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Environmental Justice in the European Union's Strategic Environmental Assessment Procedure – Lessons from Sweden's Implementation

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Acknowledgements

Before introducing my thesis on people of colour and environmental racism, I find it important to note that I am white. I do not intend to speak on behalf of marginalised communities but rather to amplify their voices and include their experiences in the EU Strategic Assessment procedure. Thereby, the dissertation is not meant to discredit the achievements made by BIPOC, but to emphasise ways of achieving more equity in environmental decision-making. Therefore, my acknowledgements go to all the inspiring activists and advocates, who have contributed to the movement, such as Benjamin Muhammad, Robert Bullard, Kimberly Crenshaw, Sophie Marjanac, Odaria Finemore, Yessie Mosby, Tessa Khan, Imeh Ituen, Leona Morgan, Emilia Roig, and so many more.

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Abbreviations

BIPOC	Black, Indigenous and People of Colour
CBD	Convention on Biological Diversity
CIEL	Centre of International Environmental Law
CJEU	Court of Justice of the European Union
CAB	County Administrative Board
CRJ	(United Church of Christ) Commission for Racial Justice
EA	Environmental assessment
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EJM	Environmental Justice Movement
ER	Environmental Report
EU	European Union
ILO	International Labour Organisation
NEPA	National Environmental Protection Act
NEJAC	National Environmental Justice Advisory Committee
NGO	Non-governmental Orgnisation
PEJ	Principles of Environmental Justice
PBA	Planning and Building Act
POCEL	National People of Colour Environmental Leadership

PPP	Policies, plans and programmes
SEA	Strategic Environmental Assessment
TFEU	Treaty on the Functioning of the European Union
UCC	United Church of Christ
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNECE	United Nations Economic Commission for Europe

Abstract

While the European Union's Strategic Environmental Assessment (SEA) Directive strongly emphasises the importance of procedural justice in environmental matters, it has not yet explicitly called for the inclusion of Environmental Justice concerns. Thereby, the Directive seems to neglect inequities in environmental decision-making, which are often faced by marginalised groups. This potential lack of recognition requires closer examination of the SEA Directive and the underlying procedure through a lens, which acknowledges such inequities. In order to bring Environmental Justice to the SEA Directive and procedure, this thesis elaborates on the concept of Environmental Justice, as well as its development from a grassroot movement to a globally recognised concept. It further attempts to illustrate to what extent Environmental Justice concerns have been considered in the SEA Directive and procedure, as well as its implementation in Sweden. To that end, the incorporation of interests of Roma and Saami in Sweden will be assessed, by reviewing the SEA procedure under the Swedish Comprehensive Plan. In addition, it proposes which principles need to be adopted, adapted, and applied to dismantle discriminatory environmental decision-making within the European Union and its Member States.

Chapter 1 – Introduction

1.1 The Strategic Environmental Assessment Directive

Prior to the implementation of plans and programmes with likely effects on the environment, the European Union (hereinafter: EU or Union) requires the conduction of assessments to determine the environmental effects of such measures.[1] The Directive 2001/42/EC (hereinafter: Strategic Environmental Assessment Directive or SEA Directive) was introduced to enhance efforts of the EU in the environmental assessment procedure on an institutional level.[2] While its main objective is to achieve a high level of environmental protection, it also calls for sustainable development,[3] thereby requiring decision-makers to additionally consider social and economic needs and interests.[4] To effectively define such, the SEA Directive grants procedural rights to the public concerned, such as access to information, and the right to consult with decision-makers.[5] Despite the SEA Directive's efforts to provide better access to the procedure, it seems to neglect inequities in environmental decision-making, which are often faced by marginalised groups.[6] Therefore, it is important to look at the SEA Directive and the underlying procedure through a lens, which acknowledges such inequities. The chosen lens for this approach is the concept of Environmental Justice.

1.2 Theoretical framework: Environmental Justice

Environmental Justice, other than the name suggests, does not concern justice for the environment, but rather justice for people, who are or have been deprived of a healthy

[1] Environmental Assessment of plans, programmes and projects: Rulings of the Court of Justice of the European Union (European Commission, 20 October 2020) KH-02-20-934-EN-N, 7.

[2] Directive 2001/42/EC on the assessment of effects of certain plans and programmes on the environment [2001] OJ L 197/30, preamble.

[3] *Supra*, art 1.

[4] Glasson, J., Therivel, R., and Chadwick, A. Introduction to Environmental Impact Assessment. 4th edition. Routledge 2012, 97.

[5] Directive 2001/42/EC, arts 3(7) and 6(2)

[6] Ituen, I., Tatu Hey, L., "Kurzstudie: Der Elefant im Raum - Umweltrassissmus in Deutschland" (translated: short study: The elephant in the room - Environmental racism in Germany) (2021) Heinrich Boell Stiftung, 9.

environment.[7] Such people often belong to already marginalised groups, such as Black, Indigenous and People of Colour (BIPOC), Sinti and Roma, women, people with disabilities, refugees, and others.[8] For Environmental Justice advocates, the point of departure is that nature cannot be shared equally if people are not treated equally.[9] Thereby, the concept departs from the dualistic premise of Western philosophical thinking, which separates human from nature throughout modernity.[10] Instead, Environmental Justice acknowledges the need to protect the environment as a shared unit, essential to human life.[11]

The concept of Environmental Justice originates from a grassroot movement protesting against the disproportionate environmental impacts on people of colour and low-income communities in the United States.[12] While the movement is said to have its beginnings in the 1960's,[13] it is important to note that it has strongly been shaped by the experiences of Indigenous peoples, who have fought for access to the environment for much longer.[14] Originally, representatives of the Environmental Justice Movement (EJM) criticised the disproportionate placement of environmentally harmful installations, such as (toxic) waste sites near communities of colour.[15] The more the movement grew, the more its scope broadened to examine unjust treatment in other areas, which eventually lead to the People of Colour Environmental Leadership (POCEL)

[7] Cole, L., and Foster, S., *From the Ground up – Environmental Racism and the rise of the environmental justice movement.* New York University Press 2001, 16.

[8] Ituen and Tatu Hey (2021), 3; Report "Why the European Green Deal needs Ecofeminism: Moving from gender-blind to gender-transformative environmental policies" (European Environmental Bureau, 16 July 2021), 6.

[9] Principles of Environmental Justice, preamble.

[10] Davies, M., *Asking the Law Question.* Thomson Reuters 2009, 452.

[11] Newton, D, *Environmental Justice: A reference Handbook.* 2nd edition. Contemporary World Issues 2009, 21.

[12] Cole and Foster (2001), 17.

[13] *Supra*, 19.

[14] *Supra*, 26.

[15] Dr Benjamin F Muhammad cited in R Bullard, "The Environmental Justice Movement Comes of Age," *The Amicus Journal, National Resources Defense Council* (Spring 1994), 32, cited in Hatim, M., "Development of a Strategic Environmental Justice Assessment Methodology (SEJAM)" Dissertation submitted in partial fulfilment, (January 2001) *Bell & Howell Information and Learning Company*, 18.

Summit, and the introduction of the Principles of Environmental Justice (PEJ).[16] Partially inspired by the Civil Rights Movement,[17] the Environmental Justice Movement argues that institutional discrimination (for the EJM, the focus was primarily on racism) creates an uneven distribution of environmental benefits and risks, which reinforces the marginalisation of already-marginalised communities.[18]

While the concept has been indoctrinated in the United States, the European Union has given Environmental Justice rather little notice.[19] The term "Environmental Justice" is mainly associated with access to environmental decision-making, therefore focusing on procedural justice, rather than the equitable access to the environment.[20] So far, neither the European Parliament, nor the European Commission have provided a definition for the term.[21] Therefore, the aim of the dissertation is to discuss the potential presence of Environmental Justice concerns in EU law, more specifically in the SEA Directive. Due to its decentralised system, which provides much discretion to local and regional authorities, the Swedish implementation of the SEA Directive is being assessed. Throughout the dissertation, Environmental Justice is

[16] People of Colour Environmental Leadership Summit Proceedings (Washington D.C., October 1991), accessed via <http://rescarta.ucc.org/jsp/RcWebImageViewer.jsp;jsessionid=D28E4F3E549F27964B50FF5FA393CE00?doc_id=32092eb9-294e-4f6e-a880-17b8bbe02d88%2fOhClUCC0%2f00000001%2f00000070>

[17] Newton (2009), 22.

[18] Cole and Foster (2001), 55.

[19] Krämer, L. "Environmental Justice and European Union Law" (2020) 16 CYELP 1, 8.

[20] An example for this is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter Aarhus Convention), which provides individuals, as well as NGOs with strong procedural rights in environmental matters, *see* Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) 2161 UNTS 447, arts 4, 6,

[21] The term has not been defined on neither the Commission's nor the Parliament's official website, see European Commission, official website, 2020 <https://ec.europa.eu/search/?QueryText=%22environmental+justice%22&op=Search&swlang=en&form_build_id=form-PJy2oTPOossTbbe1P08xyzoVyIbczyVL6A2EziQrWOI&form_id=nexteuropa_europa_search_search_form> last accessed 16 March 2022; European Parliament official website, 2022 <https://www.europarl.europa.eu/portal/en/search?planet=_all&searchQuery=%22Environmental+Justice%22> last accessed 16 March 2022.

discussed in connection with its potential to contribute to the SEA procedure. Therefore, it refers to the acknowledgement of BIPOC communities being subject to disproportionate impacts of environmental plans and programmes, and the utilisation of all available means to reduce such inequities. In doing so, reference is made to the different dimensions of Environmental Justice, which are distributive, procedural and recognitive justice.[22]

1.3 Purpose and research question

While putting much emphasis on the protection of the environment and on sustainable development, the SEA Directive has not explicitly incorporated the concept of Environmental Justice.[23] Primarily, the Directive functions as a tool to provide decisionmakers with all necessary information, including stakeholder input, thereby prioritising procedural justice.[24] However, as is explored throughout the paper, procedural justice only constitutes one of three dimensions (the other ones being distributive and recognitive), which need to be considered in environmental decision-making.[25] While access to justice is essential for just decision-making, it has certain limitations, for instance when stakeholders do not have the resources to participate in the assessment procedure.[26] Therefore it is important for public authorities to further consider the distributive and recognitive dimensions of Environmental Justice when drafting environmental legislation. To that aim, the dissertation attempts to answer the research question "To what extent has the SEA Directive incorporated Environmental Justice considerations and how can such be implemented within EU Member States?" Given that the EU is above all an economic union, scholars observe that the extent to incorporate Environmental Justice, and thereby potentially hinder economic development, is rather little.[27] Simultaneously, the SEA

[22] Fraser, N, *Scales of Justice: Reimagining Political Space in a Globalizing World.* Columbia University Press 2009, 3.

[23] Directive 2001/42/EC, art 1.

[24] *Supra*, art 6(2).

[25] Fraser (2009), 3.

[26] This can be because of temporal, geographical, linguistic or several other barriers. Cole and Foster explore such barriers in Cole and Foster (2001), 123f.

[27] The incorporation of Environmental Justice considerations requires to rethink the status quo, including the desire for economic growth, which given the significant wealth gap, should not be prioritized to the same extent as equal access to the environment. With regards to the SEA procedure, such rethinking could entail to not only assess the environmental impacts of plans, programs, and projects, but also the need for development in the first

Directive has potential to resolve discriminatory structures by encouraging legislators to think more on the institutional, as opposed to local level.[28]

Throughout the dissertation, the principles of the Strategic Environmental Assessment Directive and procedure are outlined and correlated to the Principles of Environmental Justice. Furthermore, the development of Environmental Justice, as well as the SEA procedure are presented to gain an understanding of how differently the two U.S.-born concepts have been incorporated in the EU. In order to further zoom in on the promises of Environmental Justice in the EU, the Swedish implementation of the SEA Directive is examined more closely, by looking at the Comprehensive Plan, as codified in the Swedish Planning and Building Act, and to which extent it allows for the recognition of environmental inequities faced by Roma and Saami.[29]

1.4 Methodology

In order to answer the research question, it is not only required to look at the existing law (the SEA Directive), but also at the concept of Environmental Justice. Thus, the research is conducted in an auxiliary manner by assessing the SEA Directive through the Environmental Justice lens. To that aim, the concept of Environmental Justice is introduced by illustrating its history and the development in the United States in a descriptive manner, followed by an analysis of the dimensions of distributive, procedural and recognitive justice through quantitative literature review.[30] Additionally, resources, such as the People of Colour in Environmental Leadership Summit Proceedings, as well as reports, indicating the inequities faced by BIPOC in the U.S. are discussed. Given that rather little literature on Environmental Justice considerations in the EU exists, the literature dealing with the U.S. concept is used to

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place. This could cause for fewer projects to be conducted, which might in turn affect the economic development. Nevertheless, this is likely only the case, where it is of socio-environmental benefit, *see* Connelly, S., Richardson, T., "Value-driven SEA: time for a new perspective?" (2005) 25 *Environmental Impact Assessment Review*, 391-409, 403.

[28] Directive 2001/42/EC, art 1.

[29] Legislation Planning and Building Act (2010:900) Planning and Building Ordinance (2011:338) (Karlskrona, December 2018) Ref N. 127/2016, Chapter 3.

[30] Randolph, J., "A Guide to Writing the Dissertation Literature Review", (2009) 14(13) *Practical Assessment, Research & Evaluation* 1-13, 9.

examine the application of the SEA Directive in the EU. To that aim, the SEA Directive itself, as well as its guidance document, and literature on its implementation and application are subject to legal doctrinal research. [31] Finally, legal sources relating to environmental assessments are consulted and brought into context through legal doctrinal research, such as the Directive 85/337/EC (EIA Directive).[32] In order to provide for an example of the identification of Environmental Justice principles in the national implementation of the SEA Directive, the Swedish legislation on the Planning and Building Act, as well as legislation relating to the improved inclusion of minority groups (such as the National Minorities Policy) are reviewed through legal doctrinal research.[33]

1.5 Scope

The research on the potential inclusion of Environmental Justice concerns in the SEA Directive and procedure is meant to benefit anyone interested in and/or affected by Environmental Justice issues. For this, basic knowledge on environmental law and intersectionality is suggested. As a legal basis, the thesis covers the SEA, instead of the EIA Directive, as it is believed that the incorporation of Environmental Justice in the SEA Directive has more promise to tackle discriminatory practices on an institutional, rather than on a local level.[34] Furthermore, a proper application of the SEA Directive could strongly influence the application of the EIA Directive more likely than the other way around.[35] The final reason for exploring the SEA Directive is its lack of amendments since its introduction in 2001, which could be seen as a call for updating the Directive to include vital considerations, such as racial, socio-economic and other forms of discrimination. Despite the EU's focus on procedural rights in environmental law, the thesis extends the scope to include the comparably undermined dimensions of distributive, and

[31] Taekema, S., van Klink, B., "On the Border. Limits and Possibilities of Interdisciplinary Research" in Bart van Klink & Sanne Taekema (eds.), *Law and Method. Interdisciplinary Research into Law*. Tübingen: Mohr Siebeck 2011, 7-32, 19f.

[32] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] L175/40.

[33] Taekema and van Klink (2011), 19f.

[34] Ghanimé, L., Risse, N., Levine, T., and Sahou J., "Using SEA to Enhance Povertz Reduction Strategies" in Sandler, B., et al *Handbook of Strategic Environmental Assessment.* CRC Press 2010, 291-309, 304.

[35] McCracken, R. and Westaway, N., "The History and Context of the SEA Directive" in G Jones and E Scotford (eds.), *The Strategic Environmental Assessment Directive - A Plan for success?.* Hart Publishing 2017, 3-26, 5.

recognitive justice. The research is aimed at legal and political scholars with interest and/or experience in environmental assessments and Environmental Justice. While the topic can be applied to several other disciplines, the research mainly focuses on the SEA Directive and to what extent it has incorporated Environmental Justice concerns.

Due to the decentralised decision-making procedure in Sweden, examples for limitations and promises in applying the SEA Directive are discussed, including the consideration of Saami in the North, as well as Roma in the South of the country. The Saami are discussed, as they constitute the only Indigenous group in the EU and have special rights in addition to rights provided for minority groups in Sweden. Since the Saami have a distinct relationship to nature,[36] their influence in environmental decision-making can contribute significantly to the preservation of the environment, while providing equal access to it and its resources.[37] To provide an example for a non-Indigenous group in Sweden, Roma are discussed, as they constitute a minority group, which has been subject to environmental inequities throughout the EU.[38] The Swedish government has specifically recognised the marginalisation of the Saami and Roma in the Swedish Minority Policy, which is being elaborated on in Chapter 3 and 4. Since the thesis revolves around institutional change, the analysis will be more technical, and concentrate on the legislative, rather than executive aspect. Thus, the interests of Roma and Saami will be discussed on a broader level, without relating to specific cases.

The researcher's aim is not to criticise the lack of access to participation in decision-making but to discuss the need to additionally incorporate substantive Environmental Justice concerns in the environmental assessment procedure. Therefore, the intention is not to "villainize" public developers or the EU, but rather to showcase the potential for informing the SEA procedure by acknowledging all dimensions of Environmental Justice. Such considerations could contribute to changing the structures reinforcing the marginalization of BIPOC and other underrepresented

[36] Vassvik, T., "Standing Rock as a Place of Learning – Strengthening Indigenous Identities" (2019) Master thesis in Indigenous Studies The Arctic University of Norway IND-3904, 77.

[37] Arsenault, R., Bourassa, C., Diver, S., McGregor, D., and Witham, A., "Including Indigenous Knowledge Systems in Environmental Assessments: Restructuring the Process" (2019) *Global Environmental Politics* 19(3), 120-132.

