Rights of Nature meets the Swedish Constitution*

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> The fact is, that each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound odd or frightening or laughable.[1]

Abstract

Nature is primarily seen as property in modern Western legal systems. Property usually has one or more owners with far-reaching rights to dispose of it. The idea that nature has rights is therefore new and radical; it represents a shift in the balance of power between humans and nature. The purpose of this article is to investigate how the current Swedish constitutional protection of nature may relate to the idea of the rights of nature. How is nature, environment, and the relationship between climate and nature negotiated in the existing legal and constitutional framework? Using examples from the recent Cementa and the Girjas cases, we discuss how the constitutional issues involved are legally interpreted and politically negotiated in ways leading to environment and nature being downplayed through government actions and interventions. The question is whether granting rights to nature would fit into Sweden's constitutional system and result in nature having a stronger position. Or is it a strange bird?

Introduction

Can nature have rights, in the same way as humans, or in some other way? In modern Western legal systems, nature is primarily seen as property. Property usually has one or more owners with far-reaching rights to dispose of it. The idea that nature has rights (Rights of Nature) is new and radical; it represents a shift in the balance of power between humans and nature. It is based on the view that nature should be allowed to exist on its own terms and not on man's. Expectations are that such an approach will become a tool for changing the view of the relationship between humanity and nature. The purpose of this article is to investigate how the current Swedish constitutional protection of nature, the environment, and climate may relate to the emerging idea of the rights of nature and current attempts to realize this idea. We wish to highlight the possible consequences of a transition from nature as a mere object of protection and care into a subject with rights of its own, independent of man. Consequently, our main focus in this article is the constitutional challenges and opportunities. We begin by presenting the rights of nature as an idea and phenomenon, giving examples from some places where it has been realized in law and practice. This will be contrasted with

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* This article has been published in Swedish: Marianne Dahlen & Victoria Enkvist, Regeringsformens natur och naturens rättigheter in *De lege. Regeringsformen 50 år 1974–2024* (eds. Anna Jonsson Cornell, Mikael Ruotsi, Caroline Taube och Olof Wilske) Iustus 2024, pp. 23–42.

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[1] Christopher D. Stone, "Should Trees Have Standing? – Toward Legal Rights for Natural Objects", *Southern California Law Review* 45 (1972) pp. 450–501, 455.

a review of the present position of nature, the environment, and climate in the Swedish constitution and a discussion of how the rights of nature could fit into the Swedish constitutional landscape. Rights of Nature highlights power relationships, and not least the relationship between law and politics. To illustrate this aspect, we will include a more detailed discussion of a particular case, the Cementa process concerning concessions for limestone quarries on the island of Gotland.

The Rights of Nature

Over the past decades, environmental and climate issues have become increasingly prominent in both political and media discourse, resulting from an increased environmental and climate change awareness and growing grassroots movements, one of which is Greta Thunberg and *Fridays for Future*. Young climate activists in a number of countries have initiated legal proceedings to bring about change through national courts and the European Court of Human Rights. According to *Sveriges Natur*, the membership magazine of The Swedish Society for Nature Conservation, there are more than 2000 climate lawsuits around the world, mainly led by young activists.[2] In the so called Aurora case in Sweden, several hundred young people have sued the state for jeopardizing the right to life, health, and development of children and young people in violation of Articles 2, 3, 8 and 14 of the European Conventions on Human Rights (ECHR) and Article 1 of the First Additional Protocol (protection of property) by failing to take adequate measures against climate change.[3] In April 2024 the Supreme Court granted a leave to appeal to answer the question whether the case was admissible.[4] In the Netherlands the Dutch Supreme Court has ordered the state to reduce greenhouse gas emissions by 25% in the so called Urgenda case, citing the right to life and the right to private and family life, Articles 2 and 8 of the ECHR. More senior people have also engaged in the battle against climate change. In Switzerland, a group of women called the Klima-Seniorinnen in April 2024 won a case against the state of Switzerland in the European Court of Human Rights.[5]

The aim of a human rights equivalent for nature is to enable society to better address the challenges facing nature, climate, and the environment in a robust and sustainable way. Until now, protection for the environment has mainly been found in environmental law. Such protection is found in the international, regional, and national legal systems, based on protecting people from harmful interference and emissions in nature. In some countries, the idea of the rights of nature has been put into practice. How the rights of nature have been constructed and implemented differs between countries, which affects the scope, strength, and impact of protection.

These issues have attracted the attention of the scientific community in the natural sciences, humanities, social sciences, law, and theology. There is a perception, even among many scientists, that the Earth has now entered a new age where the human footprint is shaping the Earth's development and future, which is usually referred to as the Anthropocene, the age of

[2] "Aurora kan lyftas till HD", Sveriges Natur 28, August 2023, https://www.sverigesnatur.org/aktuellt/aurora-kan-lyftas-till-hd/ (visited 29/07/2024).

[3] Aurora.se, https://xn--auroramlet-75a.se/ (visited 29/07/2024).

[4] ECLI:NL:HR:2019:2007, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf (visited 29/07/2024).

[5] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC]* – 53600/20 Judgment 9.4.2024 [GC], https://hudoc.echr.coe.int/eng/?i=002-14304 (visited 29/07/2024).

humanity. The prelude to the shift to the Anthropocene is the Industrial Revolution and the subsequent human footprint on Earth. The more precise timing of the shift is considered to be the early 1950's when a large amount of radioactive pollution was released from nuclear testing.[6] However, the view that we have entered a new phase is not shared by all and is one of several strands in the debate on climate change.

