkningslösa redan när de skrevs. Det krävs följaktligen starka skäl för att äldre rättigheter ska anses sakna rättsverkan.

Tolkningen att äldre rättigheter inte skulle vara att anse som tillstånd enligt MB är dessutom en avsevärd förändring i förhållande till vad som tidigare gällt. Vid införandet av 1983 års VL fördes en diskussion om det överhuvudtaget skulle vara möjligt att ompröva äldre tillstånd och rättigheter. Här är alltså frågan om rättigheterna har gått från en så stark ställning att det knappt ansågs möjligt att ompröva dem till att de helt saknar rättsverkan enligt MB. Att detta inte på något sätt kommenteras detta i förarbetena till MB talar för att en sådan förändring inte var avsedd.

Rättskraften i tillstånd enligt balken regleras i MB 24 kap. 1 §. Där stadgas att tillståndet gäller mot alla såvitt avser frågor som prövats i domen eller beslutet. Har något prövats i domen går det inte att åstadkomma en ändring av detta genom tillsyn enligt MB 26 kap. 9 §. Vill t.ex. en tillsynsmyndighet införa nya skyddsvillkor för verksamheten måste dessa fall normalt ske genom omprövning eller återkallelse av tillståndet. Frågan är dock hur detta ska tillämpas när det gäller privilegiebrev. I författningskommentaren till MB 24 kap. 1 § anges att RB 17 kap. 3 § inte är tillämplig på tillstånd enligt MB eftersom tillståndsprövningen sker genom officialprövning. Det är minst sagt oklart i vilken utsträckning detta kan anses gälla även för privilegiebrev.

Att privilegiebrev inte medförde en obegränsad rätt att fritt förfoga över vattnet uppmärksammades redan 1903. von Seth diskuterar då effekterna av införandet av 1734 års lag. Där uppställdes ett generellt krav att dammluckor skulle öppnas första maj och att dämning fick verkställas igen först till hösten. von Seth fastslår att det vid införandet av 1734 års lag fanns två klasser av vattenverk, dels de som inte hade någon särskild rätt, dels de vars rätt till dämning var reglerad i särskilt avtal, privilegiebrev eller dom. Vad som gällde för den senare kategorin var enligt von Seth en tolkningsfråga. Han skriver dock att:

> ”… det böra erinras, att enbart tillåtelsen att begagna en så och så beskaffad damm icke kan anses i sig hafva utan vidare inneburit en obegränsad rätt för ägaren att efter behag hushålla med vattnet vid dammen, särskilt om denna är byggd som genomfallsdamm, utan att för en sådan rätt torde fordras *uttrycklig bestämmelse* därom på ett

[14] Prop. 1997/98:45 del 2, s. 400.
[15] Prop. 1981/82:130, s. 629.

eller annat sätt i upplåtelsehandlingen eller afsyningsprotokollet.”.[16]

Vid tolkningen av vilken rätt ett privilegiebrev medför är det av central betydelse att inte bara utgå ifrån vad som står i själva dokumentet utan även beakta den tidens lagstiftning. Dagens MB är till övervägande del en ramlagstiftning. Den utgår ifrån att en prövning ska ske i det enskilda fallet och det är genom denna prövning nödvändiga villkor för driften av verksamheten ska bestämmas.

Som ovan nämnts stipulerade äldre rätt däremot långtgående generella skyddsvillkor. 1766 års fiskeristadga innebar ett ovillkorligt förbud mot att helt överbygga och därigenom stänga ett vattendrag.[17] Åtminstone en sjättedel av vattnet skulle rinna helt fritt till skydd för fisket. Det var först 1899 som detta ändades och Kungl. Maj:t under vissa förutsättningar gavs möjlighet att meddela undantag från förbudet.[18]

Av detta framgår tydligt att äldre rättigheter måste läsas mot bakgrund av den lagstiftning som gällde vid tiden för deras uppkomst. Detta rimmar dock illa med MB som en modern miljölagstiftning. Att driften av en avsevärd mängd dammar och kraftanläggningar regleras av 1734 års lag och 1766 års fiskeristadga kan knappast anses vara i linje med vare sig hållbar utveckling eller rättssäkerhet i form av grundläggande krav på förutsebarhet. Det är inte bara orimligt utan dessutom väldigt opraktiskt att ombud, myndigheter och domstolar ska lägga tid och resurser på att inte bara tolka utan även med hjälp av riksarkivet leta upp inte helt lättillgänglig närmare 300 år gammal lagstiftning. Å andra sidan är detta uttryckligen den ordning som lagstiftaren stipulerat ifråga om lagligförklaringar.

En grundläggande förutsättning för att en äldre rättighet överhuvudtaget ska kunna anses ha relevans enligt MB är dock att verksamhetsutövaren kan visa att verksamhetens inverkan på vattenförhållandena stämmer överens med den rätt som följer av den åberopade äldre rättigheten. Avledningen av vatten till turbinerna ska då t.ex. visas vara densamma som den var till kvarnen. Att en tidigare öppet rinnande vattensträcka täcks över och istället leds genom en modern tilloppstub torde vara ett tydligt exempel på när det inte längre går att hävda att verksamheten bedrivs med stöd av en äldre rättighet.

Det finns dock flera tunga skäl som talar för att rättigheter enligt ÄVL 2 kap. 41 § inte ska anses som tillstånd enligt balken. Det första och möjligtvis även det viktigaste är att införandet av MB i sig innebar en tydlig kursändring i jämförelse med äldre rätt. Vattenrätten har länge varit ett traditionstungt rättsområde där intresset av en effektiv kraftproduktion i många fall varit överordnat andra aspekter såsom biologisk mångfald.

MB är istället en utpräglad miljölagstiftning. När balken infördes framhölls i förarbetena att MB ska ses som en modern miljölagstiftning och att detta på många sätt innebar en skärpning av tidigare regler.[19] Att en avsevärd andel anläggningar bedrivs med stöd av privilegiebrev är inte i linje med detta. Att vattenkraftverk som t.ex. i fallet med Gullsby kraftverk[20] drivs med stöd av ett privilegiebrev från 1802 som gav innehavaren rätt till upphandling av lump, drivande av pappersbruk och uppdämning är varken modernt eller förenligt med stadgandet i MB 1 kap. 1 § om hållbar utveckling.

Hela balken är uppbyggd kring en väl fungerande och effektiv tillsyn vilket även det får ses

[16] von Seth, NJA II 1903 nr 7, s. 3.
[17] 1766 års fiskeristadga 3 kap. 5 §.
[18] 1900 års utformning av 7 och 8 §§ VRF.
[19] Prop. 1997/98:45 del 1, s. 163.
[20] MÖD M 5419-09.

som nydanande i förhållande till vad som tidigare gällt inom vattenrätten.[21] En effektiv tillsyn förutsätter att tillståndspliktiga verksamheter faktiskt är tillståndsprövade. Detta eftersom det är just i tillståndsprövningen som miljömässiga avvägningar ska göras och villkor för hur verksamheten får bedrivas fastställas.

När en verksamhetsutövare åberopar ett privilegiebrev som stöd för rätten att bedriva verksamhet omöjliggörs i praktiken en effektiv tillsynsverksamhet. Visserligen är det verksamhetsutövaren som har att visa både att giltigt tillstånd föreligger och vad tillståndet innebär. Faktum kvarstår dock att äldre rättigheter som måste läsas mot bakgrund av äldre rätt avsevärt försvårar tillsynen. I det ännu i april 2013 pågående målet om Östanfors kraftverk har sökandesidan åberopat 11 olika handlingar och privilegier från 1626 till 1833. Det rör sig om alltifrån köpebrev till rätt till stångjärnssmide.

Det är inte en helt lätt uppgift att i privilegiebreven överhuvudtaget hitta bestämmelser som reglerar vattnets användning. Inte heller att utröna vad de eventuella rättigheterna har för betydelse för driften av ett modernt vattenkraftverk. Här går ännu en av tillståndets funktioner förlorade. Miljöorganisationer och allmänheten, t.ex. närboende har alltid möjlighet att begära ut de tillstånd som reglerar en verksamhet. De har därmed en åtminstone teoretisk möjlighet att ta del av de förutsättningar som gäller för verksamhetens drift. Enskilda har dessutom i vissa fall möjlighet att föra talan mot myndigheters beslut att inte återkalla eller begära omprövning av tillstånd.[22] Även detta försvåras när det är så oklart vilka villkor som gäller för verksamheten.

Av detta framgår att privilegiebrev inte passar in i MB:s systematik. Det är minst sagt svårt att utifrån rättskraftsbestämmelsen ”… frågor som prövats i domen …” avgöra vad i ett privilegiebrev som ska anses rättskraftigt prövat. Detta i kombination med att breven måste läsas mot bakgrund av den lagstiftning som gällde vid deras utförande försvårar och nästintill omöjliggör en effektiv tillsyn. En effektiv tillsyn som dessutom är om inte det så ett av de viktigaste verktygen för genomförandet av balkens målsättning.

Det kan argumenteras för att det EU-rättsliga kravet på fördragskonform tolkning ska ses som en anledning att inte jämställa privilegiebrev med tillstånd enligt MB. EU:s ramvattendirektiv innehåller flera bindande krav på vattenkvalitet.[23] Flera av dessa utgör krav som Sverige kommer få svårt att leva upp till.[24] Enligt praxis från EU-domstolen är de nationella domstolarna skyldiga att fullt utnyttja den bedömningsfrihet de har enligt nationell rätt att tolka nationella rättsakter för att genomföra de krav som följer av gemenskapsrätten.[25]

Här är dock frågan mer komplicerad än så. Det svenska juridiska systemet är i sig inte oförenligt med EU-rätten. Det finns verktyg för att implementera de krav som ställs enligt ramvattendirektivet även när det gäller de anläggningar som omfattas av någon typ av äldre rättighet. Detta kan åstadkommas genom omprövningar

[21] Jfr prop. 1997/98:45 del 1, s. 491 ff.

[22] MÖD 2011:46.

[23] För diskussion om i vilken utsträckning bestämmelserna i ramvattendirektivet är bindande se Keessen m.fl. European River Basin Districts: Are They Swimming in the Same Implementation Pool? I *Journal of Environmental Law 22:2, 2010*. Se även Kommissionen mot Luxemburg, 30 november 2006, C-32/05, p. 39 och 43,

[24] Rudberg, *Constant Concessions Under Changing Circumstances: the Water and Renewable Energy Directives and Hydropower in Sweden*, s. 22.

[25] Von Colson och Kamann mot Land Nordrhein-Westfalen, 10 april 1984, C-14/83, p. 28 och Marleasing SA mot Comercial Internacional de Alimentación SA, 12 november 1990, C-106/89, p. 8.

och återkallelse. Detta kommer naturligtvis inte att fungera i praktiken, det skulle krävas så oerhört mycket mer personella och ekonomiska resurser till både myndigheter och domstolar än vad som finns idag att det vore fullkomligt orimligt och troligtvis inte ens genomförbart. Sverige kommer därmed rent faktiskt att bryta mot EU-rätten i dessa fall. Det förändrar dock inte det faktum att det ytterst rör sig om en resursfråga vilket innebär att kravet på fördragskonform tolkning inte aktualiseras. I dessa fall är det inte genom fördragskonform tolkning utan genom lagstiftning eller tillskjutande av resurser EU-rätten ska genomföras.

Den stora frågan är dock om detta är tillräckligt för att helt frångå vad som tidigare gällt. Att frånkänna privilegiebrev rättsverkan enligt MB innebär som ovan nämnts även att man helt bortser från två bestämmelser i MBP. Svaret på den frågan är inte helt självklart utan beror till viss del på hur man värderar det faktum att MB trots allt innebar en kursändring och utges vara en modern miljölagstiftning. Enligt min mening väger dock lojaliteten med lagstiftaren tyngre. Jag anser inte att det mot bakgrund av vad som ovan anförts finns tillräckliga skäl för att utgå ifrån att två paragrafer i MBP var obsoleta redan vid deras tillkomst. Privilegiebreven ska enligt detta sätt att se på det anses som tillstånd enligt MBP 5 §, hur omodernt, orimligt och opraktiskt det än är i praktiken.

Urminnes hävd

Ännu en rättighet som förekommit inom den äldre vattenrätten är urminnes hävd. Institutet urminnes hävd utmönstrades vid införandet av nya jordabalken (1970:994, JB) som trädde i kraft 1972. Av JB:s promulgationslag (1970:995, JP) 6 § framgår dock att de bestämmelser om urminnes hävd som fanns i äldre jordabalken (ÄJB) fortfarande ska gälla för de fall då hävd uppstått innan införandet av JB.

ÄJB 1 § stadgar att:

> ”Det är urminnes hävd: där man någon fast egendom eller rättighet i så lång tid okvald och ohindrad besuttit, nyttjat och brukat haver, att ingen minnes, eller av sanna sago vet, huru hans förfäder, eller fångesmän först därtill komne äro.”

I utredningen SOU 2006:14 om samernas sedvanemarker framhålls att ett uttalande av professor Undén[26] ger att urminnes hävd ska avse två mansåldrar tillsammans utgörande ungefär 90 år. Utredningen konstaterar även att det uttalandet har fått visst genomslag.[27] En förutsättning för att urminnes hävd ska kunna föreligga är därmed att anläggningen eller verksamheten som omfattas av den tillkommit innan 1882. Detta är 90 innan JB trädde ikraft och institutet urminnes hävd utmönstrades.

Som ovan nämnts upphävdes 20 kap. i 1734 års byggningabalk 1880 och ersattes av VRF. VRF:s övergångsbestämmelse i 25 § fick sin utformning delvis i enlighet med ett förslag från riksdagen. I 25 § stadgas att förordningen inte ska rubba gällande rätt och frihet att dämma osv. Riksdagen hade anfört att:

> ”… dels och i stället för ’annan tillkommen rättighet’ sättes ’annan rättighet’, det senare på det att ingen tvekan må kunna uppstå, att icke till här afsedd rättighet skall hänföras äfven den, som grundas å urminnes häfd …”.[28]

Uttalandet ska läsas som att riksdagen ville förtydliga att urminnes hävd verkligen var en av de rättigheter som avsågs i 25 §.[29] Därmed hade

[26] Undén, *Svensk Sakrätt II fast egendom*, 4:e uppl., Gleerup 1960, s. 140.
[27] SOU 2006:14, s. 382.
[28] NJA II 1882, nr 1, s. 59.
[29] Jfr protokoll från riksdagens första kammare 1880 band 1 N:o 15, s. 9 Herr Grefve Strömholm uttalar där att

urminnes hävd rättsverkan enligt VRF på så sätt att verksamheter i den utsträckning de bedrevs i enlighet med urminnes hävd inte påverkades av den nya lagens ikraftträdande.

Detta bekräftas även av af Klintberg som angående skriver att 2 kap. 41 § att:

> ”De här avsedda rättigheterna ha i regel karaktären av servitut till förmån för den fastighet vartill vattenbyggnaden hör. Ett sådant servitut är ofta av offentligrättslig natur, d.v.s. det grundar sig på privilegiebrev, dom, skattläggning, eller annan offentlig rättshandling. Exempel härpå ges i lagtexten, då där talas om ’den rätt och frihet, som är förunnad bergverk, kvarnar, och fiskeverk’. Rättigheten kan emellertid även ha uppkommit genom privaträttsligt avtal eller grundas på urminnes hävd.”.

Precis som privilegiebrev utgör urminnes hävd en rättighet enligt ÄVL 2 kap. 41 § och kom därmed att jämställas med tillstånd enligt VL, VP 15 §. VP 15 § talar uttryckligen om rättigheter i ÄVL 2 kap. 41 §, här råder inget tvivel om att urminnes hävd hade samma rättsverkan som ett tillstånd meddelat enligt VL.

Frågan är dock om rättigheter som uppkommit genom urminnes hävd behåller denna ställning även efter införandet av MB. MBP 5 § som föreskriver vilka äldre rättigheter som är att anse som tillstånd enligt MB talar om tillstånd osv. som ”meddelats” enligt motsvarande äldre bestämmelser. Urminnes hävd uppkommer genom en längre tids nyttjande, det kan knappast påstås att det är en rättighet som på något sätt har meddelats. ÄJB var dessutom en utpräglat civilrättslig lagstiftning, en stark invändning är därför att urminnes hävd inte alls kan sägas ha uppkommit med stöd av en äldre motsvarighet till 1983 års VL.

Något som ytterligare komplicerar frågan om äldre rättigheters ställning är att urminnes hävd och privilegiebrev inte är de enda kategorierna som omfattas av ÄVL 2 kap. 41 §. af Klintberg framhåller att den typen av rättigheter ofta är av servitutsliknande karaktär och att de i flertalet fall är av offentligrättslig natur. Han konstaterar dock att de även kan uppkomma genom privaträttsliga avtal och nämner även avtalsservitut.[30] Anses samtliga de rättigheter som omfattas av ÄVL 2 kap. 41 § falla in under MBP 5 § innebär det att det finns ett flertal rättigheter med samma rättsverkan som tillstånd enligt MB men som kan ändras och upphävas inte bara genom omprövning utan genom fastighetsreglering.[31]

I övrigt gör sig samma argument för och emot att urminnes hävd ska tillmätas rättsverkan enligt MB som för att privilegiebrev ska anses som tillstånd. Sammanfattningsvis är alltså den grundläggande frågeställningen densamma. Det är klart att urminnes hävd länge ansetts ha rättsverkan inom vattenrätten, hävd jämställdes enligt VP uttryckligen med tillstånd meddelade enligt VL. Att ÄJB är en civilrättslig lagstiftning och att urminnes hävd svårligen i någon mening kan anses vara meddelad är visserligen ytterligare skäl som talar mot att det är en rättighet som omfattas av MBP 5 §. Frågan kvarstår dock om detta tillräckligt för att helt bortse från MBP 34 och 40 §§.

En viktig utgångspunkt är dock att verksamhetsutövare som åberopar en rättighet enligt ÄVL 2 kap. 41 § är skyldig att bevisa både rät-

”I Lag-Utskottets utlåtande har detta uttryck blifvit förändradt till ’laglig rättighet’, på grund deraf att Utskottet velat tydligt utmärka, att ingen tvekan borde uppstå om att man här afsett äfven urminnes häfd.” Se även protokoll från riksdagens andra kammare 1880 band 1 N:o 20, s. 19.

[30] af Klintberg, *Om byggande i vatten enligt 2, 3 och 5 kap. Vattenlagen. Lagtext med kommentar och sakregister*, Norstedt 1955, s. 174.

[31] Jfr fastighetsbildningslagen 7 kap. 3 §.

tighetens existens och dess närmare innebörd. Mot bakgrund av att urminnes hävd kan utgöra en rättighet föreligger inget absolut krav att uppvisa en upplåtelsehandling men det råder trots detta höga beviskrav.[32] Det kan därmed ifrågasättas om det överhuvudtaget kan vara möjligt att bevisa att en viss vattenhushållning omfattas av urminnes hävd.

Senare praxis från Mark- och miljööverdomstolen

MÖD har i tre domar från 2012 tagit ställning i frågan om vilken rättsverkan äldre rättigheter ska tillmätas.[33] I domen om Färna kraftverk rörande äldre rättigheter uttalade MÖD följande:

> ”En rätt enligt privilegiebrev utgör en särskild rättighet att förfoga över vattnet men kan inte jämställas med ett tillstånd enligt miljöbalken. Kungsådran Kraft Aktiebolag har i målet inte visat att något tillstånd enligt miljöbalken eller de tidigare gällande vattenlagarna (1918:523 och 1983:291) finns för vattenverksamheten vid Färna kraftverk. Bolaget har inte heller gjort gällande att någon prövning enligt 1880 års vattenrättsförordning har gjorts av anläggningen.”

Eftersom rättsläget vad gäller äldre rättigheter är både svårtolkat och i viss utsträckning oklart måste prejudicerande domar på området ses som mycket välkomna. Enligt MÖD:s domar är privilegiebrev inte att anse som tillstånd enligt MBP 5 §. MÖD konstaterar att bolaget inte visat att tillstånd enligt MB eller någon av vattenlagarna föreligger och inte heller gjort gällande att anläggningen prövats enligt 1880 års VRF. Min tolkning av denna formulering är att MÖD anser att tillstånd meddelade enligt VRF är att anse som tillstånd enligt MB, men där går också gränsen för hur gamla rättigheter som har rättsverkan enligt MB. Vid tolkningen av tillstånd enligt VRF är det dock viktigt att uppmärksamma att VRF innehöll flera generella skyddsföreskrifter och det är därmed nödvändigt att tolka tillståndet mot bakgrund av dessa.

I målet om Färna kraftverk konstaterar MÖD inledningsvis att de vaga uppgifter som verksamhetsutövaren lämnat angående urminnes hävd inte visar att en särskild rätt att förfoga över vattnet. En tolkning av denna skrivning är att den indirekt ger uttryck för att det går att visa att urminnes hävd föreligger och att det i så fall innebär en särskild rättighet att förfoga över vattnet. Även Stefan Rubenson pekar i en artikel på JP Miljönet på möjligheten att domstolen ansåg att urminnes hävd skulle kunna ha betydelse. Han konstaterar dock att MÖD i sina domskäl i vissa fall tar upp omständighet som åberopats av parter utan att själv ta ställning till rättsfrågan. Enligt Rubenson är det därför inte möjligt att dra några slutsatser utifrån rättsfallet om hur domstolen ser på urminnes hävd.[34]

Vad MÖD fastslår är dock att de uppgifter som angetts om urminnes hävd inte är tillräckligt för att visa att det föreligger en ”särskild rättighet att förfoga över vattnet”. Det är precis samma formulering som domstolen använder när den konstaterar att privilegiebrev visserligen utgör en ”särskild rättighet” men att de trots detta inte kan jämställas med tillstånd enligt MB. Det är även den formulering som af Klintberg använder när han talar om samtliga de rättigheter som avses i 2 kap. 41 §.[35] Beteckningen ”särskild rättighet att förfoga över vattnet” återkommer även i MBP 34 § där den syftar på samtliga de rättig-

[32] af Klintberg, s. 174.
[33] MÖD 2012:26, MÖD 2012:27, MÖD 2012:28.
[34] Rubenson, Frågan om vattenkraft och urminnes hävd fortfarande olöst – men kanske ett begränsat problem. I *J P Miljönet*, 2012-08-14.
[35] af Klintberg, s. 174.

heter som avses i ÄVL 2 kap. 41 §. Min bedömning är därför att MÖD:s domar ska tolkas som att ingen av de rättigheter som avses i ÄVL 2 kap. 41 § är att anse som tillstånd enligt MB.

Överhuvudtaget saknas några som helst saklig skäl till varför urminnes hävd skulle anses utgöra en starkare rättighet än privilegiebrev. Hävd är en långt mer diffus rättighet och kan t.ex. inte anses meddelad. 1734 års byggningabalk kan trots allt med lite god vilja ses som en delvis offentligrättslig lagstiftning med visst skydd för allmänna intressen. I motsats till detta är ÄJB är en rent civilrättslig lagstiftning. Varken privilegiebrev och urminnes hävd är därmed enligt MÖD:s domar att anse som tillstånd enligt balken. Detta gör att de saknar rättsverkan och utgör därför inte hinder mot tillsynsåtgärder såsom förelägganden och förbud.

MÖD uttalar vidare i de tre domarna om Färna osv. att privilegiebreven talar för att anläggningen skulle bli lagligförklarad vid en sådan prövning. Detta är fullt rimligt, vid en lagligförklaring prövas ska anläggningens laglighet prövas enligt de bestämmelser som gällde vid dess tillkomst. Ett privilegiebrev som t.ex. ger rätt att uppföra en damm måste onekligen ses som ett starkt bevis på att dammen var laglig vid dess uppförande.

Nacka mark- och miljödomstol frångår i en dom från 2012 MÖD:s praxis. Domstolen konstaterar att de privilegiebrev som sökanden åberopat utgjorde rättigheter enligt VRF 25 § och ÄVL 2 kap. 41 §. Mark- och miljödomstolen framhåller att dessa rättigheter gällde som tillstånd enligt VL. Vidare anförs att de har avsetts bestå även efter införandet av MB vilket enligt domstolen framgår av MBP 5 och 34 §§.[36]

HD har i ett beslut från 2011 framhållit att MÖD:s sammansättning med tekniska ledamöter ger domstolen särskilt goda möjligheter att bedöma bl.a. tekniska och ekonomiska sakfrågor. Även det faktum att domstolen utgör ensam andra domstolsinstans med rikstäckande domsrätt bidrar till att till att MÖD spelar en viktig roll för prejudikatbildningen på miljörättens område. Detta sker genom att möjliggöra prövning i HD och inte minst genom MÖD:s egna avgöranden. HD poängterar även att MÖD:s betydande ansvar för prejudikatsbildningen gör sig gällande även i de fall där HD är sista instans.[37]

Av detta framgår tydligt att MÖD är en prejudikatsbildande instans inom miljörätten. I Sverige finns det visserligen ingen absolut skyldighet att följa prejudikat.[38] En ofta åberopad grund mot absolut bundenhet är att det är tyngden i de av överinstansen åberopade skälen som motiverade domslutet som är avgörande för domens inflytande på rättstillämpningen.[39] Ett väl underbyggt och motiverat prejudikat medför då att det krävs starka skäl för frångå det vägledande avgörandet. MÖD:s tre domar om äldre rättigheter innehåller överhuvudtaget ingen motivering till stöd för den valda tolkningen. Domstolen nöjer sig med att endast ange att privilegiebreven visserligen utgjorde rättigheter enligt ÄVL 2 kap. 41 § men att de inte kan jämställas med tillstånd enligt MB.