[38] Heidegger, P., and Wiese, K., "Pushed to the wastelands: Environmental racism against Roma communities in Central and Eastern Europe" (2020) *European Environmental Bureau.*

communities.[39] Thereby, any reference to marginalised and minority groups is not meant to discredit the achievement of BIPOC communities in the environmental decision-making procedure, but rather emphasise the vital contribution they can play in providing more equitable access to the environment and to justice.

1.6 Structure

Following the introduction, the concept of Environmental Justice and the development thereof is described in Chapter 2. The history of the Environmental Justice Movement in the United States is briefly explained, including the introduction of the Principles of Environmental Justice during the People of Colour Summit in the U.S. Consequently, the different dimensions of justice (procedural, distributive and recognitive) as outlined by Bullard, Fraser and others are introduced, with the aim of creating understanding for the interconnectedness of the different dimensions and the need to incorporate them individually, as well as collectively in the SEA Directive.

The third chapter conceptualises the emergence of the SEA Directive and illustrates its connection to the preceding EIA Directive. In addition, the different phases of environmental assessments (screening, scoping, decision-making and monitoring) are described, and the procedural principles, such as transparency, reliability and public participation outlined. Consequently, the procedure and the principles are critically examined by reviewing the presence of Environmental Justice considerations.

In the fourth chapter, the Swedish implementation of the SEA Directive is used to exemplify how Member States use the rather high amount of discretion in implementing the Directive and how that affects the inclusion of Environmental Justice concerns. Thereby, the focus lies on the Comprehensive Plan, as codified in Chapter 3 of the Planning and Building Act, which is subject to the SEA procedure. The Comprehensive Plan is analysed with regards to the application of SEA principles and the inclusion of Environmental Justice concerns. Finally, the thesis concludes by summarising the main findings related to the (potential) acknowledgement of Environmental Justice in the SEA Directive, and therefore procedure.

[39] Cole and Foster (2001), 104.

Chapter 2 – Environmental Justice

2.1 Overview

This chapter introduces the concept of Environmental Justice, its historical development, and its different dimensions. It deals with the development of the Environmental Justice movement from several individual community protests to its legal indoctrination in the United States. As the movement has been primarily shaped by U.S citizens of colour, special regards is being paid to environmental racism and to the extent to which struggles of Black, Indigenous and People of Colour (BIPOC) have been acknowledged in environmental decision-making procedure. An important event for the movement was the meeting of Black, Latinx and Indigenous activists and scholars during the People of Colour Summit in Washington D.C., contributing to the introduction of the Principles of Environmental Justice (PEJ).[40] As the PEJ implicitly acknowledge the collective importance of the Environmental Justice dimensions, which are distributive, procedural and recognitive, they are used as an example for how communities of colour imagine a more just approach to environmental decision-making. While the EU strongly emphasises the importance of procedural rights of stakeholders (*inter alia* through legislation, such as the Aarhus Convention), the chapter is meant to showcase the importance of not focusing on just one dimension of environmental justice, but at all three of them simultaneously. The different dimensions are examined by providing examples of the considerations thereof in the United States, as well as the EU and Sweden.

2.2 History and Development of Environmental Justice

The term Environmental Justice gained much recognition due to the grassroot movement emerging in the United States during the 1980's.[41] Similar to the Civil Rights Movement, the Environmental Justice Movement (EJM) has a theological background and has been shaped by church-based organisations, such as the United Church of Christ (UCC).[42] The UCC has

[40] Cole and Foster (2001), 32.

[41] Hatim (2001), 15.

[42] The UCC is a Christian civil rights organisation, which analyses, reports and responds to social justice issues within and outside the U.S, *see* United Church of Christ, "The United Church of Christ" (United Church of Christ official website, 2022) < https://www.ucc.org/who-we-are/about/history/> last accessed 11 February 2022.

contributed much to the movement, *inter alia* by conducting research in the field of Environmental Justice, thereby collecting data on an issue, which had been neglected by federal agencies.[43] The organisation is also well known for its members, such as Robert Bullard and Benjamin Muhammad (formerly known as Benjamin Franklin Chavis Jr), who have played significant roles in the EJM.[44] Benjamin Muhammad, for instance, was a leading figure during the Warren County protests, which are often referred to as the starting point of the Environmental Justice Movement.[45]

2.2.1 Warren County Protests

In 1978, the state of North Carolina decided to authorise the construction of a landfill for contaminated soil, which was likely to have a significant impact on the environment and the health of the residing community.[46] The contaminated soil, which was meant to be stored near the community, contained Polychlorobiphenyl (PCB), whose manufacture was prohibited six years prior due to its severe health risks.[47] The "overwhelmingly low-income/minority community"[48] of Warren County had barely been involved in the decision-making process, and had little resources to oppose the decision.[49] However, once the landfill was constructed, the community mobilised and started protesting against the landfill by blocking the roads for the waste delivery trucks.[50] The mass protest, during which more than 500 protestors were arrested[51] (one of them being Benjamin Muhammad),[52] gained significant amount of attention from other communities, which would get inspired to protest for their community environments

[43] Newton (2009), 23.

[44] Hatim (2001), 18.

[45] Cole and Foster (2001), 20; Newton (2009), 1; Banzhaf, S., M., L., Timmins, C., "Environmental Justice: The Economics of Race, Place and Pollution" (2019) Journal of Economic Perspectives 33(1), 185-208, 185; Vasudevan, P. "Performance and Proximity: Revisiting environmental justice in Warren County, North Carolina" (2012) *Performance Research* 17(4), 18-26, 18.

[46] Newton (2009), 19.

[47] Vasudevan (2012), 19.

[48] Hatim (2001), 20.

[49] Newton (2009), 2.

[50] Ibid

[51] Vasudevan (2012), 19.

[52] Cole and Foster (2001), 20.

as well.[53] Shortly after the Warren County protest, communities across the U.S. were challenging decisions made by local administrations due to the severe impacts the project would have on the environment and consequently community health.[54] Similar to the residents of Warren County, the communities seldomly had any legal or activist background.[55] However, due to the concerning impacts on their community health, residents organised themselves to protest hazardous installations, either through acts of civil disobedience, legal action, or other means.[56] They also started communicating and networking with other communities facing similar problems, which led to the realisation that their issues were not local but institutional ones.[57]

2.2.2 Toxic Waste and Race Study, and the Cerrell Report

This realisation was put into writing in the 1987 Toxic Waste and Race Study (TWRS) by Benjamin Muhammad for the United Church of Christ's Commission for Racial Justice (CRJ).[58] The study found disproportions in the siting of uncontrolled toxic and commercial hazardous waste facilities, with such facilities being more likely situated near communities of colour.[59] Muhammad detected these disproportions by correlating the socio-economic, as well as racial outlook within a postal code with the amount of hazardous waste sites located in the same postal code.[60] One of the findings was that "three out of five largest commercial hazardous landfills in the United States were located in predominantly Black or Hispanic communities".[61]

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[53] *Supra,* 20.

[54] In their book, Cole and Foster provide several examples of the groups challenged these decisions, either through jurisprudence, but also through organising meetings with state officials, or through activist action, such as road blockages, *Supra,* 40, 42f, 64f, 95ff.

[55] *Supra,* 33.

[56] *Supra,* 44.

[57] *Supra,* 33.

[58] *Supra,* 55.

[59] Toxic Waste and Race in the United States – A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites (United Church of Christ Commission for Racial Justice (1987), xiii. The Report defines communities of colour, as the most prominent communities of colour in the U.S., which are Black, Latinx, Asian-American, Pacific Islanders and Native Americans, *Supra,* ix.

[60] Ibid

[61] *Supra,* xiv.

Critics of the study have argued that the correlation between communities of colour living near waste facilities could also be due to people of colour moving towards such sites, rather than the sites being built near the communities.[62] However, such criticism only reiterates the underlying issue, namely that people of colour have been put at a socio-economic disadvantage. Especially within the housing market, communities of colour and poor communities are often pushed towards the outskirts of cities, requiring them to relocate near industrial areas, where they face significant health risks.[63] At the same time, the TWRS found that race was a main variable to predict the location of a commercial hazardous or a toxic waste site, as communities of colour were twice as likely to live near hazardous waste sites as opposed to a healthy environment.[64] Therefore, income, and consequently the "incentive" to move near environmentally harmful sites, was not identified as the main reason for communities of colour living near such sites.[65]

The Cerrell Report, which was conducted three years before the TWRS, draws a similar picture, with the main difference being that the report was not drafted by a civil rights organisation, but by a firm advising the California Waste Management Board about the placing of waste-to-energy conversion plants.[66] The Report advised the board to locate the plants near "lower socioeconomic neighbourhoods", given that these communities are least likely to resist the installation.[67] Furthermore, the report found specifically rural,[68] at most high-school educated,[69] low-income neighbourhoods[70] with interest in the "significant economic benefits" of the plant[71] to offer the least resistance. This could be due to lack of interest in or understanding of the project (i.e. their educational background), the interest in the economic investment (i.e. because of low income and potentially high unemployment), or them living in rural areas (i.e. because

[62] Cole and Foster (2001), 60.

[63] *Supra*, 61.

[64] Toxic Waste and Race Report, United Church of Christ (1987), xv; Hatim (2001), 57f.

[65] Toxic Waste and Race Report, United Church of Christ (1987), iii.

[66] Political Difficulties Facing Waste-to-Energy Conversion Plant Siting (Cerrell Associates for California Waste Management Board (1984).

[67] *Supra*, 39

[68] *Supra*, 12f.

[69] *Supra*, 26.

[70] *Supra*, 17.

[71] *Supra*, 23.

of lower living costs). Additionally, the report advised against sites near communities, which are predominantly "college educated, and liberal".[72] Thus, the report advised administrations to target already marginalised groups, while framing the struggles of the groups as "lack of resistance" rather than "lack of institutional power". The profile drawn up by the report aligned with the profile of the communities living near the three largest waste dumps, which were "predominantly Latino and Catholic, with many farm-workers and most residents [with] few years of formal education".[73]

While not explicitly recommending the siting of waste plants near communities of colour, the report seems to ignore, if not perpetuate, racial inequalities. Especially when read in connection with the TWRS, the findings of the Cerrell report continue to paint the picture of the perpetuating marginalisation of BIPOC communities in the environmental decision-making process. Both reports illustrate the importance of acknowledging inherent disparities between marginalised and privileged groups. Although marginalisation can happen on several levels (race, income, gender, religion, education and other), it is important to view them through an intersectional lens, whereby communities of colour with a low-income background are more likely to be targeted than their white counterparts.[74] The significant effects on communities of colour have been defined as environmental racism by Benjamin Muhammad. He argued that:

> *"Environmental racism is racial discrimination in environmental policy making and the enforcement of regulation and laws, the deliberate targeting of people of colour communities for toxic waste facilities, the official sanctioning of a life-threatening presence of poisons and pollutants in [BIPOC] communities, and the history of excluding people of colour from the leadership of the environmental movement"*[75]

[72] *Supra, 16.*

[73] Cole and Foster (2001), 72.

[74] Cho, S., Crenshaw, K.., McCall, L., "Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis" (2013) 38(4), 785-810, 787.

[75] Ben Chavis (later: Benjamin Muhammad) Opening Remarks in POCEL Summit Proceedings (1991), 2.

The baseline for environmental racism is that environmental laws and policies have the capacity to reinforce racist structures by targeting communities of colour, either through isolation, separation, or exploitation,[76] or by failing to acknowledge the structural differences.[77]

2.2.3 Principles of Environmental Justice

Five years after the issuance of the TWRS, the United Church of Christ organised the First National People of Colour Environmental Leadership Summit in 1991 (hereinafter: POCEL Summit).[78] During the four-day Summit, more than 500 participants, including lawyers, doctors, activists and scholars, have gathered to share their experiences with and expertise on Environmental Justice issues.[79] The aim was to "identify key environmental policy questions from the perspective of people of colour leadership and to impact the decision-making process in public policy in the interests of Environmental Justice".[80] An important achievement of the Summit was the drafting of the Principles of Environmental Justice (PEJ).[81] The principles were not only introduced to raise awareness about environmental injustices in the U.S. by providing a working definition of the term,[82] but they further represent the intention to break free from colonial and segregating policies.[83]

[76] It is thereby extraneous whether the discrimination is explicit or implicit, *see* Toxic Waste and Race Report, United Church of Christ (1987), x.

[77] Newton (2009), 4.

[78] Cole and Foster (2001), 140.

[79] POCEL Summit Proceedings (1991), viii.

[80] *Supra*, vi.

[81] Principles of Environmental Justice.

[82] POCEL Summit Proceedings, ix.

[83] *Supra*, xiii.

WE, THE PEOPLE OF COLOR, gathered together at this multinational People of Color Environmental Leadership Summit, to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities, do hereby re-establish our spiritual interdependence to the sacredness of our Mother Earth; to respect and celebrate each of our cultures, languages and beliefs about the natural world and our roles in healing ourselves; to ensure environmental justice; to promote economic alternatives which would contribute to the development of environmentally safe livelihoods; and, to secure our political, economic and cultural liberation that has been denied for over 500 years of colonization and oppression, resulting in the poisoning of our communities and land and the genocide of our peoples, do affirm and adopt these Principles of Environmental Justice:

The Principles of Environmental Justice

1) Environmental Justice affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.

2) Environmental Justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.

3) Environmental Justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.

4) Environmental Justice calls for universal protection from nuclear testing, extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water, and food.

5) Environmental Justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.

6) Environmental Justice demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.

7) Environmental Justice demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation.

8) Environmental Justice affirms the right of all workers to a safe and healthy work environment without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards.

9) Environmental Justice protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care.

10) Environmental Justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration On Human Rights, and the United Nations Convention on Genocide.

11) Environmental Justice must recognize a special legal and natural relationship of Native Peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination.

12) Environmental Justice affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and provided fair access for all to the full range of resources.

13) Environmental Justice calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of color.

14) Environmental Justice opposes the destructive operations of multi-national corporations.

15) Environmental Justice opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.

16) Environmental Justice calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives.

17) Environmental Justice requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to ensure the health of the natural world for present and future generations.

Textbox 1. Principles of Environmental Justice (1991)

In drafting the principles, the delegates agreed to emphasise the "sacredness of Mother Earth" as the common good of humankind.[84] This approach represents the influence of Indigenous knowledge and perception of earth, not as an infinite resource for exploitation (which correlates to the Western perception of the planet),[85] but an essential part of – rather than subject to – human life.[86] Therefore, the point of departure for the principles is neither ecocentric nor anthropocentric. Instead, it diverges from the dualistic distinction between human and nature and instead recognises their inherent interconnectedness.[87]

Since the PEJ have been introduced by a non-governmental organisation, they are not legally binding. However, they provide a tool for legal scholars to challenge environmental legislation and to (re-)interpret it from the viewpoint of marginalised individuals and groups.[88] On a national basis, the PEJ have shaped US law and have influenced the amendments to the National Environmental Protection Act (NEPA): Advised by Bullard and Muhammad, the Clinton Administration issued the Executive Order 12898, which was registered three years after the POCEL Summit.[89] The Executive Order 12898 requires state agencies to consider social concerns, such as the disproportionate health effects on minority and low-income populations, in the environmental policy procedure.[90] When doing so, the agencies can coordinate and be advised by National Environmental Justice Advisory Committee (NEJAC).[91] The

[84] Principles of Environmental Justice, Principle 1.

[85] Davies (2017), 468.

[86] POCEL Summit Proceedings, 5 (Opening prayer by Rose Auger).

[87] Philippopoulos-Mihalopoulos, A., "Towards a Critical Environmental Law" in Philippopoulos-Mihalopoulos, A Law and Ecology. Taylor & Francis Group 2011, 18-38, 31.

[88] The PEJ have gained global recognition but have mainly been referred to when discussing environmental inequities between states, rather than between groups of people, *see* Newton (2009), 96. During the 2002 Earth Summit in Johannesburg, for instance, they were used as a framework during the adoption of the Bali Principles of Climate Justice, *Supra,* 100.

[89] *Supra,* 26.

[90] Executive Order 12898, 59 FR 7629 (11 February 1994), Section 1-101.

[91] The NEJAC played an essential role for the environmental assessment procedure, as it consisted of stakeholders from communities facing environmental threats, actors involved in the EJM, as well as members from industry and business. Their shared task was to advise the White House on matters of Environmental Justice, such as waste and facility siting, health, research, public participation, enforcement, and accountability, s*upra,* Section 1-102(b)(2).

indoctrination of Environmental Justice concerns in the NEPA illustrates that the entry point of Environmental Justice is more than the access to nature. It concerns the disproportionate distribution of environmental risks on marginalised groups, the obstacles for them in exercising their procedural rights, as well as the overall lack of recognition of such disproportions. These three dimensions are explored in the following section.

2.3 Dimensions of Environmental Justice

The categorisation of the different Environmental Justice dimensions has been made by Dr Robert Bullard. He differentiated between geographic, procedural, and social equity.[92] While geographical equity refers to the access to nature, procedural equity refers to the access to justice regarding environmental concerns, and social equity to the inclusion of marginalised groups' needs and interests in environmental policy-making.[93] Bullard's three-way differentiation was later taken up by scholars and has been rephrased as distributive (geographical), representative (procedural), and recognitive (social) justice.[94]

To better conceptualise the different dimensions, the following section refers back to examples from the U.S. and uses them as a guideline to better understand Environmental Justice. Consequently, the focus shifts more and more towards the European Union, and more specifically Sweden. Finally, the current state of the incorporation of Environmental Justice concerns in the EU and in Sweden will be explored. Thereby, special attention will be paid to the Roma, who have faced most severe environmental inequities throughout Europe,[95] as well as the Saami, whose special status as people is not entirely reflected in Swedish law.[96]

2.3.1 Distributive justice

The distributive dimension of Environmental Justice often seems to be the starting point for addressing Environmental Justice concerns, most likely because it deals with the direct

[92] Newton (2009), 5.