Environment and sustainable development issues have long been at the forefront of public debate. As early as the 1972 Stockholm Conference, initiated by the Swedish Government, environment and development issues were linked and placed on the international agenda. The UN Conference on Environmental and Development in Rio de Janeiro and several subsequent world meetings on climate change are a result of the Stockholm Conference.[7] Since 1988, the UN Intergovernmental Panel on Climate Change (IPCC) has focused on current environmental and climate issues. International agreements have been concluded to address the problems facing the environment and climate change. The 2030 Agenda[8] and the 2015 Paris Agreement[9] are two examples of political and legal agreements that have attracted considerable attention in this area. Since 2009, the UN has been leading intergovernmental negotiations aimed at a paradigm shift in the approach to human-nature relations through the Harmony with Nature initiative. The ambition is to find ways to achieve a more sustainable development where human rights and the rights of nature go hand in hand to ensure good development for planet Earth and for future generations.[10] The compliance and concrete significance of these agreements are debatable, as they are mainly declarations of objectives with no direct sanctions in case the signatory states do not meet the objectives. Nonetheless, there is a great political potential in the Agenda 2030 and other international initiatives.

Giving rights to nature means granting nature the right to self-determination. Giving legal capacity to a tree, a river, a mountain, an ecosystem or the whole of nature imply that nature is an independent subject of law. The idea of nature's rights originated in grassroots movements but has also made its way into the scientific community. In 1972, just as a major environmental movement was taking shape in the West, the young legal philosopher Christopher D. Stone published his groundbreaking article "Should Trees Have Standing? – Toward Rights for Natural Objects" in the *Southern California Law Review*. Stone put forward the "unthinkable" thought that nature can and should be granted rights and be represented by people to speak for it. Stone argued that it has been considered as "a natural law" that men (the white man) and not things that have rights and legal capacity whereas, in reality, that conception is only a legal construction. It was not until the 19th century that it became possible to consider corporations as legal persons even though there had been similar discussions much earlier regarding the Catholic

[6] See *International Union of Geographic Sciences* (IUGS) *Working Group on the Anthropocene*, decision 19 May 2016, http://quaternary.stratigraphy.org/working-groups/anthropocene/ (visited 29/07/2024). For a comprehensive presentation of the Anthropocene, see Sverker Sörlin, *Antropocen: En essä om människans tidsålder* (Stockholm: Weyler förlag, 2018).

[7] "Only one Earth", conference in Stockholm 1972, Svenska Unescorådet 2 March 2012, https://unesco.se/only-one-earth-konferens-i-stockholm-1972/ (visited 29/07/2024).

[8] https://sdgs.un.org/2030agenda (visited 07/08/2024).

[9] Adopted by 196 states at the UN Climate Change conference (COP21) in Paris 12 December 2015. It entered into force on November 4, 2016. https://unfccc.int/process-and-meetings/the-paris-agreement (visited 29/07/2024).

[10] *Harmony with Nature*, UN, with further references: http://www.harmonywithnatureun.org/chronology/ (visited 29/07/2024).

Church and empires claiming status and capacity corresponding to the concept of legal personhood. Nevertheless, there has always been hesitation or even solid resistance to extending rights and legal capacity to new entities.[11]

Over time, rights – after struggle – have come to include groups of persons who had not previously been granted rights: children, women, Black people, indigenous peoples, for example, and to some extent animals.[12] Based on this historical perspective, Stone proposed that we give forests, oceans, rivers and other parts of nature, indeed all of nature, rights, including the right to speak for themselves.[13] Stone based his argument on legal reasoning about legal subjectivity, which he argued could be applied to nature, e.g. a tree, because nature should be given a value in itself, a value that is not based on nature (e.g. a particular tree) serving as a means of human benefit. According to Stone, a tree, for example, should be able to bring an action in court on its initiative and courts would then be obliged to take into account the damage caused to the tree.[14]

Stone's thoughts are based on a liberal tradition of thought and a rights discourse where the individual and property rights are central. Stone wants to include nature in this rights tradition, notwithstanding the fact that his idea runs counter to it. The introduction of the concept of "legal person", which Stone suggests to extend to include objects in nature, such as trees, was crucial to the rights, ownership, financing, and profits of corporations and financial institutions during the Industrial Revolution. The concept contributed to the rise of industrial capitalism, where a basic premise was, and is, the availability of raw materials and the freedom to make an impact on emissions into nature. Stone's idea aims to limit the possibilities of exploiting nature, but his idea is based on the same liberal tradition of thought.[15] The possibilities and difficulties of making "objects" such as nature, animals, or AI into legal persons have subsequently been explored and conflicting conclusions have been put forward.[16]

Since Stone wrote his article, a field of research has emerged around the rights of nature, with a variety of approaches and proposals. Political scientists, lawyers, theologians, historians of technology, organizations and activists have thought and written about the phenomenon. Mihnea Tanascescu provides an updated overview in *Understanding the Rights of Nature* from 2022.[17] An example of grassroots movements with a more activist approach is Henrik Hallgren and Pella Thiel's *Naturlagen*.[18]

Since the 1960s, a majority of countries in the world have adopted some form of constitutional provisions related to the environment, including Sweden.[19] These provisions are primarily aimed

[11] Stone, "Should Trees Have Standing?", pp. 453–56.
[12] Stone, "Should Trees Have Standing?", p. 453.
[13] Stone, "Should Trees Have Standing?", p. 456.
[14] Stone, "Should Trees Have Standing?", p. 458.