Frågan är då vilket prejudikatvärde som MÖD:s domar ska tillmätas. Det kan argumenteras att domar från överinstansen fyller en viktig funktion även när det gäller att öka rättstillämpningens förutsebarhet. Trots att det saknas motivering och argumentation är MÖD:s slutsats nog så tydlig: privilegiebrev gäller enligt MÖD inte som tillstånd enligt MB. Mot bakgrund av resonemanget ovan är gör jag dock bedömning att detta inte är tillräckligt för att äldre

[36] Nacka mark- och miljödomstol M 6570-09.

[37] HD 2011-11-24, i mål nr Ö 48-10.

[38] Heuman, Rättspraxis, i *Finna rätt*, 12:e uppl., Norstedts Juridik 2012, s. 135.

[39] SOU 1986:1, s. 47–48

rättigheter ska anses sakna rättsverkan. Hade MÖD resonerat t.ex. utifrån en bedömning att civilrättsliga privilegiebrev inte kan anses vara meddelade med stöd av motsvarande äldre lag hade situationen varit en annan. Här kan även tilläggas att äldre rättigheters ställning givetvis är en fråga som HD har all anledning att ta upp till prövning.

Sammanfattningsvis kan konstateras att äldre rättigheters ställning enligt MB är olycklig på flera sätt. Vilken rättsverkan äldre rättigheter ska tillmätas fortsätter att vara en fråga som ger upphov till väsentliga kostnader i form av domstolsprocesser. Det rör sig om administrativa kostnader som helt saknar samband med miljörättens centrala och övergripande fråga. Frågan om vilka miljöpåverkande verksamheter som ska anses tillåtliga och hur dessa ska kunna bedrivas med minsta möjliga negativa påverkan på miljön.

Än mer olycklig blir denna osäkerhetsfaktor eftersom verksamhetsutövare därigenom kan bli skyldiga till brott. I det fall MÖD:s ståndpunkt vinner genomslag saknar de verksamheter som bedrivs med stöd av endast privilegiebrev tillstånd enligt MB. Eftersom vattenverksamhet i regel utgör tillståndspliktig verksamhet gör sig därmed skyldig till brottet otillåten miljöverksamhet. Det kommer dock knappast att vara möjligt för en åklagare att visa uppsåt eller oaktsamhet. Även legalitetsprincipens krav på lagstiftningens tydlighet och förutsebarhet medför att det inte är möjligt att döma någon under dessa förutsättningar.

Slutkommentar

Denna artikel har uteslutande syftat till att belysa och analysera det nu gällande rättsläget. Enligt min mening är och förblir dock äldre rättigheters ställning i grunden en lagstiftningsfråga. Det är därför min starka förhoppning att den nu pågående utredningen om vattenverksamheter lägger fram förslag som en gång för alla fasar ut privilegiebrev och 1766 års fiskeristadga från den moderna miljölagstiftning MB trots allt utges för att vara.

What Role for Human Rights in Clean Development Mechanism, REDD+ and Green Climate Fund Projects?

Hans Morten Haugen[*]

Abstract

All UN bodies have a duty to contribute to the universal respect for and observance of human rights. From this basis, the article analyzes whether and how human rights are integrated in the approval of projects under the Clean Development Mechanism (CDM), REDD+ (United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries) and projects funded by the Green Climate Fund and other adaptation mechanisms under the UN Framework Convention on Climate Change. Regarding the CDM, its Executive Board has reiterated that it has no mandate to investigate human rights impacts of the approved projects, but human rights concerns are at least implicit in some of the recommendations in the Report of the High-Level Panel on the CDM Policy Dialogue. As for the REDD+, human rights are present in three Guidelines applying to REDD+ projects. The mandate for the Board of the Green Climate Fund includes the establishment of two mechanisms; one to promote the input and participation of stakeholders and one independent redress mechanism. The article finds that there has been certain progress, also due to an increased acknowledgement of conflicts emerging from projects with negative human rights impact, but even seemingly comprehensive framworks contain wording that might restrict the application of human rights. There must be an awareness of these weaknesses in the negotiations of the post-Kyoto regime, mandated by the Durban Platform for Enhanced Action.

Keywords: Inter-American Court of Human Rights; Human Rights Committee; African Commission on Human and Peoples' Rights; human rights principles; free, prior and informed consent; United Nations Declaration on the Rights of Indigenous Peoples.

1. Introduction

The Kyoto Protocol tool for climate mitigation projects in developing countries, the Clean Development Mechanism (CDM), was established without any concern for human rights impacts of its projects. As argued convincingly,[1] there is a need for a Project Review Mechanism under the CDM's Executive Board (EB), as the EB consistently has argued that it has no mandate to examine human rights impacts. The EB's awareness is growing, however, and the CDM EB's 2011 an-

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[1] D S Olawuyi, 'Towards a Transparent and Accountable Clean Development Mechanism: Legal and Institutional Imperatives' (2012) 4 *Nordic Environmental Law Journal* 33; see also A Johl and S Duyck, 'Promoting Human Rights in the Future Climate Regime' (2012) 15 *Ethics, Policy and Environment* 298; presenting four recommendations to the negotiations within the Durban Platform for Enhanced Action; FCCC, *Decision 1/CP.17 Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action* (2012).

nual report reads: 'During the reporting period, the Board was confronted with the issue of human rights, specifically the rights of people affected or potentially affected by a CDM project.'[2]

When REDD+ (United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, where the '+' refers to the role of conservation, sustainable management of forests and enhancement of forest carbon stocks) was established, it was monitored much closer by non-governmental organisations, and human and indigenous peoples' rights have been introduced as elements of the overall safeguards. REDD+ projects are to be implemented by applying a human rights-based approach:

> Activities follow a human rights-based approach and adhere to the UNDRIP [UN Declaration on the Rights of Indigenous Peoples], UN Development Group Guidelines on Indigenous Peoples' Issues, and International Labour Organization (ILO) Convention No. 169.[3]

We see that the human rights-based approach as defined by REDD+ is based on both binding and non-binding international instruments as well as UN-wide Guidelines.

Three decisions on adaptation were taken at the 17th meeting of the Conference of the Parties (COP) to the UN Framework Convention on Climate Change (FCCC),[4] most notably the specific modalities for the Green Climate Fund. A seminar on human rights and climate change reported that '…recent developments at the COP17 in Durban created a much needed opportunity for the human rights issues surrounding climate change to be integrated in the new climate regime.'[5] The article will seek to answer whether this positive assessment is actually justified.

This article will analyze whether – and in which form – human rights is a part of the existing climate change mitigation and adaptation measures, and how human rights can be better integrated into the project assessments. As projects under both the CDM and the REDD+ are run by corporate actors that might transform large areas of land and affect land rights and traditional land uses, the UN Guidelines on business and human rights and other reports by the former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (hereafter 'UN Special Representative on business and human rights') will be included in the analysis.[6] In this context it is also highly relevant to note that

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[2] CDM EB, *Executive Board Annual Report 2011, Clean Development Mechanism* (2012) 13; see also CDM High-Level Panel, *CDM Policy Dialogue: Recommendations from the High-Level Panel* (2012) 42 and 56; and CDM Secretariat, *Input to the high-level panel for the CDM Policy Dialogue. Background paper by the secretariat* (2011) paragraphs 2 and 41(a).

[3] UN-REDD and the World Bank's Forest Carbon Partnership Facility, *Guidelines on Stakeholder Engagement in REDD+ Readiness: With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities* (2012) (20 April version) 2, paragraph 6(a).

[4] FCCC, *Decision 3/CP.17, Annex: Governing instrument for the Green Climate Fund* (2012) (note that the decision to establish the Green Climate Fund was done in *Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (2011) paragraphs 102–111); FCCC, *Decision 5/CP.17, National adaptation plans* (2012); FCCC, *Decision 12/CP.17, Guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emission levels and forest reference levels as referred to in decision 1/CP.16* (2012).

[5] UN, *A/HRC/20/7* (2012) paragraph 69.

[6] For the Guidelines, see *A/HRC/17/31, Annex* (2011) paragraphs 17–21; for the endorsement, see *A/HRC/RES/17/4* (2011) paragraph 1; another important document by the former UN Special Representative on business and human rights is *A/HRC/17/31/Add.3, Annex, Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators* (2011).

human rights are increasingly understood to an integral part of the sustainable development requirements, hence giving them more specificity. The OECD requires review of 'adverse project-related human rights impacts' when applications for export credits are assessed.[7]

A 2011 human rights resolution has stated – albeit not in an operative paragraph:

> Affirming that human rights obligations, standards and principles have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes.[8]

Stating that human rights have the potential to promote coherence, legitimacy and sustainable outcomes in the complex realm of climate change decision making must be said to be ambitious. We see that the term'human rights principles' is applied. A better understanding of human rights principles and its usefulness when implementing climate change mitigation projects is central in this article, simply as the term human rights principles is applied without a clear understanding of what it entails.[9]

Human rights and the environment can be studied from several perspectives. One can adopt a retroactive approach and study the jurisprudence of many courts linking human rights and environment issues.[10] Alternatively, one can apply a long-term, future-looking approach stressing that human rights implementation is about long-term innovative planning and monitoring systems, and that overall climate change impacts need to be adressed if human rights are to be enjoyed adequately. A third perspective is to emphasize human rights principles, which specify the requirements for appropriate conduct in public decision-making processes.[11] The

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[7] OECD, *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the "Common Approaches")* (2012) 5; similar trend of strengthened human rights integration is also seen in the International Finance Corporation's 2012 Performance Standards and in the regional development banks; for an analysis of the European Investment Bank's relevant tools, see N Hachez and J Wouters, 'The role of development banks: The European Investment Bank's substantive and procedural accountability principles with regard to human rights, social and environmental concerns', in O de Schutter, J Swinnen and J Wouters eds., *Foreign Direct Investment and Human Development* (Routledge, London 2013); see also the new version of the Equator Principles for project finance, *Equator Principles III* (2013) available at <www.equator-principles.com/resources/equator_principles_III.pdf > accessed 12 June 2013.

[8] UN, *Human rights and climate change, A/HRC/RES/18/22* (2011) last preambular paragraph [adopted without a vote]. Operative paragraphs 2–5 called for the convening of a seminar. The report of this seminar, attended by representatives of at least 85 states, is available as *A/HRC/20/7*.

[9] While Olawuyi (n 1) lists most of the human rights principles in the very start of his article (participation, non-discrimination (by specifying that projects tend to be located in poor and vulnerable communities), accountability, transparency and access to remedies), at 50 and 52n79 the term 'human rights principles' is applied without making it clear what he refers to.

[10] For relevant cases from the African, American and European human rights systems, see UN, *A/HRC/19/34, Analytical study on the relationship between human rights and the environment* (2011) notes 1–4.

[11] Human rights have been specified by states in the context of the FAO (UN Food and Agricultural Organization), *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012) principle 3B: Human dignity, non-discrimination, equity and justice, gender equality, holistic and sustainable approach, consultation and participation, rule of law, transparency, accountability, and continuous improvement. A shorter and, according to this author, more precise listing is found in FAO, *Focus on: The right to food and indigenous peoples* (2007), with seven human rights principles: dignity, non-discrimination, rule of law, accountability, transparency, participation and empowerment. These seven human rights principles were also identified as the core of the right to food based approach in background paper 3 for the International Conference on Forests for Food Security and Nutrition, FAO, Rome, 13–15 May, 2013; FAO, *The right to food based approach to enhance the contribution of non-wood forest products to food security and nutrition* (2013) 3–5.

article will primarily apply the third approach, identifying the mutually reinforcing and necessary interaction between human rights principles and substantive human rights, in order to improve climate change mitigation and adaptation measures. In order to give an updated analysis, recent international human rights jurisprudence will be included in the analysis, primarily from Latin America and Africa, both because they are relevant for the overall analysis of the article, illustrating the inappropriate situations many local communities are living under, and because these continents will host many of the climate change mitigation and adaptations measures.

The article continues as follows: part two clarifies the term 'human rights principles', while part three explores the term free, prior and informed consent (FPIC) and its relationship with human rights. Part four analyzes the approval of projects under Clean Development Mechanism (CDM), identifying whether human rights concerns are explicitly or implicitly recognized, as well as examining the most relevant recommendations from the 2012 Report of the High-Level Panel on the CDM Policy Dialogue.[12] Part five reviews the proposals for establishing safeguard mechanisms for REDD+ projects as part of the so-called Bali Action Plan,[13] primarily by analyzing three Guidelines on Stakeholder Engagement,[14] on FPIC,[15] and on a feedback and grievance redress mechanism as part of the National Readiness Management Arrangements.[16] Part six identifies whether human rights are integrated into the procedures within the Green Climate Fund. Part seven identifies the human rights elements of other decisions on adaptation taken at the COP 17 meeting.

Hence, this article seeks to answer the following question: *How does the UN Framework Convention on Climate Change (UNFCCC) integrate human rights principles and standards when establishing the overall framework for designing and undertaking climate change mitigation and adaptation projects?*

2. What are human rights principles?

Human rights principles identify the minimum requirements for good public conduct,[17] and can also be referred to as principles of implementation.[18] They are dervied from substantive human rights, but with one exception,[19] there is no international agreement on requirements for being considered a human rights principle. As human rights principles tend to be mentioned together with human rights obligations and standards,[20] it is considered relevant to have a more precise understanding of these principles. We will now identify the origin, content, status, potential and risks of human rights principles, while their ap-

[12] CDM High-Level Panel (n 2).

[13] FCCC, *Decision 1/CP.13, Bali Action Plan* (2008) paragraph 1(b)(iii), calling for 'positive incentives'. Note that while the *verb* safeguard is frequently applied in the 1989 ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (Articles 4.1, 12, 14.1 and 15.1), the *noun* safeguard has been applied more recently, referring to standards and policies, initially within the World Bank, but now spreading.

[14] UN-REDD and Forest Carbon Partnership Facility (n 3).

[15] UN-REDD, *Guidelines on Free, Prior and Informed Consent* (2013) available at <www.un-redd.org/Launch_of_FPIC_Guidlines/tabid/105976/Default.aspx> accessed 8 April 2013.

[16] Forest Carbon Partnership Facility and UN-REDD, *Readiness Preparation Proposal (R-PP), Version 6 Working Draft* (2012) 16–18.

[17] H M Haugen, 'Human Rights Principles: Can they be Applied to Improve the Realization of Social Human Rights?', in *Max Planck Yearbook of United Nations Law, Vol 15* (Martinus Nijhoff Publishers, Leiden 2011); for the first explicit linking between human rights principles and environmental law; see J Ebbeson, 'The Notion of Public Participation in International Environmental Law', in *Yearbook of International Environmental Law Vol 8* (Oxford University Press, Oxford 1997).

[18] FAO (n 11) principle 3B

[19] The UN Convention on the Rights of Persons with Disabilities lists 'General principles' in Article 3.

[20] UN 2011 (n 8).

plication within the climate change regime follows in the subsequent parts.

The origin of human rights principles are recent, emerging from various processes. General Comment 12 on the right to food specifies: 'The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary.'[21] We see that only the term 'principles' is applied, but anouther paragraph applies the term 'human rights principles', but without giving additional clarity on the essence of these principles.[22] In a UN-wide process culminating with the so-called Common Understanding, the term human rights principles are specified on a high level of generality, as illustrated by the terms universality and inalienability.[23] The Common Understanding is the most quoted source for determining what is meant by human rights principles.[24]

As already mentioned, there is no international authoritative list of human rights principles that applies generally. In addition to guiding policies and decision-making processes, it must be considered essential that human rights principles enable individuals and communities to be more in charge of all decision-making processes affecting their lives. In addition human rights principles must be in accordance with the core and essential idea of human rights. Moreover, the requirements on any external policy-maker and on the communities must be seen in conjunction and as mutually reinforcing. Therefore, the listing made by FAO in the context of a study on indigenous peoples is found by this author to be both consice and comprehensive.[25] In this listing (dignity, non-discrimination, rule of law, accountability, transparency, participation and empowerment), the principle 'holistic and sustainable approach'[26] is not included. As a sustainable approach to all decision-making is most important, this author supports including this among the human rights principles. The principle of holistic and sustainable approach confirms the reciprocal relationship between sustainable development and human rights as encompassed by the principle of integration:

> Integration is pivotal to the promotion of sustainable development. It is the principle of integration that both brings together the many challenges confronting the international community and, at the same time, provides the most realistic chance of their solution.'[27]

While this observation takes a macro approach, the principle of integration is applicable also on the project level.

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[21] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 12, The right to adequate food (art. 11), E/2000/22, 102–110* (2000) paragraph 23 (extract).

[22] Ibid, paragraph 21.

[23] UN Development Group, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies* (2003) 2, available at <www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf> accessed 8 April 2013. Note that J Kirkemann Hansen and H-O Sano, 'The Implications and Value Added of a Human-Rights-Based Approach', in B A Andreassen and S. P. Marks eds., *Development as a Human Rights. Legal Political and Economic Dimensions* (2. ed) (Harvard School of Public Health and Harvard University Press, Cambridge (Mass.) 2010) find on 45–47 that these are applicable in order to guide policy decisions.

[24] UN-REDD and Forest Carbon Partnership Facility (n 3) 21, listing the Common Understanding under 'Useful Resources'; see also OECD, *DAC Action-Oriented Policy Paper on Human Rights and Development* (OECD, Paris 2007), 13, note 2.

[25] FAO 2007 (n 11); see also FAO 2013 (n 11).

[26] FAO 2012 (n 11), principle 3B, 5.

[27] ILA Committee on *International Law on Sustainable Development*, International Law Association, Berlin Conference (2004) 13.

It must also be acknowledged that peoples', including indigenous peoples' control over their natural resources is specifically recognized in common Article 1.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and of the International Covenant on Civil and Political Rights (ICCPR), and reiterated towards the end of these two covenants, in Articles 25 and 47, respectively. For minorities that are not recognized as indigenous peoples, the relationship between culture and land has been clarified by the Human Rights Committee:

> culture manifests itself in many forms, including a particular way of life associated with the use of land resources… The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[28]

The paragraph emphasizes effective participation, which is both a substantive right, recognized in the ICCPR Article 25(a) ('take part in the conduct of public affairs, directly or through freely chosen representatives') and a human rights principle, included in all relevant listings.[29] Therefore, participation is one of the human rights principles that is included in the analysis below, the others being accountability, non-discrimination and rule of law, including access to remedies.

On the status of human rights principles, the fact that the most recently adopted human rights treaty, the Convention on the Rights of Persons with Disabilities (CRPD) lists 'principles of the present Convention' indicates the emerging status of human rights principles. By this qualification, these principles cannot be said to be generally applicable – beyond the scope of the CPRD. The inclusion of human rights principles in FAO's Voluntary Guidelines on land tenure, adopted by states,[30] is another other indication that human rights principles are gaining increased status internationally. Additional evidence of the increasing status of human rights principles is provided by the fact that all relevant UN specialized agencies, funds and programs have stressed that human rights principles should guide all programming activities.[31] Finally, the World Bank is approving human rights principles as an approach to a more proactive endorsement of human rights in their operations, as stated by one of the Bank's Senior Policy Officers: 'The World Bank evidences a growing convergence with human rights, particularly at the level of principles.'[32] Neither of these, however, are evidences of a general approval of human rights principles as an integral part of international law.

Concerning the potential of human rights principles, this can be summarized as more inclusive decision-making processes, leading to a better outcomes and less conflicts. Complying with all human rights principles is demanding and might lead to longer decision-making processes. In order to guide development projects, human rights principles have a considerable potential. When discussing the substantive human rights approach and the procedural human rights approach in the context of investment decisions, Olivier de Schutter, who is currently the UN Special Rapporteur on the right to food,

[28] Human Rights Committee, *General Comment No. 23, The rights of minorities (Art. 27), CCPR/C/21/Rev.1/Add.5* (1994) paragraph 7 (extracts).

[29] FAO 2013 (n 11); FAO 2012 (n 11); FAO 2007 (n 11); UN Development Group (n 23).

[30] FAO 2012 (n 11).

[31] UN Development Group (n 23).

[32] S McInerney-Lankford, *Presentation held at Panel on Human Rights Mainstreaming at the 19th Session of the Human Rights Council* (2012) available at <www.unmultimedia.org/tv/webcast/2012/02/world-bank-panel-on-human-rights-mainstreaming-19th-session-human-rights-council.html> accessed 8 April 2013.

finds that only by 'combining the two approaches can we arrive at satisfactory results…'[33] The main problem with human rights principles is that they do not represent a definite standard, unlike rules. The easiest way to explain this is by pointing to the distinction between a principle and a rule, where the latter 'are norms that, given the satisfaction of specific conditions, definitively command, forbid, permit, or empower', while principles 'are norms commanding that something must be realized to the highest degree that is actually and legally possible.'[34] Hence, one can specify the boundaries of rules, outside which they do not apply, while it is more difficult to specify principles' boundaries. There are, however, human rights principles which are rather specific, such as participation and non-discrimination, the latter being applicable to any field of public policy.[35]

Finally, with regard to potential risks, the main point is that human rights principles can only be effective when linked to substantive human rights. Any document that merely applies the term principles and never refers to substantive human rights risks being too vague and not adequately useful. As an illustration, the Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources ('RAI Principles')[36] have no reference to substantive human rights or to any accountability mechanism. FAO is now in a process to 'develop' the RAI Principles for possible adoption at the 2014 Session of the FAO Committee on World Food Security,[37] which might result in improvements to the current text.

In summary, human rights principles are gaining increased popularity, and are applicable both on the community level and on the individual level. The plethora of various catalogues or lists on what these principles actually are might, however, be a cause for frustration and confusion. In the rest of the article we will apply the human rights principles of participation, accountability, non-discrimination and rule of law, including access to remedies. While the other human rights principles of dignity, transparency, empowerment and holistic and sustainable approach are also crucial in order to assess public conduct, they are less applicable in assessing specific projects within the context of climate change mitigation and adaptation. The human rights principles are interrelated, for example will effective participation depend on full transparency, for instance full display of project plans.

3. What is the free, prior informed consent (FPIC) requirement?

There is no international binding agreement on the scope of and content of the free prior and informed consent (FPIC) requirement. While the FPIC requirement is not explicitly recognized in any UN human rights treaties, it is recognized in the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries Article 16.2[38] and in six provisions of the UNDRIP.[39]

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[33] O de Schutter, 'The host state. Improving the monitoring of international investment agreements at the national level', in O de Schutter, J Swinnen and J Wouters eds., *Foreign Direct Investment and Human Development* (Routledge, London 2013) 162.

[34] R Alexy, 'Legal Reasoning and Rational Discourse' (1992) 5 *Ratio Juris* 143, 145.

[35] UN Human Rights Committee, *General Comment No 18: Non-discrimination* (1989) paragraph 12.

[36] FAO, IFAD, UNCTAD and the World Bank, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* (2010).

[37] FAO, Committee on World Food Security, Thirty-ninth Session, Final report (2012) 9 and Annex D.

[38] ILO 169, Article 16.2 reads (extract): '…relocation shall take place only with their free and informed consent.'

[39] UN, *A/HRC/61/295* (2007) Article 10 (relocation); paragraph 11.2 (taking of property); Article 19 (measures that may affect indigenous peoples); paragraph 28.1 (restitution and compensation); paragraph 29.2 (storage or disposal of hazardous materials) and paragraph 32.2 (projects affecting land and natural resources). Also Article 30

Three human rights comittees have, however, specified the FPIC requirement both when examining state parties' reports and when deciding in individual complaint cases.[40] Is this an indication that the committees have overstretched their mandates, as FPIC is not explicitly recognized in the treaties themselves?