[93] Ibid

[94] Fraser (2009), 3. However, as will be elaborated on in Section 2.3.2, the thesis will use Bullard's definition of procedural justice, as it offers a broad interpretation to encompass representative, as well as participative justice.

[95] Heidegger and Wiese (2020).

[96] Rudloff, E., " The Duty to Consult Saami People with Special Reference to Environmental Matters" (2021) Master's Thesis in Joint Nordic Master Programme in Environmental Law JUR-3920-1 21V.

relationship between humans and their access to the environment.[97] Distributive justice relates to the distribution of environmental goods, including access to a healthy environment and its resources, as well as the distribution of environmental risks, such as pollution.[98] An example for the unjust distribution of environmental risks on an institutional level are the findings of the Toxic Waste and Race Study (TWRS) and the Cerrell Report, which showed that BIPOC communities throughout the U.S. have been targeted in the locating of toxic waste and other hazardous facilities and were therefore more likely to be exposed to significant environmental and consequently health risks (Section 2.2.2).[99]

An example for the unjust distribution of environmental goods and risks in the European Union is the Roma community.[100] They make up the largest minority in the EU and are continuously excluded from substantive and procedural environmental rights.[101] Thereby, substantive rights can be correlated to distributive, and procedural rights to procedural justice (as explored in Section 2.3.2). Similar to Black communities in the U.S., Roma in the EU have been subject to institutional racism, which has also taken the form of environmental racism.[102] This contributed to the isolation, segregation, and exploitation of Roma communities in European environmental law.[103] The distributive inequities faced by the group encompass the access to the environment, as well as its resources. For instance, access to water and sanitation is often severely limited, requiring the group to collect it from unsafe sources, thereby increasing the communities' health

[97] Schlossberg, D., "Reconceiving Environmental Justice: Global Movements and Political Theories" (2004) *Environmental Politics* 13(3), 517-540, 518.

[98] Laurent, E., "Issues in environmental justice within the European Union" (2011) *Ecological Economics* 70, 1846-1853, 1848.

[99] Toxic Waste and Race Report, United Church of Christ (1987); Cerell Report (1948).

[100] Newton (2009), 83f; Krämer, 3; Ituen and Hey (2021), 1; While constituting several communities, such as Roma Sinti, Kale, Gitano and Beas, they are often categorized as a homogenous group, named Roma. Thus, when referring to Roma, the author does not intend to generalize but rather builds upon the definition, as provided by Heidegger and Wiese, where Roma is used "without the intention to feed into the homogenization of different identities and socioeconomic realities. Rather, [it is used] to show how different communities who are considered ‘Roma’ or ‘gypsy’ by the majority population are similarly affected by recurring patterns of environmental racism", *see* Heidegger and Wiese (2020), 9.

[101] Heidegger and Wiese (2020), 6.

[102] Ibid; Ituen and Hey (2021), 8.

[103] Heidegger and Wiese (2020), 4.

risk.[104] Furthermore, their access to nature is limited in that many Roma communities have been evicted and displaced, and therefore needed to move near sites with significant health risks.[105]

Another community, whose access to the environment has been severely infringed upon, are the Saami people, who have been historically deprived of their land and its resources and were instead faced with environmental and health risks.[106] The majority of Indigenous groups considers nature as an essential part of their community, culture, tradition, and other aspects of their lives.[107] This view of the environment as being part of, rather than subject to human life, has also been recognised in the first principle of the PEJ, which "affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species".[108] Additionally, the third principle sets out the right to "ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things".[109] Read in connection, these two principles provide a strong foundation for the fair distribution, as well as the fair access to environmental goods (i.e. land and renewable resources). Nevertheless, the special relationship of Indigenous groups to land, and their right to use the environment in a sustainable manner is often overturned by national "development programmes".[110]

As is the case for a vast majority of Indigenous groups, the Saami, who are indigenous to the North of Norway, Sweden, Finland, and Russia,[111] also revolve much of their culture and

[104] *Supra,* 20.

[105] *Supra,* 24f.

[106] Allard, C., and Skovgang, S., *Indigenous Rights in Scandinavia – Autonomous Saami Law.* Ashgate Publishing 2015, 4ff; Vassvik (2019), 12; 28.

[107] Weir, J., *Country, native title and ecology.* ANU E Press 2012, 11. This also applies to the Saami, whose culture strongly revolves around the access to nature, including reindeer husbandry, *see* Rudloff (2021), 3.

[108] Principles of Environmental Justice, Principle 1.

[109] *Supra,* Principle 3.

[110] Samediggi, "Saami Parliament Viewpoint on Gallok/Kallak" (Samediggi, 14 February 2022) <https://www.sametinget.se/164992> last accessed 6 April 2022; Lawrence, R., O'Faircheallaigh, "Ignorance as a strategy: 'Shadow places' and the social impacts of the ranger uranium mine" (2022) *Environmental Impact Assessment Review,* 93; Vassvik (2019), 20; Raitio, K., Allard, C., Lawrence, R., "Mineral extraction in Swedish Sápmi: The regulatory gap between Sami rights and Sweden's mining permitting practices" (2020) *Land Use Policy* 99, 6.

[111] Rudloff (2021), 6. This territory is also known as Sápmi.

traditions around their close connection to nature.[112] This can take form in practices, such as reindeer husbandry, fishing, hunting, or gathering.[113] A most recent example, where the Saami are being limited in their access to nature in Sweden, are ongoing discussions of constructing a mine in Gallok/Kallak, located in Sapmi.[114] The *Samediggi* (the Saami Parliament) has strongly condoned the plans of the mine, as it is likely to interfere with reindeer husbandry, which it argues is of higher national interest, than the extraction of minerals.[115]

In Sweden, the rights of national minorities, such as Roma and Saami, are currently regulated under the National Minorities Policy (hereinafter: Minorities Policy or Policy),[116] based on the Government Bill on National Minorities in Sweden.[117] As a group, which often faces discrimination in Sweden, special efforts have been made to improve non-discrimination of Roma.[118] Additionally, Saami have been explicitly recognized as a people in the Swedish Constitution, and are therefore given special consideration with regards to their access to nature in accordance with their culture and traditions.[119] The considerations laid down in the Minorities Policy rather provide for the minimum consideration of Saami interests, while the interest, as voiced by the representatives of the people are further codified in other legal instruments.[120] An essential part of the Minorities Policy includes the consideration of health and social care.[121] As a healthy environment forms an important prerequisite for community health, it could be assumed that the policy includes the importance of fair access to a healthy

[112] Vassvik (2021), 77.

[113] Rudloff (2021), 2.

[114] Saami Parliament Viewpoint on Gallok/Kallak (2022).

[115] Ibid.

[116] Government Communication 2011/12:56 A coordinated long-term strategy for Roma Skr. inclusion 2012–2032 2011/12:56 (Stockholm, 16 February 2012).

[117] Government Bill on National Minorities in Sweden (1998/99:143), Committee Report 1999/2000: KU6, Parliamentary Communication 1999/2000:69).

[118] National minorities and minority languages – A summary of the government's Minority Policy" (Swedish Ministry for Integration and Gender Equality, July 2007).

[119] The Instrument of Government (1974:152), art 2.

[120] International Covenant on Economic, Social and Cultural Rights (1966); International Covenant on Civil and Political Rights (1966); United Nations Declaration on the Rights of Indigenous Peoples (2007); Reindeer Husbandry Act.

[121] Government Communication 2011/12:56, Section 8.

environment.[122] However, the focus lies on individual access to health care, and therefore on combating the symptom of Environmental Justice (i.e., poor health)[123] rather than the causes (i.e., unjust distribution of environmental and health risks).[124]

2.3.2 Procedural justice

In order to achieve the proper enforcement of distributive justice, individuals need to be involved in the decision-making process, and have the opportunity to appeal decisions, if they are affected by them.[125] This involvement is known as representative or participative justice. While closely intertwined, throughout the thesis representative justice will be differentiated from participative justice by means of literal interpretation. Therefore, participative justice will refer primarily to the relationship between the responsible authorities and the public concerned (e.g. communication and consultation with the public concerned), while representative justice will refer to the way in which stakeholder interests are represented in the decision-making procedure (e.g. the consideration of the needs and interests of the public affected) or the actual representation of the stakeholders in the procedure (e.g. individual representation, committees). To a certain extent, representative justice can be viewed as an amalgam of participative justice (Section 2.3.3.). Unless indicated otherwise, the terms will be summarised as procedural justice to refer to stakeholder involvement, both in terms of representation as well as participation.

An example for the lack of procedural justice in the U.S., is the decision-making procedure leading up to the Warren County protest. During the procedure, the affected stakeholders, who have been subject to the unjust distribution of environmental risks, have not been properly involved in the decision-making procedure.[126] The protests were a result of continuous attempts

[122] This has also been included in Article 191, which forms the basis for the European Assessment procedure, and which emphasises the need to include human health concerns in the protection of the environment, *see* Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C326/47, art 191.

[123] Government Communication 2011/12:56, Section 8.

[124] Section 7 of the Strategy deals with the Housing Situation and recognises the discrimination faced by Roma, which consequently lessens their access to good housing. However, the Strategy does not connect the discrimination in the housing sector, with the potential exposure to increased environmental risks, *supra*, Section 7; Arsenault et al (2019), 121.

[125] Schlossberg (2004), 526.

[126] Vasudevan (2012), 25.

to convince the state authority to refrain from constructing the landfill.[127] This was due to the suspected health risks associated with the contaminated soil, which has not been considered by the authority.[128] The community was not informed of the proposed project, nor were their concerns taken into consideration during the public consultation, during which the authority argued that the landfill would not constitute a significant health risk.[129] While the public consultation in itself formed part of achieving participative justice, it can hardly be categorised as such, since its primary purpose was to convince the affected public, rather than consult with them.[130] If the public concerned is not informed or consulted properly, they are likely to contest the decision, as has been the case for the citizens of Warren County. Since they were not heard in their public appeal, they decided to demonstrate against the landfill by blocking the roads.[131] Therefore, the protest cannot only be viewed as an example for the frustration felt by marginalised groups, who have been excluded from the decision-making process. It can further be seen as a bad-practice example of excluding stakeholders from the assessment procedure, which will in turn be less efficient. However, efficiency is a key objective of the assessment procedure (Section 3.4.3.1). While the focus should still be on the importance of stakeholder inclusion, the need for efficiency can be seen as a supporting argument for properly consulting with the public concerned.

In a best-practice scenario, the public of Warren County would have been informed and consulted. Otherwise, if their concerns had not been considered properly, they would have been given the opportunity to appeal the decision. The European Union has attempted to provide for such a legal framework, *inter alia* through the Aarhus Convention, which provides legal persons with "the right of access to information, public participation in decision-making, and access to justice in environmental matters".[132] Similarly, the environmental assessment (EA) procedure offers the public concerned to be involved in the decision-making process, as it requires Member States to ensure access to information and consultation with regards to plans,

[127] Cole and Foster (2001), 19.

[128] Ibid

[129] Vasudevan (2012), 25.

[130] Ibid.

[131] Netwon (2009), 2.

[132] Aarhus Convention, art 1.

programmes and projects with likely significant effect on the environment.[133] Since the Aarhus Convention has extended the right to further include NGOs,[134] which can act on behalf of the affected public,[135] it has in some way relieved BIPOC stakeholders from the responsibility to voice their concerns in person at every single instance. However, the representation through NGOs can also negatively affect the procedural rights of marginalised groups, as they could argue based on a purely ecological standpoint, thereby putting community struggles in relation to environmental protection.[136]

In addition to the participative rights introduced by the Aarhus Convention, the Swedish state has established the *Samediggi* (the Saami Parliament). The *Samediggi* is an important tool for representation of Saami concerns in several areas, such as the environment and access to natural resources.[137] Furthermore, as part of the National Minorities Policy, the Swedish government has included specific requirements for administrative authorities to involve minorities, where they might be affected by a local or regional decision.[138]

Although procedural rights are crucial for stakeholders, including affected BIPOC communities, they cannot contribute effectively towards achieving more justice for marginalised communities. If they were required to take action every time their access to a healthy environment is threatened, they would not have much time to do anything but appeal and protest. Furthermore, procedural justice tends to ignore the power disparities between the public institutions and the affected stakeholders.[139] Therefore, it is necessary to shift the focus from individual appeals to institutional reform, where the burden to strengthen Environmental

[133] Directive 85/337/EC, art 6(4); Directive 2001/42/EC, art 6.

[134] Aarhus Convention, art 2(4).

[135] C-240/09 *Slovak Brown Bear* (2011) ECLI:EU:C:2011:125, para 54.

[136] Such standpoints are problematic, as they often come from a priviliged view, where the access to a healthy environment is seen as a given, and therefore the primary focus is on the preservation of protected areas. However, this could cause for the decision-making authority to be persuaded to conduct projects with significant environmental impact near communities, who already suffer from severe environmental and consequently health risks, instead of a protected site, *see* Cole and Foster (2001) "Traditional Environmentalists", 28-31.

[137] Under Swedish law, rights of Saami are included in the legislation of the respective sector, such as the Forest Act or the Mineral Act, *see* Rudloff (2021), 40; 42.

[138] Government communication 2011/12:56, 17, Section 4.7.

[139] Cole and Foster (2001), 103.

Justice shifts from the stakeholders to the government.[140] The first step to do so is to recognise the institutional burdens faced by marginalised groups.

2.3.3 Recognitive justice

Recognitive justice fulfils the role of acknowledging the inequities faced by marginalised groups in the environmental decision-making process.[141] An example for this is the U.S. Executive Order 12898 (hereinafter: the Order), which requires state agencies to identify, address and act on social disproportions in environmental decision-making.[142] The Order achieves the recognition of distributive justice by acknowledging the "disproportionately high and adverse human health impacts or environmental effects on minority populations and low-income populations".[143] While encouraging public participation, the Order does not recognise aspects of procedural justice in environmental decision-making to the same extent as distributive justice aspects, since it does not refer to procedural burdens, especially those faced by marginalised groups.[144] Therefore, in addition to recognising the disparities, it is important to allow those, who are subject to the legislations, to be part of drafting it, as they can bring their own experiences and expertise, which is unlikely considered by comparably privileged decision-makers.[145]

The Principles of Environmental Justice (PEJ), as drafted by BIPOC, call for recognitive, distributive as well as procedural justice in environmental law (Section 2.3.4.).[146] Additionally,

[140] *Supra,* 104.

[141] Blue, G., Bronson, K., Lajoie-O'Malley, A., "Beyond distribution and participation: A scoping review to advance a comprehensive environmental justice framework for impact assessment" (2021) 90 *Environmental Impact Assessment Review, 1-9,* 2.

[142] Executive Order 12898, 59 FR 7629 (11 February 1994), Section 1-101.

[143] *Supra,* Section 1-102(b)(1).

[144] *Supra,* Section 1-103; Cole and Foster list the procedural burdens, such as lack of time, access to transport, linguistic barriers and others, *see* Cole and Foster (2001), 123f.

[145] Rudloff (2021), 1.

[146] An example for a more explicit recognition of procedural justice can be found in Principle 8, which "affirms the right of all workers to a safe and healthy work environment without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards.", *see* Principles of Environmental Justice, Principle 8. This Principle draws on the issue

other than the European approach, which primarily focuses on participative justice, the PEJ further calls for representative justice, which can be deduced from the emphasis on the need for more BIPOC in environmental decision-making,[147] as well as Principle 16, which stresses the importance of including the expertise and experience of communities as advocates for environmental justice.[148]

Another form of recognition can be found in Principle 11, which reinstates the importance to "recognise a special legal and natural relationship of Native Peoples [through legislation] affirming sovereignty and self-determination".[149] While some consider the establishment of the *Samediggi* as a first step towards recognising Saami as self-determined, the *Samediggi* is nevertheless still subject to state jurisdiction and not given the same amount of institutional power, i.e. to decide on environmental matters.[150] As a principle, when discussing recognitive justice, it is also important to look at the representative aspects, i.e. who has formulated the legislation. While attempts to include marginalised groups in the procedure are important and admirable, they can also be viewed as a means to distract such groups from changing the institutional barriers, which they are facing. The mine construction in Gallok/Kallak can be used as an example for the lack of consideration given to the *Samediggi* on a local level, which further calls for better consideration of Saami concerns on an institutional level, as their dissent of the construction has not been sufficiently considered by the municipality.[151] In addition to the Saami Parliament Act, Sweden has ratified the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognises the right of Indigenous people to self-determination.[152] However, the Declaration is not legally binding, leaving full discretion to the

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that the inclusion of marginalised stakeholders does emerge from an interest to consult, rather than an interest to persuade, *see* Cole and Foster (2001), 34; 48; 77.

[147] Principles of Environmental Justice, preamble.

[148] "Environmental Justice calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives." *Supra*, Principle 16.

[149] *Supra*, Principle 11.

[150] Rudloff (2021), 13.

[151] Saami Parliament Viewpoint on Gallok/Kallak; Ways to better incorporate Roma and Saami concerns in the SEA procedure are discussed in Chapter 4, dealing with the Swedish implementation of the SEA Directive.