[15] See for example Seth Epstein, Marianne Dahlén, Victoria Enqvist & Elin Boyer, "Liberalism and Rights of Nature: A Comparative Legal and Historical Perspective", *Law, Culture and the Humanities* 2022, pp. 1–23.
[16] There is no space to detail the debate here, but see further e.g. Visa A. J. Kurki, *A Theory of Legal Personhood* (Oxford: Oxford University Press, 2019), Ngaire Naffine, "Hidden presuppositions and the problem of paradigm persons", *Open Edition Journals* 44, 2021, https://doi.org/10.4000/revus.6953 (visited 20/07/2024) and Raffael N. Fasel, "Shaving Ockham", *Open Edition Journals* 44 2021, https://doi.org/10.4000/revus.6953 (visited 20/07/2024).
[17] Mihnea Tanasescu, M., *Understanding the Rights of Nature: A Critical Introduction (Bielefeld*: Transcript Verlag, 2022).
[18] Henrik Hallgren & Pella Thiel, *Naturlagen: om naturens rättigheter och människans möjligheter* (Stockholm: Volante, 2022).
[19] United Nations Environment Programme, Environmental Rule of Law: First Global Report (2019) 2, https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report (visited 30/07/2024). See also Agnes Hellner & Yaffa Epstein, "Allocation of

at ensuring a good and healthy environment for present and future generations.[20] A characteristic feature of the rules is that humans are at the center.[21] In some countries, however, nature has been given a more central role in the constitution and its own specific rights. The most prominent example is Ecuador, which in 2009 became the first country in the world to enshrine the rights of nature in its constitution. A number of articles in the constitution recognize nature's right to exist and manage itself, giving all communities, peoples and nations the right to call upon public authorities to enforce the rights of nature. However, it is worth noting that it is still humans who represent nature in legal proceedings, which means that full legal subjectivity has not been achieved. The State is obliged to remedy violations of nature. The Ecuadorian Constitution promises a new model of sustainable development, based on the idea that humanity and nature should live in harmony and that nature is no one's property.[22] Another famous example is the Whanganui River in New Zealand, which has been declared a legal entity with its own rights, represented by the Maori people living along the river.[23] There are more examples of the realization of nature's rights around the world, some are the following: In the United States, nature's rights have been enshrined in local ordinances, the first being the Lake Eire Bill of Rights (LEBOR), adopted by the citizens of Toledo, Ohio in 2019. LEBOR gives the lake ecosystem the right to exist and develop on its terms, as well as the right to self-government and a clean and healthy environment for the city's residents. However, it was annulled in court shortly after its adoption because it was unconstitutional.[24] In 2022, Spain became the only country in Europe to pass a law making the Mar Menor, Europe's largest saltwater lagoon, a legal entity with its own rights. Initiatives have been taken also in Sweden, in particular a declaration of rights for Lake Vättern, with formulations similar to those in LEBOR.[25] In the Swedish parliament motions to that effect have been tabled at several occasions, last time in November 2022, to introduce a new section 2:26 in the Swedish Instrument of Government (IoG) (Regeringsformen, RF), giving nature the right to naturally exist, flourish, generate and develop. None of the motions have been adopted.[26]

Nature in the Swedish Constitution

In environmental and climate cases, legal arguments are often based on human rights and constitutional rights. Consequently, the design and construction of these rights are of great importance for the realization of protection. This is often overlooked in analyses of the role of law in climate litigation. Nature does not have its own

institutional Responsibility for Climate Change Mitigation: Judicial Application for Environmental Provisions in the European Climate Cases Artic Oil, Neubauer and l´Affaire du Siécle", *Journal of Environmental Law*, vol. 35, no. 2, 2023, p. 208.

[20] See for example the Swedish IoG (RF) 1:2 para. 3.

[21] Agnes Hellner & Yaffa Epstein, "Allocation of institutional Responsibility for Climate Change Mitigation: Judicial Applicatioon of constitutional Environmental Provisions in the European Climate Cases *Arctic Oil, Neubauer*, and *L'Affaire du siècle*.", Journal of Environmental Law, Vol. 35, Issue 2, July 2003 pp. 207–227, at 208.

[22] *Harmony with Nature*, UN, Law and Policy: http://www.harmonywithnatureun.org/rightsOfNature/, 12 (visited 30/07/2024).

[23] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 No. 7, 20 March 2017. https://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html (visited 30/07/2024).

[24] Adopted on February 26 2019, see "Rights of Nature Case Study Lake Eire", *Harmony with Nature's* web-site: http://files.harmonywithnatureun.org/uploads/upload1141.pdf (visited 30/07/2024).

[25] Vätterns rättigheter (Rights of lake Vättern): https://naturensrattigheter.se/vattern/ (visited 30/07/2024).

[26] Motion 2022/23:728, raised by Rebecka Le Moine, (MP, the green party), https://www.riksdagen.se/sv/dokument-och-lagar/dokument/motion/naturens-rattigheter_ha02778/ (visited 14/08/2024).

rights in the Swedish Constitution. However, there are a number of provisions that may be of importance for the protection of the environment and nature and by extension, the climate. One such rule is IoG 1:2 para. 3, which states that the public authorities shall promote sustainable development leading to a good environment for present and future generations. The provision in its original wording was added in 1976. Its purpose was to express "certain particularly important principles for the direction of social activity".[27] When a proposal was made, and which was later adopted, to introduce a rule on the promotion of sustainable development and a good environment for present and future generations in the Constitution in 2021, it was considered appropriate to include such wording in IoG 1:2. In the Government Bill it was emphasized that Sweden should be a pioneer in environmental protection.[28]

The wording of the new provision in IoG 1:2 para. 3 is linked to purposes of the Environmental Code (*miljöbalken* 1998:808), and the Government stated that it was "natural that the central environmental policy concept of sustainable development" was confirmed, a concept that was first introduced by the 1987 Bruntland Commission Report "Our Common Future".[29] It was also pointed out that in addition to being an overall objective for environmental policy and the Environmental Code, sustainable development is also essential in international as well as EU environmental law. In this context, it was considered imperative to emphasize the principle of solidarity with future generations in the efforts to achieve long-term sustainability.