First, as regards the ICESCR and the ICCPR, they have a common Article 1.2 that reads (extracts): 'All peoples may, for their own ends, freely dispose of their natural wealth and resources… In no case may a people be deprived of its own means of subsistence.' By the terms 'their' and 'its own' it is reasonable to state that this entails an understanding of collective property. To be deprived of their means of subsistence is a most threatening situation for any peoples, and strong protection must be ensured to avoid such situations from occuring. Hence it is reasonable to state that the FPIC requirement is one reasonable procedural guarantee from allowing such a situation from occuring. Therefore, the author concurs with the position that FPIC is embedded in and is an intergral element in the the right to self-determination of peoples, as control over natural resources is integral to self-determination.[41]

Second, as regards the International Convention on the Elimination of all forms of Racial Discrimination, it recognizes in Article 5(d)(v): 'The right to own property alone as well as in association with others.' The Committee on the Elimination of all forms of Racial Discrimination has made it clear that states must 'recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources…'[42] Also here we see that the term 'their lands' is applied, indicating a property relationship. Hence, there is an explicit recognition of communal or collective ownership of land. Territorial rights are generally stronger for indigenous peoples than for other minorities, but it must be noted that the UN-REDD and the World Bank's Forest Carbon Partnership Facility, Guidelines on Stakeholder Engagement has a title which lists both 'Indigenous Peoples' and 'Other Forest-Dependent Communities'.[43] Moreover, the individual governments' inadequate recognition of indigenous peoples or of communally owned land is not decisive in order to determine whether such peoples and such lands are to be respected as such.[44]

Concerning the content of the FPIC requirement it is the understanding of the term 'consent' that differs most. The multi-stakeholder Forest Stewardship Council specifies that consent includes the possibility to modify, withhold or withdraw approval.[45] By including the possibil-

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has a wording that comes very close to a FPIC requirement. Note that UNDRIP has now been endorsed also by the four states that originally voted no (USA, Canada, Australia and New Zealand). On a more general level, addressing inadequate specification on compensation and benefit-sharing, A Angelsen and D McNeill notes that 'FPIC seems to be an impossible precondition to satisfy', see 'The evolution of REDD+', in M Brockhaus, W D Sunderlin and L V Verchot (eds) *Analysing REDD+: Challenges and choices* (Center for International Forestry Research, Bogor 2012) 31–49 at 41.

[40] UN-REDD, *Legal Companion to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC). International Law and Jurisprudence Affirming the Requirement of FPIC* (2013) available at <www.un-redd.net/index.php?option=com_docman&task=cat_view&gid=2655&Itemid=53> accessed 8 April 2013.

[41] UN Expert Mechanism on the Rights of Indigenous Peoples, *Final report on the study on indigenous peoples and the right to participate in decision-making, A/HRC/18/42* (2011) paragraph 20.

[42] CERD, *General Recommendation No. 23: Indigenous Peoples* (1997) paragraph 5 (extract).

[43] UN-REDD and Forest Carbon Partnership Facility (n 3).

[44] UN-REDD, *Guidelines on Free, Prior and Informed Consent* (2013) 26 (on communally owned land) and 38 (Annex 1) (on indigenous peoples) available at <www.un-redd.org/Launch_of_FPIC_Guidlines/tabid/105976/Default.aspx> accessed 8 April 2013.

[45] Forest Stewardship Council, FSC guidelines for the implementation of the right to free, prior and informed

ity to withdraw approval, this understanding of what is implied in the FPIC goes rather far. A more cautious approach is taken by the UN-REDD, defining consent as:

> the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected peoples or communities. Consent must be sought and granted or withheld according to the unique formal or informal political-administrative dynamic of each community.[46]

This definition is a strengthening of the consent requirement as defined by UN-REDD, as the former UN-REDD definition of FPIC did not explicitly include the option of withholding consent. We saw above that the FSC has an understanding of consent which includes the possibilty to withdraw consent, which is unlike the current UN-REDD definition. This definition does, however, implicitly include the option of withdrawal, provided that the 'conditions upon which the original consent was based',[47] are no longer met.

To sum up, the FPIC requirement is integral to both the natural resource dimension of the right to self-determination of peoples and to the right to own property alone or collectively. Hence, FPIC can be understood as a operationalization of the more generally formulated substantive human rights. FPIC can also be considered to be an operationalization of human rights principles, as FPIC specifies the content of the human rights principle of participation,[48] addresses issues of discrimination,[49] and cannot be exercised effectively without transparency. In the UN-REDD and the World Bank's Forest Carbon Partnership Facility Guidelines on Stakeholder Engagement, human rights and the FPIC are specified in the same paragraph on requirements of stakeholder engagement practices, which indicates the mutually reinforcing relationship between the two.[50]

4. Are human rights taken into account in projects approved under the Clean Development Mechanism?

In brief, the Kyoto Protocol to the UNFCCC says in Article 12 that projects in non-Annex I states resulting in certified emission reductions (CER) can be funded by Annex I states or companies registered in such states. Such CER can be used to achieve compliance with part of their reduction commitments. The projects must be approved or validated by an independent auditor accredited by the CDM Executive Board (CDM EB). Such auditors are hence given a status as Designated Operational Entity (DOE).[51] The basis for the validation are criteria set down by the CDM EB.[52]

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consent (FPIC), Version 1 11 (Bonn: FSC, 2012). For a non-binding instrument specifying the 'option of a no-action alternative…', see CBD COP 2004, *Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, Decision VII/16 F, Annex*, paragraph 21.

[46] UN-REDD (n 15) 20.

[47] Ibid, 30, reading: 'if the conditions upon which the original consent was based are being met, ongoing consent is implied.'

[48] UN-REDD and the World Bank's Forest Carbon Partnership Facility (n 3) paragraph 6(b) reads (extracts): 'FPIC is essential to ensure the full and effective participation of indigenous peoples in program activities and policy and decision-making processes.'

[49] UN-REDD (n 15) 33 ('whether special measures have to be adopted to ensure the participation of women and other vulnerable groups within the the community'); see also ibid, 44.

[50] UN-REDD and the World Bank's Forest Carbon Partnership Facility (n 3) paragraph 6.

[51] A list of the 44 DOEs is available at <http://cdm.unfccc.int/DOE/list/index.html> accessed 8 April 2013. For an overview of the whole process, see C Streck and J Lin, 'Making Markets Work: A Review of CDM Performance and the Need for Reform' (2008) 19 *European Journal of International Law* 409, 414–415.

[52] All applicaple rules applying to CDM project are found at <http://cdmrulebook.org/315> accessed 8 April 2013.

When referring to human rights in the 2011 annual report, the CDM EB also identified the following measures already taken: improved access to information; adopted modalities for direct communication with stakeholders; revised procedures for handling communications to the Board; and making the performance of DOEs more transparent, in order to improve accountability.[53] The revised CDM's Project Cycle Procedure has been welcomed by the organisations with observer status in the CDM EB,[54] and a CDM Sustainable Development Tool (SD tool) has been adopted, noting that 'the use of this SD tool is entirely voluntary.'[55]

There is one other crucial actor within the CDM system, namely the Designated National Authority (DNA), established within each state party to the Kyoto Protocol with a mandate to authorise and approve participation in CDM projects. As for the relationship between the DNA and the CDM EB regarding alleged human rights violations resulting from CDM projects, the High-Level Panel report notes:

> Some suggest that, taking into account the fundamental principles reflected in the Charter of the United Nations, the CDM Executive Board has a responsibility to consider such allegations [of human rights violations arising from CDM projects], even if the designated national authority has assessed that the project has positive sustainable development effects.[56]

We see that there is a requirement on the part of the DNA of assessing the 'sustainable development effects', but how this is done in each case is determined by each DNA. In this context, the UN Guidelines on Business and Human Rights provides most relevant instructions, saying that all state agencies that shape business practices 'are aware of and observe the State's human rights obligations when fulfilling their respective mandates…'[57] The criticism against CDM projects causing severe conflics and evictions,[58] has

[53] CDM EB (n 2).

[54] CDM EB, *Sixty-seventh meeting, Report, CDM-EB-67*, (2012) 23, paragraph 112(a); especially the provisions for direct communication with stakeholders on case specific issues. The same observers noted that '…sustainable development co-benefits of CDM project activities is not ambitious…' (ibid, paragraph 112(c); see also CDM EB, *Report on Sustainable Development Co-benefits and Negative Impacts of CDM Project Activities (Version 01.0) EB 65, Proposed Agenda – Annotations, Annex 17* (2011).

[55] The SD tool version 0.8 was approved by the CDM EB, *CDM Executive Board seventieth meeting report, CDM-EB70* (2012) 20, paragraph 82; it is maintained by the UNFCCC secretariat. The SD tool manual is available at http://cdm.unfccc.int/Reference/index.html, and the SD tool is available at www.research.net/s.aspx?sm=18gHbqaSXStje1ZSfnNI3k2%2be9hblXIZ7ZPrqk8cVyc%3d (both accessed 12 June 2013), the latter containing 12 substantive sustainable development criteria and specification of actual or intentional third party verification of any claims made in the SD declaration (questions 19 and 20). Note that the version 0.6 of the SD tool, available at www.research.net/s.aspx?sm=%2fdumoEfBCbSDw8R4AtZsHioFvPZTV6gyvm%2bIrncblzI%3d (accessed 12 June 2013) also included six 'no harm safeguards principles, including respect human rights (question 17) and land rights (question 21), as well as a detailed specification of stakeholder engagement (question 23). The CDM EB asked the CDM secretariat to '[s]implify the tool'; see CDM EB, *CDM Executive Board sixty-ninth meeting report, CDM-EB-69* (2012) 20, paragraph 98 (a).

[56] CDM High-Level Panel (n 2) 42. The reference to the UN Charter is relevant, as FCCC is a part of the UN, and therefore Article 59 of the UN Charter, referring to the integration of human rights throughout the UN system, must be observed by all UN bodies. The FCCC Secretariat implicitly refers to the UN Charter in a slightly incorrect manner, by stressing its contribution to '…realizing the vision of peace, security and human dignity on which the United Nations is founded'; see *Secretariat staff vision* (undated) available at <http://unfccc.int/secretariat/items/1629.php> accessed 8 April 2013. Human rights – not human dignity – is a foundational basis of the UN.

[57] UN Guidelines (n 6) 11, principle 8 (extract).

[58] A full review of disputed projects is beyond the scope of this article; for a CDM project that allegedly violates the recognized property rights of the largest indigenous peoples in Panama, see CDM Watch, *Press Release: UN's offsetting project Barro Blanco hampers Panama peace-talks* (2012) available at <www.cdm-watch.org/?p=3293> accessed 8 April 2013; see also Olawuyi (n 1) 34n6 and

so far not been adequately addressed as potential human rights concerns by any of the CDM actors (EB, DOE and DNA).

While it is correct that current rules or criteria under the CDM do not specify human rights obligations, and human rights is not explicitly mentioned neither in the UNFCCC nor in the Kyoto Protocol, a COP decision emphasizes that 'Parties should, in all climate change related actions, fully respect human rights.'[59] This generally worded, but encompassing paragraph addressed the duties of the DNA, as these are the CDM bodies representing states. Hence, each DNA's actions or omissions can be attributed to the respective states, and as long as the DNA are not explictly instructed to take into account how the CDM project might impact on human rights enjoyment, the CDM has inadequate human rights accountability.

Concerning participation, there exist specifications on how stakeholders shall be invited to comment on the project, and how these comments shall be taken due account of by the DOE in the validation of a project.[60] A stakeholder is defined as 'the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity.'[61] Hence, anyone can comment on the CDM project activity and these comments are to be taken due account of by the DOE.[62] In principle, this is an inclusive approach, which can lead to most diverse voices on the proposed project by the menmbers of affected communities. The High-Level Panel recommends 'guidelines for adequate local consultation procedures…'[63]

Currently, there is no mechanism under the CDM to ensure that persons who traditionally are sidelined from decision-making processes are actually able to voice their opinions. Another

35 n11 (the latter on Bajo Aguán gas project in Honduras; where FIAN, *Human Rights Violations in Bajo Aguán* (2011) 14–16 reports that 23 peasants have been killed); for cases from Africa, see P Bond and others, *The CDM in Africa Cannot Deliver the Money: Why the carbon trading gamble and 'Clean Development Mechanism' won't save the planet from climate change and how African civil society is resisting* (2012), available at <http://ccs.ukzn.ac.za/files/CCS%20EJOLT%20CDM%20report%20final.pdf> accessed 8 April 2013.The report analyzes several dubious CDM projects: landfills outside of Durban and Alexandria, which might pose a danger for the local community; recovery of oil-associated gas flaring in Nigeria; forestry projects by (Norwegian-owned) Green Resources in Mozambique, South Sudan, Tanzania and Uganda and (UK-owned) New Forests Company in Uganda – without a proper FPIC; as well as large hydropower dam project that will result in resettlement of farming- and fishing-dependent communities. Other highly poluting activities are receiving CDM CERs; see Christian Aid, *The Role of Carbon Markets in Countering Climate Change* (2009) 3n8. Moreover, ActionAid is opposing efforts to allow carbon sequestration projects in the realm of agriculture becoming eligible for CDM CERs.

[59] FCCC, Decision 1/CP.16 (n 4) paragraph 8. While we saw (n 55) that the CDM EB decided to remove human rights from the SD tool, there is a reference to human rights in CDM EB, *Experience gained by the UNFCCC secretariat in implementing the CDM, Version 01.0, CDM-EB72-AA-A01* ('Secretariat experiences') (2013) 8; see also ibid for specific recommendations on revising the CDM Modalities and Procedures (specified in FCCC, Decision 3/CMP.1 (2006)), scheduled to be done at the CMP 9 in November 2013, including a 'requirement to monitor/assess the contribution of the CDM in promoting sustainable development…' (recommendation 10; on the role of human rights within sustainable development, see OECD 2012 (n 7)). See also recommendation 13 ('extend the oversight role of host Parties towards CDM project activities they host over the whole project life cycle…'). While nothing is said on the requirement of any consultation process, this is addressed in CDM EB, *Summary compilation of stakeholder inputs regarding possible changes to the CDM modalities and procedures, Version 02.0, CDM-EB72-AA-A02* ('Stakeholder inputs') (2013) 5, paragraph 23 (DNAs 'acting as a capacity-builder/trainer…') and 7, paragraph 43(a) (requiring confirmation 'that the consultation has met host Party guidelines or procedures…').

[60] FCCC, Decision *3/CMP.1, Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol* (2006) paragraph 37(b).

[61] Ibid, 7, paragraph 1(e).

[62] This understanding saying that all members of the public are stakeholders is confirmed by the CDM EB, *Sixty-sixth meeting, Report, CDM-EB-66, Annex 64* (2012) 7n2.

[63] CDM High-Level Panel (n 2) 58 (recommendation 10.4).

weakness is that the information on stakeholders' views is only available for the DOE, and these views might not be adequately transmitted to the DNA or the CDM. It is the state that is responsible for the conduct of an inclusive and participatory consultation process, which fulfills all the main requirements of the FPIC. As guideance tools can be applied the Principles for responsible contracts, particularly on community engagement.[64]

Finally on access to justice, the High-Level Panel makes this recommendation, quoted in full:

> Establish a grievance mechanism for local stakeholders to address environmental and social concerns and to facilitate the resolution of issues emerging after the registration of a project, while fully respecting national sovereignty and without impeding ongoing project operations. The mechanism should be established at the national level, but can be supported by existing CDM institutions if requested by a host country.[65]

This recommendation is interesting in terms of both procedure and substance. On procedure, by establishing the grievance mechanism at the national level, it can be expected that the institutional capacities will differ considerably between countries. Moreover, in order to build credibility and coherence, decisions should be published on a common home-page and regular experience-sharing between the different grievance mechanisms must be ensured. It also seems as if the grievance mechanism is to be applied only by local stakeholders. There have been several successful human rights litigations undertaken by international organisations on behalf of affected communities,[66] which seems to be restricted by the wording of this recommendation. As to the the substance, we see that the term 'environmental and social concerns' is applied. These formulations are vague, and any non-judicial grievance mechanism should comply with the effectiveness criteria outlined in the UN Guidelines on Business and Human Rights.[67]

In order to identify whether 'environmental and social concerns' can be understood to encompass human rights, it is most relevant to remind that OECD explicitly says that 'social impacts encompass relevant adverse project-related human rights impacts.'[68] Hence, human rights impacts can be seen as a specification of the social dimension within sustainable development. As specified in the Kyoto Protocol paragraph 12.2, the purpose of the CDM is that non-Annex I states are achieving sustainable development.

It is not possible to predict whether these recommendations, as well as the recommendations for the revision of of the CDM Modalities and Principles,[69] will actually be approved and whether the other on-going processes will actually improve the working of the CDM EB and the DOEs. While there is an increased emphasis on stakeholder participation, transparency, accountability and access to justice that is to be welcomed from a human rights perspective, there should also be guidelines specifying when a project should not be allowed to proceed, or

[64] Special Representative on business and human rights (n 6) 18–20.
[65] High-Level Panel (n 2) 61 (recommendation 11.2).
[66] The maybe most known example is *Social and Economic Rights Action Center* [based in Lagos] *and the Center for Economic and Social Rights* [based in New York*] v. Nigeria, Communication No. 155/96*, where the African Commission on Human and People's Rights in 2001found violations of 7 provisions of the African Charter, resulting from the oil activities in the Ogoniland.
[67] UN (n 6) 26, principle 31.
[68] OECD (n 7) 5.
[69] CDM EB (n 59) ('Secretariat experiences'), 7–8.

when a project could loose its status as a CDM project as there are no sustainable development co-benefits.[70]

5. Are human rights taken into account in REDD+ projects?

The FCCC's Conference of the Parties' meeting in 2007 acknowledged as a part of the Bali Action Plan 'positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries…'[71] A vaguely worded preambular paragraph identified what has later become known as safeguard measures: 'Recognizing also that the needs of local and indigenous communities should be addressed when action is taken…'[72]

As already seen, REDD+ projects are to be implemented by applying a human rights-based approach, complying with both legally binding and non-binding international instruments.[73] The problem is that these operative paragraphs are preceeded by a wording that is somehow schizofrenic. The second sentence says that 'countries are *expected* to adhere to standards outlined in key relevant international instruments…',[74] while the third sentence specifies that it is 'critical' to ensure compliance with human rights and FPIC requirements. Moreover, customary tenure systems are to be recognized within the context of REDD+ projects.[75]

There is, however, an emphasis on national legislation, national circumstances and national sovereignty in the implementation of safeguard mechanisms.[76] These references might reduce the importance of both local customary tenure systems and international human rights law in the implementation of REDD+ projects. In general, national legislation and enforcement mechanisms are not necessarily adequately effective in order to secure the rights of indigenous peoples and other local forest-dependent communities, also as there are states denying that they have indigenous peoples. Implementation of REDD+ projects might result in the deprivation of of their land and resources, as recognized by Norway.[77] The UN Permanent Forum on Indigenous Issues (UNPFII) observed that 'the current [REDD framework] is not supported by most indigenous peoples.'[78] The recommendations from the UNPFII said that REDD needs to be guided by the UNDRIP, specifically by 'respecting the rights of self determination and the [FPIC] of the indigenous peoples concerned.'[79]

The government of Norway, playing an important role in the REDD+ discussions due to its large financial contributions both to national initiatives and multilateral initiatives, has in an

[70] Termination of projects is addressed in CDM EB (n 59) ('Stakeholder inputs'), 5, paragraph 22.

[71] FCCC, *Decision 2/CP.13, Reducing emissions from deforestation in developing countries: approaches to stimulate action* (2008) 3, paragraph 11.

[72] Ibid, preambular paragraph 10.

[73] UN REDD and the Forest Carbon Partnership Facility (n 3) 2, paragraph 6(a).

[74] Ibid, paragraph 6.

[75] Ibid, paragraph 6(a). UNDRIP (n 39) Article 26 is on the lands indigenous peoples possess by reason of traditional ownership or other traditional occupation or use, saying that 'States shall give legal recognition and protection to these lands…'

[76] FCCC (n 59) 24, Appendix I, paragraphs 2(a) and 2(b).

[77] FCCC, *Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan. Submissions from Parties, FCCC/AWGLCA/2009/MISC.4, Part II* (2009) 58. As REDD+ projects are essentially about conserving forest areas, it is relevant to remind of conservation projects which have been found to violate affected communities' rights, see *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya, Comm. No. 276/2003* (2010), finding violations of six Articles of the African Charter, including the right to property [Article 14] (paragraph 238) and the right over natural resources [Article 21] (paragraph 268).

[78] UN Permanent Forum on Indigenous Issues, *Report on the seventh session, E/2008/43* (2008) paragraph 45.

[79] Ibid.

earlier submission specified what the Parties *shall* do under their actions under the REDD+ mechanism:

> Respect the rights of indigenous peoples and ensure the full and effective involvement of stakeholders, in particular indigenous peoples and local communities, in the design and implementation of all activities linked to this mechanism.[80]

By stressing the full and effective involvement in all activities, this might be understood as requiring a more challenging process, but this will also imply a much greater likelihood that the relevant rights are actually observed and that fewer conflict will arise. The FPIC Guidelines are comprehensive and they do specify under which conditions a consent must be said *not* to have been given. It also implictly addresses the issue of cooptation of community leaders and sidelining of vulnerable members of the community, stressing that women's voices are adequately heard.[81]

If, however, a REDD+ project should proceed despite these clearly expressed objections and in disregard of the FPIC Guidelines, a relevant question is what consquences this will have for the state in question.

On the one hand, specific guidelines on a feedback and grievance redress mechanism (hereafter 'Guidelines on Grievance Mechanisms') have been adopted. They specify that:

> Effective grievance redress mechanisms should address concerns promptly and fairly, using an understandable and transparent process that is culturally appropriate and readily accessible to all segments of the affected stakeholders, and at no cost and without retribution or impeding other administrative or legal remedies.[82]

These are elements that generally falls within the effectiveness criteria for non-judicial grievance mechanisms,[83] but the UN Guidelines also state that the such mechanisms must be rights-compatible and predictable, where the latter is operationalized as 'clear and known procedure with an indicative timeframe for each stage…' These must be considered to be requirements that come in addition to those listed by the Guidelines on Grievance Mechanisms, which also requires 'an effective and timely system for informing complainants of the action taken'.[84]

While national mechanisms for feedback and grievance redress are to be established, there are no appropriate venue within UN-REDD to bring complaints. Hence, there are no sanctions against states that has conducted a consultation with affected communities, but which proceeds with a project that has not obtained their explicit consent.[85] The only sanction is that the financer,

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[80] FCCC, *Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan. Submissions from Parties, FCCC/AWGLCA/2009/MISC.4, Add.2* (2009) 21, paragraph 11d.

[81] UN-REDD (n 15), 44, identifying women-only interviews and focus group interviews as well as '[o]ther methods to support women's engagement that are not meeting-based…' The Guidelines on Stakeholder Engagement (n 3) are, however, less instructive, by stating on p. 5, paragraph 8.d: 'It is also important to ensure that consultations are gender sensitive.'

[82] Forest Carbon Partnership Facility and UN-REDD (n 16) 17; see also p. 16.

[83] UN (n 6) 26, principle 31.

[84] Forest Carbon Partnership Facility and UN-REDD (n 16) 17.

[85] Note that the World Bank's *Operational Policy 4.10* (2005) applies the term consultation, in paragraph 11, while IFC's *Performance Standard 7 on Indigenous Peoples* (2012) applies the term consent, in paragraphs 13–17. Norway has called for 'free, prior and informed consultation', not consent (FCCC (n 75) 58, which has been met with concerns, as noted in *Norad Evaluation Report 12/2010*, 42. For three recent cases specifying that inadequate consultation can lead to human rights violations, see Human Rights Committee, Ángela Poma Poma v. Peru, CCPR/C/95/D/1457/2006 (2009) paragraphs 7.7 (finding a violation of the right to enjoy her own culture together with

either a state or a corporation, withdraws its financing from the project.

An additional concern as regards REDD+ projects is that plantations are not in principle excluded from any REDD+ efforts.[86] Plantations are positively assessed in the 1992 Forest Principles,[87] and the motivation for the adoption in of the Voluntary guidelines on responsible management of planted forests[88] implies that it is most unlikely that planted forests will in legal terms be considered qualitatively different from other forests. Plantations might threaten the continued use and harvesting of forest resources by indigenous peoples and other local communities and FAO seems to have an understanding of only persons and enterprises taking out timber being 'forests users'.[89]

Therefore, while planted forests would appear to be different from natural forests, there is no basis in international law or non-binding instruments for treating plantation forests different from other forests. Hence, it is fair to say that the inclusion of planted forests in REDD+ might threaten the continued use of the land and harvesting of natural resources by indigenous peoples and other local communities.

On the positive side, human rights and customary rights over land have a more explicit recognition within REDD+ than within the CDM, and the three Guidelines analyzed are rather comprehensive, even if some of the paragraphs are inadequate.[90] The Guidelines on Stakeholder Engagement states that they apply equally to indigenous peoples – which enjoy strong protection under international human rights law – and to other forest-dependent communities – which do not enjoy strong protection under international human rights law.[91] In the FPIC Guidelines there is, however, a distinction made between indigenous peoples and forest-depending communities.[92]

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the other members of her group); Inter-American Court of Human Rights, *Sarayaku v. Ecuador, Merits, Reparations and Costs, Judgment of 27 June 2012 (Series C No. 245)* paragraph 299; see also paragraph 176 (finding a violation of the right to communal property of the Sarayaku People, for having failed to adequately guarantee their right to consultation); and *Xákmok Kásek v. Paraguay Judgment of 24 August 2010 (Merits, Reparations, and Costs) (Series C No. 245)* (2010) paragraph 182 (finding a violation of the right to property) and paragraph 217 (finding a violation of the right to a decent life, resulting from inadequate provision of food, water, health care and education).

86 FCCC (n 75) 56, where Norway states: 'Concerns have been raised over the inclusion of industrial plantations in the definition of forests, as this could lead to the conversion of natural forest into plantations. In our view, this concern is not best addressed by excluding plantations from the forest definition.'

87 UN, *A/CONF.151/26 (Vol. III), Annex III, Non-legally Binding Authoritative Statement of Principles for A Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests* (2012) paragraph 6(d).

