

***WETLANDS-RELATED LEGISLATION AND INSTITUTIONS IN
THE WADDEN SEA COUNTRIES***

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Case Study

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1. The Ramsar Convention and Wetlands Management in Germany, Denmark and The Netherlands. The General Role of the Convention

Denmark, Germany and The Netherlands were among the countries which played an active role in the establishment of the Ramsar Convention in 1971 and its development in the years that followed. It was politically recognized that international cooperation was essential in order to conserve and manage the wetlands on their territory, of which many were of importance for migratory waterfowl. The Ramsar Convention was ratified by the Federal Republic of Germany in 1976, by Denmark in 1978 and by The Netherlands in 1980.

The Ramsar Convention came to play a significant role in the wetlands and nature conservation policies of the three countries in the following years. The implementation of the Convention was one of the elements contributing to halting the loss and degradation of wetlands and addressing the problems related to wetlands management. An indicator of its success in the three countries environmental policy is given by the relatively extensive listing of Ramsar areas. The reasons for its success were, in particular, that the Convention and its key obligations were considered specifically relevant to the pertaining nature and environmental issues and furthermore innovative in their nature. Simultaneously, it was the common opinion that the obligations could be met not only by existing laws but also by a wide range of other instruments.

The conservation and wise use of wetlands is an undisputed issue in the three countries. The governments acknowledge the role of legislation in the broadest sense in achieving this goal, but it is also recognized that it cannot be accomplished with legislation only. Also other instruments must be applied. Conservation and wise use of wetlands is basically related to loss and degradation of wetlands and disturbance to its wildlife. Since the adoption of the Ramsar Convention and the establishment of national wetlands policies at the start of the 70s, the loss of wetlands has basically been arrested in the three countries. Nonetheless, the conservation status of many wetlands on the territory of the countries, in terms of degradation and disturbance, is still critical because of various developments, in particular, because of the input of surplus nutrients and pollutants, developments and activities in the adjacent areas and the use of natural resources of such areas. The management of such developments

demands a broader approach than site protection and the application of a large amount of instruments which integrate the conservation and wise use of the wetlands with the surroundings. Legal instruments and institutional arrangements have therefore played an important role, however, the total conservation and wise use of wetlands demands a much broader scope. Finally, it must be recalled that legislation is the outcome of a political process and that this process may balance the elements of conservation and wise use in different ways.

In particular the listing of wetlands of international importance and the implementation of the wise use concept played a major role in the introduction of new policy, legislation and institutional arrangements. This was mostly undertaken in connection with other related national and other international legislation, e.g. the European Union Bird Directive. It is therefore difficult to determine the overall influence of the Ramsar Convention on policy and legislation and on individual cases. The provisions of the Convention are, however, referred to in many cases as being a reason for a particular policy and legislation. As illustrated below, the listing of areas and institutionalizing in legislation has played a particular role in Denmark, whereas the wise use concept has played a major role in The Netherlands in terms of development of integrated policies. None of the countries have, however, developed a specific wetland legislation. Although legislation has played a major role, it is also recognized that it is but one of the important elements of conserving and wisely using wetlands:

- there is already extensive legislation and planning;
- coherency can best be developed in conjunction with overall policy development which attempts to integrate various instruments;
- users can be better committed to conservation and wise use through a process of co-management which can confer legal responsibilities to the user groups concerned; and
- awareness of the ecological importance of wetlands is essential to support or alter behavior.

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2. The Ramsar Convention and the Wadden Sea Cooperation

The Wadden Sea is a marine wetland area shared by the three countries. It is of wide international importance, a.o. for migratory waterfowl of which 10-12 millions pass through the area annually on their migratory route from the breeding grounds in Siberia, Iceland, Greenland and Northeast Canada to their wintering grounds in Europe and Africa. In the 70s, it was recognized by the governments that joint cooperation was essential for a comprehensive protection of the area. Since the countries became contracting parties to the Ramsar Convention and were members of the European Community, a coordinated implementation of the Convention and the European directives, in particular, the European Bird Directive with regard to the Wadden Sea, has been taken into consideration while accomplishing that objective. The Joint Declaration on the Protection of the Wadden Sea 1982, which is the formal basis of the trilateral Wadden Sea cooperation, institutionalized these aims.