Several of the bodies commenting on the government bill pointed out that it was unclear what effect the new environmental provision would have on the interpretation of other laws. The Government responded to the critique by emphasizing that IoG 1:2 is a program declaration "whose main function is to oblige the public to work positively to ensure that the expressed objectives are realized as far as possible".[30] At the same time, the Government emphasized that the program declaration has significance for the interpretation of the Constitution as well as law in general. Consequently, in the legislative process as well as in legal practice, it is of great importance that courts and public authorities concerned consider the program declaration in their decision making. It is expressed in the following words:

> This means that an individual cannot successfully base an action in legal proceedings solely on one of the provisions in Chapter 1, Section 2 of the Instrument of Government. However, a provision in Chapter 1, Section 2 of the Instrument of Government can be invoked and be of significance as an interpretation of how another invoked provision is to be applied, e.g. in an environmentally friendly manner. (Our translation).[31]

This means that the application of environmental law is a matter of constitutional interpretation. Legal rules must be interpreted in the light of the constitutional rule in question. During the 2000s, there has been a development where the

[27] Government Bill, prop. 1975/76:209, pp. 97, 127, 136 and Report to the standing committee on the constitution, bet. KU 1975/76:56, p. 41.
[28] Government Bill, prop. 2001/02:72 p. 23.
[29] Government Bill, prop. 2001/02:72 pp. 21–24.
[30] Prop. 2001/02:74 p. 24.
[31] Swedish Government Official Report, SOU 2001:19 p. 64. In the original Swedish wording: "Det nu sagda innebär att en enskild inte med framgång kan grunda en talan i en rättsprocess enbart på något av stadgandena i 1 kap. 2 § RF. Däremot kan ett stadgande i 1 kap. 2 § RF åberopas och få betydelse som tolkningsdatum för hur ett annat åberopat lagrum skall tillämpas, t.ex. på ett miljövänligt sätt."

consideration of rights has come to play an increasingly important role in the interpretation and application of laws. For a constitutional interpretation to be possible, the constitutional rule must have a certain degree of concreteness and the law in question be susceptible to a constitutional interpretation. If the wording of the right in question allows for an excessively broad interpretation in terms of scope, the right risks becoming an empty shell without any concrete meaning. At the same time, too narrow a scope of interpretation can create other problems, in that many phenomena/objects/subjects risk falling outside the scope of protection. Since the constitution is intended to be permanent or at least difficult to change, the design of laws have to be open ended enough to cover different phenomena. Flexibility lies in the scope for interpretation. The preparatory works to IoG 1:2 para. 3 refers to the opening article of the Environmental Code and reads as follows:

> The provisions of this chapter aim to promote sustainable development, which means that present and future generations are assured of a healthy and good environment. Such development is based on the recognition that nature has a conservation value and that man's right to change and use nature is associated with a responsibility to manage nature well. (Our translation).[32]

A fundamental idea in the Environmental Code is that people cannot engage in a way of life that damages the environment and depletes natural resources. It also states that both present and future generations must be assured of a healthy and good environment in which to live. The preparatory works to the Environmental code state that development in society must be steered towards paths that are sustainable in the long term. It also emphasizes that humans have a responsibility to manage nature well. In the bill, this is expressed in the following terms "Anyone who carries out any form of activity or takes measures of various kinds must always ensure that human health and the environment are protected against damage and inconvenience."[33]

In the light of the Environmental Code, the provision on the environment in the IoG 1:2 para 3 is clarified. Humanity is placed at the center and regarded as a steward of nature. Nature is subordinate to people. When strong socio-economic interests are at stake, it turns out that the constitutional provisions can be circumvented.

Environment in negotiation with other societal interests of vital importance

The relationship between politics and law is constantly under discussion. One area where the balance between the two has come under scrutiny is the possibility of appealing against government decisions, which is now regulated by the Act on judicial review of certain government decisions (lagen 2006:304 om rättsprövning av vissa regeringsbeslut). Before the Act was adopted, the Government was the final instance in some administrative matters. This arrangement was inconsistent with the ECHR, the right to judicial review, which is the background to the introduction of the act. An important issue in the drafting process of the act was how intrusive judicial review of political decisions could be

[32] Government Bill, prop. 2001/02:72 pp. 21–24. In the original Swedish wording: "Bestämmelserna i denna balk syftar till att främja en hållbar utveckling som innebär att nuvarande och kommande generationer tillförsäkras en hälsosam och god miljö. En sådan utveckling bygger på insikten att naturen har ett skyddsvärde och att människans rätt att förändra och bruka naturen är förenad med ett ansvar för att förvalta naturen väl."

[33] Government Bill, prop. 1997/98:45 p. 2. In the original Swedish wording: "[D]en som bedriver någon form av verksamhet eller vidtar åtgärder av olika slag alltid skall se till att människors hälsa och miljön skyddas mot skador och olägenheter."

without unduly affecting democracy.[34] The tension between law and politics has changed but not disappeared with the introduction of the Act on judicial review, as illustrated by the Cementa case and the Girjas case discussed in the following section.

In Sweden, various forms of balancing of interests have taken place in a number of legal proceedings concerning the environment. One of the most high-profile cases from a constitutional perspective is the Cementa case. The case consists of a number of court decisions and a government decision.[35] In the Cementa case, vital and opposing societal interests were at play. The protection of the environment eventually had to take a back seat, in favor of the (economic/societal) need for cement. The government took relatively drastic measures to ensure that Cementa's operations would continue. The geographical area in question is Slite on the island of Gotland. As the Cementa case involves a number of different legal issues, that have been tried in courts at different levels, we start with a brief summary of the case. The summary follows a background description given by the Land and Environment Court (*Mark- och miljödomstolen*).[36]

Until the end of October 2021, the company Cementa AB held a concession for limestone and marlstone mining in Slite. This is established in a 2010 Land and Environment Court decision.[37] The concession was limited to a period of ten years. It was furthermore established that the activity was not considered to affect the nearby Natura 2000 areas to any greater extent.[38] In 2017, three years before the concession expired, Cementa applied for permission to continue and expand quarrying operations in Slite. The application covered the same amount of extraction and the same maximum depth as in the previous concession from 2010 plus new extraction sites. The Land and Environment Court granted the application.[39] The decision was appealed to the Land and Environment Court of Appeal (*Miljööverdomstolen, MÖD*), which set aside the lower court's decision on the grounds that the environmental impact assessment contained considerable deficiencies.[40] Cementa lodged an appeal against the decision to the Supreme Court (*HD*), which did not grant a leave to appeal. Consequently, the decision by the Environment Court of Appeal stood.[41]