88 FAO, *Responsible management of planted forests. Voluntary guidelines* (2006) 41, reporting that the Voluntary Guidelines was a response to adverse environmental, social and economic effects, resulting in negative perceptions of planted forests, creating a need to promote sound planted forest investment and management. The Voluntary Guidelines acknowledges on p. 34: 'Even apparently degraded land may be of great importance to the survival of the poorest, precisely because it is of no economic value to stronger members of the community.'

89 FAO, *Forest Management and Climate Change: a literature review, Forests and Climate Change Working Paper 10* (2012) 5, 7 and 9, applying a limited concept of who is a 'forest user'.

90 See n 75 and accompanying text.

91 UN-Redd and Forest Carbon Partnership Facility (n 3) 1–2, paragraph 4.

92 UN-REDD (n 15) 11, stating that 'the Guidelines do not require a blanket application of FPIC to all forest-depending communities', clarifying on p. 12 that the Guidelines 'requires States to … secure FPIC from communities that share common characteristics with indigenous peoples'; for an argument saying that traditional communities as such are entitled to enjoy the right to self-determination, drawing upon two cases from the Inter-American Court of Human Rights (*Moiwana Community vs. Suriman, Jugdment of 15 June 2005 (Preliminary Objections, Merits, Reparations and Costs) (Series C No. 124)* [being descendants of slaves] and *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs*

As compared to the much more limited CDM tools for sustainable development,[93] the REDD+ guidelines analyzed in this section are more comprehensive. Moreover, it seems as if thesee guidelines are published and applied without any formal approval by any UNFCCC decision-making body.

6. Are human rights taken into account in projects under the Green Climate Fund?

We saw in the introduction that the decisions from the COP 17 in Durban allegedly implied an opening for 'human rights issues surrounding climate change to be integrated in the new climate regime.'[94] As there is no specific reference, there is a need to review the decisions in order to identify what is their human rights-relevant content. After a most careful examination, the following human relevant COP 17 decisions have been identified, relating to human rights adaptation:[95] i) the effective involvement of all stakeholders in Green Climate Fund (GCF) decisions; ii) the establishment of a mechanism on stakeholder engagement in the design, development and implementation of the GCF's activities; iii) establishment of an independent redress mechanism; (iv) the requirement of national plans for adaptation; and v) addressing safeguards in the context of forest reference emission levels. Each of them will be reviewed, first those applying to GCF, while the two latter on adaptation will be analyzed in the subsequent part.

First, the GCF is to

> promote the paradigm shift towards low-emission and climate-resilient development pathways by … channelling new, additional, adequate and predictable financial resources to developing countries… and strengthen engagement at the country level through effective involvement of relevant institutions and stakeholders … and taking a gender-sensitive approach.[96]

Hence, the GCF is to fund projects, programmes, policies and any other activities for a low-emission and climate-resilient future in developing countries. We see that effective engagement of stakeholders, including women, is emphasized in the working of the GCF. One of the roles and functions of the Board for the GCF is specified as: 'Develop environmental and social safeguards and fiduciary principles and standards that are internationally accepted.'[97] Hence, there are to be fiduciary principles and standards, in addition to the requirement that safeguards are to be *developed*, provided that they are internationally accepted.

How is the term 'internationally accepted' to be understood? Obviously, human rights treaties, particularly those which are ratified by a high number of states, must be considered as being internationally accepted. Moreover, as the UNDRIP has now been endorsed by those states that originally voted against, also this declaration must be considered to be internationally accepted.

Judgment of November 28 2007 (Series C No. 172) [titulated tribal people]) see de Schutter (n 33) 166n28.

[93] See n 55 for a brief presentation of the voluntary SD tools.

[94] UN 2012 (n 8) 15, paragraph 69.

[95] Note that preambular paragraphs are not included in the analysis; for one example of a preambular paragraph, see FCCC, *Decision 2/CP.17* (n 4) 12, referring to poverty alleviation and socio-ecological issues in the context of the REDD+ safeguards.

[96] FCCC, *Decision 3/CP.17, Annex* (n 4) 4, paragraphs 2 and 3

[97] Ibid, 6, paragraph 18 (e); see also 11, paragraph 56: 'financing agreements will be in keeping with the Fund's fiduciary principles and standards and environmental and social safeguards to be adopted by the Board'; and 12, paragraph 65.

Fiduciary duties are usually applied in financial matters, and is defined in *A Dictionary of Law* as: 'A person, such as a trustee, who holds a position of trust or confidence with respect to someone else and who is therefore obliged to act solely for that person's benefit.' There has, however, been a development in the understanding of fiduciary duties in the context of responsible investments, including how to safeguard the interests of third parties.[98] Hence, a reasonable explanation of how fiduciary principles and standards are to be implemented is that the body that is to undertake a project financed by the GCF has to act for the benefit of the funder, while at the same time complying with environmental and social safeguards that are internationally accepted.

Second, the working of the GCF is to be based on a participatory approach:

> The Board will develop mechanisms to promote the input and participation of stakeholders, including private-sector actors, civil society organizations, vulnerable groups, women and indigenous peoples, in the design, development and implementation of the strategies and activities to be financed by the Fund.[99]

There is no basis for claiming that 'stakeholder engagement' provisions generally qualifies for being relevant for human rights. The fact, however, that the CGF emphasizes participation of vulnerable groups, women and indigenous peoples implies that this provision has a relationship to the realization of human rights, more specifically non-discrimination. There is, however, no specification on how women and other vulnerable persons are to be involved and how it to be ensured that they are able to present their views without fear for reprisals from community or district leaders.

Third, there shall be an independent redress mechanism that will report to the GCF Board. It 'will receive complaints related to the operation of the Fund and will evaluate and make recommendations.'[100] Unlike the proposed grievance mechanisms under the CDM and the UN-REDD which are to be national, this mechanism is to operate under the GCF Board. While the term redress refers merely to the final outcome of a grievance process, the fact that the term grievance is not included in the name of the mechanism should not be a reason for concern: redress requires a process that clarifies the reason for the redress. While the redress mechanism is on the GCF's 2013 work plan,[101] there is no available information on any details on the redress mechanisms. The effectiveness criteria found in the UN Guidelines on Business and Human Rights are most relevant also in the context of this redress mechanism, even if the GCF will be an international fund administered by an international secretariat based on decisions by the GCF Board.

In summary, the participatory approach *is* evident in the mandate given to the GCF.[102] There are several processes to operationalize the working of the GCF, whose final outcome

[98] Section 172 (1) (d) of the 2006 United Kingdom Companies Act, specifying that company directors must have regard to 'the impact of the company's operations on the community and the environment'; see also J Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) 3 *Innovations: Technology, Governance, Globalization*, 189, 195; C A Williams and J M Conley, 'Is there an Emerging Fiduciary Duty to Consider Human Rights?' (2008) 74 *University of Cincinnati Law Review*, 75–104; and UN Principles for Responsible Investments, *Responsible investment and fiduciary duty* (no date) available at <www.unpri.org/viewer/?file=wp-content/uploads/3.Responsibleinvestmentandfiduciaryduty.pdf > accessed 8 April 2013.

[99] FCCC, *Decision 3/CP.17, Annex* (n 4) 12, paragraph 71.

[100] Ibid, paragraph 69.

[101] FCCC, *Report of the Green Climate Fund to the Conference of the Parties, FCCC/CP/2012/5* (2012), 23 (Annex IV, V(h)).

[102] See n 99 and accompanying text.

is difficult to assess. The paragraphs mandating these processes are rather general, but the establishment of an independent redress mechanism to receive complaints relating to the CGF's operation goes in principle further than what is entailed in the three UN-REDD guidelines, for FPIC,[103] Stakeholder Engagement,[104] and for a Grievance Mechanism.[105] The latter does not encompass any mechanism on an international level. The coming year will be decisive for the CGF's institutional structure, including its safeguard mechanisms.

7. Are human rights taken into account in other climate change adaptation measures?

The decision on adaptation says:

> enhanced action on adaptation … should follow a country-driven, gender-sensitive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional and indigenous knowledge, and by gender-sensitive approaches…[106]

Also here, the emphasis on the vulnerable groups, and the gender-sensitive, participatory and fully transparent approach is relevant for human rights realization. Moreover, traditional and indigenous knowledge is emphasized, but this part of the provision is weakened, however, by the phrase 'as appropriate'. A possible explanation for this might be that there is currently no international treaty which specifically regulates traditional knowledge.[107] There is a basis in human rights provisions – both the ICCPR and the ICESCR – for recognizing traditional knowledge as a human rights.[108] The most specific recognition of traditional knowledge is in the 1994 United Nations Convention to Combat Desertification (UNCCD), Article 18.2.[109] It is obvious that traditional and indigenous knowledge could be most valuable when implementing national adaptation plans.

Moreover, the decision on adaptation says that national adaptation plans, should be based on and guided by the best available science. The relevant paragraph of the decision on national adaptation plans continues: 'Requests developed country Parties to continue to provide least de-

[103] UN-REDD (n 15).

[104] UN-REDD and Forest Carbon Partnership Facility (n 3).

[105] Forest Carbon Partnership Facility and UN-REDD (n 16).

[106] FCCC *Decision 5/CP.17* (n 4) 1, paragraph 3. For an indication of relevant climate adaptation projects and programmes, many of which will affect land rights and traditional land uses, see FCCC, *Decision 1/CP.16* (n 4) 3h1. Indigenous knowledge is also emphasized by the International Indigenous Peoples' Forum on Climate Change (IIPFCC) 2012, *Statement to the UNFCCC-Subsidiary Body for Implementation (SBI), 36th session*, available at <www.forestpeoples.org/sites/fpp/files/publication/2012/05/subsidiary-body-implementation-sbi-statement-unfccc.pdf> accessed 8 April 2013.

[107] The mandate of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF) was given by WIPO General Assembly in 2000 (WIPO, *WO/GA/26/10* (2000) paragraph 71), which in 2003 was specified by stating: "no outcome of its work is excluded, including the possible development of an international instrument or instruments" (WIPO, *WO/GA/30/8* (2003) paragraph 93(iii)), and in 2011, by mandating: "negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs" (WIPO, *WO/GA/40/7* (2011) paragraph 16(a); see also WIPO, *WO/GA/40/19* (2011) paragraph 181).

[108] H M Haugen, 'Traditional Knowledge and Human Rights' (2005) 8 *Journal of World Intellectual Property* 663; H M Haugen, *Technology and Human Rights: Friends or Foes? Highlighting Innovations Applying to Natural Resources and Medicine* (Republic of Letters Publishing, Leiden 2012) ch. 6.

[109] UNCCD Article 18.2 reads (extracts): 'The Parties shall … protect, promote and use in particular relevant traditional and local technology, knowledge, know-how and practices…'

veloped country Parties with finance, technology and capacity-building…'[110] A study has identified three problems relating to technology transfer decisions in international treaties, namely defining and assessing such transfers and holding developed countries to account.[111] The same study, however, finds that the dicussions on the implementation of the so-called 'Technology Mechanism'[112] have already made progress on resolving these problems.[113]

In this context, it should be acknowledged that the ICESCR recognizes 'the right for everyone to enjoy the benefits of scientific progress and its applications.'[114] Hence, there is a human rights basis both for recognizing and applying traditional knowledge and for making scientific progress and its applications more available.[115]

Finally, when providing information on how the REDD safeguards are addressed and respected, the should be a recognition of 'relevant international obligations and agreements, and respecting gender considerations.'[116]

This paragraph stands out from the other paragraphs reviewed above in three respects. First, there should only be a 'recognition' of relevant international obligations and agreements. Second, even if gender is included immediately after 'relevant international obligations and agreements' this does necessarily assist in defining what is 'a relevant agreement'. Third, gender 'considerations' are only to be respected. While the provision might be read so as to include international human rights treaties, particularly those relating to women's rights, this paragraph is both vaguer and less participatory than the other paragraphs reviewed.

Hence, we see that the decision on adaption is explicitly ackowledging vulnerable persons, and emphasizing participatory and fully transparent approaches, but include no accountability mechanisms. Moreover, as with the decisions on the GCF, there are no references to the FPIC requirement. This can be considered somewhat surprising, as GCF and national adaptaion projects will imply making use of land which might affect land rights and traditional uses of this land.

8. Conclusions

Projects that are to make use of vast land areas have come under great criticism recently, irrespective of whether they have been granted CER under the CDM or being identified for REDD activities.[117] A study by the World Bank finds

[110] FCCC *Decision 5/CP.17* (n 4) 3 paragraph 20.

[111] P Gehl Sampath and P Roffe, *Unpacking the International Technology Transfer Debate: Fifty Years and Beyond*, International Centre for Trade and Sustainable Development Discussion paper (2012) 49.

[112] FCCC 2011 (n 59) 17, paragraph 117.

[113] Gehl Sampath and Roffe 2012 (n 111) 50. The study also finds that the key is the linking of technology transfers and trade, while this author would focus as much on foreign direct investments as a tool for technology transfers.

[114] ICESCR, Article 15.1(b); see also Article 15.2 on the diffusion of science and Article 15.4 on international scientific cooperation; for an analysis of ICESCR Article 15.1(b) and technology transfer, see Haugen 2012 (n 108), chapter 2 and 8, respectively.

[115] On the scope of obligations derived from Article 15.1(b), see UNESCO 2009, *Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications*. Only one reference is made to climate change in the Venice Statement, namely paragraph 13(c) on protection from abuse and adverse effects of science and its applications, listing climate change as an area of 'contemporary controversy', most likely referring to geoengineering. For a brief discussion, see Haugen 2012 (n 101) 226–232.

[116] FCCC, *Decision 12/CP.17* (n 4) 1, paragraph 2.

[117] There are 72 aforestation and reforestation projects under the CDM; see <www.cdmpipeline.org/cdm-projects-type.htm> accessed 8 April 2013; and the number of REDD+ 'arrangement records', according to the voluntary REDD+ Database, are 1292; see <www.reddplusdatabase.org/by/recipients> accessed 8 April 2013; for a defintion of what is considered to constitute land grabbing, see International Land Coalition, Tirana Declaration (2011) paragraph 4, available at <www.landcoalition.org/about-us/aom2011/tirana-declaration> accessed 8 April 2013.

that 'lower recognition of land rights increases a country's attractiveness for land acquisition…'[118]

On this background, the need for robust safeguard mechanisms is most important. It is not the frequent referencing to human rights treaties or other human rights instruments that matters, but whether there is actually a human rights compliant conduct. It must be acknowledged that by having safeguard mechanisms that are embedded in human rights provisions, this enhances legitimacy, accountability and predictability.

The article has found that FPIC is an operationalization of both substantive human rights – particularly the right to self-determination as applying to natural resources and the rights applying to collectively owned land – and of human rights principles. Moreover, the states have agreed on the FPIC in the context of the non-binding UNDRIP. While the article has not undertaken an in-depth analysis of the substantive human rights that might be affected as a result of the restrictions on the use of or access to traditional lands,[119] it must be noted that in several cases, procedural rights were found to have been violated, but through these violations, also substantive human rights were deemed to have been violated.

As for the three realms of climate change measures, the CDM as it currently operates has an inadequate integration of human rights. It is too early to make any assessment on the implementation of the recommendations from the High-Level Panel on the CDM Policy Dialogue and the revision of the CDM Modalities and Principles, but some of the recommendations point in a positive direction. As regards the UN-REDD, the Guidelines have many positive aspects, but the use of the term 'expectations' in adhering to international instruments and the reference to national legislation, national circumstances and national sovereignty in the implementation of safeguard mechanisms can give states too much leeway.[120] In the mandate for the Green Climate Fund, the reference to women and to vulnerable persons is of little value unless specific guidance is adopted on how their participation is actually to be promoted, but an international redress mechanisms will at least provide for a minimum level of accountability of actors undertaking projects or programs with GCF funding.

If human rights are to be effectively integrated into the relevant realms of the FCCC analyzed in this chapter, it is of little value merely to 'refer to' or to 'consider' human rights. What is crucial is that the respective bodies are entrusted with a mandate which allow them to take human rights actively into account, by applying both human rights principles and substantive human rights.

[118] K Deininger and D Byerlee, *Rising Global Interest in Farmland. Can It Yield Sustainable and Equitable Benefits?* (The World Bank, Washington 2010) 55. Half of the land that has been transferred in the last decade is in Africa, and of this land, 66 per cent were intended to be used for biofuels, while 15 per cent is intended for food production, and approximately 7 per cent were intended for forestry, including carbon sequestration; see W Anseeuw et al., *Land Rights and the Rush for Land, Findings of the Global Commercial Pressures on Land Research Project* (International Land Coalition, Rome 2012) 25. FAO 2012 (n 11) indicates a greater emphasis on explicit human rights and customary rights when dealing with land

[119] See n 66, n 77, n 85 and n 92 for international human rights jurisprudence.

[120] See n 74 and 76 and accompanying text.

Norges første marine nasjonalpark – gir den det ønskede vern?

Liz-Helen Løchen[1]

Abstract

This article analyses if the management of Norway's first marine national park, Ytre Hvaler nasjonalpark, is in compliance with the Nature Management Act of 19 June 2009 no. 100 and fulfils the regulation that creates the protected area. Furthermore, the article examines if there is compliance between law, regulation and practice, especially in situations where the decisions of the authority may directly affect the unique nature of the national park. These aspects are of great interest, especially since the challenges and conflicts one may meet for marine protected areas may be quite different from the ones met for terrestrial habitats and protected areas. First, the goals for the management of the national park are discussed. Secondly, the article discusses what measures the managing authority will have to implement in order to reach these goals, and finally, cases from the local managing authority are discussed in order to highlight how the management is followed through in practice. An important question that arises is if the long term effects of the management practice will reach its initial purpose to protect the area, or if the management in fact is working against its purpose.

1. Innledning

1.1 Innledning og problemstilling

"I dag har Norge 40[2] nasjonalparker, blant dem sju på Svalbard…Når vi avrunder nasjonalparkplanen, vil vi ha vernet 17–18 prosent av norsk natur. Da vil ikke hovedansvaret lenger dreie seg om etablering, men om skjøtsel og forvaltning av det vi har vernet".[3]

Sitatet får frem et viktig poeng. Hva skjer med verneområdene etter at de er opprettet. Er det samsvar mellom lov og den verneforskriften som oppretter verneområdet. Et annet spørsmål er om det er samsvar mellom lov, verneforskrift og senere forvaltningspraksis når forvaltningsmyndighetene treffer vedtak som berører naturverdiene i et verneområde. Spørsmålene er interessante der hvor man har kombinert landbasert og marint områdevern, fordi konfliktsituasjoner og utfordringer som knytter seg til land ikke nødvendigvis er tilsvarende for vann, og vice versa.

For å undersøke dette nærmere har jeg foretatt en kvalitativ studie av skjønnsutøvelsen[4] i det som er Norges første marine nasjonalpark.

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[2] Ifølge Direktoratet for naturforvaltning er antall nasjonalparker i dag på 42, 35 på fastlandet og 7 på Svalbard.

[3] Sitatet er hentet fra tidligere statssekretær Heidi Sørensen (Sosialistisk Venstreparti) i Miljøverndepartementet, publisert den 03.08.2010, (http://www.tv2.no/nyheter/innenriks/har-vernet-en-sjettedel-av-norge-3258286.html). Lesedato 28.01.2013.

[4] I artikkelen brukes ordet skjønnsutøvelse om forvaltningens adgang til å gi tillatelser og godkjenning etter verneforskriften, eller dispensasjon fra den.

Bakgrunnen for å opprette en marin nasjonalpark var at Regjeringen ønsket å "etablere et nettverk av marine beskyttede områder for å sikre representative, særegne, sårbare og truede marine naturtyper og naturverdier i norsk kyst og havområder" og "beskytte gjenværende korallrev i norske farvann".[5] Resultatet var at Ytre Hvaler nasjonalpark ble vernet 26. juni 2009,[6] med hjemmel i den tidligere naturvernloven.[7] Få dager senere, den 1. juli 2009 trådte naturmangfoldloven (nml.) i kraft, og naturvernloven ble opphevet, jf. nml. § 76. En av hovedbegrunnelsene for ny lov var at naturvernloven ikke tok tilstrekkelig høyde for de utfordringene vi i dag står overfor når det gjelder forvaltning av natur og biologisk mangfold.

Naturmangfoldloven gir et mer helhetlig, langsiktig og forpliktende regelverk for å ivareta naturens mangfold.[8] Et av målene med loven er å stanse tap av biologisk mangfold og legge til rette for bærekraftig bruk av naturen.[9] Når det gjelder hvilken betydning naturmangfoldloven skal ha for eldre vernevedtak, gir loven ingen klare signaler, jf. nml. § 77 første punktum. Ordlyden kan forstås slik at bestemmelsene i naturmangfoldloven ikke gjelder, og at det blir et spørsmål om fremtidig revisjon av verneforskriften for å bringe den i samsvar med loven.[10] Forarbeidene gir ingen konkret veiledning, bortsett fra å legge til grunn at temaet kan reguleres i forskrift.[11] På den annen side vil Grunnloven § 97 om forbud mot tilbakevirkende kraft trolig ikke ha en like tungtveiende betydning ved forvaltningen av naturens mangfold. Videre taler hensynet til klare, effektive og forutsigbare regler sterkt for at det er bestemmelsene i naturmangfoldloven som gjelder. I artikkelen er loven brukt som en viktig tolkningsfaktor.

For å finne ut om praksis er i samsvar med lov og forskrift når forvaltningsmyndighetene treffer vedtak i et verneområde, drøftes tre hovedtemaer i denne artikkelen: hvilke mål som ligger til grunn ved forvaltningen (punkt 2), virkemidler man har for å nå målene (punkt 3), og hvordan forvaltningsmyndighetene forholder seg til disse rammene gjennom skjønnsutøvelsen i praksis (punkt 4). Når det kommer til praksis, er et sentralt spørsmål i artikkelen om skjønnsutøvelsen på sikt vil bidra til at det skjer en uthuling av verneformålet for nasjonalparken.

1.2 Et komparativt perspektiv

Underveis i artikkelen foretas mindre sammenligninger med svensk og dansk forvaltning. Sammenligningen er ikke ment å være uttømmende, og gjøres for å sette norsk forvaltning inn i et bredere perspektiv.

Ytre Hvaler nasjonalpark dekker et areal på ca. 354 km^2, hvorav ca. 340 km^2 er sjøareal.[12] Det vil si at ca. 96 % av det vernede areal ligger i havet. Området er vurdert til å ha en stor verdi for friluftslivet både lokalt, regionalt og i nasjonal sammenheng.[13] En rekke av artene som lever her er ført opp i den norske rødlisten over truete og sårbare arter, eller arter som er i tilbakegang. Det er også mange sjeldne og verdifulle naturtyper i området.[14] I nasjonalparken forvaltes blant annet et av verdens største kjente innenskjærs kaldt-

[5] St. meld. nr. 12 (2001-2002) Rent og rikt hav s. 74.
[6] Forskrift om vern av Ytre Hvaler nasjonalpark, Hvaler og Fredrikstad kommuner, Østfold (verneforskriften). Vedtatt ved kongelig resolusjon den 6. juni 2009 nr. 833.
[7] Lov om naturvern (naturvernloven) av 19. juni 1970 nr. 63.
[8] Ot. prp. nr 52 (2008-2009) Om lov om forvaltning av naturens mangfold s. 14.
[9] Lov om forvaltning av naturens mangfold (nml.) av 19 juni. 2009 nr. 100 § 1.
[10] Om naturmangfoldlovens betydning som ramme for vernet etter eldre verneforskrifter se Backer, 2010 *Naturmangfoldloven Kommentarutgave* s. 625.
[11] Ot.prp. nr. 52 (2008-2009) s. 349 pkt. 19.4.
[12] Verneforskriften § 1 annet ledd.
[13] Kongelig resolusjon 2009 s. 2.
[14] Kongelig resolusjon 2009 pkt 1.2.

vannskorallrev, Tislerrevet.[15] Med tilstøtende grense til Ytre Hvaler, har man på svensk side Kosterhavets nationalpark. Her omfatter vernet nesten 400 km^2, hvorav ca. 98% ligger i havet.[16] Ytre Hvaler og Kosterhavet utgjør et sammenhengende system, og områdene er svært like med tanke på artsmangfold, undersjøiske habitater og landskapstyper. De er de første nasjonalparkene med marint fokus både i Sverige og i Norge.

I Danmark finner vi et tilsvarende område, Nationalpark Vadehavet. Parken inneholder et av verdens mest verdifulle tidevannsområder.[17] Området har ikke fått benevnelsen marin nasjonalpark, men ved å dekke et areal på ca. 1.500 km^2, hvorav ca. 1.200 km^2 er sjøareal, er det i praksis en marin nasjonalpark.

1.3 Forvaltningen

Ordet "forvaltning" er tvetydig.[18] Noen ganger sikter det til den virksomhet som skal forvaltes. Andre ganger sikter det til de typiske forvaltningsorganene, slik som Kongen (regjering), departementer og direktorater, kommuner og fylkeskommuner. Ingen av de to betydningene har en skarp grense. Når ordet "forvaltning" brukes i denne artikkelen, sikter jeg til den virksomhet som skal forvaltes, med mindre annet kommer frem av sammenhengen.