On the adoption of the Joint Declaration and at consecutive triennial Wadden Sea ministerial conferences, it was concluded, on the basis of reviews of the implementation of the instruments mentioned, including the Ramsar Convention, that the available national legal instruments were basically sufficient to implement the key obligations of the Convention

being the designation of Ramsar sites and formulating and implementing their planning, in order to promote the conservation of such areas, promote, as far as possible, wise use and establish nature reserves on wetlands and provide for their wardening. The Convention does not prescribe the application of specific instruments. The question of whether a certain activity conflicts with the conservation obligations depends primarily on an assessment of the impacts of the activity (Koester 1989). There are, therefore, several solutions to the same problem.

In the case of the Wadden Sea, the issue of wetlands conservation was hence not perceived as being a legal issue but a matter of how the countries could commonly establish a framework within which the Wadden Sea as a whole would be conserved and wisely used. This has resulted in the agreement on shared principles, targets and common policies and measures as entailed in the so-called Trilateral Wadden Sea Plan which is basically a political agreement adopted at the 1997 ministers conference. The legal aspects of the implementation of the Convention have, therefore, never played an important role in the trilateral Wadden Sea cooperation.

Furthermore, the Bird Directive is a much more powerful instrument seen from a legal perspective. Under the Bird Directive so-called Special Protection Areas (SPA) are designated to which the Directive applies and such SPAs also cover wetland areas. The Directive is European Union legislation and is an instrument which must be implemented in the national law of the member states, which has direct legal implications. Recently it has been followed by the Habitat Directive which in conjunction with the Bird Directive establishes a coherent European ecological network named Natura 2000. The Habitat Directive prescribes more specifically the conditions under which plans and projects may be agreed upon for such sites. These obligations are valid also for areas designated under the Bird Directive (Art. 6 and 7 of the Habitat Directive). From a legal viewpoint, it would therefore seem that relevant European legislation would be much more promising in conserving and wisely using wetlands, however, it should be recalled that it covers basically only specific sites being those of major importance.

It was recognized in the above reviews that there were differences in terms of the delimitation of the national portions of the Wadden Sea as a Ramsar site. The Danish Ramsar Site is relatively the largest Wadden Sea Ramsar Site and includes the Wadden Sea up to three nautical sea miles off-shore, the major parts of the islands and the adjacent marsh areas behind the seawalls are ecologically related to the Wadden Sea proper which has been designated as nature reserve. The differences stem from a different interpretation of the Convention upon its ratification. Whereas Denmark adheres to the view that the designated Ramsar sites should not be restricted to sites which are subject to specific conservation regimes, the policy of the Dutch government is that only sites which already enjoy the status of nature reserves or something similar can be designated for inclusion in the List. (Koester 1989; Tweede Kamer 1985-1986). The differences suggest a different result of the review of the Ramsar Convention upon ratification and subsequent implementation. The nomination of Ramsar sites and the relation between site designation and legislation has played a significant role in Denmark whereas in The Netherlands the implementation of the wise use concept has been a major issue.

3. Implementation of the Ramsar Convention in Denmark. Listing of Ramsar Areas and Legislation

As mentioned above, the Ramsar Convention entered into force in Denmark in 1978. The implementation of the Convention has been extensively analyzed and a summary of the main findings of the analysis is presented below with the aim to determine the scope and contents of the review upon the ratification (Koester 1989).