The Cementa AB is one of the country's largest suppliers of cement and when the concession for limestone mining was not renewed, it was feared that it would have severe consequences for Swedish industry. In light of the expected consequences of a shutdown of Cementa, in the early autumn of 2021 the government proposed in a government bill an amendment to the Environmental Code. The bill introduced a temporary regulation in chapter 17a, to apply from October 15 2021 until the end of the year. In practice, this meant that the government would

[34] Caroline Taube, "Den dömande makten", in Ingvar Mattson & Olof Petersson (eds.), *Svensk författningspolitik*, 6th ed. (Lund: Studentlitteratur, 2022), p. 215.

[35] The case includes a number of individual decisions, starting with the Land and Environment Court (*Mark- och miljödomstolen*) cases M 2334-09, October 1 2010, M 1579-20, July 6 2021, Supreme Court (*HD*) T 4746-21, August 25 2021, Government Decision (*Regeringens beslut*), November 18 2021, M2021/01774, Supreme Administrative Court (*HFD*) 7208-21 656-22, December 7 2022, Land and Environment Court (*Mark- och miljödomstolen*) M 2724-22, December 13 2022.

[36] Land and Environment Court (*Mark- och miljödomstolen*), M 2724-22, December 13 2022, 15–16.

[37] Land and Environment Court (*Mark- och miljödomstolen*), M 2334-09, October 1 2010.

[38] Land and Environment Court (*Mark- och miljödomstolen*), M 2334-09, October 1 2010.

[39] Land and Environment Court (*Mark- och miljödomstolen*), M 2334-09, October 1 2010.

[40] Land and Evironment Court of Appeal (*Mark- och miljööverdomstolen, MÖD*), M 1579-20, July 6 2021.

[41] Supreme Court (*HD)*, T 4746-21, August 25 2021.

take over the concession examination and the right to grant exemptions from the environmental assessment procedure concerning activities on Natura 2000 sites.[42]

The Legislative Council (*lagrådet*) critiqued against the bill on two grounds: firstly because of deficiencies in the preparation of the bill and secondly because the constitutionally protected generality requirement was not considered to be met. The Legislative Council took note of the lack of concrete instructions on the preparation of government bills in the constitution and stated that nonetheless, it is clearly of great importance that the bodies given the bill for consideration are given sufficient time to submit well-founded consultation responses.[43] The Legislative Council emphasized that the concrete content of the preparation requirement is determined by "the nature of the government matter".[44] In the case of the proposed amendment to the Environmental Code, the consultation period was in practice less than a week. The Council considered the short consultation period to be particularly problematic in view of the complex content of the bill. In light of these circumstances, it was considered that the drafting requirements under IoG 7:2 were not met.[45]

The Council also discussed whether the Act complied with the requirement of regulatory generality – a prohibition against *in casu* legislation. To be considered a regulation (and not a decision in an individual case) it must be legally binding, addressed to individuals or authorities, and have a general applicability. The generality requirement is not clearly expressed in a specific article of the IoG. However, it follows from IoG 11:4 and IoG 12:3, that no judicial function may be performed by the Riksdag unless laid down in fundamental law or the Riksdag Act Riksdagsordningen, the Riksdag's rules of procedure).[46] The Council pointed out that the requirement of generality is first and foremost formal, but that other circumstances must be taken into account, such as the number of people affected by the law, the size of the geographical area affected, and the duration of the regulation in question.[47] The Council did not see any deficiencies in a formal sense, as the content of the proposed law was a general standard. However, the Council considered that the substantive part was problematic as the regulations in Chapter 17a of the Environmental Code would only be in force for a very limited time period the time was adapted entirely to the needs in an individual case, namely Cementa's concession for limestone mining.[48] Another problem identified by the Council was that the requirements in the bill were formulated so that the law could only be applied in the Cementa case. The Council stated that the proposed legislation appeared to be a measure taken […] "to correct the outcome of the concrete concession case which had ended with the Supreme Cort's decision on August 25 2021 not to grant a leave to appeal of the rejection decision by the Land and Environment Court." (Our translation.)[49] Against this background, the Leg-

[42] Government Bill, prop. 2021/22:15.

[43] Legislative Council (*lagrådet*), Minutes from the 2021-09-16 meeting, p. 5.

[44] Legislative Council (*lagrådet*), Minutes from the 2021-09-16 meeting, p. 5.

[45] Legislative Council (*lagrådet*), Minutes from the 2021-09-16 meeting, p. 5.

[46] See Erik Holmberg, Nils Stjernquist, Magnus Isberg, Marianne Eliasson & Göran Regner, *Grundlagarna*, 2nd ed. (Stockholm: Norstedts Juridik, 2006), p. 501.

[47] Holmberg *op. cit.*, pp. 317–18.

[48] Legislative Council (*lagrådet*), Minutes from the 2021-09-16 meeting, p. 8.

[49] Legislative Council (*lagrådet*), Minutes from the 2021-09-16 meeting, pp. 8–9. In the original Swedish version: […] "för att korrigera utfallet av den konkreta tillståndsprocess som tog sin ände i och med Högsta domstolens beslut den 25 augusti 2021 att inte meddela prövningstillstånd avseende Mark- och miljööverdomstolens avvisningsbeslut."

islative Council considered that there were considerable reasons to believe that the bill also contravened the generality requirement.