For å sikre en bedre måloppnåelse i miljøvernpolitikken vedtok Regjeringen i 2010 at nasjonalparker skal forvaltes lokalt, gjennom politiske sammensatte organer.[19] Ytre Hvaler nasjonalpark forvaltes i dag av et lokalt forvaltningsstyre. Forvaltningen omfatter "summen av de oppgaver man får ved at nasjonalparken er opprettet".[20] Det kan innebære spørsmål om tolkning av verneforskriften, avgjørelser i enkeltsaker om tillatelser og godkjenning etter verneforskriften, eller dispensasjon fra den. Videre kan det innebære å gi informasjon om verneforskriften og verneverdiene i området, eller å foreta skjøtsel av verneområdet. Selv om forvaltningsmyndighetene har en viss fysisk rådighet ved å foreta skjøtsel, jf. nml. § 47, har de i utgangspunktet ingen positiv rådighet over verneområdene.[21] Ved forvaltningen av Ytre Hvaler nasjonalpark legger loven opp til at forvaltningsmyndigheten skal utarbeide en forvaltningsplan for området. Planen skal vise hvordan de tenker å bruke den kompetansen verneforskriften gir.[22]

I Sverige forvaltes nasjonalparkene av et forvaltningskontor,[23] og i Danmark av et fond og en nasjonalparkbestyrer.[24] I Sverige baserer man seg på en såkalt adaptiv forvaltning. Det innebærer at man "sätter mål för skydd och förvaltning, beslutar om åtgärder för att uppnå dessa mål, kontinuerligt övervakar utvecklingen av målen och justerar åtgärderna om målen inte uppnås". Kompetansen til forvaltningen av Kosterhavet går ut på å "förvalta Kosterhavets na-

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[15] Kongelig resolusjon 2009 s. 2.

[16] Länsstyrelsen Västra Götalands Län. (http://projektwebbar.lansstyrelsen.se/kosterhavet/Sv/om-nationalparken/Pages/index.aspx). Lesedato 07.06.2013.

[17] Plan for Nationalpark Vadehavet 2013–18 s. 8.

[18] Eckhoff og Smith, 2006 *Forvaltningsrett* s. 5.

[19] Det er Direktoratet for naturforvaltning som fastsetter hvem som er forvaltningsmyndighet i Ytre Hvaler nasjonalpark, jf. verneforskriften § 7. I valget av forvaltningsmodell har Regjeringen vektlagt at forvaltningen skal være kunnskapsbasert, lokalt forankret og bidra til en mest mulig enhetlig forvaltning. Se St.prp.nr.1 (2008-2009) for Miljøverndepartementet budsjettåret 2009, s. 218–226, som legger grunnlaget for et lokalt forvaltningsstyre.

[20] Backer, 2010 *Naturmangfoldloven Kommentarutgave* s. 276.

[21] Jf. eks. Rt. 1980 s. 94 (100) og Rt. 1987 s. 311 (319).

[22] Backer, 2012 *Innføring i naturressurs- og miljørett* s. 251.

[23] Skötselsplan for Kösterhavets Nationalpark s.211.

[24] Lov om nationalpark §§ 8 og 12. Her er det viktig å understreke at den danske lov om nationalpark hovedsakelig innholder prosessuelle regler knyttet til utpekning og planlegging for nasjonalparkene, og dermed få forpliktelser for forvaltningen. De bindende restriksjonene er å finne i "bekendtgørelse 867/ 2007 om fredning og vildtreservat i Vadehavet".

tionalpark enligt fastställd skötselplan och meddelade föreskrifter".[25] Nasjonalparkbestyrelsen i Danmark har, til forskjell fra norsk og svensk forvaltningsmyndighet, ingen myndighetskompetanse.[26] Gjennomføringen av forvaltningen avhenger i langt større grad av at grunneiere inngår "frivillige aftaler om naturbevaring, naturpleje, drift, naturgenopretning, styrkelse af kulturhistoriske værdier og offentlighedens adgang" med det offentlige.[27] Forvaltningen av danske nasjonalparker skiller seg på den måten noe fra svensk og norsk forvaltning.[28]

Likt for forvaltningsmyndighetene i de tre landene er at de tar utgangspunkt i lov og forskrift. I Norge og i Sverige er forvaltningsplan og skjøtselsplan et viktig hjelpemiddel,[29] mens Danmark benytter en såkalt "nationalparkplan".[30] Felles er at "planen" inneholder rammer for etablering og utvikling av nasjonalparken i sin helhet. Den har imidlertid ingen direkte rettsvirkning overfor grunneiere eller andre myndigheter. I Norge er forvaltningsplanen, som nevnt, et viktig hjelpemiddel ved at den skal utdype og realisere formålet med vernet.[31] Utkast til forvaltningsplan skal derfor legges frem *samtidig* med vernevedtaket, jf. nml. § 35 tredje ledd. For Ytre Hvaler foreligger det ingen endelig forvaltningsplan. Nå, over tre og et halvt år etter at området ble vernet som nasjonalpark, foreligger det kun *et forslag* til forvaltningsplan. Til sammenligning fikk Sverige sin skjøtselsplan knappe fem måneder etter at Kosterhavet ble opprettet.[32]

2. Bevaringsmål

2.1 De overordnede mål i naturmangfoldloven

I Norge angir naturmangfoldloven de overordnede målene for områdevern, mens verneforskriften angir det nærmere formålet og hvilken tilstand som ønskes oppnådd med vernet, jf. nml. § 34 annet ledd første punktum. Et av målene med å verne områder i Norge er at det skal bidra til bevaring av naturtyper, landskap, arter og genetisk mangfold, jf. nml. § 33 første ledd bokstav a og b. Som nasjonalpark kan man verne større naturområder som inneholder særegne eller representative økosystemer eller landskap, og som er uten tyngre naturinngrep, jf. nml. § 35 første ledd. Annet ledd legger til grunn at: "I nasjonalparker skal ingen varig påvirkning av naturmiljø eller kulturminner finne sted, med mindre slik påvirkning er en forutsetning for å ivareta verneformålet". Første ledd setter krav til områdets kvalitet, mens annet ledd setter en skranke for hvilke handlinger som kan tillates i en nasjonalpark. Det sentrale her er å fastslå om bestemmelsen er absolutt i den forstand at forvaltningsmyndigheten ikke kan gi dispensasjon fra den. Spørsmålet er derfor hva som er en "varig påvirkning" i en nasjonalpark.

En naturlig språklig forståelse taler for at naturmiljøet skal "bli ved sitt", altså ikke endres. Mens det å oppføre en hytte i en nasjonalpark for eksempel vil anses som en varig påvirkning, vil på den annen side oppsetting av telt ikke være det. Det å anlegge en teltplass kan derimot lettere tenkes å være et tvilstilfelle. Forarbeidene til naturmangfoldloven legger til grunn at bruken av

[25] Skötselsplan for Kösterhavets Nationalpark s.211.
[26] Plan for nationalpark Vadhavet 2013–18 s. 127.
[27] Lov om nationalpark § 14 første ledd.
[28] Her må det understrekes at Vadehavet også er utpekt som et Natura 2000 område, og dermed omfattet av Natura 2000-planer for forvaltning av området, jf. miljømålsloven. Videre er det fastsatt særlige bestemmelser i bekendtgørelse om fredning og vildtreservat i Vadehavet.
[29] I Norge bruker man både forvaltningsplan og skjøtselsplan. I Sverige bruker man kun skjøtselsplan, som er det samme som den norske forvaltningsplan.
[30] Plan for nationalpark Vadhavet 2013–18.
[31] Ot.prp. nr. 52 (2008-2009) s. 187 pkt. 11.1.1.
[32] Nasjonalparken ble vernet den 19.mars 2009 og skjøtselsplanen kom den 27.august 2009.

uttrykket innebærer at all vedvarende virksomhet skal være forbudt i en nasjonalpark. Visse former for høsting, skånsom tilrettelegging for turisme med sikte på å oppleve natur, og i noen tilfeller slått eller beite, kan fremdeles finne sted. Det skal imidlertid være forbudt å føre opp nye bygninger.[33]

Bestemmelsen setter på den måten opp et minimumsvern.[34] Det vil si at forvaltningsmyndigheten *ikke* kan gi dispensasjon etter nml. § 48, dersom det kommer i strid med nml. § 35. Tiltak som man ønsker å gjennomføre må *alltid ligge innenfor* de rammene som naturmangfoldloven trekker opp for nasjonalparkvern. Dersom det ikke er samsvar, og saken kommer opp for domstolene, er resultatet at vedtaket må settes til side som ugyldig.

2.2 Bevaringsmål i verneforskriften

Målet med vern av Ytre Hvaler er å "bevare et egenartet, stort og relativt urørt naturområde ved kysten i sørøst-Norge, bevare et undersjøisk landskap med variert bunntopografi, bevare økosystemer på land og i sjø med naturlig forekommende arter og bestander, kystlandskap med sjøoverflate og havbunn med korallrev, hard- og bløtbunn." Videre skal allmennheten gis anledning til naturopplevelse gjennom utøvelse av tradisjonelt og enkelt friluftsliv med liten grad av tilrettelegging.[35]

Til sammenligning er formålet med Kosterhavet å "bevara ett särpräglat och artrikt havs- och skärgårdsområde samt angränsande landområden i väsentligen oförändrat skick.[36] For Vadehavet er formålet blant annet å "bevare, styrke og udvikle naturen, dens mangfoldighed, sammenhæng og dynamik, især for de internationalt betydningsfulde lavvandede havområder, vadeflader, marskenge og øvrige kystnære naturarealer".[37]

Et sentralt spørsmål, for alle de tre landene, er hva som ligger i uttrykket *"bevaring"*. I utgangspunktet bør det innebære at naturen forvaltes med sikte på å ivareta den naturlige utvikling av økosystemene, uten noen form for menneskelig påvirkning. Det faktum at arter og naturtyper hele tiden er i en prosess, taler for at formålet er å ta vare på denne dynamikken. Slikt sett vil naturen fortsette å være relativt urørt. Skjøtsel kan imidlertid i visse tilfeller være helt nødvendig, også der det er tale om å la naturen gå sin gang, for eksempel ved tiltak for å fjerne fremmede arter. Ved bevaring av kulturlandskapet vil man være direkte avhengig av fortsatt bruk, i og med at det ellers risikerer å gro igjen.[38] Slik sett kan det være forskjellige forutsetninger for å bevare naturverdiene i et område.

For Ytre Hvaler legger verneforskriften til grunn at man skal bevare økosystemer, og ivareta arter og bestander som forekommer naturlig på land og i sjøen. Ingen enkeltarter nevnes i formålsbestemmelsen. Derimot nevnes tre marine naturtyper, korallrev, hard- og bløtbunn. Et slikt fokus i formålsbestemmelsen gir dem en prioritet i forvaltningen. Sammenlignet med Sverige og Danmark, går Norge lengre i å presisere formålet. Verneforskriften gir imidlertid ingen klar og entydig definisjon av hvilken *tilstand* som ønskes oppnådd med vernet. Den gir heller ingen direkte resultatforpliktelse. Nml. §§ 4 og 5 må derfor benyttes i tolkningen av hva som ligger av bevaringsmål i verneforskriften.

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[33] Ot.prp. nr. 52 (2008-2009) s. 410.

[34] Backer, 2010 *Naturmangfoldloven Kommentarutgave* s. 317–318.

[35] Verneforskriften § 2.

[36] Formålet fremgår ikke av forskriften, men av skjøtselsplanen s. 27.

[37] Bekendtgjørelse om nationalpark Vadehavet § 2 første ledd.

[38] Hågvar og Berntsen 2001 *Økologi og miljøvern* s. 214.

2.3 Forvaltningsmål i naturmangfoldloven

Nml. §§ 4 og 5 angir samlede og langsiktige *forvaltningsmål* for naturtyper og arter. I en nasjonalpark er ivaretakelsen av naturmangfoldet hovedfokuset og formålet med vernet. Det vil si at når forvaltningsmålene i nml. §§ 4 og 5 er generelle og gjelder for alle naturtyper og arter i Norge, taler gode grunner for at de gjelder *ekstra strengt* i et område vernet som nasjonalpark.[39]

Verneforskriften går langt i å spesifisere at det er et mål å bevare naturtypene korallrev, hard- og bløtbunn. Gjennom nml. § 4 innebærer det at mangfoldet av naturtypene skal ivaretas innenfor deres naturlige utbredelsesområder, og med det artsmangfoldet og de økologiske prosesser som kjennetegner den enkelte naturtype. For naturtypene som finnes i Ytre Hvaler innebærer det at et kvalitativt og et kvantitativt element skal være oppfylt.[40] Det vil si at naturtypene skal finnes med et tilstrekkelig antall lokaliteter og arealomfang, og at den økologiske kvaliteten skal være god.

Annet punktum legger til grunn at økosystemers funksjon, struktur og produktivitet skal ivaretas. Det vil si at naturen både kan gå sin gang og at aktiv forvaltning kan inngå i begrepet. Økosystemers funksjon, struktur og produktivitet, er dynamiske begreper som kan beskrive den naturlige utviklingen i et område.[41] Gjennom ivaretakelse av parametrene kan en si noe om den økologiske tilstanden i nasjonalparken er god.

Som et av de første landene i Europa har Norge utarbeidet en rødliste for naturtyper. Kriteriet for å komme med er at naturtypen står i fare for å forsvinne, uavhengig av om det skjer gjennom naturlige eller menneskeskapte prosesser.[42] Risikovurderingen bygger blant annet på om det er arealreduksjon, om naturtypen har begrenset antall lokaliteter, om naturtypen finnes på svært få lokaliteter, eller om tilstanden er vesentlig endret.[43] Listen gir en samlet vurdering av sannsynligheten for at en naturtype skal forsvinne. Da forvaltningsmyndighetene forutsettes å gjøre selvstendige vurderinger, vil ikke listen alene være nok til å gjøre prioriteringer for nasjonal forvaltning av naturtyper. Likevel kan den være med på å gi viktige retningslinjer.[44]

Forvaltningsmålet for arter er at de og deres genetiske mangfold skal ivaretas på lang sikt, slik at de kan forekomme i levedyktige bestander i sine naturlige utbredelsesområder, jf. nml. § 5. Forvaltningsmålet gjelder etter ordlyden generelt, for alle arter, uansett om arten har en direkte nytteverdi for mennesker eller ikke.[45] I forarbeidene er det lagt til grunn at det skal oppnås en god tilstand.[46] Spørsmålet er hva som menes med "god". Dette kan i enkelte tilfelle være vanskelig å besvare, og vil kunne variere fra art til art. Det som kan sies med sikkerhet er at når man treffer et forvaltningsvedtak, som kan påvirke artene eller deres leveområder, skal bevarings-

[39] Nml. §§ 4 og 5 viser til en forholdsmessighetsvurdering. Det vil si at tiltak som vurderes i utgangspunktet skal avveies mot andre viktige samfunnsinteresser, jf. nml. § 14. Forholdsmessighetsvurderingen knyttet til andre samfunnsinteresser vil imidlertid ikke komme inn ved forvaltningen av en nasjonalpark. Begrunnelsen er at lovgiver på forhånd har foretatt en avveining mellom bruk og vern, og kommet til at naturverdiene skal komme foran brukerinteresser.

[40] Ot.prp. nr. 52 (2008-2009) s. 81 pkt. 8.3.6.2.

[41] Ot.prp. nr. 52 (2008-2009) s. 375, merknader til § 4.

[42] Korallrev er plassert som sårbar i "Norsk rødliste for naturtyper 2011" s. 56.

[43] Artsdatabanken, nasjonal kunnskapskilde for biologisk mangfold (http://www.artsdatabanken.no/artArticle.aspx?m=284). Lesedato: 19.02.2013.

[44] I 2010 ble det innført et nytt verktøy i norsk forvaltning, en "naturindeks". Den skal gi et bilde av utviklingen av mangfoldet i norsk natur og bidra til å måle om tap av arter stanser. Indeksen kan knyttes opp til den juridiske drøftelsen, ved at alle de store økosystemene og alle områder i Norge skal ha en positiv utvikling fra 2010 og frem over i tid.

[45] Ot.prp. nr. 52 (2008-2009) s. 82.

[46] Ot.prp. nr. 52 (2008-2009) s. 376.

målet legges til grunn slik at artene fortsatt kan forekomme i levedyktige bestander i sitt naturlige utbredelsesområde. Når det treffes et vedtak som kan virke inn på om målene nås, *må* det tas hensyn til forvaltningsmålene i naturmangfoldloven og unngå at vedtaket får et innhold som gjør det vanskelig å nå målene.

Videre kan hva som menes med "god" knyttes opp mot Norsk rødliste for arter.[47] For at arter skal havne på listen vurderes blant annet om arten er i bestandsnedgang, om det finnes få individer, eller om arten kun finnes på et lite område.[48] Arter som klassifiseres til en av kategoriene utdødd, utdødd i vill tilstand, regionalt utdødd, kritisk truet, sterkt truet, sårbar, nær truet eller datamangel, benevnes som rødlistearter.[49] Selv om forarbeidene legger til grunn at det ikke er noen automatikk i at en art som befinner seg på rødlisten, skal få et særskilt vern etter naturmangfoldloven, er listen et viktig verktøy ved forvaltningen, da den danner et faglig grunnlag.

I Ytre Hvaler finnes det rundt 131 rødlistearter.[50] Hvor mange av dem som befinner seg i det marine miljøet har jeg ikke funnet opplysninger om, og årsaken kan være at arbeidet med å kartlegge det marine mangfoldet er vanskeligere enn på land. På svensk side vises det imidlertid til at "antalet marina rödlistade arter (undantaget fåglar) som är funna eller troligen finns i Kosterhavet är 196 stycken vilket innebär att 86 % av alla hittills rödlistade svenska marina arter finns i Kosterhavets nationalpark."[51] Sammenlignet med Sverige finnes det et dårligere kunnskapsgrunnlag for de marine artene som lever i Ytre Hvaler. Begrenset detaljkunnskap om utbredelsen av enkeltarter i det marine miljøet medfører at det lokale forvaltningsstyret *må* legge vekt på sentrale miljørettslige prinsipper, slik som føre-var og samlet belastning.[52] Dette kommer jeg tilbake til i punkt 4.

Avslutningsvis bør det nevnes at vurderingen av hva som ligger i "god" kan knytte seg opp mot habitatdirektivet.[53] Artikkel 1 bokstav i fastsetter at en arts bevaringsstatus anses for *gunstig* når "data vedrørende bestandsudviklingen af den pågældende art viser, at arten på lang sigt vil opretholde sig selv som en levedygtig bestanddel af dens naturlige levesteder, og artens naturlige udbredelsesområde hverken er i tilbagegang, eller der er sandsynlighed for, at det inden for en overskuelig fremtid vil blive mindsket, og der er og sandsynligvis fortsat vil være et tilstrækkeligt stort levested til på lang sigt at bevare dens bestande". Selv om habitatdirektivet ikke er en del av EØS-avtalen, gir direktivet viktige signaler over hva slags bevaringsmål man bør ha innenfor et verneområde.[54]

Konklusjonen av det som hittil er drøftet er at verneforskriften bærer preg av å ha blitt vedtatt under den gamle naturvernloven. Den stiller ikke opp klare mål og gir heller ingen direkte resultatforpliktelse. Det er en svakhet at man i

[47] Rødlistevurderingene er gjort med utgangspunkt i IUCN sine retningslinjer. De inkluderer et sett av kategorier, som er en gruppert rangering av arter i forhold til vurdert risiko for at de skal dø ut, og et sett av kriterier som brukes for å fastsette hvilken kategori en art tilhører. Formålet er å oppnå en så standardisert og objektiv risikovurdering som mulig.

[48] Artsdatabanken, nasjonal kunnskapskilde for biologisk mangfold (http://www.artsdatabanken.no/Article.aspx?m=273&amid=8288). Lesedato: 19.02.2013.

[49] Norsk rødliste for arter 2010 s. 20.

[50] Kongelig resolusjon. Verneplan for Ytre Hvaler s.1.

[51] Skjøtselsplan for Kosterhavet s. 35.

[52] Rettspraksis har henvist til "føre-var" som et alminnelig miljørettslig prinsipp, også før naturmangfoldloven trådte i kraft. Se eksempelvis RG. 2000 s. 1125. Videre er økosystemtilnærming karakterisert som et alminnelig forvaltningsprinsipp for alle myndighetsområder. Se St.meld. nr. 42 (2000-2001) s. 20.

[53] Rådets direktiv af 21.maj.1992 om bevaring af naturtyper samt vilde dyr og planter.

[54] Direktivet gir viktige signaler om hva som bør tillates innenfor et verneområde, jf. lovavdelingens uttalelser 2012-07-04.

så stor grad må benytte naturmangfoldloven til tolkning og utfylling av hvilke mål som ligger til grunn for nasjonalparkvernet. En hypotese er at man opprettet verneområdet rett før naturmangfoldloven trådte i kraft nettopp for å unngå å gi klare mål i et område hvor man allerede har store nærings- og bruksinteresser. Det å vedta nasjonalparken etter naturvernloven kan også ha medført større fleksibilitet ved arbeidet med forvaltningsplanen, og de kompromissene som ser ut til å komme der.

3. Virkemidler

3.1 Innledning

Innledningsvis nevnte jeg at det er av interesse å se på forvaltningen i praksis når man har kombinert landbasert og marint områdevern. Dette fordi konfliktsituasjoner og utfordringer som knytter seg til land ikke nødvendigvis er tilsvarende for vann. Forarbeidene til naturmangfoldloven legger til grunn at det marine miljøet bør behandles likt med det terrestre.[55] Et interessant spørsmål er i så fall hvordan praksis forholder seg til dette.

Sentralt i det følgende er å slå fast hvilke virkemidler det lokale forvaltningsstyret har for å nå de ovennevnte målene. Et spørsmål er hva slags vern verneforskriften gir, i tillegg til det vernet som følger av nml. § 35. For Ytre Hvaler er virkemidlene fastsatt i verneforskriften § 3, som definerer den fremtidige bruken av nasjonalparken. Bestemmelsen er bygd opp slik at hovedregelen om vern kommer først, før generelle unntak og spesifikke tillatelser til inngrep i verneområdet listes opp. I det følgende vil jeg gå igjennom hovedregelen om vern, før jeg ser på de generelle og spesifikke unntakene.

3.2 Hovedregelen om vern

Utgangspunktet er at landskapet og sjøbunnen er vernet mot "inngrep av enhver art", jf. verneforskriften § 3 pkt.1.1. Spørsmålet er hva som er å anse som et "inngrep" i en nasjonalpark.

Verneforskriften går langt i å definere hva et inngrep er, ved at en rekke handlinger og aktiviteter listes opp. Samtidig understrekes det at opplistingen ikke er uttømmende, slik at andre handlinger vil kunne falle inn under bestemmelsen. Avgjørende er om tiltaket kan påvirke verneverdiene, og et sentralt moment er om inngrepet kan påvirke landskapsbildet på land eller i sjøen. En varig påvirkning vil nok alltid kunne anses som et inngrep. Motsatt vil det som ikke kan påvirke verneformålet, heller ikke omfattes av begrepet. Ved at verneforskriften verner om det undersjøiske landskapet og kystlandskapet med sjøoverflate, og om økosystemer både på land og i vann, taler gode grunner for at restriksjonsnivået for hva som utgjør et inngrep er likt for begge miljøene.

Hovedregelen om vern av plantelivet går ut på at all vegetasjon på land og i sjø er vernet mot skade og ødeleggelse, jf. verneforskriften § 3 pkt. 2.1. En "skade og ødeleggelse" kan foreligge når plantelivet blir forringet. Rent hærverk og mindre handlinger kan også omfattes av begrepet. Når man ser hovedregelen opp mot verneforskriftens formål, i sammenheng med at en nasjonalpark utgjør et strengt vern, leder det til den konklusjon at det foreligger et like strengt restriksjonsnivå for plantelivet på land og i det marine miljøet.

Dyrelivet i nasjonalparken, herunder hi, reir, hekke-, yngle- og gyteplasser, er vernet mot skade og unødig forstyrrelse, jf. verneforskriften § 3 pkt.3.1. Den konkrete problemstillingen er hva som utgjør en "skade og unødvendig forstyrrelse". Det kan være en skade når dyrelivet blir forringet. Bruken av ordet "unødvendig for-

[55] Ot.prp. nr. 52 (2008-2009) s. 222 pkt. 11.8.7.4.

styrrelse" taler for at selv mindre alvorlige handlinger faller inn under bestemmelsen. Hovedregelen dekker i utgangspunktet kun handlinger som forringer dyrelivet på land og i sjøen. Det er imidlertid ikke alltid slik at en enkelt handling medfører en forringelse, men at den sett sammen med andre handlinger kan medføre at den samlete belastningen blir for stor. Det kan være aktiviteter som ikke direkte er regulert i verneforskriften, men som likevel utgjør en trussel mot naturen. Forsøpling er et eksempel på en utfordring for dyrelivet. Økt levestandard og mer fritid har medført økende båttrafikk innenfor nasjonalparkens grenser. Dette, sett i sammenheng med en del "nye" aktiviteter, som for eksempel kiting, kan samlet sett utgjøre en skade og unødig forstyrrelse på dyrelivet. Her vil prinsippene om samlet belastning og føre-var komme inn, jf. nml. §§ 9 og 10. Prinsippene, sett opp mot naturmangfoldloven og verneforskriftens formål, tilsier at "skade og unødvendig forstyrrelse" ikke er begrenset til å bare ramme handlinger som faktisk fører til forringelse av dyrelivet, men at det er tilstrekkelig med en *rimelig sannsynlighet* for at det vil skje som følge av en handling. Det tilsier og at aktiviteter som ikke direkte er regulert i verneforskriften, likevel vil kunne falle inn under ordlyden.