[152] United Nations Declaration on the Rights of Indigenous Peoples (2007), UNTS 61/295, art 3.

state authority. Thus, the state recognition of a peoples' self-determination can be described as rather contradictory, as Saami would need state approval to exercise the right to self-determination. Especially Indigenous groups, who intend to live parallel to the state population,[153] should not be "granted" rights, but have their forms of law recognised and respected by states.[154]

With regards to the recognition of environmental injustices faced by Roma, there is comparably little legislation, which requires to take another look at the Minorities Strategy. In the instrument, Sweden has recognised several areas, where minorities are excluded, such as education, health, housing, and security.[155] However, the National Minorities Bill fails to acknowledge the institutional discrimination faced by the groups, and instead blames it on discrimination on the individual level.[156] Similarly, while the strategy intends to improve the access to health care, it fails to provide for potential reasons for disparities in health, which could be, e.g. due to unequal access to water and sanitation.[157]

2.4 Collective importance of the three dimensions

While each dimension is influential in achieving Environmental Justice, it is also important to look at their collective importance, as well as potential overlaps. For instance, representative justice can be viewed as an amalgam between participative and recognitive justice. This is due to the fact that representative justice concerns the recognition of marginalised groups as part of, rather than subject to the environmental decision-making procedure (therefore aligning with recognitive justice), as well as the inclusion thereof in the procedure (procedural justice). Before concluding the chapter, this final section discusses the overlaps between the different dimensions, by relating them to the Principles of Environmental Justice (PEJ). The implementation of the PEJ in state law through the consultation of BIPOC stakeholders is an example for representative justice, since the principles were drafted during a Summit organised

[153] Rudloff (2021), 1.

[154] "The scope of the Saami Parliament is limited by the fact that their powers are granted by states", *supra* 13.

[155] National minorities and minority languages (July 2007).

[156] This is also partially why the policy focuses on "improving the public image" of minorities, rather than removing institutional barriers, Ibid.

[157] Heidegger and Wiese (2020), 20.

and attended by BIPOC,[158] thereby representing the interests of the affected communities. Additionally, the PEJ also acknowledge the disparities faced by communities of colour, which is an indicator of recognitive justice. Since individual principles also concern the access to procedure,[159] as well as distributive justice,[160] the PEJ can be used as an example for the interconnectedness of the different dimensions, as well as an example for how they can be implemented collectively.

The PEJ concentrate on procedural justice in Principle 7, which "demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation",[161] as well as the "strict enforcement of principles of informed consent".[162] In addition, there are also considerations paid to representative justice (therefore relating to procedural and recognitive justice), as the Principles call for education based on BIPOC experiences and the "appreciation of [the] diverse cultural perspectives".[163] The principles relating to the recognitive dimension concern the affirmation of "the sacredness of Mother Earth and the interdependence of all species",[164] while the distributive dimension concerns the right to a healthy environment, its resources.[165] The overlap between the distributive and recognitive dimensions relates to concerns, which on the one hand take into account the need for equal distribution, and, on the other hand, recognise the socio-political inequities in environmental decision-making. Such concerns, often relate to

[158] Newton (2009), 26.

[159] Principles of Environmental Justice, Principle 7.

[160] *Supra,* Principles 3, 4, 6.

[161] S*upra*, Principle 7.

[162] *Supra,* Principle 13.

[163] *Supra,* Principle 16.

[164] *Supra,* Principle 1.

[165] "[EJ] affirms the right to be free from ecological destruction[,] mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things[,] calls for universal protection from nuclear testing, extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water, and food [and] demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production", *supra* Principles 3, 4, 6.

recognising past environmental inequities and trying to redistribute the access to a healthy environment to marginalised groups on a governmental,[166] corporate,[167] and individual level.[168] Therefore, the intersection between distributive and recognitive justice concerns implications of restorative and redistributive justice. Thereby, the former concerns the restoration of any harm done to an individual or a group (e.g. limited access to sanitation), and the latter the redistribution of resources, which have been taken away (e.g. Indigenous territory).[169]

Finally, the more general principles, which connect the three dimensions, are the need to conduct "public policy based on mutual respect and justice for all peoples, free from any form of discrimination",[170] and "the fundamental right to political, economic, cultural and environmental self-determination of all peoples".[171] Each principle should be applied with regards to the distribution of environmental goods, the access to the decision-making process, as well as the recognition of BIPOC needs and interests in implementing new legislation.

The graph below is meant to illustrate the interconnectedness between the three dimensions, as applied to the Principles of Environmental Justice.

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[166] "[EJ] protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care", *supra* Principle 9; "[EJ] must recognize a special legal and natural relationship of Native Peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination", *supra*, Principle 11; "[EJ] affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and provided fair access for all to the full range of resources", *supra* Principle 12.

[167] "[EJ] opposes the destructive operations of multi-national corporations[,] opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms, *supra* Principles 14, 15.

[168] "[EJ] requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to ensure the health of the natural world for present and future generations", *supra* Principle 17.

[169] Sowman, M., Wynberg, R., "Governance, equity and sustainability in sub-Saharan Africa" in Sowman, M., Wynberg, R. (eds) *Governance for Justice and Environmental Sustainability: Lessons across natural resource sectors in sub-Saharan Africa* Routledge 2014, 1-22, 9.

[170] Principles of Environmental Justice, Principle 2.

[171] *Supra*, Principle 5.

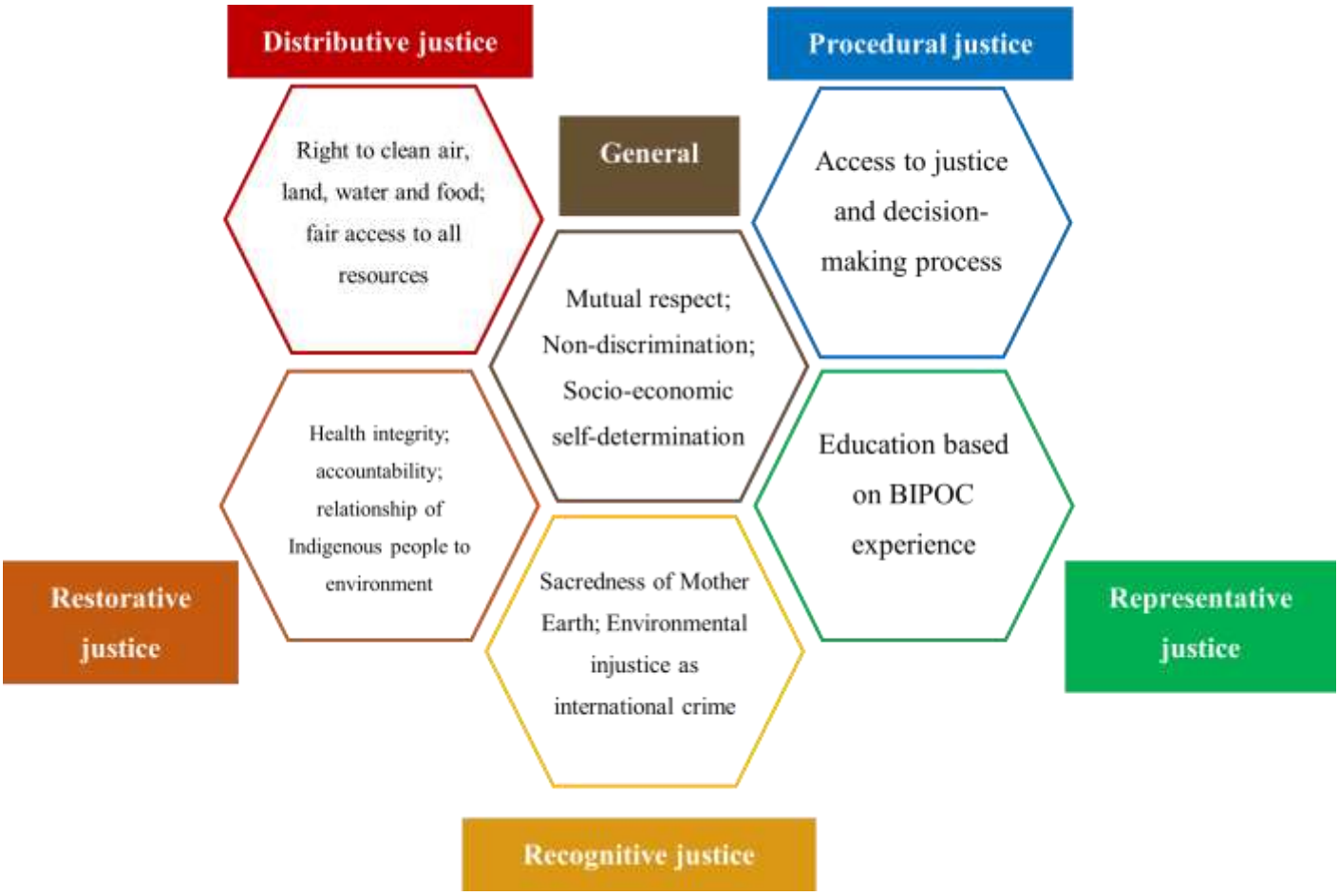

Figure 1 Interconnectedness between the three Environmental Justice dimensions

2.5 Conclusion

Environmental Justice concerns the access to the environmental decision-making process, the right to live in a healthy environment and the acknowledgement of the exclusion of marginalised groups from the environmental decision-making process. While the concept has been developed, and even indoctrinated in the United States, the European Union has been comparably reluctant, especially with regards to the collective implementation of the three dimensions of Environmental Justice (distribution, procedure, and recognition).

One could argue that the lack of European initiative to adequately implement the concept of environmental justice is part of the reason why Sweden has not made efforts to recognise the environmental inequities faced by marginalised groups, such as the Roma and Saami.[172] This

[172] Krämer (2020), 8.

becomes visible when examining the Swedish implementation of the Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) Directives in Sweden.[173] Both Directives lay down requirements for Member States to assess the environmental impacts of plans, programmes and projects. While environmental improvement is an admirable objective, the sole focus on the environment, without considerations of Environmental Justice, could further marginalise communities of colour. Since environmental injustices can only be identified when looking at the bigger picture, the following chapters discusses the inclusion of Environmental Justice concerns on a strategic level. To that aim, it elaborates on the extent to which the EIA as well as the SEA Directives entail or lack consideration of the dimensions of Environmental Justice.

[173] Rudloff (2021), 66.

Chapter 3 – Strategic Environmental Assessment

3.1 Overview

Looking back at the example of Warren County, the protests do not only provide an example for distributive, and procedural injustice. They also exemplify the need to consider social and environmental effects on a strategic level. The Warren County landfill constituted a single project at a specific site, which was likely to cause significant environmental impacts due to the contaminated soil.[174] This narrow scope, both geographically (specific site), as well as substantially (hazardous waste landfill) qualifies the proposed activity as a project. However, the landfill was the result of a nation-wide ban on polychlorinated biphenyls (PCB).[175] The objective of the ban was to reduce environmental and health risks from the effects of PCB throughout North Carolina.[176] As a result of the ban, manufacturers illegally dumped the waste near the North Carolinian coast, requiring the state authorities to move it to a more secure site, with their final choice being Warren County.[177] Had the PCB ban been subject to a strategic assessment, the legislators might have considered the environmental effects of the plan, i.e. the illegal dumping of the chemical, and introduced measures to avoid them, such as developing a sustainable disposal programme. In case of such measures, the contaminated soil would not have been dumped illegally, and the need for a landfill would not have been created in the first place.

The effect of the ban and the impact it had on Warren County illustrates the importance of considering the environmental and socio-economic impacts at an early stage of the decision-making process. The landfill has been subject to an Environmental Impact Assessment (EIA), which is meant to determine the significant environmental impacts of a project and to suggest alternatives. However, the project was a result of a plan, which has not been subject to an environmental assessment. The European Union has adopted a tool to conduct such an assessment at an earlier stage, which is the Strategic Environmental Assessment (SEA). The SEA allows for environmental considerations to be taken into account before implementing

[174] Vasudeva (2012), 19.

[175] Ibid

[176] Ibid

[177] Ibid

new legislation. Thereby, the assessment focuses primarily on the preservation of the environment, without contemplating the equal access thereto.[178] The applicable legal framework in the European Union, the EIA Directive and the SEA Directive, intends to improve environmental decision-making by consulting with stakeholders and considering potential impacts in a holistic manner.[179] By actively involving stakeholders and broadening the interpretation of environmental concerns, the EU legislation provides a promising framework for considering Environmental Justice concerns. However, the EU Environmental Assessment Directives do not explicitly mention Environmental Justice, which can be seen as failure to recognise the existence of environmental inequities in Europe, as well as the power dynamics between stakeholders and decision-makers within the assessment procedure.

In the following chapter, Environmental Assessments (EAs), as conducted by the EU, are discussed, which involves an overview of environmental impact assessments (EIAs), followed by an exploration of the complementarity between EIAs and SEAs (Section 3.2). While both procedures constitute subcategories of Environmental Assessments, they differ in scope (EIAs look at the individual, SEAs at the institutional level), and applicability (EIAs have been introduced earlier and are more commonly used).[180] Nevertheless, their main objectives and principles are closely related, and are discussed collectively in in Section 3.4 and Section 3.5. Due to the thesis' focus on institutional change, the primary legal basis is the Directive 2001/42/EC (SEA Directive). However, the Directive 85/337/EC (EIA Directive), is briefly introduced to allow for a better overview of the general principles of EAs, as well as the EA procedure in the European Union.

3.2 Environmental Impact Assessments

In the European Union, the SEA has emerged from the pre-existing conduction of EIAs.[181] EIAs are evaluations of proposed projects, which are likely to significantly impact the

[178] Directive 2001/EC/42, art 1.

[179] McCracken and Westaway (2017), 4.

[180] Glasson, J., Therivel, R., and Chadwick, A. *Introduction to Environmental Impact Assessment.* 4th edition. Routledge 2012, 302.

[181] *Supra,* 299.

surrounding environment.[182] The assessments are meant to determine to which extent the proposed activity could negatively impact the project site, and to suggest impact-mitigating alternatives.[183] The potential impacts and alternatives need to be documented in the Environmental Impact Statement (EIS).[184] While the definitions of "significant", "environment" and "impacts" might differ from jurisdiction to jurisdiction, certain characteristics are reoccurring. The use of "significant", for instance can insinuate the impact of the project on its own (individual impact), as well as in connection to other activities (cumulative impact).[185] The "environment" mainly constitutes the biophysical environment, as well as the flora and fauna relying on it,[186] with "impacts" entailing changes in soil, air, or water quality, effects on biodiversity, as well as climate change.[187] Thereby, the impacts considered include those, occurring during the operation of the project, but also during its construction and finalisation.[188] Given that humans are also reliant on the environment, concerns of people directly affected by the project (the public concerned) need to be taken into consideration in the EIA procedure.[189] Such considerations mainly relate to the impacts on the social (health, housing, lifestyle, culture, etc.) and economic (profit, employment, infrastructure, etc.) aspects of the project.[190]

As has been the case for Environmental Justice, environmental assessments originated in the United States: In 1969, Section 102 of the National Environmental Policy Act (NEPA) introduced the requirement for federal agencies to consider potential environmental impacts in

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[182] Environmental Law Guidelines and Principles 9. Environmental Impact 227 Assessment. Decision 14/25 of the Governing Council of UNEP, of 17 June 1987, cited from Westerlund, S., *Fundamentals of Environmental Law Methodology.* Version 0.7b. Uppsala University 2007, 326).

[183] Westerlund (2007), 322.

[184] *Supra,* 317.

[185] Glasson et al (2012), 392/96 *Commission v Ireland*, para 52.

[186] *Supra,* 15; 97.

[187] *Supra,* 6.

[188] *Supra,* 14f.

[189] *Supra,* 15.

[190] *Supra,* 97. While the criticism on EAs will be discussed in more detail later, it is important to note that such socio-economic factors tend to be used in favour of the project, thereby outweighing the potential environmental risks, which are also closely connected to social interests, such as health, *see* Enriquez de Salamanca, A., "Stakeholders' manipulation of Environmental Impact Assessment" (2018) 68 *Environmental Impact Assessment Review,* 10-18, 13.

the decision-making procedure.[191] NEPA instructs state agencies to draw up a statement listing the potential impacts of a project, possible alternatives as well as the balancing of short-term economic interest and the sustainable use of the environment.[192] The EIA gained increased recognition globally, including Europe, which led to the adoption of EC Directive 85/337 on the Assessment of the Effects of Projects with likely Significant Impact on the Environment (hereinafter: EIA Directive), and the consecutive amendments resulting in Directive 2011/92/EU and Directive 2014/52/EU.[193] The EIA Directive was introduced with the intention to harmonise environmental laws throughout Europe, while ensuring competition between Member States.[194] The EIA Directive further required the conduction of EIAs for public projects, which therefore extended the scope of NEPA, which only required EIAs for private projects. [195]

While the introduction of the EIA is often hailed as having surpassed the U.S. procedure, it has not incorporated concerns of Environmental Justice. This is especially concerning due to the nature of the EIA, which Cole and Foster describe as an ""announce and defend" approach" for the affected stakeholders.[196] The criticism derives from the late stage,[197] at which the assessments are conducted, as the project has either already been commenced, or thoroughly planned, while stakeholder input and the discussion of alternatives is rarely in the developer's interest. Therefore, as soon as affected stakeholders, such as marginalised groups, step forward to invoke their access to a healthy environment, they are seen as a nuisance, rather than consultancy peers.[198]

[191] McCracken and Westaway (2017), 5.

[192] The National Environmental Policy Act (1969), Section 102C (i)-(v).

[193] Directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124.

[194] Glasson et al (2012), 44.

[195] Enriquez de Salamanca (2021), 2.

[196] Cole and Foster (2001), 111.

[197] Implementation of Directive 2001/42 on the assessment of the Effects of Certain Plans and Programmes on the Environment accessed via <https://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf>, 1.

[198] Cole and Foster (2001), 111.