Despite the Legal Council's criticism, the new Chapter 17a was adopted on September 29, 2021. The Act entered into force on October 15, 2021, and expired on January 1, 2022.[50] The Government granted a concession for quarrying in Slite on November 18, 2021.[51] The concesson was valid until the end of 2022 and covered the extraction of residual stone within the quarrying areas covered by the concession from 2010. The government considered that the quarry could affect the Natura 2000 areas Hejnum Kalgate, Kallgatburg, and Bojsvätar, which is why a Natura 2000 concesson was also granted in regard to the quarrying activities.

The Supreme Administrative Court (HFD) received a number of applications for judicial review of the Government's decision on the temporary concession. In one of the applications an injunction was also claimed pending final decision. The application was rejected and consequently the Government's favorable decision on the quarrying activities continued to apply.[52] In that case, the question of the preparation requirement was examined. The Supreme Court emphasized that there are no rules on the length of the consultation period for government decisions and that short deadlines are acceptable in urgent and serious situations.[53] The Supreme Administrative Court highlighted the assessment made by the Environment and Agriculture Committee (miljö- och jordbruksutskottet) that the preparation requirement was met despite the short preparation time.[54] One circumstance that was given particular significance was that, according to the Supreme Court, the legislative amendments were aimed at averting an imminent risk of serious societal consequences as a result of cement shortage.

As regards the generality requirement, in the case concerning judicial review the Supreme Administrative Court emphasized that the Riksdag may not make decisions in individual cases, a prohibition that cannot be circumvented by enacting legislation. At the same time, however, it was also pointed out that there was no detailed definition of what the generality requirement actually means. In its opinion, the court referred to case law stating that a regulation must be generally formulated and applicable, i.e. it may not expressly refer to a specific case.[55] The court emphasized that this requirement is evident from case law that the requirement is essentially formal, i.e. that the wording is formulated in a general manner.[56] In accordance with the view of the Legislative Council, the Supreme Administrative Court considered that the wording of the law is general. However, assessing who is actually concerned, the court came to a different conclusion than the Legislative Council. The court considered the provisions of Chapter 17a, to concern an indeterminate group of agents, namely operators engaged in activities relating to the extraction of limestone in Sweden.[57] According to the Supreme Administrative Court,

[50] Introduced by law 2021:875, terminated by law 2021:876.

[51] 'Government's decision of 18 November 2021, M2021/01774, see also "Regeringens arbete med cementförsörjningen", https://www.regeringen.se/sveriges-regering/klimat--och-naringslivsdepartementet/regeringens-arbete-med-cementforsorjning/ (visited 07/08/2024).

[52] Supreme Administrative Court (*HFD*) case 7208-21 656-22, 7 December 2022.

[53] Supreme Administrative Court (*HFD*) case 7208-21 656-22, 7 December 2022.

[54] The Environment and Agriculture Committee Report (*Miljö- och jordbruksutskottets betänkande*), 2021/22:MJU7.

[55] Supreme Administrative Court (*HFD*) case 7208-21 656-22, 7 december 2022.

[56] Supreme Administrative Court (*HFD*) case 7208-21 656-22. See also RÅ 80 1:92 and RÅ 1999 ref. 76.

[57] Supreme Administrative Court (*HFD*) case 7208-21 656-22.

the fact that there is only one such operator and that the law has only been applied once did not constitute a breach of the requirement of generality and consequently, there was no reason to annul the government decision.[58]

Interestingly, the Legislative Council and the Supreme Administrative Court come to opposite conclusions regarding the generality requirement. The Supreme Administrative Court emphasizes case law confirming that the generality requirement is essentially formal. The Legislative Council, on the other hand, presumes that the generality requirement is not merely formal. The Supreme Administrative Court focuses on the wording of the legal rule in question while the Legislative Council makes a broader interpretation. It should be added that Cementa AB is actually mentioned in the government bill. Under the heading "Reasons for the government's proposal regarding entry into force and transitional provisions" the following is stated: "Cementa's concession for quarrying of limestone and water activities, which among other things involve the removal of emerging surface and groundwater in Slite on the island Gotland, expires on October 31, 2021. The legislative amendments therefore need to enter into force as soon as possible." (Our translation).[59]

Cementa then submitted a new application for a concession for continued and expanded quarrying activities for four years. It was examined by the Land and Environment Court, which granted the concession in December 2022, covering continued and expanded quarrying activities at the Västra brottet and the Filehajdar quarry.[60]

Would there have been a different outcome if nature in Sweden had been granted constitutional protection as a legal subject with its own rights? The answer is that, in this particular case it might not have made any difference because of the political interventions. The courts followed the law, i.e. environmental considerations were taken into account. But when the highest court, the Land and Environment Court of Appeal rejected Cementa's application, the government proposed a temporary law to circumvent the court's decision. The law was subsequently adopted by the Riksdag. Although there were clear rules on environmental protection in the Environmental Code and in the Swedish constitution, economic interests weighed so heavily that an exception was deemed necessary. The politics took precedence over the law.

Similar considerations have been made regarding iron ore mining in Kallak (Kallak K No. 1). Despite massive criticism from nearby Sami villages, the Sami Parliament, UNESCO, the County Administrative Board of Norrbotten, the Church of Sweden and other important organizations, the government announced the processing concession on March 22, 2022.[61] Then-minister Karl Petter Thorvaldsson stated that it is necessary to open new mines in Sweden to cope with the green transition by 2045. This is not the first time that Norrland has played a central role in Sweden's economic development. In his book *Framtidslandet*, environmental historian Sverker Sörlin describes the shifting visions and interests that met in the exploitation of the

[58] Supreme Administrative Court (*HFD*) case 7208-21 656-22.

[59] Government Bill, prop. 2021/22:15 p. 40. In the original Swedish version: "Cementas tillstånd till täkt av kalksten och vattenverksamhet som bl.a. innebär bortledning av uppkommande yt- och grundvatten i Slite på Gotland upphör att gälla den 31 oktober 2021. Lagändringarna behöver därför träda i kraft så snart som möjligt."