Verneforskriften går lengre enn nml. § 35 i å definere hva som kan være en varig påvirkning. Ved å bruke ord som "inngrep", "skade" eller "ødeleggelse", og ved å konkretisere en rekke handlinger, gir verneforskriften det lokale forvaltningsstyret et godt virkemiddel ved at terskelen for å tillate en handling er høy. Konklusjonen er at inngrep som kan skade eller forringe verneverdiene, som en klar hovedregel skal unngås eller begrenses. Dette utgangspunktet gjelder i like stor grad både på land og i vann.

3.3 Generelle unntak

Tross den klare hovedregelen, og selv om hoveddelen av vernet ligger i havet, har ikke det marine miljøet i Ytre Hvaler nasjonalpark like omfattende restriksjoner som på land. I stedet er det opprettet marine "soner", sone A til E. Formålet er å tilfredsstille verneformålet i nasjonalparken. Sone A er det eneste stedet med faktiske restriksjoner på sjøbunnen, jf. verneforskriften § 3 pkt. 3.1 bokstav b. I forhold til det opprinnelige høringsforslaget ble sone A redusert fra 36,29 km2 til 33,81 km2.[56] Samlet sett medfører en slik reduksjon en svekkelse av miljøhensynet. Reduksjonen ble likevel godtatt grunnet ønske om fortsatt effektivt fiske i nasjonalparken.[57] I sone C og D er ferdsel forbudt på enkelte holmer i begrensede tidsrom, jf. verneforskriften § 3 pkt. 5.5. I sone B er det jaktforbud, jf. verneforskriften § 3 pkt. 3.2. bokstav b, mens det i sone E er hastighetsbegrensninger på 5 knop i enkelte områder, jf. verneforskriften § 3 pkt. 6.1 bokstav b.[58]

Verneforskriften fastsetter et generelt unntak om at hovedregelen, som verner om dyrelivet, ikke er til hinder for fiske og fangst i sjøen, eller jakt og fangst på land, jf. verneforskriften § 3 pkt. 3.2 bokstav a og b. Vernet er derfor ikke til hinder for at man fisker med trål i nasjonalparken. Forarbeidene til verneforskriften legger til grunn at vernet ikke er til hinder for fiske med aktive redskaper, under den forutsetning at det "ikke påfører organismer og strukturer på havbunnen skade."[59] Likevel kommer det frem at det ikke sees bort fra at "skader fortsatt vil kunne inntreffe i forbindelse med tråling".[60]

I forslag til forvaltningsplan er det satt som mål at det marine miljøet skal utnyttes som en ressurs for fiskerinæringen innefor rammene av

[56] Kongelig resolusjon 2009 s. 18.
[57] Kongelig resolusjon 2009 s. 18.
[58] Kongelig resolusjon 2009 s. 44, 45 og s. 47.
[59] Kongelig resolusjon 2009 s. 44.
[60] Kongelig resolusjon 2009 s. 8.

verneformålet. På den annen side kommer det frem at det er en utfordring å utvikle et miljøvennlig fiske.[61] I forbindelse med at det anses som en utfordring å utvikle et miljøvennlig fiske, vises det til Vadehavet hvor følgende tiltak er innført i forbindelse med rekefiske: "For at markere rejefiskeriet som bæredygtigt vil Danmarks Fiskeriforening gennemføre en såkaldt MSC-certificering i løbet af planperioden, så forbrugerne kan være sikre på, at produktet er fisket på bæredygtig vis. Dette miljømærke gives for en 5-årig periode og stiller bl.a. krav om, at fiskeriet ikke må beskadige økosystemet eller havmiljøet. Undervejs er der flere muligheder for at tilpasse fiskeriet, hvor det evt. ikke er i stand til at overholde kravene. Hvis ændringerne ikke kan dokumenteres, mister fiskerne retten til miljømærket."[62] Rekefiske er så vidt jeg vet ikke i strid med det danske nasjonalparkvernet.

Det sentrale her blir å stille følgende spørsmål: Er tråling i Ytre Hvaler å anse som en "varig påvirkning", og dermed i strid med nml. § 35?

Tråling er en aktivitet hvor man sleper fiskeredskaper mot bunnen. Fiske med aktive bunnredskaper (bunntrål eller eventuelt annet fiskeredskap som slepes mot bunnen), er antatt å være den største kjente trusselen mot enkelte av naturtypene som finnes i nasjonalparken, herunder korallrev.[63] Det er anslått at mellom en tredjedel og halvparten av dypvannskorallene som finnes langs Norskekysten, er skadet eller ødelagt som følge av bunntråling.[64] Aktiviteten påvirker naturmiljøet, og er en trussel mot naturtypene. Det må derfor relativt kort kunne slås fast at tråling er å anse som et inngrep. Spørsmålet om det er en varig påvirkning kan imidlertid være noe vanskeligere å slå fast.

På den ene siden er det en aktivitet hvor mye av påvirkningen gradvis vil forsvinne dersom aktiviteten opphører. Dette taler mot at det er en varig påvirkning. På den annen side blir korallrev, hard- og bløtbunn svært negativt påvirket av tråling. Påvirkningen fra tråling antas å ha økt innenfor nasjonalparkens grenser den senere tid i forbindelse med intensivering av næringen, og at instrumenter og redskaper er blitt modernisert.[65] Et tungtveiende argument for at det er en varig påvirkning er at korallrev har en langsom vekst og at de er svært sårbare. I noen tilfeller kan ta århundrer før de bygges opp igjen etter negativ påvirkning.[66] Den lave veksthastigheten til koraller tilsier at en bør være ytterst forsiktig med å tillate aktiviteter som kan skade dem, og at et strengt føre-var-prinsipp skal legges til grunn ved forvaltningen av koraller og svampesamfunn.[67]

Etter en konkret helhetsvurdering, hvor jeg legger avgjørende vekt på korallrevene og korallskogenes betydning i økosystemet, deres sårbarhet og tilstand, er min konklusjon at tråling i Ytre Hvaler nasjonalpark er å anse som en varig påvirkning.

Ved at nml. § 35 lovfester et minimumsvern og setter en absolutt grense for hva slags type aktivitet man kan tillate i en nasjonalpark, kommer tråling direkte i strid med dette minimumsvernet. Det kommer også i strid med formålet i verneforskriften om å bevare det undersjøiske landskapet og havbunnen med korallrev, hard- og bløtbunn. I den sammenheng viser jeg til de internasjonale IUCN retningslinjene, hvor følgende legges til grunn: "Category II[68] areas present a particular

[61] Kongelig resolusjon 2009 s. 56.
[62] Plan for Nasjonalpark Vadehavet s. 102.
[63] DN-rapport 4-2008 pkt. 4.
[64] St. meld. nr. 12 (2001-2002) s. 12.
[65] Forslag til Forvaltningsplan s. 49.
[66] Korallrevrapport 2003 s. 5.
[67] St. meld nr. 37 (2008-2009) s. 56–57.
[68] Catergory II brukes som en beskrivelse om nasjonalparker. For nærmere informasjon se: IUCN Guidelines for Applying Protected Area Managment Categories 2008 s. 27.

challenge in the marine environment…This is because many human activities even undertaken at low levels (such as fishing) are now recognised as causing ecological draw-down on resources, and are therefore now seen as incompatible with effective ecosystem protection. Where such uses cannot be actively managed in a category II area to ensure the overall objectives of ecosystem protection are met, consideration may need to be given to whether any take should be permitted at all."[69]

Ifølge retningslinjene kan selv enkle aktiviteter, slik som fiske, være en utfordring for restriksjonsnivået i en marin nasjonalpark. Dersom aktiviteten kommer i konflikt med verneformålet, skal det vurderes om aktiviteten kan fortsette innenfor verneområdet.

IUCNs retningslinjer er ikke rettslig bindende. Videre er de utviklet i et internasjonalt perspektiv og ikke fullt ut tilpasset norske forhold. Likevel legger forarbeidene til naturmangfoldloven til grunn at: "[d]et anses (…) som en fordel å tilnærme norsk rett til retningslinjene".[70]

Det generelle unntaket medfører at det skjer en direkte uthuling av formålet med vernet. En naturlig konsekvens av det strenge minimumsvernet etter nml. § 35, er at det må gå foran ved en eventuell konflikt, slik at verneforskriften settes til side. Et annet spørsmål er om verneforskriften må settes til side som ugyldig på dette punkt, dersom det blir reist sak for domstolene. Flere tungtveiende grunner taler etter mitt skjønn for at svaret på dette er ja.

Et annet eksempel på de generelle unntakene er motorferdsel til sjøs. Motorferdsel er en handling som kan ha negativ påvirkning på landskapet, plantelivet, dyrelivet og friluftslivet. På land er aktiviteten regulert som et inngrep, jf. verneforskriften § 3 pkt. 6.1 bokstav a. Det marine miljøet har ingen tilsvarende restriksjoner. En utfordring med en slik forskjell er at antall fritidsbåter stadig øker i omfang. Det medfører økt støy og et økt konfliktnivå mellom ulike grupper som bruker området. På sikt kan det gi større fare for ulykker i det marine miljøet. Med et stort antall fritidsbåter og mange besøkende, vil støy kunne fremstå som et uønsket resultat når målet er gode naturopplevelser. Det kan også være skadelig for enkelte av artene som lever i nasjonalparken. Det ble derfor vurdert å etablere områder i det marine miljøet hvor all motorferdsel på sjøen skulle forbys, blant annet av hensynet til stillhet og ro. Forslaget ble imidlertid ikke gjennomført, med den begrunnelse at naturvernloven ikke ga hjemmel til det.[71]

Enkelte vil kanskje argumentere med at det er lite hensiktsmessig å innføre like strenge restriksjoner i havet som på land når det gjelder motorferdsel. Som et motsvar vises det til at Kosterhavet har innført det som kalles "tysta områder", hvor motorisert ferdsel på sjøen er forbudt.[72] Et slikt forbud samsvarer med tanken om at en nasjonalpark er et område hvor man kan dra for å komme i kontakt med naturen. Ettersom vurderingen i dag skal knytte seg til naturmangfoldloven, bør tilsvarende virkemiddel vurderes på nytt i Ytre Hvaler.

Konsekvensene av å verne et område som nasjonalpark er at lovgiver på forhånd har foretatt en avveining mellom bruk og vern på et generelt grunnlag, og besluttet at naturverdiene skal komme foran brukerinteressene.[73] Drøftelsene ovenfor viser problemene ved at det i en nasjonalpark, som er en av de strengeste formene for vern, i så stor grad legges til rette for aktiviteter som er antatt å være de største negative faktorene

[69] IUCN Guidelines for Applying Protected Area Managment Categories 2008 s. 58.
[70] Ot.prp. nr. 52 (2008-2009) s. 191 pkt. 11.3.3.
[71] Kongelig resolusjon 2009 s. 47.
[72] Hensynsområde sone B, se skjötselsplan för Kosterhavet s. 91.
[73] Ot. prp. nr. 52 (2008-2009) s. 187 pkt. 11.1.

for enkelte av naturtypene i det marine miljøet,[74] mens det fremgår klart av verneforskriften at bevaring av korallrev, hard- og bløtbunn er et av de viktigste formålene med vernet. Selv om det er forståelig at det kan være vanskeligere å regulere aktiviteter i det marine miljøet, viser eksemplene fra Kosterhavet og Vadehavet at det lar seg gjennomføre.

3.4 Spesifikke tillatelser

Verneforskriften gir det lokale forvaltningsstyret hjemmel til å gi tillatelse til visse typer handlinger (se nærmer om praktiseringen av disse bestemmelsene i punkt 4). Den er formulert slik at forvaltningsmyndigheten *kan* gi tillatelse, men ikke at de har en plikt til det. Avgjørelsen av om tillatelse skal gis er opp til forvaltningsmyndighetens skjønn innenfor rammene av alminnelige forvaltningsrettslige regler.[75]

Et sentralt moment ved slike tillatelser, enten det er på land eller i vann, er hvordan man tolker de enkelte ord og uttrykk i verneforskriften. Det lokale forvaltningsstyret kan for eksempel gi tillatelse til "bygging av enkle brygger", jf. verneforskriften § 3 pkt. 1.3.bokstav c. Spørsmålet blir hva som ligger i "enkle brygger". En språklig forståelse taler for at det må dreie seg om bygging av små brygger. Sett opp mot formålet med vernet, om bevaring av landskapet og et relativt urørt naturområde, taler for at enhver vurdering skal være streng. Et sentralt spørsmål vil være om tiltaket kan sies å utgjøre en varig påvirkning, jf. nml. § 35, altså om påvirkningen er en forutsetning for å ivareta verneformålet. Dersom en brygge blir liggende, taler det for at det er en varig påvirkning. I utgangspunktet bør det derfor dreie seg om midlertidige brygger. I den kongelige resolusjonen om opprettelsen av nasjonalparken ble det også presisert at det kun skal gjelde små, enkle brygger for å lette ilandstigning. Videre er det understreket at de ikke skal dimensjoneres for at båter skal ligge fortøyd over lengre tid.[76] På den annen side fremgår det av verneforskriften § 2 at et av verneformålene med nasjonalparken er å gi allmennheten anledning til naturopplevelse gjennom utøvelse av tradisjonelt og enkelt friluftsliv. Enkle brygger kan nok i enkelte tilfeller sies å være dekket av nettopp dette.

Nasjonalparkvernet tilsier imidlertid at ikke enhver kan forvente å få tillatelse, selv om det er snakk om en liten og enkel brygge, da en del brygger, bøyer og fortøyningsbolter vil sette et vesentlig preg på landskapet. Spørsmålet man må stille seg er om tiltaket ligger innenfor de rammene som naturmangfoldloven trekker opp for nasjonalparkvern. I vurderingen skal det legges vekt på inngrepet i landskapet og naturtypen som tiltaket berører. Dette må sees i forhold til behovet for den enkelte.[77]

Dersom verneforskriften ikke gir adgang til tillatelse, åpner naturmangfoldloven for å gi dispensasjon, jf. § 48. Forutsetningen er at det "ikke strider mot vernevedtakets formål og ikke kan påvirke verneverdiene nevneverdig, eller dersom sikkerhetshensyn eller hensynet til vesentlige samfunnsinteresser gjør det nødvendig." Bestemmelsen stiller opp tre alternative vilkår. I denne artikkelen er det første alternativ som er mest interessant. Her må to kumulative vilkår være oppfylt. Det må *ikke* stride mot vernevedtakets formål, og det må ikke ha nevneverdig påvirkning på verneverdiene. Selv om vilkårene er oppfylt, har ingen krav på dispensasjon. Omfanget, miljøvirkningen og nødvendigheten av tiltaket det søkes dispensasjon om vil ha betydning. De hensyn som taler for å gi tillatelse må sees i sammenheng med om det vil stride mot

[74] DN-rapport 4-2008 pkt. 4.
[75] Ot. prp. nr. 52 (2008-2009) s. 424.
[76] Kongelig resolusjon 2009 s. 36.
[77] Forslag til forvaltningsplan s. 58.

verneverdiene om tilsvarende dispensasjonssøknader blir innvilget i fremtiden.[78]

Hittil har vi undersøkt mål og virkemidler. Spørsmålet videre er hvordan forvaltningsmyndigheten bruker adgangen til å gi spesifikke tillatelser i praksis. For å unngå at det skjer en uthuling av verneformålet, er det sentralt å holde fast ved hovedregelen om at Ytre Hvaler nasjonalpark er vernet mot inngrep av enhver art, og at de foretar en konkret vurdering når spørsmål om å gi tillatelse kommer opp.

4. Skjønnsutøvelsen i praksis

I artikkelen er det verken tid eller plass til å gjøre rede for all forvaltningspraksis fra Ytre Hvaler nasjonalpark. Jeg har derfor valgt ut tre eksempler for å illustrere nærmere hvordan praksis samsvarer med de overnevne mål og virkemidler.[79]

Et eksempel jeg har sett nærmere på er spørsmål om å få tillatelse til å utvide eksisterende fritidsbolig inne i nasjonalparken. Det rettslige grunnlaget for vurderingen er verneforskriften § 3 pkt. 1.1, som legger til grunn at landskapet er vernet mot inngrep av enhver art. Verneforskriften § 3 pkt. 1.3 bokstav a fastsetter at forvaltningsmyndigheten *kan* gi tillatelse til mindre utvidelse av bygninger i nasjonalparken. Men hva er en "mindre utvidelse" i en nasjonalpark? I utgangspunktet må det dreie seg om bagatellmessige inngrep, som ikke vil endre landskapskvaliteten eller formålet om bevaring av urørt natur. Et sentralt moment er om tiltaket vil finne sted i nærheten av forekomster av sjeldne eller truete arter eller naturtyper. Videre må det ikke komme i konflikt med det overordede målet om å ta vare på landskapet. Mange mindre utvidelser kan over tid få direkte konsekvenser for landskapet og for urørtheten. Et sentralt poeng er at det lokale forvatningsstyret tenker langsiktig, slik at de kan nå det overordnede målet om å ta vare på den urørte naturen.

Praksis viser at det lokale forvaltningsstyret ikke foretar en generell tolkning av ordlyden.[80] I stedet henviser de direkte til forslag til forvaltningsplan, som foreslår at tilbygg på inntil 5 m^2 kan regnes som mindre utvidelser.[81] Spørsmålet som reises i denne sammenheng er i hvilken grad man lovlig kan standardisere skjønnet ved å bygge på retningslinjene om 5 m^2 i forslag til forvaltningsplan. Vil det videre si at tillatelse alltid kan forventes dersom det søkes om en endring på inntil 5 m^2?[82]

Ytre Hvaler ligger inn mot et av de mest populære hytteområdene langs Oslofjorden, og inntil en tett befolket region. I nasjonalparken er det etablert 185 bygninger, hvorav ca. 60 er hytter.[83] Under den forutsetningen at samtlige hytteeiere søker om en mindre utvidelse, tilsvarer det en utvidelse på ca. 300 m^2. Menneskelig aktivitet kan medføre store utfordringer både for verneformålet og den faktiske forvaltningen. Ved spørsmål om å gi tillatelse, må man derfor legge vekt på den totale virkningen en tillatelse kan få, og se det opp mot de påregnelige langtidsvirkningene, jf. prinsippet om samlet belastning i

[78] Backer, 2010 *Naturmangfoldloven Kommentarutgave* s. 411–412.

[79] Ved at dette har vært en kvalitativstudie, tas det forbehold om at forvaltningen fremstår annerledes i andre vedtak enn de jeg har undersøkt. Dersom enkelte ønsker å sette seg inn i de vedtakene jeg har sett på, kan man sende e-post med saksnummer, til postmottak@fmos.no.

[80] I forhold til henvisninger til forvaltningsplanen er sak 2011-47, 2011-27 og 2011-18 av interesse.

[81] Forslag til forvaltningsplan s. 94.

[82] I en konkret sak dreide det seg om en utvidelse på ca. 10 m^2. Dette reiste problemstilling om tiltaket var å anse som en "vesentlig utvidelse". Spørsmålet var om en utvidelse på 10 m^2 kunne anses å stride mot vernevedtakets formål, jf. nml. § 48. Forvaltningsstyrets oppfatning var at et slikt tiltak ville være i strid med vernevedtakets formål, og at det kunne medføre uheldig presedensvirkning i forhold til andre hytteeiere, som kunne være i samme situasjon. Søknaden ble derfor avslått. Likevel kom det frem at tillatelse kan forventes dersom det søkes om tilbygg på inntil 5 m^2. Saksnummer er: 2011-18.

[83] Forslag til forvaltningsplan s. 91 pkt. 3.1.6.

nml. § 10. Prinsippet innebærer at man ikke bare ser på det enkelte tiltak isolert, men på summen av virkninger. Det vil si både tidligere tiltak og påregnelige senere inngrep.[84]

Selv om det er behov for administrative retningslinjer, viser eksempelet faren ved at forvaltningsplanen tilsynelatende inneholder klare regler. Selv om det skal mye til for at alle søker om utvidelse, understreker eksemplet viktigheten av at det lokale forvaltningsstyret *i hver enkelt sak* foretar en konkret vurdering, basert på hvilke konsekvenser en mindre utvidelse vil få for området. På den måten vil man forhindre at miljøverdier går tapt "bit for bit".

Et annet eksempel jeg har sett nærmere på er spørsmål om å få tillatelse til oppankring i sone A. Hovedregelen er som nevnt at dyrelivet er vernet mot skade og unødig forstyrrelse. Sportsdykking med oppankring er en aktivitet som kan være en direkte trussel mot korallrevene i sone A.[85] Korallrev regnes for å være en av de mest artsrike marine biotopene vi har ved at de danner store produktive økosystemer på havbunnen.[86] Ved å fungere som tilholdssted for andre organismer, øke tilgangen på føde- og gyteplasser, samt være oppvekstområde for yngre individer, er det biologiske mangfoldet i et korallrev stort. Verneforskriften legger likevel til grunn at det lokale forvaltningsstyret kan gi tillatelse til oppankring i sone A, jf. § 3 pkt. 3.3.

Praksis i oppankringssaker viser at det lokale forvaltningsstyret ikke foretar en generell tolkning av hva som ligger i "skade og unødvendig forstyrrelse".[87] De har begrenset detaljkunnskap om utbredelsen av enkeltarter i sone A, og antar at enkelte sårbare arter eller artsgrupper kan ta skade av gjentatt oppankring. De antar videre at skadene på naturmiljøet, spesielt på sårbare og ømfintlige arter vil være begrenset hvis oppankringen skjer i nærmere definert områder. Kunnskap er en viktig forutsetning for å føre en forutsigbar og effektiv forvaltning av naturmangfoldet. Utgangspunktet ved forvaltningen er derfor at beslutningene som fattes skal bygge på et så godt kunnskapsgrunnlag som mulig, jf. nml. § 8.[88] Dersom det er usikkerhet knyttet til konsekvensene for miljøet, skal forvaltningsmyndigheten legge vekt på dette og legge til rette for at vesentlig skade unngås.[89]

Detaljkunnskap om de viktigste marine områdene, som omfatter et stort biologisk mangfold, variasjoner i bunntopografi, naturtyper og mange sjeldne arter, bør ligge inn under overvåkingsansvaret til forvaltningsmyndighetene. Når det lokale forvaltningsstyret har begrenset detaljkunnskap om utbredelsen av enkeltarter i området hvor det søkes om tillatelse, sett i sammenheng med at de er i tvil om gjentatt tillatelse kan få negative konsekvenser for miljøet, taler føre- var prinsippet, jf. nml. § 9 sterkt for at et slikt tiltak ikke skal gjennomføres.[90]

Som en kontrast til det overnevnte eksemplet, har jeg undersøkt spørsmålet om å få bruke batteridrevet vannscooter ved dykking.[91] Rettslig grunnlag er verneforskriften § 3 pkt. 7.2 første ledd som legger til grunn at unødvendig støy er forbudt i nasjonalparken. Problemstillingen etter første ledd knytter seg til hva som er "unødven-

[84] Backer, 2012 *Innføring i naturressurs- og miljørett* s. 71–72.
[85] Korallrevrapport 2003 s. 26.
[86] DN-rapport 4-2008: pkt. 3.1.2.
[87] Saksnummer til tre vedtak jeg har sett på er: 2011-26, 2011-21, 2011-39.
[88] Bestemmelsen inneholder en rimelighetsstandard ved å legge til grunn at det skal foretas en avveining mellom kostnadene ved å skaffe et vitenskapelig beslutningsgrunnlag på den ene siden, og sakens karakter og mulig miljøpåvirkning på den annen side.
[89] Backer, 2010 *Naturmangfoldloven Kommentarutgave* s. 90.
[90] Den rettslige betydningen av prinsippet er at det utgjør et tungtveiende hensyn i beslutningsprosessen, og at det må tas i betraktning når en avgjørelse skal treffes, se Backer, 2010 *Naturmangfoldloven Kommentarutgave* s. 97–99.
[91] Sak 2011-26.

dig" støy i en nasjonalpark. En naturlig, språklig forståelse taler for at lyd som er overflødig kan karakteriseres som støy. Stillhet er et viktig element i en nasjonalpark og naturens egne lyder er en viktig del av naturmiljøet, som kan være avgjørende for en positiv natur- og friluftsopplevelse og for det biologiske mangfoldet. I den kongelige resolusjonen er det lagt til grunn at det er viktig å kontrollere den form for støy som ikke er knyttet til aktiviteter som verneforslaget aksepterer.[92]

Praksis viser at det lokale forvaltningsstyret ser på "batteridrevet undervannskuter…som vannskuter i henhold til annet lovverk som definerer disse".[93] En slik uttalelse er å forstå som en henvisning til lov om fritids- og småbåter § 40,[94] som nedlegger et generelt forbud mot bruk av vannscooter. Det lokale forvaltningsstyret tolker en batteridrevet motor for å være vannscooter og gir ikke tillatelse til å bruke den i forbindelse med dykking. Bestemmelsen i småbåtloven § 40 gjelder etter ordlyden kun for vannscooter og mindre motordrevne fartøy, som er konstruert for å *føre personer*, og som etter alminnelig språkbruk ikke kan betegnes som båter. En undervannsscooter er ikke konstruert for å føre personer, men et hjelpemiddel for dykkere i sterk strøm under vann. Den består av en batteripakke og en liten propell, og forurenser heller ikke. I den kongelige resolusjonen ble det også lagt til grunn at elektrisk drevne undervannscootere ikke ville bli rammet av forbudet.[95] Hva som da er årsaken til at det lokale forvaltningsstyret fører en såpass restriktiv linje på dette området og ikke på oppankringsspørsmålene ovenfor, er et interessant spørsmål. Det ligger imidlertid utenfor artikkelens rammer å gå dypere inn i dette.