3.3 Strategic Environmental Assessment

While EIAs list the environmental impacts of individual projects, SEAs list the impacts of policies, plans and programmes (PPP).[199] Thereby, policies relate to (non-binding) objectives, plans refer to the execution of policies, and programmes to the execution of several projects (either simultaneously, or consecutively).[200] SEAs can be connected to EIAs through hierarchical ordering, called 'tiering', which requires the adoption of a hierarchy between different types of assessments. Thereby, policies constitute the first tier, plans the second, programmes the third and projects the fourth.[201] The former tiers give substance to the latter, while the latter specifies the execution of the former. Consequently, one can view SEAs as an institutional/macro/long-term EIA considering the cumulative impact of several projects and potential mitigating alternatives at an even earlier stage.[202] By attaching value to earlier stages than EIAs, SEAs broaden the temporal scope, as decision-makers are required to consider environmental impacts early on.[203] This allows for a more proactive, as opposed to reactive approach. They further extend the geographical scope from local projects in the EIA procedure to "areas beyond immediate locality".[204]

Following the successful introduction of EIAs by implementing the NEPA in the United States, and the EIA Directive in the European Union, the United Nations Economic Commission for Europe (hereinafter UNECE) adopted the Convention on Environmental Impact Assessment in a Transboundary Context (hereinafter Espoo Convention).[205] The Espoo Convention was introduced to mitigate the transboundary environmental impacts of proposed activities, thereby extending the application of EIAs to other states from "Europe, the Caucasus, Central Asia, as

[199] Glasson et al (2012), 300.

[200] Ibid

[201] Ibid

[202] *Supra*, 300f.

[203] Sheate, W., Byron, H., Dagg, S., Cooper, L., "The Relationship between EIA and SEA Directives, Final Report to the European Commission" (2004) Imperial College London Consultants, ENV.4./ETU/2004/0020r.

[204] Glasson et al (2012), 18; It has also been acknowledged by the European Commission when introducing the SEA Directive. In the SEA Guidance Document, it is stated that "[an EIA] takes place at a stage when options for significant change are often limited", *see* Implementation of Directive 2001/42, 1.

[205] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991).

well as Canada, Israel and the US".[206] The Convention requires state authorities to conduct assessments for projects with likely environmental impacts, such as "human health and safety, flora, fauna, soil, air, water," and other potential effects on the environment.[207] While Environmental Impact Assessments have already been codified in the U.S. and the EU, the Convention manifested an international consensus to contribute to the preservation and protection of the environment in a collective global manner, while focusing on the prevention of transboundary harm.[208]

In addition to the international recognition of EIAs, the Espoo Convention also contributed to the implementation of SEAs, by calling for a meeting of the parties to the Espoo Convention in Sofia in 2001.[209] This was the same year the Strategic Environmental Assessment Directive (hereinafter SEA Directive) has been implemented by the European Union, which has significantly contributed to the discussion of international strategic environmental assessments during meeting.[210] The result was that delegates decided to expand on the achievements of the Espoo Convention, by further requiring parties to conduct strategic assessments.[211] After another round of negotiations in Kiev in 2003, the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a transboundary context (SEA Protocol) has been implemented.[212] After having received 16 ratifications, the Protocol entered into force in 2010. Due to the important role the EU has played in its implementation, the SEA Protocol closely mirrors the SEA Directive, with one exception being the exclusion of policies in the SEA Directive (Section 3.3.1) Similarly to how the SEA

[206] Bonvoisin (2010), 167.

[207] Espoo Convention, art 1 (vii).

[208] Pulp Mills on the River Uruguay Case *Argentina v Uruguay* [2010] ICJ Rep 60, rec 203; This case, also known as the Pulp Mills case, was brought before the International Court of Justice (ICJ), which used the Espoo Convention to interpret state obligations to conduct EIAs. Although neither state has ratified the Espoo Convention, the Court refers to the instrument as a manifestation of international practice to avoid transboundary harm, *supra* rec 205.

[209] Draft Decision II/9 on Strategic Environmental Assessment to be taken at the second meeting of the parties to the Convention on Environmental Impact Assessment in a Transboundary Context (Sofia, 26-27 February 2001).

[210] Bonvoisin (2010), 165.

[211] Draft Decision II/9 on Strategic Environmental Assessment.

[212] McCracken and Westaway (2017), 25.

Directive was introduced to supplement the Environmental Assessment procedure of the EIA Directive, the SEA Protocol has been introduced as a supplement to the Espoo Convention.[213]

3.3.1 Strategic Environmental Assessment Directive

In the European Union, Environmental Assessments are regulated under the EIA Directive and SEA Directive. Both are based on Articles 191 and 192 of the Treaty on the Functioning of the European Union (TFEU), relating to the Union's objectives for the protection and preservation of the environment and the required action to achieve the objectives.[214] While the EIA Directive was meant to require developers[215] of projects with probable environmental impacts to conduct assessments, the implementation of the SEA Directive requires the conduction of environmental assessments for plans and programmes.[216] During the drafting of the EIA Directive, legislators were also discussing the possibility of extending its scope from EIAs for public and private projects, to further include plans and programmes.[217] In the end, the majority decided against broadening the scope but further drafted a proposal on SEAs.[218] In 2001, the Directive 2001/42/EC on the Assessment of Effects of Certain Plans and Programmes on the Environment was implemented to broaden the temporal and geographical scope of EIAs.[219] The conduction of SEAs has been required since 2004, when the Directive was meant to be transposed in Member States' environmental legislation.[220] The objective of the SEA Directive is to achieve a more effective and holistic assessment procedure, by extending the geographical and temporal scope of the EIA Directive.[221] Since its introduction, the SEA Directive has been subject to review but other than the EIA Directive, it has not been amended.[222]

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[213] Bonvoisin (2010), 165.

[214] Treaty on the Functioning of the European Union (2008), arts 191-192.

[215] The EIA Directive defines developer as "*the applicant for authorisation for a private project or public authority which initiates project*", *see* Directive 85/337/EEC, art 1(2).

[216] Glasson et al (2012), 302.

[217] Ibid

[218] Ibid

[219] *Supra*, 11; Sadler, B., and Jurkeviciute, A., "SEA in the European Union" in Sadler, B et al *Handbook of Strategic Environmental Assessment.* CRC Press 2010, 121-150, 122.

[220] Glasson et al (2012), 303.

[221] Implementation of Directive 2001/42/EC, 1.

[222] Sadler and Jurkeviciute (2010), 131.

Neither the EIA, nor SEA Directive have binding effect, which means that Member States have discretion as to how they want to transpose them into national law. [223] In general, the SEA Directive seems to provide Member States with much discretion in the implementation and application of the Directive.[224] This can also be seen with regards to the rather broad definition of plans and programmes, which encompasses:

> "plans and programmes, [...] which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and which are required by legislative, regulatory or administrative provisions".[225]

For the EIA Directive, which is also meant to be interpreted broadly, this includes the consideration of the cumulative impact of several projects.[226] Since the conduction of several related projects is usually the result of a programme, the cumulative assessment of an EIA can in some instances overlap with the conduction of an SEA for programmes. These plans or programmes are then subject to both, whereas the former can inform the latter.[227]

The SEA Directive makes certain limitations with regards to the sectors, for which plans, and programmes must be subject to. It mandates assessments for plans and programmes relating to fields, such as "agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use".[228] Contrary to the EIA Directive, which contains a rather detailed list of mandatory EIA projects,[229] the SEA Directive gives more discretion to Member States to determine whether a plan or programme constitutes part of the aforementioned sectors and whether it sets the framework for an EIA project.[230]

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[223] Glasson, et al (2012), 303.

[224] Sadler and Jurkeviciute (2010), 126.

[225] Directive 2001/42/EC, art 2(a).

[226] Glasson et al (2012), 86.

[227] Directive 2001/42/EC, art 3(2)(b); art 11(2); Sheate et al (2004), V.

[228] S*upra*, art 3(2)(a).

[229] Directive 85/337/EEC, Art 4; Annex I.

[230] Directive 2001/42/EC, art 3(2)(a).

By focusing solely on plans and programmes, the SEA Directive deviates from the scope as agreed upon in the SEA Protocol, which has been ratified by the EU.[231] The exclusion of policies in the SEA Directive can be considered problematic, as policies make up the first tier.[232] Therefore, by excluding policies from the SEA procedure, the EU has limited the possibilities to assess and potentially mitigate environmental and social impacts at an early stage. This means that potential alternative policies, and resultingly plans, programmes and projects cannot be assessed, limiting the options for considering Environmental Justice concerns early on (Figure 2 and Figure 3).[233]

Figure 2, EA procedure with SEA at all tiers[234]

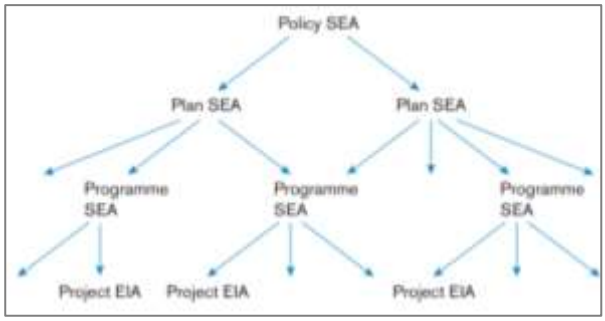
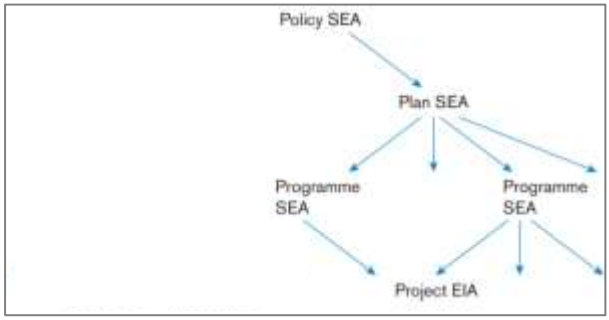


Figure 3, EA procedure without SEA of policies[235]



3.4 Strategic Environmental Assessment procedure

During the SEA procedure, the decision-makers are responsible to gain insight into the plan or programme, its impacts, and potential alternatives. Thereby, the objective of the assessment is to inform the decision-makers, so that they can consider all necessary information "during the preparation of a plan or programme and before its adoption".[236] Due to its basis in Article 191 and 192 of the TFEU, and the phrasing of its objective in Article 1,[237] the Directive can be

[231] McCracken and Westaway (2017), 25. However, it needs to be noted that the SEA Protocol, due to its strong influence from the SEA Directive, focuses primarily on plans and programmes, while it advises parties to consider conducting SEAs for policies, without creating legal obligations to do so, *see* Draft decision II/9, 13.

[232] Glasson et al (2012), 302.

[233] Ibid

[234] Image (edited) from Glasson et al (2012), 300.

[235] Ibid

[236] Directive 2001/42/EC, art 4(1); Westerlund (2007), 324.

[237] "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and

described as ecocentric in nature, whilst acknowledging the importance of incorporating socio-economic interests. By creating the divide between human and nature, the Directive reinforces the dualistic realm, which opposes the interconnected approach called for in the PEJ (Section 2.2.3).[238]

The responsibility to conduct an assessment lies with the developer, which is the national, regional, or local authority proposing the plan or programme.[239] The assessment occurs in four different phases: Screening, scoping, decision-making, and monitoring. In the following sections, the different phases, and consequently the underlying procedural principles are introduced. Furthermore, the explicit or implicit inclusion or exclusion of Environmental Justice concerns is explored for each phase.

3.4.1 Screening

During the screening phase, the developer assesses whether or not an SEA is needed, i.e. whether the proposed plan or programme is likely to have a significant environmental impact.[240] On a general level, the SEA Directive gives much discretion to Member States to determine the criteria, which need to be fulfilled in order to determine the need for an SEA.[241] However, it sets a framework for rather basic requirements. For instance, it needs to be assessed whether the proposed activity constitutes a plan or programme, as defined in Article 2.[242] In addition, the developers are required to assess whether the plan or programme is likely to have significant environmental effects,[243] which are proposals for sectors listed in Article 3, or for those, which set a framework for projects subject to the EIA Directive.[244] It thereby needs to be noted that

programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.", *see* Directive 2001/42/EC, art 1.

[238] Principles of Environmental Justice, preamble.

[239] Directive 2001/42/EC, art 2(a); Glasson et al (2012), 6.

[240] Langlet, D. and Mahmoudi, S, *EU Environmental Law and Policy.* Oxford University Press 2016, 159.

[241] Sheate et al (2004), 5.

[242] Directive 2001/42/EC, art 2(a).

[243] *Supra*, art 3(1).

[244] "[A]griculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use", *Supra*, art 3(2)(a). A third criterium is that the PP is located in or near a Natura 2000 site. However, since the dissertation is meant to focus on socio-

plans and programmes are meant to be interpreted broadly (with the main requirement being that they ought to be proposed by a public authority), and that the sectors listed in Article 3 cover a wide range, meaning that the proposed activity is likely to constitute a plan and programme under the Directive.[245] Therefore, the Directive makes it rather difficult for public bodies to circumvent the screening phase and argue that certain public proposals are not subject to the Directive.

Due to potential overlaps with the EIA Directive, the SEA Directive stresses the importance of procedural effectiveness. [246] This relates back to the tiering practices of plans, programmes and projects (Section 3.3.) If a public proposal with likely significant environmental effects is introduced without an SEA, it is possible that the conduction of a resulting project does not take place because the EIAs have identified significant environmental impacts. Consequently, where a plan or programme has been subject to an SEA and is therefore altered or simply not implemented, it saves time and money, which would have been invested for the conduction of several EIAs for several projects. Additionally, to avoid spending resources on the same assessments twice, the Directive calls for a harmonisation of the assessment procedures.[247]

In addition to effectiveness, the Directive also stresses the importance of reliability. However, since the developer is responsible for the conduction of the SEA, criticism arises as to which interests are taken into account throughout the assessment procedure. [248] Already in the screening phase, it is more likely in the interest of the developer to follow through with their plan, which is less likely to succeed if it becomes subject to an SEA. Thus, the conduction of the SEA through the developer can already be seen as a lack of Environmental Justice concerns, as the proposed plan or programme has been drafted from a singular viewpoint, which is

environmental aspects, those relating purely to flora and fauna, without directly impacting human life, will not be discussed to the same extent, Ibid

[245] Sadler and Jurkeviciute (2010), 124; Jones (2017), 39; Glasson et al (2012), 86; Bonvoisin, N. "The SEA Protocol" in Sadler, B et al *Handbook of Strategic Environmental Assessment.* CRC Press 2010, 169; *see also Kraaijeveld* Case C-72/95.

[246] Polido, A., Ramos, T., "Towards effective scoping in strategic environmental assessment" (2015) 33(3) *Impact Assessment and Project Appraisal,* 171-183, 171.

[247] Directive 2001/42/EC, art 11(2).

[248] Elling, B., "Some Wider Reflections on the Challenge of Public Participation in SEA" in Sandler, B., et al *Handbook of Strategic Environmental Assessment.* CRC Press 2010, 356-368, 364.

unlikely to have considered impacts on communities, who are not represented in the public authority drafting the proposal.[249]

3.4.2 Scoping

During the scoping phase, all potential environmental impacts of the proposed activity are being identified.[250] Furthermore, the purpose of the plan or programme, as well as potential alternatives will be considered.[251] The scoping phase also functions as a means to consider socio-economic impacts and respective alternatives.[252] The scope is thereby laid down in Article 2, setting the parameters for what constitutes a plan and programme, and Article 3, assessing whether the PPs can cause significant environmental effects.[253] After having received all necessary information, EA conductors are required to identify the most significant ones.[254] The SEA Directive does not provide for a detailed list of plans and programmes, which must be subject to an SEA but rather provides Member States with discretion to decide what kind of plan or programme requires an SEA.[255] However, Annex II provides for a list of criteria, which ought to be taken into account.[256] Some of the criteria include the impacts with regards to human health, as well as paying attention to the "value and vulnerability of the area likely to be affected due to […] cultural heritage".[257] While not being legally binding and while not explicitly acknowledging the marginalisation of certain groups, these criteria can be viewed as a first step towards recognising Environmental Justice concerns in the SEA procedure, as it allows for the consideration of health risks, which are faced by, i.e. Roma,[258] and risk to cultural heritage, which could include cultural practices, such as reindeer herding of the Saami.[259]

[249] Ibid.

[250] Glasson et al (2012), 5; 86.

[251] *Supra*, 5; 90.

[252] Ibid

[253] Implementation of Directive 2001/42/EC, 5, para 3.1.

[254] Glasson et al (2012), 86.

[255] Sheate et al (2004), 5.

[256] Directive 2001/42/EC, art 3(5).

[257] *Supra*, Annex II(2).

[258] Heidegger and Wiese (2020), 24.

[259] Rudloff (2021), 36.

Nevertheless, it needs to be reinstated that the SEA is conducted by the developer, i.e. the public authority proposing the plan or programme. Therefore, the main purpose for the developer is to achieve the implementation of the proposal.[260] This raises doubts as to whether the developer would include considerations, which are not explicitly required, especially when the considerations have not yet been implemented in EU primary law.[261] The conduction of the assessment by the developer is often criticised, as it can be argued that the developer will create an assessment in their favour.[262] Furthermore, there are liability measures with regards to an incomplete or falsified assessment.[263] To ensure that developers do not abuse the possibility to conduct EAs in their favour, the state authority should consult with other authorities with expertise on health, the environment or other sectors applicable to the plans and programmes.[264]

3.4.3 Documentation

In the documentation phase, the main impacts of the PP will be formulated and are summarised in the environmental report (ER).[265] The ER needs to include the identification, description, and evaluation of the significant environmental effects, as well as reasonable alternatives of the plan or programme.[266]

[260] Elling, (2010), 363.