[60] Land and Environment Court (*Mark- och miljödomstolen*), M 2724-22, 13 December 2022.

[61] Geological Survey of Sweden (*SGU*), "Regeringen beviljar koncession för Kallak", https://www.sgu.se/om-sgu/nyheter/2022/mars/regeringen-beviljar-koncession-for-kallak/ (visited 07/08/2024).

North during industrialization.[62] The same issues are being raised in the wake of the green transition. In particular, mining in Kallak comes into conflict with reindeer husbandry. While the decision includes conditions to protect reindeer herding, representatives of the Sami community see the decision as a blow to Sami culture.[63] If nature would have rights of its own, the decisive factor would be whether and, if so, how such rights would be formulated and even more importantly, how the rights could or would be limited. In the Cementa example it was not the balancing of interests in the court cases that was decisive. The balancing was taken out of courts and instead the balancing act took place on the political level. Nonetheless, the introduction of rights for nature might contribute to a clearer and stronger framework for the legislator.

The Cementa and Kallak K No. 1 cases are examples of how constitutional rules protecting the environment, climate and indigenous peoples' rights can be set aside by politicians – government and parliament – when these rights threaten industrial and political prioritizations.

Rights of Nature and indigenous people

The idea of rights of nature is strongly inspired by the view of the nature-human relationship in indigenous knowledge and practices.[64] When translated into a legal context, it has much in common with the conceptualization of indigenous people's rights, in particular by questioning the distinction between humans and nature. Indigenous culture is strongly linked to the land through subsistence and traditional economic activities. Like the rights of indigenous peoples, the rights of nature can come into conflict with other societal interests, not least large economic interests. One example of such a collision is the Per Geijer deposit in Kiruna, which was widely publicized at the start of Sweden's EU presidency. The metals are considered essential for Sweden and Europe in the green transition.[65] The metal deposit is located on the reindeer grazing lands of the Gabna Sami village. Gabna is a mountain Sami village that has been severely affected by LKAB's mining operations for more than a century. If the new deposit starts to be mined, the last remaining migration route between the reindeer pastures will be cut off. If reindeer herding disappears, it will have serious consequences for Sami culture and the Sami language.[66]

In the case of mineral exploitation in Norrland, Sami rights are juxtaposed with economic growth, jobs and the green transition. As described earlier, the idea of nature's rights has many common features with indigenous rights. In Sweden, Sami reindeer herding, hunting and fishing often coincide with sustainable development and other values. In Sweden, the Sami have been recognized as an indigenous people with the right to special cultural treatment under international law since 1977, which has subsequently been confirmed by the Riksdag on a number of occasions, for example in connection

[62] Sverker Sörlin, *Framtidslandet*, Bearbetead och utökad nyutgåva (Luleå: Teg Publishing, 2023).

[63] Sveriges Natur, "Regeringen beviljar gruvbrytning i Kallak", https://www.sverigesnatur.org/aktuellt/regeringen-beviljar-gruvbrytning-i-kallak/ (visited 2023-12-19).

[64] Joshua C. Gellers, *Rights for robots: artificial intelligence, animal, and environmental law* (Milton Park, Abingdon, Oxon: Routledge, 2021), p. 104.

[65] https://lkab.com/press/europas-storsta-fyndighet-av-sallsynta-jordartsmetaller-nu-25-procent-storre-idag-tas-forsta-steget-i-kritisk-provning/ (visited 15/12/2023). See also "Jättefynd av sällsynta jordartsmetaller i Kiruna", SR 12 Januari 2023. https://sverigesradio.se/artikel/lkab-har-gjort-jattefynd-av-sallsynta-jordartsmetaller-i-kiruna (visited 07/08/2024).

[66] "Här ställs kampen om samebyns framtid på sin spets", DN, 10 January 2023, https://www.dn.se/sverige/har-stalls-kampen-om-samebyns-framtid-pa-sin-spets/ (visited 07/08/2024).

with the adoption of the Council of Europe's Framework Convention for the Protection of National Minorities.[67] The rights of the Sami are enshrined in the Swedish constitution, IoG 1:2 para. 6: "The opportunities of the Sami people and ethnic, linguistic and religious minorities to maintain and develop their own cultural and social life shall be promoted."[68] This wording is a result of the 2010 constitutional reform and was intended to confirm the special status of the Sami people in Sweden. In addition, reindeer husbandry has special protection in IoG 2:17 para. 2, an exception to the main rule on freedom of trade in IoG 2:17 para. 1. These provisions thus potentially include indirect protection for the environment, the climate, sustainable development and a good environment for future generations. Such indirect protection consists in a belief that the Sami people have a different and "more environmentally friendly" approach to nature and lifestyle than the majority society. The idea is that when – or if – their rights are respected, nature is also respected and protected. So far, no government has managed to resolve the issue of Sami land rights. That is why the issues have continued to end up in the Supreme Court.

In a recent Swedish decision, Girjas Sami village against the State from January 2020, for the first time, and contrary to the provisions of the Swedish Reindeer Husbandry Act (1971:437), a Sami village was granted exclusive fishing and small game hunting rights, including the right to control the lease of those rights without the consent of the State on the Sami village's reindeer grazing lands. The court's decision is based on the concept of protracted use and the historical doctrine of immemorial prescription. To support the argumentation, the court makes use of innovative interpretations of both constitutional and international law provisions concerning the opportunities of the Sami people and the rights of indigenous people's.[69] The court claims that the introductory provisions of the constitution in the IoG 1:2, para. 6, contrary to what constitutionalists traditionally claim – that the first chapter is merely a declaration of objectives – the provision also has practical significance when weighing opposing interests against each other.[70]

Furthermore, the court finds support for its interpretations in the ILO Indigenous and Tribal Peoples Convention No. 169[71], a convention which is not ratified by Sweden. Regardless of this fact, the court establishes that parts of the convention now constitute general principles of international law, relevant for the case.[72]

The Girjas case constitutes a considerable development in the field of Sami law. As of today, the future significance of the case is however unclear. Shortly after the ruling, in May 2020, the Government appointed a parliamentary committee, the Reindeer Land Committee (*Renmarkskommittén*) with the assignment of creating a long-term sustainable solution to the issues. In an interim report from June 2023 titled Hunting and Fishing in Reindeer Grazing Land (*Jakt och fiske i renbetesland*), it is proposed to clarify that the prohibition on leasing hunting and fishing

[67] Government Bill, prop. 2009/10:80 p. 189. See also the Culture Committee's Report, KrU 1976/77:43, p. 4, and Government Bill, prop. 1976/77:80 p. 16.