The preparation for the Danish ratification initially focussed on the obligation to designate Ramsar sites to accompany the ratification. A working group under the Ministry of the Environment presented a proposal for a list of 22 sites but because extensive rounds of hearings had to be conducted it was not before 1977 that a final list of 26 sites could be presented. Other ministries closely concerned were the Ministry of Agriculture which was responsible for wildlife management and the Ministry of Transport exercising the sovereign rights over the territorial waters. It was concluded at that time that the requirements of the Convention could be met within the terms of the existing legislation. As indicated above, according to the Danish interpretation, the nomination of the Ramsar sites did not imply an actual obligation to place a wetland under a special conservation regime but was simply a duty to manage wetlands in order to maintain their ecological character. In fact only a minor part of the 26 sites were subject to a special conservation regime at that time. It appears this interpretation was essential to obtain the agreement of the Ministry of Transport which was apparently concerned about the consequences. The Minister of the Environment explicitly indicated to Parliament that the Convention did not imply an obligation to subject the sites to additional legal protection nor to involve direct legal obligations towards the citizens. In fact in subsequent years, Ramsar sites and wetlands in general were subject to further legal regulation.

Notwithstanding the fact that the conclusion of the review of the obligations mainly focussed on the 26 Ramsar sites, it was considered that the Planning Act Reform and the Environmental Protection Act would suffice to meet the obligation to promote wetlands conservation and wise use in general, however, at the time, it was also recognized that the obligations could not be met without changes in laws related to agricultural use. In the following years, a substantial amount of laws and regulations were implemented which unquestionably enhanced the wetlands conservation. A large majority of those laws and regulations, however, were not intended to implement only the Ramsar Convention but were the results of general environmental and nature protection legislation. The list of laws and regulations is too extensive to mention and only a few of the most important ones are considered.

The most important implementation measure is the amendments to the Nature Protection Act in 1978 and subsequent amendments which introduced the general protection of certain biotopes including wetlands in general. The provisions imply that no changes may be made to these ecosystems without authorization from the county councils and the National Forest and Nature Agency as appeal authority. In succeeding circulars issued by the National Forest and Nature Agency it was stressed that discretion is restricted by international conventions such as the Ramsar Convention. The Convention was also implemented in other national legislation e.g. the Water Supply Act, The Marine Environment Act, in agricultural legislation and executive orders on the use of the territorial waters and the prohibition of use of lead pellets in hunting in Ramsar sites.

An important line of implementation has been the physical planning of regional authorities. It has recently - in 1994 - been subject to an Executive Order on the delimitation and administration of the SPAs and the Ramsar Sites. The Order lays down guidelines and binding rules for the way in which the sites are to be administered by the authorities. No plans may be laid down for any type of intervention that would be detrimental to the site or cause disturbance which could have serious consequences for those species in whose favor the site has been designated. The Order explicitly states that areas within Ramsar sites, e.g. may not be designated as urban zones, or infrastructure installations planned or constructed (National Forest and Nature Agency 1996).

A key element in the implementation of the Convention in Denmark has been the designation of a relatively extensive number of Ramsar sites contrary to The Netherlands and also to Germany which basically designate areas which are already subject to a conservation regime. The legal question has therefore always played a major role in Denmark, however, the above overview has also demonstrated that the review and consecutive application of instruments is not confined to law in the traditional concept but includes planning as one of the most important elements. In fact, the most important review issue was which issues to address and whether legal or other instruments would have to be applied. This issue implicitly played a major role in The Netherlands and was probably one of the reasons why this country put major emphasis on the implementation of the wise use concept from the beginning. Also the fact may have played a role that it may have been difficult, for political reasons, to introduce new legislation in the field of, in particular, nature conservation, however, this has not been investigated further.

4. Implementation of the Ramsar Convention in The Netherlands. Wise Use of Wetlands as the Central Theme

In 1985, the Dutch Minister of Agriculture and Fisheries, being responsible for nature conservation including the implementation of the Ramsar Convention in The Netherlands, informed the Parliament on the implementation of the Convention (Tweede Kamer der Staten Generaal. Vergaderjaar 1985-1986). The memorandum submitted to Parliament was in essence a review of the obligations of the Convention and how the government perceived its implementation in The Netherlands. As stated above, the wise use concept has always played a major role in Dutch wetlands policy and management. It was, in particular, The Netherlands government which promoted the further discussion on the issue in the framework of the Convention. It resulted in the endorsement of the wise use guidelines at the Montreux Conference, 1990, and the additional guidance at the Kushiro Conference, 1993.