[92] Kongelig resolusjon 2009 s. 49.
[93] Sak 2011-26.
[94] Lov om fritids- og småbåter (småbåtloven) av 26. juni 1998 nr. 47.
[95] Kongelig resolusjon 2009 s. 49.

5. Konklusjon

Virkemidlene det lokale forvaltningsstyre har for å nå bevaringsmålene er gode ved at terskelen for å tillate en varig påvirkning eller et inngrep i Ytre Hvaler nasjonalpark er høy. Verneforskriften gir en sterk beskyttelse ved at inngrep som kan skade eller ødelegge naturverdiene som en klar hovedregel skal unngås eller begrenses.

Til tross for dette inneholder verneforskriften et generelt unntak om fortsatt næringsvirksomhet i nasjonalparken som medfører en direkte uthuling av verneformålet. I og med at det foreligger et ønske om fortsatt næringsvirksomhet i nasjonalparken, fremstår viktigheten av at det juridiske utgangspunktet reflekteres på en god og klar måte i *den faktiske skjønnsutøvelsen* som desto viktigere. Når det lokale forvaltningsstyre går direkte til unntakene og begynner saksbehandlingen der, bidrar det til at det skjer en uthuling av verneformålet. Hovedregelen om at ingen varig påvirkning skal finne sted i en nasjonalpark mister på den måten mye av sin tilsiktede hensikt.

Selv om området har fått juridiske rammer for vern, vil en stadig utvidelse og økte tillatelser føre til en utfordring for naturverdiene. Små enkeltsaker, som bygging av en liten brygge, ombygging av hytte, eller oppankring i sone A, kan hver for seg være "ubetydelige", men blir i sum over tid vesentlige og for mange. Praksisen jeg har sett på viser utfordringene ved å innføre standardiserte regler, når det er behov for en konkrete vurderinger fra sak til sak. På sikt kan en slik tilnærming gjøre det vanskeligere å nå de overordnede bevaringsmålene.

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Ett nytt energieffektiviseringsdirektiv i EU – Vad betyder det för svensk lagstiftning?

Carmen Butler och Jennie Wiederholm[1]

Abstract

This article analyzes a new EU energy efficiency directive, Directive 2012/27/EU, against its predecessor, Directive 2006/32/EC, a directive intended to be a starting point for increasingly ambitious and specific policy towards energy savings in the EU. The central question in the article is how Sweden has transposed the earlier directive to achieve the levels of energy savings envisioned, and how well it is positioned to meet the provisions of the new directive. The article provides a technical analysis of Sweden's legislative achievements with respect to the public sector and energy companies. In doing so, it seeks to contribute to legal and policy literature on future energy efficiency legislation in Sweden and beyond.

1. Inledning

För att säkerställa ambitiösa klimat- och energimål har EU utformat ett klimat- och energipaketet med bindande lagstiftning. Dessa mål kallas för ”20-20-20” målen, och består av tre centrala mål till 2020: (1) en 20 % minskning av växthusgaser år 2020 jämfört med 1990; (2) en 20 % ökning av energikonsumtion från förnybara källor, och (3) en 20 % förbättring av energieffektivitet.[2] I samband med detta paket har energieffektivitet kallats för Europas största energikälla.[3]

Under hösten 2012 kom ett nytt energieffektiviseringsdirektiv från EU. Det danska ordförandeskapet hade under första halvan av 2012 som ambition att få det klart under sin ordförande period men det lyckades inte helt. Efter utdragen förhandling antog EU direktivet den 25 oktober, och den 15 november publicerades det i Europas officiella tidning.[4]

Det framförhandlade nya direktivet, Direktiv 2012/27/EU av Europaparlamentet och Rådet av 25 oktober 2012, förändrar direktiven 2009/125/EG om upprättande av en ram för att fastställa krav på ekodesign för energirelaterade produkter och 2010/30/EU om märkning och standardiserad produktinformation som anger energirelaterade produkters användning av energi och andra resurser. Det upphäver direktiv 2004/8/EG om främjande av kraftvärme på grundval av efterfrågan på nyttiggjord värme på den inre marknaden för energi och direktiv 2006/32/EG om effektiv slutanvändning av energi och om energitjänster. Anledningen var att dessa direktiv inte ansågs kunna utnyttja den fulla potentialen för energieffektivisering inom unionen.[5]

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[2] European Commission, Climate Action: The EU climate and energy package, http://ec.europa.eu/clima/policies/package/index_en.htm.

[3] Meddelande från kommissionen till rådet och Europaparlamentet, Europeiska ekonomiska och sociala kommittén samt Regionkommittén, handlingsplanen för energieffektivitet 2011, Bryssel den 8.3.2011, KOM(2011) 109 slutlig, punkt. 1.

[4] European Commission, Energy Efficiency Directive, http://ec.europa.eu/energy/efficiency/eed/eed_en.htm.

[5] Europaparlamentets ståndpunkt fastställd vid första behandlingen den 11 september 2012 för antagandet av Europaparlamentets och rådets direktiv 2012/27/EU om energieffektivitet, om ändring av direktiven 2009/125/EG och 2010/30/EU och om upphävande av direktiven

Det huvudsakliga syftet är inte några direkta förändringar i sak utan kan snarast ses som en skärpning av de tidigare direktiven. Orsaken till det nya direktivet är att kommissionen sett att de energibesparingsmål som satts upp inte alls är på väg att nås, vi energieffektiviserar i alldeles för långsam takt. Kommissionens bedömning är att vi med nuvarande takt bara kommer att nå halvvägs till det uppsatta målet, 20 % förbättring av energieffektivitet.[6]

Kommissionen uttrycker själva i sin medborgarsammanfattning sju punkter[7] som förändringarna i och med det nya direktivet, vari vi analyserar följande två punkter:

- **Offentliga organ** ska köpa energieffektiva byggnader, varor och tjänster och renovera 3 % av sina byggnader varje år för att drastiskt sänka energiförbrukningen.
- **Energibolagen**[8] ska minska sin energiförsäljning 1,5 % varje år genom energibesparingar från och med 1 januari 2014 till och med 2020.

Jämfört med det tidigare direktivet om energieffektivisering, det nya direktivet skapar inte några stora nya krav för Sverige. Tvärtom skapar det möjligheter för att Sverige ska kunna axla en ledande roll.

2. Det tidigare direktivet

Direktiv 2006/32/EG om effektiv slutanvändning av energi och om energitjänster (”det tidigare direktivet”) upprättar en ram för fastställande av EU:s krav för energieffektivisering.

Ingressen till direktivet förklarar drivkrafterna bakom skapandet av ett direktiv som reglerar energieffektivisering. Med tanke på begränsade möjligheter att skapa nya kraftverk inom EU bidrar direktivet till unionens försörjningstrygghet avseende energi.[9] Direktivet anses bidra till unionens trygghet ytterligare genom att minska klimatförändringar, då drygt 78 % av växthusgaser kommer från energisektorn.[10] Utöver detta anses direktivet bidra till unionens innovationsförmåga och konkurrenskraft.[11]

Syftet med direktivet anges i Artikel 1. Direktivet syftar till att avskaffa barriärer mot energieffektivisering inom EU genom att fastställa vägledande mål, samt mekanismer, incitament, mallar och regler för bättre energieffektivisering. Direktivet syftar också till att skapa bra villkor för slutanvändare av el och energitjänster.[12]

Bestämmelserna i artikel 4 fastställer direktivets centrala mål. Varje medlemsstat ska vidta åtgärder under de första nio åren av direktivets tillämpning för att nå energieffektivisering som motsvarar 9 % av den genomsnittliga energiförbrukningen för medlemsstaten mellan 2001 och 2005.[13] Målet ska nås genom energitjänster och andra åtgärder som förbättrar energieffektivisering. Energitjänster omfattar innovationer i teknologi eller metod som stödjer förbättrad energieffektivitet, exempelvis energibesiktning-

2004/8/EG och 2006/32/EG, ingressens 2 och 8 övervägande.

[6] Ibid., s.1.

[7] De andra fem punkter omfattar näringslivet (väntas blir mer medvetet om olika sätt att spara energi); konsumtentera (ska bli bättre på att styra sin energiförbrukning med hjälp av information från sina mätare och räkningar); energiproduktionen (ska granskas ur effektivitetssynpunkt); certifieringssystem (ska införas för energileverantörer för att garantera hög teknisk kompetens).

[8] Begreppet ”el bolag” är ett begrepp vi använder endast i denna artikel för att avgränsa vilka aktörer vi analyserar. Det är inte ett begrepp som används i det tidigare direktivet eller det nya direktivet.

[9] Europaparlamentets och rådets direktiv 2006/32/EG av den 5 april 2006 om effektiv slutanvändning av energi och om energitjänster och om upphävande av rådets direktiv 93/76/EEG, L 114/64, 27.4.2006, ingressens 1 övervägande.

[10] Ibid., ingressens 2 övervägande.

[11] Ibid., ingressens 3 övervägande.

[12] Ibid., artikel 1.

[13] Ibid., artikel 4.1.

ar och individuella mätare, samt energianalys, energirevisioner, fastighetsförvaltning och leverans av effektivare energi (inklusive värme och kyla). Vissa produkter är också kopplade till energitjänster, så som smarta mätare som ger slutanvändarna detaljerad information om deras energiförbrukning och kontroll över detta i syfte att lära dem hur de kan spara energi och energikostnader framöver.

Utöver några bilagor till direktivet som ger riktlinjer för vilka metoder och faktorer som ska användas för att vidta och räkna effektiviteten av åtgärderna, är det upp till varje medlemsstat att bestämma hur den ska förverkliga målet på 9 % inom landet. Medlemsstaterna ska vart tredje år överlämna en handlingsplan till kommissionen, med den första handlingsplanen 2008 och den andra 2011.[14]

Rättsgrunden för direktivet är artikel 175(1) Fördraget om EU:s Funktionssätt (FEUF),[15] vilken motsvarar nuvarande artikel 192 FEUF. Valet att grunda direktivet på artikel 175(1) FEUF betyder att tyngdpunkten i direktivet är miljön snarare än unionens inre marknad. Rent praktiskt betyder det att unionen inte har exklusiv befogenhet att lagstifta avseende ämnet energieffektivisering. Rättsakten utgör snarare en så kallad minimiharmonisering så att medlemsstaterna kan utföra strängare skyddsåtgärder utöver de som finns i direktivet.[16]

Trots att ingressen tyder på att konkreta åtgärder behövs för att motverka klimatförändringar och brister på energiförsörjning, saknar direktivet riktigt tydliga åtgärder. Det tidigare direktivet har kritiserats för att dess syfte är att skapa nya energitjänster i en fri marknad snarare än att skapa tydliga och verkställbara mål för energibesparningar. På så sätt tycks direktivet tillämpa en doktrin som kallas för ”free market environmentalism”. Enligt denna doktrin ska miljön regleras med flexibla riktlinjer snarare än fasta mål eftersom regeringar inte kan lösa miljöproblem lika bra som den fria marknaden kan.[17]

Den offentliga sektorn

I direktivet lyfts offentlig sektor fram som en viktig del i arbetet med energieffektivisering.[18] Offentlig sektor har två roller, dels som pådrivare genom att man inför energikrav i offentlig upphandling och därmed stimulerar marknaden, dels som förebild. Båda dessa uppdrag behandlas i artikel 5.

Vad gäller upphandling är direktivet relativt tydligt, medlemsstaterna ska införa minst två av sex förtecknade åtgärder i bilaga 6. Mycket kortfattat är dessa alternativa åtgärder:

- Utnyttja finansiella instrument
- Inköp enligt förteckningar över energieffektiva produktspecifikationer
- Inköp av utrustning som är energieffektiv enligt livscykelkostnadsanalyser
- Krav på att byta ut eller modifiera utrustning och fordon
- Utnyttja energibesiktningar
- Inköpa eller hyra energieffektiva byggnader

Vidare ska medlemsstaterna offentliggöra riktlinjer för energieffektivitet och energibesparing så att dessa kan tjänstgöra som bedömningskriterier i anbudsförfaranden. En viktig aspekt är också att det uttryckligen sägs att dessa regler ska

[14] Ibid., artikel 14.
[15] Ibid., inledningen.
[16] Se för vidare information Langlet, D., och Mahmoudi, S., *EU:s miljörätt*, 3 uppl., Norstedts Juridik, Stockholm, 2011, s. 123–134.
[17] Boute, A. och De Geeter, A., Directive 2006/32/EC on Energy End-Use Efficiency and Energy Services: Realising the Transition to Sustainable Energy Markets?, 3 Journal of European Environmental and Planning Law 414 2006, s. 418.
[18] Europaparlamentets och rådets direktiv 2006/32/EG, ingressens 7 och 8 övervägande, samt artikel 5.

genomföras utan att vare sig nationell eller EU-gemensam upphandlingslagstiftning åsidosätts.

Vad gäller offentliga sektorns roll som föredöme är det mindre konkret vad som ska göras. I ingressen tas som exempel att förutom de åtgärder som finns listade i bilaga 3 och 6, ska initiativ tas till pilotprojekt. För att få så stor effekt som möjligt av detta ska medlemsstaterna informera medborgare och företag om offentlig sektors arbete och kostnadsfördelar med energieffektiviseringsåtgärder. I ingressen lyfts också fram vikten av informationsutbyte och erfarenheter mellan framför allt myndigheter.

Elbolag

Avseende elbolag, inklusive energidistributörer, systemansvariga för distributionen och företag som säljer energi i detaljistledet, framställer ingressen i direktivet ett paradoxalt syfte. Det kopplar inte försäljning av el till tillväxt. Direktivet utmanar medlemsstaterna att se till att försäljningen av el minskas och att försäljningen av energitjänster som leder till energieffektivisering ökar istället. Utöver denna utmaning har medlemsstaterna utmaningen att reglera energisektorn utan att snedvrida konkurrensen mellan aktörer. Idén är att energisektorn ska leverera högre kvalitet med energitjänster kopplade till energieffektivisering.[19]

Medlemsstaterna ska se till att energidistributörer, systemansvariga för distributionen och företag som säljer energi i detaljistledet samlar statistisk information om sina slutanvändare. Denna information kan omfatta tidigare information om slutanvändares förbrukning, och den ska omfatta aktuell information om slutanvändarnas aktuella förbrukning så som slutanvändarnas belastningsprofiler, kundsegmentering och kundernas geografiska lokalisering.[20]

Dessa aktörer ska inte kunna hämma efterfrågan och tillhandahållandet av energitjänster och andra åtgärder för energieffektivisering. Medlemsstaterna ska se till att de avstår från all verksamhet som kan ha denna effekt eller annars hindra utvecklingen av marknaden för energitjänster.[21]

Utöver detta ska medlemsstaterna välja mellan ett antal olika bestämmelser att införliva i nationell lag avseende energidistributörer, systemansvariga för distributionen och företag som säljer energi i detaljistledet. Medlemsstaterna ska se till att dessa aktörer

- erbjuder sina kunder på konkurrenskraftigt prissatta energitjänster,
- erbjuder sina kunder på konkurrenskraftigt prissatta energibesiktningar och/eller åtgärder för förbättrad energieffektivitet så som finansiella instrument för energibesparande,
- bidrar till de fonder och finansieringsmekanismer som är avsedda för energieffektiviseringsprogram, eller
- ser till att frivilliga avtal och/eller andra marknadsinriktade arrangemang, exempelvis så kallade vita certifikat finns eller upprättas.[22]

Medlemsstaterna ska se till att även andra aktörer än energidistributörer, systemansvariga för distributionen och företag som säljer energi i detaljistledet har tillgång till marknaden för energieffektivisering. Sådana andra aktörer kan omfatta energitjänstföretag, installatörer av energiutrustning, energirådgivare och energikonsulter. För dessa aktörer ska medlemsstaterna se till att det finns tillräckliga incitament att skapa innovation, likvärdig konkurrens och jämlika villkor så att även dessa aktörer ska kunna er-

[19] Ibid., ingressens 20 övervägande.
[20] Ibid., artikel 6.1(a).
[21] Ibid., artikel 6.1(b).
[22] Ibid., artikel 6.2.

bjuda och genomföra åtgärder för förbättrad energieffektivitet.[23]

Energibesiktningar informerar slutanvändare om hur mycket och när de använder energi, med tanken att denna information kommer att hjälpa dem att fatta bättre beslut om energibesparingar. I samband med detta ska medlemsstaterna se till att det finns effektiva energibesiktningssystem som är utformade för att identifiera möjliga åtgärder för förbättrad energieffektivitet.[24]

För att möjliggöra effektiva energibesiktningssystem ska medlemsstaterna se till att slutanvändarna av energi "har individuella mätare som till ett konkurrenskraftigt pris korrekt visar slutanvändarens faktiska energiförbrukning och ger information om faktisk användningstid". Slutanvändarna ska få information om sin energiförbrukning, pris på energi, jämförelser med historisk förbrukning, jämförelser med den genomsnittliga slutanvändaren och kontaktinformation till organisationer som kan hjälpa dem minska sin förbrukning. Energidistributörer, systemansvariga för distributionen och företag som säljer energi i detaljistledet ska bifoga denna information tillsammans med slutanvändarnas räkningar, avtal, transaktioner eller kvitton.[25]

Detaljerad vägledning för hur medlemsstaterna ska kunna kontrollera energimarknaden för att lyfta fram energieffektivisering och minska hinder för detsamma finns dock inte i det tidigare direktivet. På så sätt kan ovan nämnda artiklar anses ställa krav utan att ge medlemsstaterna verktyg för att uppfylla dem.

3. Sveriges rättsakter

Redan innan direktiv 2006/32/EG blev en rättsakt i EU hade Sverige lagstiftat om energieffektivisering. Ökade elkostnader under 1990-talet ledde till lagstiftningsreformer som stödde energieffektivitet.[26] I 1990-talet exempelvis lagstiftades om mätning och debitering med fokus på flerbostadshus. Införlivandet av nya regler resulterade i betydande minskningar av elanvändningen. På grund av detta då Sverige presenterade sin första handlingsplan 2008 under direktiv 2006/32/EG uppskattade Svensk Energi att mellan 90 till 95 % av alla slutanvändare i lägenheter hade individuell mätning och debitering. Skillnaden i elanvändning som en följd av detta är påtaglig. Energimyndigheten rapporterade att när elanvändning är individuellt debiterad, är den mellan 10 och 30 % lägre än när den är kollektivt debiterad.[27]

Efter att direktiv 2006/32/EG antogs av kommissionen och rådet passade den svenska regeringen på att uppdatera Sveriges energi- och klimatpolitik. I februari 2008 lämnades ett delbetänkande av energieffektiviseringsutredningen, Ett energieffektivare Sverige (SOU 2008:25). Slutbetänkandet, Vägen till ett energieffektivare Sverige (SOU 2008:110) kom i november samma år. Delbetänkandet innehåller ett förslag till Sveriges första nationella handlingsplan för energieffektivisering under direktivet. Handlingsplanen fastställdes i och med proposition 2008/09:163, En sammanhållen klimat- och energipolitik – Energi. I propositionen föreslog regeringen målet 9 % energibesparing i Sverige till 2016 jämfört med den genomsnittliga förbrukningen för medlemsstaten mellan 2001 och 2005. Regeringen föreslog och riksdagen tillsatte även ett delmål innebärande 6,5 % energibesparing till 2010.[28] Energimyndigheten utsågs till myndighe-

[23] Ibid., artikel 6.3.
[24] Ibid., artikel 12.
[25] Ibid., artikel 13.
[26] Nair, G. et al, Factors influencing energy efficiency investments in existing Swedish residential buildings, Energy Policy 38 (2010), s. 2597.
[27] Prop. 2008/09:163, En sammanhållen klimat- och energipolitik – Energi, Stockholm den 11 mars 2009, s. 135.
[28] Ibid., s. 77.

ten som ansvarar för att övervaka processen att nå målen under det tidigare direktivet.[29]

Den offentliga sektorn

Regeringen konstaterade i proposition 2008:09/163 att det behövdes en ambitionshöjning gällande de statliga myndigheterna för att uppfylla direktivet och att detta borde ske inom ramen för det statliga miljöledningssystemet.[30] För att genomföra detta ska Energimyndigheten få ge råd och stöd och Naturvårdsverket ska följa upp miljöledningssystemet. Någon ny lag eller författning föreslås inte för detta i den nämnda propositionen. Dock är den nu gällande förordningen, Förordning om miljöledning i statliga myndigheter; SFS 2009:907, antagen endast två veckor efter den förordning som reglerar myndigheternas upphandling.

Vad gäller upphandling så ansåg regeringen att det krävdes en särskild förordning för att direktivet ska kunna anses korrekt implementerat. Detta genomförde regeringen med Förordning (2009:893) om energieffektiva åtgärder för myndigheter. Förordningen kan i stort sägas innehålla ett uppdrag till myndigheterna att använda minst två av de sex åtgärderna från direktivets bilaga 6. Myndigheterna ska rapportera till statens energimyndighet vilka åtgärder de avser att använda.

Direktivet talar om offentlig sektor, någon utskriven definition av vad som avses innehåller inte direktivet. I Sverige får dock sägas att den gängse definitionen inkluderar även kommuner och landsting. Jämför man med den definition av offentliga organ som finns i kommissionens förslag till nytt direktiv så kopplas definitionen till upphandlingsregler och omfattar således även statliga och kommunala bolag.

Den svenska förordningen gäller bara för förvaltningsmyndigheter och domstolar. Energieffektiviseringsutredningen menar att statliga myndigheter har en särställning i offentlig sektor eftersom det är över dessa som medlemsstaterna fullt ut disponerar bestämmanderätten. Därför bör de statliga myndigheterna vara ett föredöme inom den offentliga sektorn. Regeringen ansluter sig i propositionen till denna uppfattning.

Både utredningen och regeringen lyfter fram det frivilliga arbete som redan pågår i kommuner och landsting, t ex ”uthållig kommun” och ”klimatkommunerna”.[31] För att stödja kommuner och landsting infördes förordning 2009:1533, Förordning om statligt stöd till energieffektivisering i kommuner och landsting.

Elbolag

I proposition 2008:09/163 bedömde regeringen att direktivets bestämmelser om energieffektiviserande tjänster och produkter redan hade tagits upp i tidigare rättsakter i Sverige så att regeringen inte behövde vidta ytterligare åtgärder.[32]

Avseende artikel 6.1(a) angående den statistiska informationen som elbolag ska överlämna om slutanvändarna, bedömde regeringen att kravet var uppfyllt av lagen (2001:99) och förordningen (2001:100) om den officiella statistiken.[33] Enligt lagen och förordningen är näringsidkare redan skyldiga att lämna information om sin tillförsel och förbrukning av energi, energibalanser och energiprisutveckling.