[68] In the original Swedish wording: "Samiska folkets och etniska, språkliga och religiösa minoriteters möjligheter att behålla och utveckla ett eget kultur- och samfundsliv ska främjas."

[69] NJA 2020 p. 3.

[70] NJA 2020 p. 3.

[71] ILO 169, adopted 27 June 1989, https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRUMENT_ID:312314 (visited 07/08/2024).

[72] For a thorough analysis of the Girjas case, see Christina Allard & Malin Brännström, "Girjas Reindeer Herding Community v. Sweden: Analysing the Merits of the Girjas Case", *Arctic Review on Law and Politics*, Vol. 12 (2021) 57–69, DOI https://doi.org/10.23865/arctic.v12.2678.

rights in the Reindeer Husbandry Act does not apply in relation to a Sami village that, according to a Supreme Court Ruling, has a stronger right to hunting and fishing than the State.[73] The interim report has caused division in the Government.

Nature's rights – a strange bird?

Introducing rights for new entities such as nature is complex. It challenges the traditional view of what rights are and who or what can have rights. The rights of nature require a change in the way we think about nature and the environment. Perhaps we are currently in a time of change. New rightsholders and new types of rights have emerged at different periods in history: the elimination of race discrimination, the rights of women, children, and indigenous peoples, persons with disabilities. These new rights were all subject to hard resistance. In order to understand the implications of giving nature rights, shifting the status of nature from object to subject and rightsholder, lessons can possibly be learned from examining the previous rights struggles. What were the major objections and obstacles, and what were the factors that promoted the eventual inclusion of new rights holders? Are there remaining obstacles after the adoption and implementation of the rights? Are there parallels with nature's rights, and are there major differences?

Realizing rights of nature challenges fundamental values in a liberal market economy. One major challenge is the likely interference with property rights. The challenge lies both in the legislative, implementation and application phase. The formulation and implementation therefore require clarity in the wording of the law and clear rules of interpretation, not least on how to weigh opposing against each other. This kind of conflict can manifest itself not only when different rights are conflicting with each other, but also when there is a conflict between different rightsholders claiming the same right. In Swedish constitutional law there is currently no guidance on how to balance this kind of clashing interests.[74] Also, realizing rights of nature gives rise to a host of complex issues concerning representation. Who should represent nature? How should representatives of nature be appointed? How to safeguard that the persons appointed to or claiming to represent nature act really act in the best interest of nature? and not in self-interest? This raises complex and conflicting issues of representation.

In this article, we have discussed both direct and indirect protection of nature, the environment, and climate. Direct protection refers to when nature, the environment, or the climate are explicitly mentioned in constitutional and environmental provisions, as in IoG 1:2 para. 3. Indirect protection refers to the aims and consequences of the application of various legal rules, where nature, the environment or the climate are not the explicit target. One example that we have discussed in this article is Sami law. Environmental protection can be a positive side effect of protecting Sami culture and Sami use of land and water, ways that are much less exploitative of nature.

An important aspect of environmental cases in general and which is highlighted in the cases we have discussed in this article, is the relationship between law and politics. In the Cementa case, the Government stepped in and legislated when the courts rejected company's application

[73] Swedish Government Official Report, SOU 2023:46 *Jakt och fiske i renbetesland. Delbetänkande av Renmarkskommittén*, p. 550.

[74] See Karin Åström & Victoria Enkvist, "Vem får mest rätt? – om konsten att beakta rättighetsskyddet i mål med flera rättighetshavare", *Europarättslig tidskrift* 2022, pp. 415–436.

for continued and expanded limestone mining. In the Girjas Case, the Supreme Court's ruling in favor of the Sami reindeer community represents a significant change in Swedish Sami law. Also in this case the Government stepped in, by appointing a parliamentary committee to amend the legislation set aside by the court. When it comes to sensitive and contentious issues such as society's need for and production of cement, or important minerals deemed vital for the green transition, political leaders may initially be reluctant to take a position on the issues. This has led to the issues being decided in court instead. However, as illustrated in this article, when a court decision based on law, including the constitution, was not considered satisfactory from a political perspective, it resulted in direct political interventions. There is reason to believe that the same phenomenon would occur, even if rights of nature were given constitutional protection. Notwithstanding these difficult challenges, such a legal framework may still have a transformative value.

Strong societal and economic interests such as the green transition, Swedish industry, strengthening the rural parts of Sweden, and new jobs, have proven to be highly valued when balanced against with climate and environmental protection. Stone drew attention to the conflicting interests in environmental cases as early as in 1972. He proposed to strengthen the position of nature through the "unthinkable" thought of making parts of nature or ecosystems legal persons with rights. However, giving rights to nature entails many challenges. Either way, it is our belief that giving nature a stronger legal and political position involves finding solutions and compromises that are politically accepted *and* starts a shift in balance making it possible for nature to assert itself against powerful industrial interests. We can only agree with Stone's dark prophecy: if we do not succeed, nature will disappear "in a quantitative compromise between two conflicting interests".[75]

[75] Stone, "Should Trees Have Standing?", p. 461.