[261] Articles 191 and 192, which are the basis for the SEA and EIA Directive, do not consider social concerns, other than human health, or the economic and social development of the Union, *see* Treaty on the Functioning of the European Union (2008), art 191. The unlikelihood of considering rather new concepts in the assessment procedure, has also been explored by Nita et al with regards to the consideration of climate change in the EU EIA procedure, *see* Nita, A., Fineran, S., Roylowicz, L., " Researchers' perspective on the main strengths and weaknesses of Environmental Impact Assessment (EIA) procedures" (2022) *Environmental Impact Assessment Review, 92*, 7.

[262] Elling (2010), 363.

[263] Directive 2001/42/EC.

[264] Polido and Ramos (2015), 172.

[265] Bonvoisin (2010), 170; In the EIA procedure, the report is known as Environmental Impact Statement or EIS, *see* Westerlund (2007), 315.

[266] Directive 2001/42/EC, art 5(1).

3.4.3.1 Reliability and effectiveness

In providing the significant effects and alternatives, much emphasis is put on the reliability of the information received and produced.[267] Due to its reliance on science as an indicator for whether or not certain plans or programmes should be conducted, the SEA Directive pays much attention to the quality and quantity of information provided to the authorities. However, the emphasis on "objective and reliable" information does not allow for criticism towards the present-day research, which is primarily dominated by Western standards.[268] In the assessment procedure, the distinction is made between hard data (scientific findings) and soft data (social values), whereas consulting experts and responsible authorities constitutes the former, and consulting the public concerns the latter.[269] However, the distinction between expertise and experience can be seen as an example for the lack of recognitive justice, as it reduces the experiences of (BIPOC) stakeholders to soft data, thereby dismissing the knowledge and potential contribution of stakeholders in the assessment procedure.[270] This is contrary to the PEJ, which require the inclusion of BIPOC "as equal partners at every stage of decision-making".[271] The principles further call for "the education of present and future generations which emphasises social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives".[272] Such consideration could significantly contribute to more recognitive justice, as it allows for a more holistic approach in gathering information, which is ultimately the goal of the assessment procedure.[273]

In the SEA Directive, considerations of socio-economic interest can be found in Annex I, which suggests factors to include in the SEA. The Annex thereby qualifies population, human health and cultural heritage (including architectural and archaeological heritage) as issues, which could be impacted by the significant environmental effects.[274] Therefore, the SEA Directive

[267] Principles of Environmental Impact Assessment Best Practice (1999), Section 2.4.

[268] Glasson et al (2012), 301.

[269] *Supra,* 100.

[270] Connelly and Richardson (2005), 392.

[271] Principles of Environmental Justice, Principle 7.

[272] *Supra*, Principle 16.

[273] IAIA Principles of Environmental Impact Assessment Best Practice (International Association for Impact Assessment, January 1999), 2

[274] Directive 2001/42/EC, Annex 1(a)

considers socio-economic aspects, which could also be viewed as a step towards recognising environmental justice. However, it needs to be reinstated that the ER is not binding with regards to environmental matters but serves primarily an informative function.[275] Therefore, even if the ER strongly advises against a plan or programme due to its socio-economic impacts, the responsible authority could still dismiss it. Furthermore, while the inclusion of health and cultural concerns is very important, one step closer to Environmental Justice would be to acknowledge the disproportions in access to health between groups of different socio-economic backgrounds, and actively work towards improving the access to the health sector for groups, such as Roma, who have had limited access in the past (Section 4.3.3.2).[276]

3.4.3.2 Public participation and transparency

As has been discussed in Section 2.3.2., to improve stakeholder participation throughout the Union, the EU has adopted the Aarhus Convention, which provides the public concerned with strong procedural rights, such as access to information, participation and the right to appeal.[277] While the participation of the public concerned has already played a central role in the conduction of EIAs,[278] the Aarhus Convention extended the rights of legal persons to have easier access to environmental decision-, and law-making. It even introduced procedural rights for stakeholders in the SEA procedure before the adoption of the SEA Directive, as article 7 lays down the requirement for public authorities to consult the public in a transparent and fair manner concerning environmental plans, programmes and policies.[279] Similarly, the SEA Directive requires authorities to inform and consult with the public concerned during the drafting of the ER.[280] Thereby, Member States are given discretion to identify the public, while the SEA Directive provides guidance, and defines them as "affected or likely to be affected by, or having an interest in the decision-making".[281] Read in line with the Aarhus Convention, this allows organisations to act on behalf of the environment as well as affected marginalised

[275] The findings of the SEA can be binding, where they showcase that a protected habitat will be affected by the PP, *see* Implementation of Directive 2001/42/EC, 11, para 3.27.

[276] Heidegger and Wiese (2020), 24.

[277] Krämer (2020), 15.

[278] Directive 85/337/EC, art 6.

[279] Aarhus Convention, art 7.

[280] Implementation of Directive 2001/42/EC, 34.

[281] Directive 2001/42/EC, art 6(4).

groups.[282] The identification of organisations as "the public" has removed an obstacle for marginalised groups, whose interests can now be represented by an organisation acting on their behalf, rather than having to gather information and participate individually. This especially applies to marginalised groups, who have been discriminated against in sectors such as education and consequently do not have the necessary educational background to encounter, understand or appeal decisions made on their behalf.[283]

Nevertheless, in practice, the participation of the public is still often viewed as a means to create "awareness and a positive attitude from stakeholders".[284] This is also due to the fact that the person or groups responsible for the conduction of the assessment, is the proposer of the plan or programme, and therefore likely biased. Additionally, the involvement of the public can also lead to conflict between different groups, such as people interested in new employment opportunities, and those opposing environmental degradation.[285]

Finally, it needs to be noted that the procedural access of the public concerned is still limited to the participative dimension, as it relates to the rights of stakeholders once they have been identified as such. This puts them into a reactive, instead of a proactive role.[286] As has been the focal point of the POCEL Summit and the PEJ, it is advised for the SEA Directive to further call for more representation of marginalised groups in the conduction of plans, and not just the assessment thereof.[287]

3.4.4 Decision-making

Since the ER is not legally binding, the actual decision of whether or not to allow a project, does not directly constitute a phase of the SEA. However, since the process is heavily reliant on review, the decision can be used as an indicator for the quality of information-gathering by

[282] Aarhus Convention, art 2(4).

[283] An example for this are Roma groups in Sweden, whose integration into the educational system has been described as "not satisfactory", *see* Government Communication 2011/12:56, 24, para 5.1.

[284] Polido and Ramos (2015), 171.

[285] Cole and Foster (2001) "Traditional Environmentalists", 28-31.

[286] Glasson et al (2012), 299.

[287] Principles of Environmental Justice, preamble.

the decision-makers.[288] A key principle of EAs is the consideration of all information and the necessity to give reason why certain aspects have (not) been included.[289] Thus, decision-makers are required to prove that their decision is based on the information provided by the ER and make the decision available to the public.[290] However, it needs to be noted that the final decision is made according to the information provided and the arguments laid down in the SEA. If the SEA has not analysed sufficient environmental effects of a proposed plan or programme, the authorities are likely to accept it without second-guessing the effects on people. This is due to the dualistic nature of the SEA Directive.[291] However, as provided for in the PEJ, there is a need to recognise the interconnectedness of human and nature, rather than characterising them as two separate entities.[292] As environmental assessments are meant to be conducted in a holistic manner, such separation hinders the gathering and understanding of different sources of knowledge to fully assess the underlying effects. One way to dismantle such distinctions is the incorporation of BIPOC expertise and experience,[293] especially for Indigenous people, whose relationship to nature allows for a multitude of ways to achieve sustainable use of the environment.[294]

Another distinction, which needs adaptation is the distinction between the public authority and the stakeholders, and the underlying power dynamics.[295] It is suggested to address the power dynamics, and thereby recognise the lack of institutional power provided to marginalised

[288] Glasson et al (2012), 5.

[289] Bonvoisin (2010), 170.

[290] Ibid

[291] Similarly, such dualistic thinking has also contributed to the colonial differentiation between "white" and "other", *see* Davies (2009), 316ff. Often times the close relation to nature is how colonizers differentiated between "civilized" and "uncivilized", given that the latter would not make sufficient use of the natural resources, *supra* 301f.

[292] Principles of Environmental Justice, preamble.

[293] *Supra*, Principle 16.

[294] Jolly D., and Thompson-Fawcett, M., "Enhancing Indigenous impact assessment: Lessons from Indigenous Planning theory" (2021) *Environmental Impact Assessment Review 87*.

[295] Harris, P., McManus, P., Sainsbury, P., Viliani, F., Riley, E., "The institutional dynamics behind limited human health considerations in environmental assessments of coal mining projects in New South Wales, Australia" (2021) *Environmental Impact Assessment Review* 86.

groups.[296] Finally, it is important to point out the fact that the final decision is made by a public authority. It seems more likely for that decision-making body to act in the interest of another public authority, rather than to deny a plan or programme based on the fact that it is strongly opposed by stakeholders.[297]

3.4.5 Monitoring

Regardless of whether or not the project has been permitted, the effects of the plan or programme or lack thereof will be put in juxtaposition with the effects identified in the ER. It needs to be noted that monitoring does not constitute a final stage in the EIA process, as the procedure is rather circular than linear.[298] Thus, monitoring does not essentially constitute the final phase, but is rather conducted throughout and after the assessment. This allows for new insights to be considered at any potential stage, including the incorporation of BIPOC expertise and experiences. However, while constituting a great source of information, the reliance on monitoring as indicator for a successful or failed assessment further contributes to the marginalisation of already marginalised groups. If BIPOC stakeholders have strongly opposed a plan or programme with likely socio-environmental effects, and their arguments have not been sufficiently considered in the decision-making, they are suffering consequences, which they have not agreed to. This requires them to bring the effects, which had not been assessed, to the public authority, putting marginalised groups once more in the reactive, rather than proactive role.[299]

3.5 Conclusion

In summary, one can argue that the SEA Directive provides several avenues to be interpreted as entailing Environmental Justice considerations. This is, for instance, due to the strong emphasis on public participation (Section 3.4.3.2.) and the inclusion of socio-economic considerations (Section 3.4.3.1. and Section 3.5.) in the SEA procedure. Nevertheless, it is important to note that the sole interpretative potential of the Directive does not suffice to include

[296] Cashmore, M., and Axelsson, A., "The mediation of environmental assessment's influence: What role of power?" (2013) *Environmental Impact Assessment Review* 39, 5-12; Glasson et al (2012), 20.

[297] Enriquez de Salamanca (2018), 13.

[298] Jiricka-Pürrer, A., Wanner, A., Hainz-Renetzeder, C., "Who cares? Don't underestimate the values of SEA monitoring!" (2021) Environmental Impact Assessment Review 90, 106610, 2.

[299] Glasson et al (2012), 299.

Environmental Justice concerns in the procedure, as this puts the responsibility on the public authorities, who tend to be more invested in the implementation of the plan, rather than the achievement of Environmental Justice.[300] One way of solving this, is to require more representation of affected (marginalised) groups in the decision-making institutions, and to explicitly call for the consideration of Environmental Justice concerns in the SEA procedure. This would cause the primary focus on the participative dimension of SEAs to broaden and further incorporate the representative and recognitive dimensions. This could not only contribute to better acknowledgement of social considerations but is likely to contribute towards a more holistic approach, recognising the interconnectedness between environment and humans (thereby focusing primarily on aspects of a clean, inhabitable environment, rather than economic growth).

[300] Enriquez de Salamanca (2018), 12.

Chapter 4 – Environmental Justice considerations in the Swedish Implementation of the SEA Directive

4.1 Overview

The SEA Directive provides a theoretical framework for the assessment procedure in its Member States, which can determine how they intend to incorporate the Directive in the national legislation. Given the high Member State discretion when applying the SEA Directive, it is important to assess how the Directive and its principles can be transposed into national law. Sweden was one of the first Member States to implement the Directive correctly, thereby indicating a willingness to expand the environmental assessment procedure to include plans and programmes. Furthermore, it is is one of two EU Member States with an Indigenous Saami population, thereby requiring the state to consider Indigenous needs and interests. The following chapter discusses the implementation of the SEA Directive in Sweden and to what extent principles relating to environmental justice have been considered. The focus lies on the Comprehensive Plan, as codified in the Planning and Building Act,[301] and supplemented by the Environmental Code.[302] Thereby, the Comprehensive Plan is reviewed in its compatibility with the SEA Directive, and the underlying principles analysed through an Environmental Justice lens. To that aim, particular attention is paid to the consideration of Indigenous needs, as exemplified by the consultation of Saami in the SEA procedure. Furthermore, the consideration of Roma interests, as amplified by the National Minorities Policy, is applied to the Swedish implementation on of the SEA Directive. Finally, additional means of working towards better inclusion of environmental justice concerns are introduced.

4.2 SEA Directive in Sweden

Since the SEA Directive does not have direct effect, Member States are given discretion as to the wording and the context in which the Directive is being implemented. Sweden has

[301] Building and Planning Act (2010:900), Chapter 3.

[302] The only English version of the Environmental Code available is from 2000, which is four years before the Swedish implementation of the SEA Directive. Therefore, the references made to the Environmental Code in the Planning and Building Act will refer to an unofficial translation of the Swedish document, *see* Miljöbalk (1998:808) SFS 2021:1018.

implemented the Directive in 2004.[303] It was thereby only one of few countries, which had implemented done so in time, as several Member States were hesitant to incorporate it.[304] As is the case for the provisions laid down in the EIA Directive, the SEA Directive has been implemented in Chapter 6 of the Environmental Code, and additionally in the Planning and Building Act (PBA).[305] This was decided by the PBA Committee , which was responsible for reforming the planning procedure in Sweden, and consequently of transposing the SEA Directive into Swedish law.[306] Therefore, the rationale behind implementing the Directive in Sweden differs from the rationale behind adopting the Directive. While the SEA Directive is based on Article 191 and 192 of the TFEU, dealing with environmental protection, the Swedish implementation of the Directive was the result of a reform in the land and town planning sector, dealing not solely with environmental, but also with socio-economic needs and interests.[307] In a way, the rationale could be considered as mirroring more closely the interconnected approach to environmental planning (Section 2.2.3). However, similarly to the SEA Directive, the PBA concentrates primarily on the use of the environment for humans, therefore reflecting a more anthropocentric approach.

A key difference between the intended implementation of the SEA Directive and the actual implementation thereof in Sweden stems from the original approach to land planning in the country. In Sweden, the conduction of plans and programmes is rather decentralised, with decision-making happening at the regional or local level. Sweden consists of 21 counties,[308] with the responsibility to decide on the implementation of plans and programmes lying with the

[303] Jones (2017), 27.

[304] Ibid

[305] Sheate et al (2004), 47.

[306] In line with the objective of the SEA Directive, the PBA Committee was assigned to reform the planning procedure to further contribute to sustainable development, a better environment, and a more efficient decision-making procedure, *see* Hilding-Rydevik, T., Akserskog, A., "A clear case of 'doublespeak': the Swedish governmental SEA implementation discourse" (2011) *Journal of Environmental Planning and Management* 54(4), 495-515, 500.

[307] Planning and Building Act (2010:900), Chapter 1, Section 1.

[308] Government Offices of Sweden "The Swedish model of government administration" (Common website of the Government and the Government Offices, 11 March 2015) < https://www.government.se/how-sweden-is-governed/the-swedish-model-of-government-administration/> last accessed 7 April 2022.

County Administrative Boards (CABs).[309] Additionally, the decisions on the local level are made by 290 municipalities,[310] which are responsible for the conduction of environmental assessments in the form of waste, energy, or transport plans, action programmes, or the Comprehensive Plan.[311] The focus on municipalities in the SEA procedure stems from their previous responsibility to conduct EIAs.[312] Since Sweden intends to refrain from significantly changing the existing legislation, this responsibility was extended to the SEA procedure.[313] Therefore, given that the purpose of the SEA Directive was to conduct assessments on a more institutional level, the decentralised approach seems to contradict the Directive's purpose.[314] However, since environmental effects are primarily reviewed on a municipal level in Sweden, and given that the Article 2 of the SEA Directive requires plans and programmes to be conducted by "an authority at national, regional or local level" (as opposed to and),[315] the decentralised approach is still in accordance with the Directive.

The PBA Committee has implemented the SEA Directive as a means to strengthen the EIA procedure.[316] By conducting EAs at an earlier stage, and therefore assessing the framework, from which projects with significant environmental effect might emerge, the conduction of SEAs can lead to the review of programmes, whose projects would have undergone individual EIAs. Therefore, SEAs are viewed as a means to significantly increase cost-, and time-efficiency.[317] At the same time, when implementing the SEA Directive, Sweden has continuously stressed the importance of continuing the conduction of EIAs and not shifting towards conducting solely SEAs.[318] Therefore, the Swedish implementation of the SEA Directive seems to align with the Directive's principle of efficiency, without undermining the

[309]Planning and Building Act (2010:900), Chapter 3, Section 16.

[310] The Swedish model of government administration (2015).

[311] Application and Effectiveness of the SEA Directive (Directive 2001/42/EC) Sweden - Legal and Organizational Arrangements accessed via <https://ec.europa.eu/environment/eia/pdf/SE_SEA_summary_report.pdf>.

[312] "Following the consultation, the county administrative board shall decide whether the activity or measure is likely to have a significant environmental impact", *see* Environmental Code, Chapter 6, Section 4.

[313] Hilding-Rydevik and Akerskog (2011), 503.

[314] Implementation of Directive 2001/42/EC, 5, para 3.4.