Avseende artikel 6.1(b) konstaterade regeringen att den inte hade identifierat några hinder till efterfrågan på energitjänster i Sverige som de som nämns i artikeln. Således ansåg regeringen att ytterligare genomförandeåtgärder inte behöv-

[29] Sveriges andra nationella handlingsplan för energieffektivisering, beslutad vid regeringssammanträde den 30 juni 2011, s. 16.
[30] Prop. 2008/09:163, s. 63.
[31] SOU 2008:110 s.299, samt Prop. 2008/09:163, s. 64.
[32] Prop. 2008/09:163, s. 113.
[33] Ibid., s. 65.

des. Däremot tyckte regeringen att marknaden för energieffektivisering i Sverige hade stor potential som skulle kunna utvecklas vidare.[34]

Regeringen bedömde att ytterligare åtgärder inte heller behövdes gällande artikel 6.2 (listan med olika åtgärder för att främja konkurrenskraftigt prissatta energitjänster, energibesiktningar och finansieringsmekanismer), samt artikel 6.3 (om stöd för andra aktörer än energidistributörer, systemansvariga för distributionen och företag som säljer energi i detaljistledet). Sverige hade redan införlivat Europaparlamentets och rådets direktiv 2002/91/EG av den 16 december 2002 om byggnaders energiprestanda (”byggnaders energiprestanda direktivet”) och antagit lagen (2006:985) om energideklaration för byggnader. Enligt dessa regler tillhandahöll elbolag energitjänster, och Energimyndigheten publicerade information om förbättrad energieffektivitet på myndighetens hemsida.[35]

Regeringen ansåg ändå att marknadens storlek i Sverige var begränsad dels på grund av en allmän brist på personal med energikompetens och dels på grund av brist på kunskap inom Sverige om energieffektiviserande tjänster.[36] Således bedömde regeringen att Energimyndigheten fortlöpande skulle bevaka utvecklingen på marknaden och även utreda om ett standardavtal bör utvecklas för energitjänster.[37]

Regeringen bedömde att Artikel 12 om energibesiktningar i det nya direktivet genomfördes när Sverige införlivade byggnaders energiprestanda direktivet.[38] Enligt regeringen säkerställer och främjar lagen (2006:985) om energideklaration för byggnader tillgången till energibesiktningar.[39]

Angående mätning och upplysningar i samband med fakturering av energiförbrukningen som föreskrivs i artikel 13 bedömde regeringen att Sveriges befintliga regler inte täckte alla krav. Enligt förordning (1999:716) om mätning, beräkning och rapportering av överförd el, 16 §, hade Sverige förvisso ställt krav på månadsvis fakturering av mätresultat som innebär exempelvis mätvärden registrerade per timme. Dessutom hade Sverige Energimyndighetens föreskrifter och allmänna råd om mätning, beräkning och rapportering av överförd el, STEMFS 2007:5, där det föreskrevs i 6 kap. 8 § att elnätsföretag skulle lämna information till slutanvändare om mätarställningar vid varje månadsskifte. Informationen skulle innehålla uppgifter om årsförbrukning och förbrukningsstatistisk per månad i form av mängder el som används och procent av årlig användning för de senaste 13 månaderna. Emellertid saknade de svenska reglerna krav på en jämförelse med den genomsnittliga förbrukaren eller kontaktinformation till organisationer som kan hjälpa till att minska energianvändning genom effektivisering.[40] Således kunde Sverige göra mer för att implementera det tidigare direktivet.

4. Det nya direktivet

Då det visade sig att unionens mål att minska energianvändningen med 20 % fram till 2020 inte skulle kunna nås med det tidigare direktivet, började Europaparlamentet och rådet att bana väg för förbättrad energieffektivisering. I juni 2011 lämnade kommissionen ett förslag till nytt energieffektiviseringsdirektiv. Efter förhand-

[34] Ibid.
[35] Ibid., s. 66.
[36] Ibid., s. 115.
[37] Ibid., s. 66 och 113.
[38] Ibid., s. 71.
[39] Ibid., s. 71 och 113–115.

[40] Ibid., s. 72–73. Dessutom noterade regeringen att det inte fanns något krav på de enskilda bostadsrättsföreningarna under svenska lag på separat debitering. Regeringen menade att för att få den största möjliga energieffektiviseringen borde mer täckande krav för separat debitering införas i jordabalken och i bostadsrättslagen. Ibid., s. 136.

lingar mellan medlemsstaterna antogs ett i flera avseenden förändrat nytt energieffektiviserings direktiv i parlamentet i september 2012.[41] När direktivet 2006/32/EG upphävs förblir bilagorna I, III och IV gällande, de handlar om beräkningen av energieffektivisering och exempel på lämpliga åtgärder för förbättrad energieffektivitet. Även Artikel 4.1 – 4.4, som föreskriver att medlemsstaterna ska sträva efter att nå energibesparingar på 9 % fram till 2016 förblir gällande. Dessa bestämmelser upphävs när tidsfristen för 9 % målet går ut.[42]

Ingressen till det nya direktivet förklarar vad som krävs för att komma närmare 20 % målet fram till 2020. För det första krävs mer omfattande krav på hela energikedjan, inklusive energiproduktion, transmission och distribution; att den offentliga sektorn banar väg för bättre metoder, byggnader och apparater; och att slutanvändarna ges verktyg för att minska energiförbrukning.[43] Därutöver krävs en integrerad strategi för alla aktörer med mål som är bindande.[44]

Ingressen förklarar också att medlemsstaternas skyldighet att införliva det nya direktivet i nationell lag bör begränsas till bestämmelserna som representerar en väsentlig förändring jämfört med direktiven som upphävs.[45]

Artikel 1 bekräftar att det nya direktivet, precis som det tidigare direktivet, syftar till att nå 20 % målet fram till 2020. För att nå detta resultat inför direktivet bestämmelser som är avsedda att avhjälpa marknadsmisslyckanden som hindrar effektiviteten i försörjningen och användningen av energi, så som bristen på information som gör att slutanvändare fattar beslut som inte gynnar energibesparande. I enlighet med detta mål ska medlemsstaterna enligt artikel 3 sätta upp ett vägledande nationellt energieffektivitetsmål.

Det nya direktivet föreskriver inte uttryckligen på vilka aktörer det ska tillämpas. Emellertid framgår av kontexten att det ska tillämpas på energisektorn, nämligen eldistributörer och företag som säljer energi, samt den offentliga sektorn och slutanvändare.

Till skillnad från det tidigare direktivet är rättsgrunden för det nya direktivet artikel 194(2) FEUF.[46] Artikel 194(2) FEUF anger uttryckligen att det är unionens policy att främja energieffektivisering och energibesparande. Meningen med valet av artikel 194 som rättsgrund för det nya direktivet är att fastställa en gemensam ram att främja denna policy inom unionen,[47] samtidigt som medlemsstaterna ges flexibilitet avseende hur direktivet införlivas i och anpassas till nationella regler.[48] Direktivets artikel 1.2, andra stycket bekräftar att bestämmelserna i direktivet är minimikrav och ska inte förhindra medlemsstaterna att upprätthålla eller införa strängare åtgärder.[49]

Trots att det nya direktivet pekar på behovet av bindande mål bibehåller det ändå karaktären av ett ramdirektiv. Bestämmelser och bilagor är utformade för att ge vägledning som kommissionen kan använda för att stödja medlemsstater i att nå förbättrad energieffektivitet. Medlemsstaternas utrymme för flexibilitet i genomförande av det nya direktivet är alltså fortfarande stor, och känslan av att direktivet styrs av ”free market environmentalism” finns kvar.

[41] Se för vidare information http://ec.europa.eu/energy/efficiency/eed/eed_en.htm.
[42] Ibid., ingressens 63 övervägande.
[43] Ibid., ingressens 8 övervägande.
[44] Ibid., ingressens 10 och 12 övervägande.
[45] Ibid., 64 ingressens övervägande.
[46] Ibid., inledningen. Artikel 194, rättsgrunden för energimarknaden, uppkom först vid Lissabonfördraget som en energi-specifik rättsgrund. Langlet, D. och Mahmoudi, S., 2011, s. 152–153.
[47] Förslag till Europaparlamentets och rådets direktiv om energieffektivitet och om upphävande av direktiven 2004/8/EG och 2006/32/EG, KOM(2011) 370 slutlig, 22.6.2011, punkt 3.2.
[48] Ibid., punkter 3.3 och 3.4.
[49] Ibid., artikel 1.2.

Den offentliga sektorn

Redan i ingressen till det nya direktivet uttrycks den offentliga sektorns stora betydelse för framgång i energieffektiviseringsarbetet. Man lyfter upp att offentlig sektor står för 19 % av EU:s inhemska bruttoprodukt och därmed har man goda förutsättningar att påverka utbudet av mer effektiva produkter, byggnader och tjänster. Man ser också möjligheter att stimulera beteenden hos medborgare och företag. Organ på nationell, regional och lokal nivå bör alla föregå med gott exempel. Ytterligare argument för varför offentliga sektorn ska gå före i energieffektiviseringsarbetet är att minskad energiförbrukning frigör resurser till andra angelägna ändamål.[50]

I ingressen lyfts också byggnader som mycket viktiga, i befintligt byggnadsbestånd finns den största energisparpotentialen. Många byggnader är offentligägda och de offentliga byggnaderna menar man är sådana som är synliga i samhället, därför bör krav ställas på renoveringar av offentligägda byggnader.

Kommissionen föreslog ett mycket långtgående direktiv[51] där alla offentliga organ skulle renovera 3 % av sin ägda byggnadsyta varje år för att uppnå energieffektiviseringsmål. För Sveriges del skulle det förutom statliga myndigheter omfatta även kommuner, landsting samt statliga och kommunala bolag. Till exempel skulle alla allmännyttiga bostadsföretag ha omfattats. Efter förhandlingar så har direktivet i den utformning som det antogs av parlamentet fått en betydligt mindre långtgående utformning.

Artikel 5 behandlar offentliga sektorns byggnader som förebild. Grundidén är att 3 % av ytan i byggnader som ägs av statliga myndigheter ska renoveras årligen så att de uppnår minimikrav vad gäller energiprestanda. From 1/1 2014 omfattas byggnader med mer än 500 kvm, from 9/7 2015 omfattas byggnader större än 250 kvm. Det är yta där man använder energi för att påverka klimatet som inkluderas. Byggnader med sämst energiprestanda ska prioriteras. Undantag får göras för att skydda arkitektoniska eller historiska värden, för byggnader som tjänar försvarssyften och för byggnader för andakt och gudstjänst.

Om man något år renoverar mer än 3 % så kan man tillgodoräkna sig det tre år tillbaka eller framåt i tiden. Man kan också räkna in när gamla byggnader rivs eller tas ur bruk och ersätts med nya eller med att man utnyttjar befintliga byggnader bättre.

Jämför man det som antagits av parlamentet med kommissionens förslag så är det betydligt färre byggnader som berörs. Hur stora skillnaderna är varierar förstås från land till land men för Sverige är det en mycket stor skillnad. Istället har en ny artikel kommit till, artikel 4, Byggnadsrenovering, enligt denna ska medlemsstaterna fastställa en långsiktig strategi för byggnadsrenoveringar för hela det nationella byggnadsbeståndet för att få tillstånd investeringar i renoveringar.

Den offentliga sektorns inköp var en viktig punkt i det tidigare direktivet men i det nya direktivet är denna fråga reglerad på ett nytt sätt. Medlemsstaterna ska se till att statliga myndigheter endast köper produkter, tjänster och byggnader med hög energiprestanda. Närmare precisering av vad detta innebär finns i bilaga 3.

I direktivet jämfört med kommissionens förslag har skrivningarna mjukats upp. Kravet att inköpa med hög energieffektivitetsprestanda förutsätter att detta kan göras kostnadseffektivt, med ekonomisk genomförbarhet, hållbart i vid bemärkelse, på tekniskt lämpligt sätt och med tillräcklig konkurrens. Vissa undantag görs för försvarsmakten. Vidare så har omfattningen av kravet även här gått från att gälla hela den of-

[50] Direktiv 2012/27/EU om energieffektivitet, … ingressen punkt 15.

[51] Proposal for a Directive on energy efficiency and repealing Directives 2004/8/EC and 2006/32/EC [COM/2011/370].

fentliga sektorn till att gälla statliga myndigheter, men medlemsstaterna ska uppmuntra lokal och regional nivå att även de prioritera energieffektivitetsprestanda.

Elbolag

Det nya direktivet bygger på bestämmelser i det tidigare direktivet med nya bestämmelser avseende ett kvotpliktsystem, energibesiktningar och individuella mätare. Ingressen till det nya direktivet understryker vikten av smarta mätare för att nå EU:s mål för 2020: ”När det gäller el ska minst 80 % av användarna senast 2020 ha ett intelligent mätarsystem, förutsatt att uppsättningen av smarta mätare bedöms vara en framgång”.[52]

Artikel 7 i det nya direktivet föreskriver att medlemsstater antingen ska inrätta ett kvotpliktsystem för energieffektivitet eller genomföra alternativa åtgärder. Ett kvotpliktsystem definieras inte, men ingressen förklarar angående ett kvotpliktsystem att ”gemensamma ramen bör ge energiföretagen möjlighet att erbjuda energitjänster till alla slutanvändare, inte bara till dem som de säljer energi till. Detta ökar konkurrensen på energimarknaden, eftersom energiföretagen kan differentiera sin produkt genom att tillhandahålla kompletterande energitjänster.”[53] Direktivet definierar en kvotplikpart som ”energidistributör eller företag som säljer energi i detaljistledet som är bunden eller bundet av de nationella kvotpliktsystem för energieffektivitet.”[54]

Oavsett vilken strategi medlemsstaterna väljer, måste de se till att energidistributörer och/eller företag som säljer energi i detaljistledet når ett fast mål. Dessa aktörer ska uppnå energibesparingar som motsvarar åtminstone 1,5 % i volym av den årliga energiförsäljningen till konsumenter varje år från och med den 1 januari 2014 till och med 2020. Bilaga IV och V ger vägledning för hur medlemsstaterna ska räkna energibesparande. En statistiskt signifikant andel av rapportering av energibesparande ska verifieras.[55]

Enligt artikel 7 får medlemsstaterna bygga in en viss flexibilitet i kvotpliktsystemet genom att låta kvotpliktiga parter ta med i sina beräkningar energibesparande från tredje parter och även från tidigare år.[56] Medlemsstaterna får också föreskriva bestämmelser med ett socialt mål, exempelvis att kvotpliktiga parter ska genomföra energieffektiviseringsåtgärder i hushåll som drabbas av energifattigdom eller subventionerade bostäder.[57]

Alternativa åtgärder som en medlemsstat kan genomföra istället för ett kvotpliktsystem omfattar energiskatter, finansieringsinstrument, avtal, energimärkningssystem, och yrkes- och andra utbildningar som kan leda till användning av energieffektiv teknik. Vissa villkor tillämpas.[58]

I likhet med det tidigare direktivet ska medlemsstaterna se till att slutanvändarna upplyses med information om deras energiförbrukning, dels genom att göra energibesiktningar tillgängliga och kostnadseffektiva, dels genom mätning och dels genom fakturering. Elbolag ska också samla statisk information som de gjorde under det tidigare direktivet.[59]

Medlemsstaterna ska främja besiktningar för hushåll samt små och medelstora företag, och även hjälpa företagen med konkreta exempel på hur en energibesiktning kan förbättra lönsamheten. För större företag ska medlemsstaterna se till att de genomför en energibesiktning åtminstone

[52] Direktiv 2012/27/EU om energieffektivitet, ingressens 31 övervägande.
[53] Ibid., ingressens 20 övervägande.
[54] Ibid., artikel 2.14.
[55] Ibid., artikel 7.
[56] Ibid., artikel 7.7 och 7.8.
[57] Ibid., artikel 7.7(a). Energifattigdom definieras inte i direktivet.
[58] Ibid., artikel 7.
[59] Ibid., artikel 7.8.

vart fjärde år.[60] Bilaga VI ger minimikriterier för energibesiktningar.

I likhet med det tidigare direktivet föreskriver direktivet att individuella elmätare bör användas. Skillnaden är att det nya direktivet ställer mer detaljerade krav. Detta behandlas i artikel 9. Högre krav utöver det som föreskrivs i det tidigare direktivet är exempelvis att slutanvändare av el, bl.a., ska ha individuella mätare ”så långt det är tekniskt möjligt, ekonomiskt rimligt och proportionerligt i förhållande till möjliga energibesparingar”. Under samma förutsättningar ska en individuell mätare alltid tillhandahållas när en befintlig mätare byts ut eller när en ny inkoppling görs in en ny byggnad eller en byggnad som undergår större renoveringar. Vissa andra villkor tillämpas på smarta mätare, när och i den utsträckning som medlemsstaterna genomför system för smarta mätare enligt, bl.a., direktiv 2009/72/EG om gemensamma regler för den inre marknaden för el.[61]

I likhet med det tidigare direktivet föreskrivs att fakturering ska levereras för att informera slutanvändare om deras energiförbrukning. Det som är nytt är nivån på faktureringsdetaljer som elbolag ska leverera, och en tidsfrist för när individuella mätare ska installeras. Artikel 10, som avser fakturering, är delad i två scenarier beroende på om slutanvändarna i en medlemsstat har smart mätare eller inte. När slutanvändarna inte har smarta mätare, ska medlemsstaterna ska se till att energidistributörer, systemansvariga för distributionssystem och företag som säljer energi i detaljistledet – i de fall där det är tekniskt möjligt och ekonomiskt försvarbart – leverera korrekta fakturor till kunder baserade på faktisk användning av el. Det ska göras senast den 31 december 2014. När slutanvändare i medlemsstaten har smarta mätare, exempelvis efter medlemsstatens genomförande av direktiv 2009/72/EG och direktiv 2009/73/EG, ska de få information om sin historiska användning av el som möjliggör detaljerad kontroll. Oavsett vilken mätning som gäller ska slutanvändarna kunna begära och få information om sin historiska användning av el. Dessutom ska slutanvändarna kunna välja att få fakturor elektroniskt, och fakturan ska ge slutanvändarna en heltäckande redovisning av de aktuella kostnaderna för el enligt bilaga VII. Bilaga VII ger minimikrav för fakturering och faktureringsinformation som grundar sig på faktisk användning.[62]

5. Analys – vad det nya direktivet innebär för Sverige

Offentliga organ

Byggnader

Åtgärden att öka energibesparingar i sina byggnader fanns med som en av de sex alternativa åtgärderna i det tidigare direktivet och även i den svenska förordningen som implementerade detsamma. Där fanns dock ingen kvantifiering. Myndigheterna har ju också bara varit ålagda att välja minst två av de sex åtgärderna, vilket gör att detta måste ses som ett i huvudsak nytt krav.

Att kravet rent regelmässigt är nytt innebär dock inte att uppgiften för myndigheterna är ny. I regeringens faktapromemoria om det nya direktivet från juli 2011[63] konstateras att i Sverige renoveras de flesta byggnader efter 30–40 år, vilket alltså stämmer väl med de föreslagna 3 %.

Det finns ett flertal frågor för Sverige att ta itu med för att genomföra kravet i direktivet. Renoveringskraven i artikel 5 har den energiprestanda som föreskrivs i direktiv 2010/31/EU som norm. Det direktivet säger att alla nya byggnader from 2020 ska vara nära-noll-energi bygg-

[60] Ibid., artikel 8.
[61] Ibid., artikel 9.
[62] Ibid., artikel 10.
[63] Regeringskansliet, Faktapromemoria, 2010/11:FPM141, s.3.

nader men direktivet lämnar till medlemsstaterna att definiera vad nära-noll-energi innebär. Sverige har inte satt ner foten i den frågan ännu. I en skrivelse till riksdagen i mars 2012 gjorde regeringen bedömningen att nära noll innebär en skärpning från dagens energikrav på nya byggnader.[64] Exakt hur mycket menar man är för tidigt att säga, noggrannare utredning krävs för att kunna fastställa en nivå som är miljömässigt, fastighetsekonomiskt och samhällsekonomiskt motiverad. Nästa revision är planerad till 2015 vilket kan innebära ett dilemma för myndigheter som ska börja renovera redan under 2014. Sverige behöver alltså börja med att definiera vad kraven innebär.

En annan viktig fråga för Sverige är vilka fastigheter som omfattas. Staten äger idag fastigheter på flera sätt. Två myndigheter har till uppdrag att äga och förvalta fastigheter; ett antal myndigheter äger fastigheter för sin verksamhet, och fyra helägda statliga bolag äger och förvaltar fastigheter. Endast de fastigheter som ägs av myndigheter berörs.

I mars 2011 lämnades ett utredningsbetänkande[65] i vilket föreslogs genomgripande förändringar i statens organisation för att äga och förvalta fastigheter och försörja myndigheterna med lokaler. Utan att gå in på den utredningen så kan sägas att en huvudprincip i deras förslag är att staten ska äga färre fastigheter än idag. Vad kommer detta att innebära för Sveriges arbete med energieffektiviseringsdirektivet? Ett möjligt scenario är att de fastigheter som ägs av svenska myndigheter i stor utsträckning kommer att vara kulturfastigheter eller militära fastigheter vilka kan undantas från energieffektiviseringskraven enligt artikel 5 punkt 2.

Upphandling

Hur stora förändringar kraven kring upphandling innebär för myndigheterna beror på vilka av de alternativa åtgärderna i förordning (2009:893) om energieffektiva åtgärder för myndigheter de valt att tillämpa. Många myndigheter har tillämpat fler än två av punkterna och framför allt de punkter som handlar om inköp och hyra av lokaler.[66] Detta talar alltså för att det inte blir stora omställningar för myndigheterna med det nya direktivet. Sverige kommer dock att behöva nya förordningar som stämmer överens med direktivet. SFS 2009:893 behöver ersättas och möjligen kommer även ändringar i lagen om offentlig upphandling att behövas.

Elbolag

Regleringen av elbolag i det nya direktivet ställer krav som är mer detaljerade än kraven i det tidigare direktivet. Det enda helt nya kravet är att medlemsstaterna fastställer ett mål att energidistributörer och/eller företag som säljer energi i detaljistledet ska uppnå energibesparingar som motsvarar åtminstone 1,5 % i volym av den årliga energiförsäljningen till konsumenter varje år från och med 1 januari 2014 till och med 2020. Det är upp till Sverige att bestämma, inom ramen för det nya direktivet och artikel 4 i det tidigare direktivet, hur man ska nå målet.

I Sveriges andra nationella handlingsplan som överlämnades till kommissionen 30 juni 2011 rapporterades att Sverige skulle klara de övergripande målen, inklusive målet 9 % energieffektivisering till 2016, ”med god marginal”. Avseende marknaden för energieffektiverande tjänster och produkter, ansåg Sverige att inga ytterligare åtgärder krävdes. Remissinstanserna, bl.a. Energimyndigheten, Föreningen Sveriges

[64] 2011/12:131, Vägen till nära-nollenergibyggnader, s.4.
[65] SOU2011:31, Staten som fastighetsägare och hyresgäst.
[66] Sveriges andra nationella handlingsplan för energieffektivisering, s. 44.

Energirådgivare, och Svensk Energi, delade denna bedömning.[67]

De bristerna som Sverige identifierade var förhållandevis små och lätt att åtgärda, exempelvis brist på kompetent personal och kunskap om energieffektiviserande tjänster,[68] behovet av bättre fakturering till slutanvändare,[69] och tveksamma fastighetsägare som inte vill ingå energitjänstekontrakt.[70] För att ta itu med dessa utmaningar planerade regeringen åtgärder, bl.a., för bättre utbildning angående energitjänster och vad de innebär.[71] Utöver detta var regeringen redo att vidta åtgärder som översteg kraven i det tidigare direktivet även innan det nya direktivet kom. Exempelvis ålade regeringen Energimyndigheten att överväga vilka ytterligare åtgärder som behövdes för att främja marknaden för energitjänster och därmed förbättrad energieffektivisering.[72]

6. Slutsatser

Det är högst sannolikt att Sverige redan nu är på rätt spår avseende det nya direktivet. Det nya direktivet ställer inte några högre krav än det tidigare direktivet, utan bara mer detaljerade krav. Enligt nationella myndigheter klarar Sverige målen från det tidigare direktivet med god marginal, och enligt den Europeiska Kommissionen finns det inga större brister eller avvikelser i Sveriges införlivande av det tidigare direktivets bestämmelser.[73]

I och med att Sverige redan ligger på topp när det gäller det nya direktivet och med tanke på att det nya direktivet grundas på artikel 194(2) FEUF, ett minimikrav, skulle Sverige kunna leda unionens policy avseende energieffektivisering genom att lagstifta strängare krav än de som finns i det nya direktivet. Den intressanta frågan är därför inte vad det nya direktivet innebär för Sverige, utan vad Sverige skulle kunna göra för att leda policyn avseende energieffektivisering i unionen.

För att Sverige ska kunna leda policyn avseende energieffektivisering i unionen måste de lagstiftande politikerna i Sverige ta reda på huruvida det svenska folket är redo att vidta ytterligare åtgärder för ett energieffektivare Sverige. Enligt Naturskyddsföreningen är svaret ja, i synnerhet om man tänker på alternativen. Med stöd av en opinionsundersökning 2012 drog Naturskyddsföreningen slutsatsen att endast 20 % av svenskarna i första hand vill satsa på kärnkraft, medan 73 % hellre vill satsa på förnybar energi eller energieffektivisering.[74] Timingen för den åsikten är bra för Sverige och Sveriges politiker när det gäller det nya direktivet.

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[67] Prop. 2008/09:163, s. 113.
[68] Ibid.
[69] Enligt regeringen uppfyller Sverige de principiella kraven om fakturering i direktivet, men det finns utrymme för förbättring eftersom ”det saknas regler om information på fakturorna för el som fullt ut motsvarar direktivets krav.” Ibid., s. 72.
[70] Ibid., s. 115.
[71] Ibid., s. 113.
[72] Ibid., s. 116.
[73] 19 EU states face court action over buildings' CO2 emissions, EurActiv, 8 januari 2013, URL http://m.euractiv.com/details.php?aid=516901.
[74] Naturskyddsföreningen – Västerbottens län, Nyheter, Debatt – avveckla kärnkraft, 2012-10-02, http://www.naturskyddsforeningen.se/kretsar-lan/vasterbotten/vasterbottens-lan/nyheter2/?news=24506.