[315] Directive 2001/42/EC, art 2(a).

[316] Hilding-Rydevik and Akerskog (2011), 502.

[317] Ibid

[318] *Supra*, 505.

importance of environmental impact assessments. However, as argued by Hilding-Rydevik and Akerskog, it can be said that the focus of the transposition lies too much on the procedural requirements. Despite the Directive's procedural nature,[319] it also refers to sustainable development,[320] which should not be disregarded in the Member States' implementation thereof.[321] The following section analyses the procedural principles of the Swedish SEA procedure, whilst discussing (potential) incorporations of more substantive principles, such as Environmental Justice considerations. To that aim, the Swedish Comprehensive Plan is introduced and analysed in its compatibility with the SEA Directive, as well as its inclusion of Environmental Justice concerns.

4.3 The Comprehensive Plan

The Comprehensive Plan (hereinafter: the Plan) is regulated in Chapter 3 of the PBA.[322] The main purpose of the PBA, and consequently the Plan is to "promote societal progress with equal and proper living conditions and a clean and sustainable habitat".[323] Thus, the PBA identifies societal progress as the main priority, and the preservation of the environment as a prerequisite for achieving such. Thereby, the objective of the PBA differs from the objective of the SEA Directive, which focuses primarily on the protection of the environment "with a view to promoting sustainable development". [324] This means that the PBA takes a more anthropocentric approach, as it puts humans at the centre. While not aligning with the arguably ecocentric nature of the SEA Directive, it can be seen as a more promising step towards Environmental Justice, as its main purpose revolves around societal progress, which is interpreted to encompass equal living conditions, thereby indirectly calling for distributive justice.[325] Since the Swedish example shows that the priorities of the Directive can shift when being implemented in national

[319] Directive 2001/42/EC, rec 9.

[320] *Supra*, art 1.

[321] Hilding-Rydevik and Akerskog (2011), 505.

[322] Planning and Building Act (2010:900), Chapter 3.

[323] *Supra*, Chapter 1, Section 1. As is the case for the Brundtland definition of sustainable development, the Act further includes intergenerational rights by including the interest of future generations, Ibid. *See also* Langlet and Mahmoudi (2016), 42.

[324] Planning and Building Act (2010:900), Chapter 1, Section 1.

[325] Directive 2001/42/EC, art 1.

law, leads to the assumption that the Directive can also be implemented without undermining the interconnectedness between human and nature, and prioritising one over the other.

4.3.1 Screening

While the SEA Directive provides Member States with discretion to make certain plans and programmes subject to SEAs, the classification of the Plan as a plan or programme under the Directive is made on a case-by-case basis. [326] During the screening phase, the developer, which is the municipality, determines whether a plan or programme with significant environmental effects must be subject to an SEA. [327] Therefore, it must be determined whether the Plan constitutes a plan or programme under the SEA Directive, and whether it is likely to have significant environmental effects.[328] Thereby, the name itself (Comprehensive Plan) does not suffice to characterise the Plan as such.[329] Nevertheless, due to the broad interpretation of plans and programmes, which encompasses "rules or guidance as to the kind of development which might be appropriate or permissible in particular areas",[330] the Plan is likely to qualify as a plan or programme in most instances. Furthermore, its main purpose is to list the intended development of the environment within the municipality, which points towards the need for an SEA.[331] When doing so, the substance as well as the impacts (consequences) of the Plan must be addressed by the developer.[332] Therefore, the Plan is likely to be subject to an SEA in most instances. Should the authorities decide against the conduction of an assessment, they must give reason as to why an SEA would not be applicable.[333]

Since the developer is responsible to determine the need for an SEA, it is unlikely for the screening procedure to incorporate interests and concerns of marginalised groups. The PBA

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[326] *Supra* Chapter 3, Section 4; Article 2(5) of the Directive states that "Member States shall determine whether plans or programmes [...] are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes, *see* Directive 2001/42/EC, art 2(5).

[327] Building and Planning Act (2010:900), Chapter 3, Section 1.

[328] Directive 2001/42/EC, arts 2-3; SEA Directive Guidance Document, 5, para 3.1.

[329] Implementation of Directive 2001/42/EC, 5, para 3.3.

[330] *Supra*, 6, para 3.5.

[331] "The objective of this Directive is […] to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes", *see* Directive, 2001/42/EC, art 1

[332] Planning and Building Act (2010:900), Chapter 3, Section 6.

[333] *Supra* Chapter 3, Section 4; Directive, 2001/42/EC, art 3(7).

does not explicitly require developers to include the public interest in the screening phase. However, on a more general level, the developer is required to involve the public in the SEA procedure (Section 4.3.3.2).[334]

As has been the case for the Gallok/Kallak mine, Saami opposition is not always considered on a local/small-scale level.[335] This raises doubts as to whether Saami, such as *Samediggi* representatives will be heard when implementing legislation. To further strengthen the rights of groups, which are often excluded from the environmental assessment procedure, the PBA could explicitly require that public interests need to be considered at each phase, especially those of stakeholders with limited access to the decision-making process. For instance, should the Plan for a municipality in Saami territory suggest the construction of a mine, a wind park, or other projects with significant environmental effects, the municipality should forward the Plan to Saami institutions, who can then determine the need for an SEA, with a potential veto right on plans with significant effect on Saami customs and traditions, such as reindeer herding. Similarly, Roma representatives should be given the opportunity to assess land uses, which are likely to affect the life and health of Roma (e.g. landfills near Roma settlements) and be given the opportunity to at least make the Plan subject to an SEA.

4.3.2 Scoping

The Plan does not need to be subject to a scoping phase, during which the potential effects of the plan on the environment are being listed, since the main purpose of the Plan is to list the intended development of the environment, thus entailing environmental effects.[336] Nevertheless, Chapter 3 Section 5 provides for a detailed list of considerations, which must be taken into account in the assessment procedure.[337] Such include the fundamental features of the intended environmental development, the attainment of environmental quality standards (which can both be correlated to significant environmental effects), as well as the correlation to other policies, plans and programmes on a national or regional level (which refers to tiering

[334] *Supra*, Chapter 2.

[335] Saami Parliament Viewpoint on Gallok/Kallak (2022).

[336] Glasson et al (2012), 5; 90.

[337] Planning and Building Act (2010:900), Chapter 3, Section 5; The requirements must be listed in the Plan, as well as in the environmental report, *supra* chapter 3, Section 7.

practices).[338] Thereby, the provisions seem to follow the examples provided for by Annex II of the SEA Directive, which distinguishes between the characteristics of plans and programmes, including their connection to other public proposals, as well as the characteristics of the effects.[339] However, the environmental effects are much more vague in the PBA, and, contrary to the SEA Directive, do not explicitly mention concerns, such as human health, or cultural heritage.[340] Nevertheless, it needs to be reinstated that the main objective of the PBA (societal progress) already provides for a stronger focus on social interests, and therefore is more likely to consider effects on health and culture. The Convention on Biological Diversity (CBD) requires contracting parties to maintain innovations and practices, that entail the sustainable use of the environment.[341] Given that the SEA Directive refers to the CBD,[342] it can be assumed that "cultural heritage" is meant to be interpreted widely to further encompass practices promoting sustainable use of the environment, such as reindeer herding.

As discussed with regards to the SEA Directive, SEAs are conducted by the project developer, which, in Sweden, is the municipality drafting the Plan. Therefore, the Plan reflects the intentions of municipal authorities, making it rather unlikely for Environmental Justice needs to be considered.[343] This is especially the case where peoples, such as the Saami, and minority groups, such as Roma, are underrepresented in the respective municipalities. In addition to strongly focusing on the injustices faced by Roma and other minority groups, which is a step towards recognitive justice, the Minorities Policy stresses the importance of municipal involvement to combat inequities faced by such groups, as well as the importance to consult with them, which contributes to participative justice. [344] While the efforts are admirable, they are likely insufficient to influence the municipalities to actually consider the interests of minority groups, unless it is in the interest of the authorities. A potentially more effective measure to allow for minority interests to be heard is for minority representatives to not only

[338] *Supra,* Chapter 3, Section 5(1), (3) and (4).

[339] Directive 2001/42/EC, Annex II(1) and (2).

[340] *Supra,* Annex II(2).

[341] Convention on Biological Diversity (Rio de Jainero, 5 June 1992) vol 1760, I-30619, art 8(j).

[342] Directive 2001/42/EC, rec 3.

[343] Elling (2010), 363.

[344] Government communication 2011/12:56, 12, Section 4.7.

consult with but to be part of the municipal authority, or to at least explicitly incorporate Environmental Justice considerations in the SEA procedure.

4.3.3 Documentation

With regards to the SEA documentation for the Plan, the PBA makes reference to Chapter 6 of the Swedish Environmental Code, which regulates the conduction of the Environmental Impact Statement (hereinafter: the proposal).[345] During the conduction of the proposal, the municipality needs to include the information gathered in the scoping phase, the consideration of public interests,[346] as well as substance and consequences of the Plan.[347] The main aim is to "obtain the best possible basis for decision and to enable transparency and influence".[348] Therefore, the PBA Committee has acknowledged the same procedural principles as required under the SEA Directive (Section 3.4.3), which are reliability, public participation and transparency.

4.3.3.1 Reliability

While the PBA does not elaborate much more on how the best possible basis for decision is obtained, it makes reference to Chapter 6 of the Environmental Code, dealing with the Environmental Report.[349] Section 12 lays down the scope and level of detail of the Environmental Reports, which requires reasonable assessment methods and current knowledge.[350] Thereby, no specifications are made with regards to the sources of knowledge, which means that it could further encompass the inclusion of BIPOC experiences and expertise. However, since such considerations are seldomly included, unless they are explicitly required, it is rather unlikely that such knowledge forms part of the assessment. This is especially the case for "development" plans and programmes, which are likely to further marginalise BIPOC communities.

The *Samediggi* constitutes an opportunity for Saami experiences and expertise to be included in the assessment procedure. One of the functions of the Saami Parliament is to "[ensure] that

[345] Planning and Building Act (2010:900), Chapter 3, Section 4.

[346] *Supra*, Chapter 3, Section 13; Directive 2001/42/EC, art 6(1).

[347] Planning and Building Act (2010:900), Chapter 3, Section 6.

[348] *Supra*, Chapter 3, Section 8.

[349] Environmental Code, Chapter 6, Section 11.

[350] *Supra*, Chapter 6, Section 12(1).

Saami needs are considered, including the interests of reindeer breeding in the use of land and water".[351] Thereby, interests other than reindeer herding are not explicitly listed, which could create issues when interpreting the substantive scope of *Samediggi* jurisdiction. The *Samediggi* can contact the municipality proposing the Plan, or the County Administration Board (CAB), which is responsible for the decision.[352] Whether the information provided by the *Samediggi* is being considered, depends on the CAB. It thereby needs to be noted that the provisions to consult only concern the consultation with representatives of the Saami Parliament, thereby excluding Saami individuals and Saami groups.[353] Thus, even the influence of a recognised people is still rather limited compared to public institutions, creating hurdles for Saami to express their knowledge and experiences.

The acknowledgement of Indigenous knowledge as hard data could be fostered by applying the Nagoya Protocol to the CBD (hereinafter Nagoya Protocol).[354] The instrument was established as a means to improve the implementation of the CBD objective of "the equitable sharing of benefits arising from utilisation of genetic resources".[355] Article 7 of the Nagoya Protocol strongly emphasises Indigenous recognitive rights by requiring their knowledge to be assessed.[356] Thereby, the Convention provides for a set of tools to achieve such, for instance, by establishing national focal points and competent national authorities, who are responsible for ensuring equitable access to genetic resources, as well as the decision-making procedure.[357] By recognising all three elements, and specifically emphasising the importance of Indigenous consultation, the Nagoya Protocol acts on all three Environmental Justice dimensions. However, since the application of the Nagoya Protocol is still subject to state discretion,[358] Sweden has yet to implement the Protocol in a way, in which Indigenous knowledge is given more importance in the SEA procedure.

[351] Saami Parliament Act, Chapter 2, Section 1(4).

[352] Planning and Building Act (2010:900), Chapter 3, Section 16.

[353] Ibid

[354] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilisation to the Convention on Biological Diversity (Nagoya 2010) United Nations. K3488.A48..

[355] Convention on Biological Diversity, art 1; Nagoya Protocol, introduction.

[356] Nagoya Protocol, art 7.

[357] *Supra,* art 13(1).

[358] Rudloff (2021), 35.

Similar opportunities for Roma are yet to be created. The Swedish Minorities Policy emphasises the essential incorporation of the experiences and expertise of Roma communities to improve their access to human rights.[359] Thereby, the Policy acknowledges the lack of knowledge on Roma issues and expects the underlying strategy to change according to new insights. Such recognition can open up the SEA procedure immensely, as it fits into the narrative of the environmental assessment procedure being circular rather than linear, where new information can and should be taken into account at any stage.[360] Furthermore, the recognition of a lack of knowledge is an essential step towards recognitive justice, as it opens up the information sources to be shaped by minority groups, such as Roma, directly. To do so, the Minorities Policy could be amended to focus on the inequities faced by Roma, and thereby acknowledging the oppressive power wielded by public institutions, rather than concentrating on improving the public perception of Roma.[361]

4.3.3.2 Public participation

As required in the SEA Directive, the consideration of public interests plays a key role. The developers are required to consult with the CAB, as well as the members of the municipality with significant interest.[362] The developers can further decide to consult with other public authorities, such as other potentially affected municipalities.[363] With regards to public interest, the PBA refers to Chapter 2 of the Act, requiring the consideration of public and private interests.[364] The purpose of the consideration of public interest is described as the "good management [of the environment] in view of the public interest", which is given priority.[365] On the one hand, one can argue that this deviates much from the ecocentric notion of the SEA Directive. On the other hand, it can also be viewed as an explicit recognition of the

[359] Government communication 2011/12:56, 11.

[360] Glasson et al (2012), 5.

[361] Part of the Minority Policy strategy includes the "repair [of] Roma faith in mainstream society and close the gap in trust", *see* Government communication 2011/12:56, 10. While the intention, namely to eradicate stereotypes affecting Roma, might be admirable, it still concentrates on the symptoms (i.e., stereotypes) rather than the root cause (i.e., institutional discrimination) of Roma marginalisation.

[362] Planning and Building Act (2010:900), Chapter 3, Section 8.

[363] *Supra*, Chapter 3, Section 9.

[364] *Supra*, Chapter 2, Section 1.

[365] *Supra*, Chapter 2, Section 2.

interconnectedness between environment and human life, thereby mirroring more closely the Principles of Environmental Justice.[366] This becomes further visible in Section 3 of Chapter 2, which defines a healthy environment, and access thereto as a social concern.[367]

The Swedish Minorities Policy explicitly calls for the participation of minority groups in decisions, which concern their access to human rights.[368] Thereby, such rights do not explicitly refer to environmental access, but rather to language, education, housing, and access to health services.[369] Therefore, the access to participation does not include environmental matters and matters of land and country planning. This requires municipalities and CABs to interpret Comprehensive Plans with a view towards promoting Roma access to human rights. However, since the Policy is not directly linked to the PBA, and the PBA does not include the participation of marginalised groups, it is rather unlikely that interests of Roma and other minority groups are given sufficient consideration, as they are not given stronger rights than other "individuals, who have significant interest in the proposal".[370]

This is different from the consultation of Saami, which is primarily done through representatives, such as those of the *Samediggi*.[371] Additionally, the Nagoya Protocol calls for rather strong procedural rights, as it requires prior and informed consent or approval and involvement of Indigenous and local communities".[372] The implementation of the free and prior informed consent requirement in Swedish Planning law could significantly alter the Swedish SEA procedure to provide better procedural access, especially for Saami.[373]

Another way to strengthen Saami rights in the SEA procedure would be to ratify the International Labour Organisation's (ILO) Indigenous and Tribal Peoples Convention 169. So far, the only state with a Saami population, that has ratified the Convention, is Norway, which

[366] This is laid down in Principle 1, affirming the "ecological unity and interdependence of all species", *see* Principles of Environmental Justice, Principle 1.

[367] Building and Planning Act (2010:900), Chapter 2, Section 3(2).

[368] Government communication 2011/12:56, 9.

[369] Ibid.

[370] Planning and Building Act (2010:900), Chapter 3, Section 8.

[371] Saami Parliament Act (1992:1433), Chapter 2, Section 4.

[372] Nagoya Protocol, art 6(2).

[373] Rudloff (2021), 35.

has thereby strengthened Saami participatory rights, as well as their distributive rights to exercise their culture and access the environment.[374] An example for formulating recognitive justice from the Convention can be found in Article 2, which requires states to take measures for "assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life".[375] The provision does not only address the existence of socio-economic inequities faced by Indigenous people, and requires states to eliminate them, it also requires Indigenous people to be the primary proposer of potential means to do so. Additionally, the provision recognises potential differences in ways of life, thereby not providing equal, but rather equitable rights to Indigenous groups. In addition to the ILO Convention 169, Sweden could further implement the Nordic Saami Convention, as drafted by representatives of Saami and the Nordic states.[376] The objective of the Convention is to recognise Saami as self-determined people,[377] and, as original residents of the territory, enabling them to make use of land and water "to the same extent as before".[378] This could significantly contribute to the incorporation of recognitive justice, which will further strengthen distributive, as well as restorative rights.[379] Furthermore, the recognition of the Saami Convention, could significantly contribute to the participation thereof in the EA procedure, as self-determination, and consequently self-administration, requires participation in the decision-making process.[380]

[374] International Labour Organisation, Indigenous and Tribal Peoples Convention (7 June 1989) C169, art 2(2)(b); art 4.

[375]ILO Convention 169, art 2(2)(c).

[376] Rudloff (2021), 13f; Koivurova, T., "The Draft for a Nordic Saami Convention" (2008) *European Yearbook of Minority Issues* 6, 103-136, 107.

[377] Nordic Saami Convention, art 3.

[378] *Supra*, art 34.

[379] As explored in Section 2.4., restorative justice can be seen as an overlap between recognitive and distributive justice, as it recognises past wrongs with regards to distribution and attempts to redistribute the environmental goods accordingly.

[380] Rudloff (2021), 14.

4.3.4 Decision-making

Once the public has been consulted and the effects of the plan identified, the municipality needs to exhibit the proposal for at least two more months,[381] after informing the public concerned.[382] Before the commencement of the exhibition period, the municipality is further required to send it to the CAB for review.[383] Once the exhibition period has ended, the CAB is required to assess whether the Plan is in line with the PBA, as well as the Environmental Code.[384] As is the case for SEA reports, while its conduction is binding, the EA for the Plan is not. [385] However, it is likely that the CAB will aim for a high level of environmental protection, as it primarily reviews the Plan's compatibility with the Environmental Code.[386] Thus, the consideration of Environmental Justice concerns is rather unlikely. While environmental protection and social justice concerns should not conflict with each other, the separation of the two has created the prioritisation of one over the over, which causes for marginalised groups to be further excluded from their access to the environment, and the decision-making procedure.

Something, which is not expressly mentioned with regards to the Comprehensive Plan is the requirement to suggest alternatives. This could be due to the fact that the conduction of the Plan is mandatory, and therefore the focus is rather on how to make use of the environment, as opposed to whether to make use of it. It can be argued that the strong focus on public participation would allow for affected municipalities and individuals to voice their concerns and consequently suggest alternatives themselves. Since the Plan itself is not binding, the suggestion of alternatives can also happen at a much later stage.[387] However, this contradicts the premise of the SEA procedure, which calls for the assessment of environmental effects at an early stage, before the implementation of the plan or programme.[388] To act more in line with the SEA Directive, as well as working towards the incorporation of Environmental Justice

[381] Planning and Building Act (2010:900), Chapter 3, Section 12.

[382] *Supra,* Chapter 3, Section 13.

[383] *Supra,* Chapter 3, Section 16.

[384] Ibid

[385] *Supra,* Chapter 3, Section 3.

[386] *Supra,* Chapter 3, Section 10(3).

[387] *Supra,* Chapter 3, Section 3.

[388] Directive 2001/42/EC, art 4(1); Westerlund (2007), 324.

concerns, Sweden is advised to implement the suggestion of alternatives while consulting with the public, regardless of whether or not the Plan is binding.

4.3.5 Monitoring

Finally, once a plan has been implemented its actual effects need to be analysed. This is done once per the municipal council's term of office,[389] which is every four years.[390] The CAB thereby reviews whether the Plan accurately represents the requirements laid down in Section 5.[391] Some of the requirements include "the fundamental features of the envisaged usage of land and water areas, the municipality's view on how the built environment is to be used developed and preserved, […] the municipality's course of action, [and] the municipality's view on the risk of damage to the built environment".[392] The CAB then sends a summary with its view on the topicality of the Plan, including state and municipal interests, to the municipality.[393]

Similarly to the SEA procedure, the monitoring phase serves more of a reactive rather than proactive function. Since the review does not create any legal obligations for the developer, the conduction of the Plan can unlikely be halted or reversed, even when socio-environmental interests are at stake. Furthermore, since the focus is primarily on environmental concerns, the interests of minority groups are unlikely to be considered. To combat such, the PBA should stress the function of the monitoring phase as a means to collect data, which had not been reviewed earlier. This can only occur, when the previous phases have sufficiently incorporated all potential effects on the environment and the residing communities. To avoid too much reliance on the monitoring phase to illustrate the socio-environmental effects, stakeholder, and specifically BIPOC experiences and expertise need to form part of the SEA procedural principles.

4.4 Conclusion

Due to the fragmentation of law, and the decentralisation of decision-making, the requirements for the Swedish assessment procedure are spread out throughout several pieces of legislation,

[389] Building and Planning Act (2010:900), Chapter 3, Section 27.

[390] Swedish Local Government Act Ds 2004:31 (1 September 2004), Chapter 3, Section 24

[391] Planning and Building Act (2010:900), Chapter 3, Section 27, 28.

[392] *Supra,* Chapter 3, Section 5(1),(2),(4),(7).

[393] *Supra,* Chapter 3, Section 28.

while the conduction and assessment thereof takes part both on the local (municipalities), as well as regional (counties) level. On the one hand, such fragmentation can arguably cause confusion in the SEA procedure, for developers and affected stakeholders alike, due to the uncertainty as to which of the several legislations is applicable. On the other hand, the fragmented nature of the Swedish legislation also allows for a swifter inclusion of environmental justice principles, as different legislations can be co-referenced to make way for better Environmental Justice consideration. The implementation of the SEA Directive in the PBA, as opposed to solely in the Environmental Code, has already contributed to a shift from the ecocentric approach of the Directive to a more holistic view, where the environment is seen as essential for societal progress. Nevertheless, the Swedish approach to environmental law still deviates from the interconnected approach, embodied in the PEJ, which rejects ontological dualisms. Similarly to the references made to the Environmental Code, Swedish SEA legislation (including the PBA and the Environmental Code) can reference the Minorities Act and other regulations dealing with matters of discrimination of minorities. Read in connection, the different pieces of legislation can imply the incorporation of Environmental Justice concerns in the conduction of SEA, as well as the drafting of plans and programmes.

Chapter 5 - Conclusion

Environmental Justice calls for the correction of institutional errors, which have continuously excluded BIPOC from a fair access to the environment and to justice. Due to the significant amount of research done by the Environmental Justice advocates in the US,[394] the institutional discrimination of BIPOC in the U.S. environmental decision-making procedure could be revealed. It could further be confronted due to the gathering of people, who have been excluded from the decision-making process, as has been the case for the Warren County protests and the POCEL Summit.[395] Efforts to effectively dismantle institutional structures, which constitute a burden for BIPOC's access to the environment, should incorporate the three dimensions of Environmental Justice, which are distributive, procedural and recognitive justice. Especially due to the interconnectedness between the different dimensions, the collective application thereof is crucial.

The incorporation of Environmental Justice concerns requires the adoption and adaption of legislation, working on an institutional level. An example for such legislation is the EU SEA Directive, which assesses the environmental effects of plans and programmes. Similar to the more general approach of the EU in the environmental law sector, the SEA Directive stresses procedural principles, such as reliability, effectiveness, transparency and public participation, thereby concentrating primarily on procedural justice. However, due to the interconnectedness of the different dimensions, the procedural principles also provide room for the consideration of distribution and recognition. An example for the lack of such consideration arises from the fact that the assessment is conducted by the developer, i.e. the public authority proposing the plan or programme. Given that marginalised groups do not often form part of such authorities,[396] the scope of interests to be taken into account are rather narrow, and therefore unlikely to consider concerns of Environmental Justice. The lack of representation of BIPOC

[394] POCEL Summit Proceedings (1991); Toxic Waste and Race Report, United Church of Christ (1987); Hatim (2001); Cole and Foster (2001);

[395] Cole and Foster (2001), 20ff.

[396] This can be due to the lack of education, required for such positions, as is missing for Roma in Sweden, *see* Government communication 2011/12:56; It can also be due to a lack of association with the authority, as might be the case for Saami, who have the best chance to voice their interest in the *Samediggi*, rather than a public authority dealing with one specific environmental issue (e.g. forestry, mining, etc.), *see* Rudloff (2021), 40ff.

stakeholders in the SEA procedure is further visible when looking at the (almost contradictory) principle of reliability. While it is required for the SEA procedure to contribute to information-gathering from a variety of sources in a reliable manner, the Directive perpetuates a hierarchy between "Western" and "other" science. Thereby, the incorporation of BIPOC knowledge only occurs, where the authority deems it necessary, or where stakeholders openly protest for their access to the decision-making procedure. This illustrates the essence of explicitly recognising Environmental Justice considerations in the SEA Directive, as everything, that is not explicit, needs to be interpreted. However, this is unlikely to happen in favour of BIPOC interests, if there is a lack of representation thereof in the responsible institutions, as well as unaddressed power discrepancies between such institutions and affected stakeholders. Especially Indigenous knowledge could significantly contribute to the inclusion of Environmental Justice concerns in the assessment procedure, as they have expertise on and respect for the environment.[397] Furthermore, they traditionally view human and nature as equals,[398] thereby steering away from Western legal discourse differentiating between ecocentric or anthropocentric environmental law.[399]

In Sweden, the SEA Directive has *inter alia* been implemented in the PBA, which requires the conduction of a Comprehensive Plan on the municipal level. Since the PBA has been amended in an attempt to reform the planning and building sector, it focuses on societal progress, thereby following a different premise than the ecocentric SEA Directive. While the rather anthropocentric nature of the PBA gives reason to believe that it could better consider the needs and interests of marginalised groups, it still plays into the ontological dualism, separating human and nature. To counter such dualism, Sweden could further the contribution of Indigenous people groups in the SEA procedure, as they have much expertise on sustainable land uses. Furthermore, Sweden could ratify the ILO Convention 169, the UNDRIP, as well as the Nordic Saami Convention, thereby providing a strong foundation for Saami rights, which could eventually lead to the recognition of Saami as self-determined. A smaller step towards recognitive justice, but nevertheless an important one, is the proper implementation of the Nagoya Protocol, which could allow for Indigenous knowledge to inform the SEA procedure.

[397] Jolly and Thompson-Fawcett (2021).

[398] Principles of Environmental Justice, Principle 11.

[399] Davies (2017), 461.

Since Roma do not constitute a people under Swedish law, they have fewer options to open up the SEA procedure to incorporate their knowledge, needs and interest. Therefore, Roma are reliant on policies, such as the National Minorities Policy, which recognises several institutional burdens faced by Roma people. Nevertheless, to effectively strengthen Roma rights relating to Environmental Justice, the Policy would need to be adapted to recognise not just the symptoms (e.g. poor health, poor access to education, poorer living conditions) but further the main cause for Roma exclusion from the environmental decision-making (i.e., the institutional discrimination thereof in their access to the environment).

As could be seen with regards to the Swedish implementation of the SEA Directive, compared to the introduction of the Principles of Environmental Justice or the Nordic Sami Convention, the legislation is only as holistic, as the people designing it. If the SEA Directive is implemented by a group of primarily white "experts" in land planning,[400] the implementation is unlikely to include concerns of Environmental Justice to the same extent as if transposed by a more diverse team. This shows the importance of representative justice, which derives from procedural, as well as recognitive justice. In providing marginalised groups with access, not just to the procedure, but also to the legislation- and decision-making process, states can achieve representative, and consequently recognitive and procedural justice. To do so, Sweden needs to harmonise the existent rules on environmental preservation and societal progress, and specifically make reference to legislations, such as the Sami Parliament Act or the National Minorities Bill when conducting SEAs.

Finally, the analysis of the SEA Directive, and the Swedish implementation thereof through the Environmental Justice lens shows that everything, which is not explicitly codified in legislation, needs to be interpreted into being by decision-makers. However, as decision-makers seldomly face the same challenges as marginalised groups, more specifically BIPOC, it is important to strategically incorporate their expertise, experience, needs and interests in environmental legislation. It is therefore important to transform the SEA Directive, and consequently the Swedish implementation thereof, to explicitly aspire to work towards achieving all three dimensions of Environmental Justice.

[400] Hilding-Rydevik, Akersog (2011), 500.

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Annex

WE, THE PEOPLE OF COLOR, gathered together at this multinational People of Color Environmental Leadership Summit, to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities, do hereby re-establish our spiritual interdependence to the sacredness of our Mother Earth; to respect and celebrate each of our cultures, languages and beliefs about the natural world and our roles in healing ourselves; to ensure environmental justice; to promote economic alternatives which would contribute to the development of environmentally safe livelihoods; and, to secure our political, economic and cultural liberation that has been denied for over 500 years of colonization and oppression, resulting in the poisoning of our communities and land and the genocide of our peoples, do affirm and adopt these Principles of Environmental Justice:

The Principles of Environmental Justice

1) Environmental Justice affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.

2) Environmental Justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.

3) Environmental Justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.

4) Environmental Justice calls for universal protection from nuclear testing, extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water, and food.

5) Environmental Justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.

6) Environmental Justice demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.

7) Environmental Justice demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation.

8) Environmental Justice affirms the right of all workers to a safe and healthy work environment without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards.

9) Environmental Justice protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care.

10) Environmental Justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration On Human Rights, and the United Nations Convention on Genocide.

11) Environmental Justice must recognize a special legal and natural relationship of Native Peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination.

12) Environmental Justice affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and provided fair access for all to the full range of resources.

13) Environmental Justice calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of color.

14) Environmental Justice opposes the destructive operations of multi-national corporations.

15) Environmental Justice opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.

16) Environmental Justice calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives.

17) Environmental Justice requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to ensure the health of the natural world for present and future generations.

Textbox 1. Principles of Environmental Justice (1991)

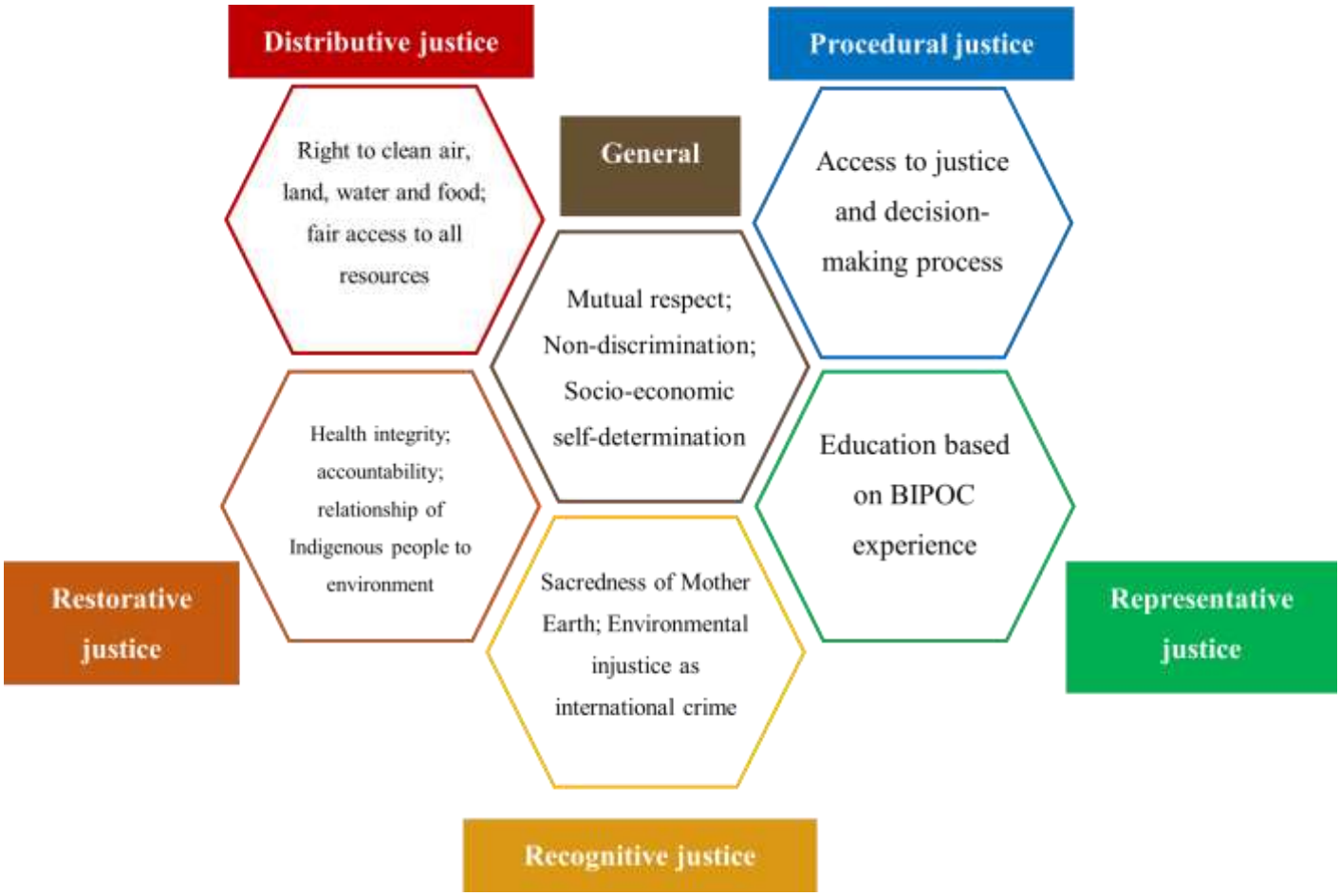

Figure 4 Interconnectedness between the three Environmental Justice dimensions

Figure 5, EA procedure with SEA at all tiers

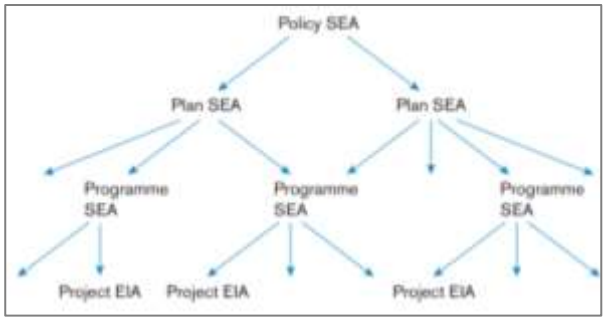

Figure 6, EA procedure without SEA of policies