The wise use of wetlands was conceived in the 1985 memorandum as being an issue of, in essence, the establishment of a coherent national policy. The major elements of the policy were:

- the national nature and landscape planning scheme which included wetlands as one important category which should enjoy an adequate protection;
- national, regional and local planning;
- application of the regulation on land management agreements, providing financial compensation to farmers; and

- targeted application of appropriate legislation in particular legislation regarding environmental protection and water management (Tweede Kamer der Staten Generaal. Vergaderjaar 1985-1986).

As appears from the Dutch national reports to the Ramsar Convention Conferences of 1993 and 1996, the review of the implementation of the wise use concept is an ongoing process. The 1996 report is primarily devoted to the wise use of wetlands and a number of operational evaluation criteria formulated on the basis of the wise use guidelines to evaluate the Dutch policies on the wise use of wetlands. The operational evaluation criteria entail three main categories which encompass a number of questions:

- nature conservation: does the present use endanger the properties and components and to what extent does restoration of wetlands occur?
- resource use: a.o. to what extent are resources and attributes properly exploited and does this lead to decreasing prospects?
- institutional arrangements: a. o. to what extent have national and regional wetlands policies resulted in better protection of wetlands, and are institutional arrangements being developed and implemented to achieve this?

The first two categories cover a review of the ecological state of wetlands in The Netherlands, how they are conserved and the constraints to conservation of wetlands values, which have been referred to above. The institutional arrangements review legal aspects and cross sectoral issues. The review notes that there is as yet no national policy dedicated to wetlands. Departments and ministries define their own sectoral priorities “in which wetland values and functions are afforded protection and conservation when they are beneficial to specific sectoral interests” (Ministry of Agriculture, Nature Management and Fisheries 1996). A national policy would be able to introduce ecological sustainability and wise use of wetlands in sectoral policies at the national level. However, it is emphasized that planning instruments are sophisticated, in particular, at the regional and local governmental level and wetlands are sometimes subject to a sort of master planning.

The Dutch Nature Policy Plan, which was adopted by Parliament in 1990, formulates the overall national nature policy valid for a time range of 25 years. It encompasses a considerable number of aspects which overlap with the wise use principles. The main elements of the policy plan are:

- the creation of a national ecological network, of which wetlands are an essential element;
- the development of nature areas through, a.o. restoration projects, which will entail the restoration of wetlands and the creation of new wetland areas; and
- the creation of ecological corridors to maintain or restore possibilities for migration of animals and plants.

The Nature Policy Plan is not a formal law but a plan endorsed by Parliament which will have to be implemented in sectoral laws and planning on all levels of government. The national government facilitates the implementation through making substantial financial means available. The wise use concept has been a very appropriate approach since the conservation and wise use of wetlands in The Netherlands is not a main responsibility of the environmental departments but distributed over several departments and ministries. The Nature Policy Plan has contributed significantly to formulating a coherent wetlands policy

which enjoys broad public attention through the involvement of non-governmental organizations through the planning process. The policy has also formulated the weighing of the different interests in wetlands conservation which have been or will be further implemented in (sectoral) laws.

In essence there is no major difference between the implementation of the Convention and the implementation of the wise use principles. The implementation of the wise use principles is the ongoing implementation of the Convention. The review process is therefore an ongoing process in which legal aspects also play an essential role. But the problem in reviewing the Convention from a legal point of view is the broad scope of the commitments and the “non-legal” nature of the obligations. Also the wise use guidelines are broadly formulated so that a meaningful legal review is often difficult to carry out.

5. Conclusions

The implementation of the Ramsar Convention in the three countries involves a broad number of instruments of which formal laws are but one of the elements. Another essential element is national, regional and local planning which is naturally based upon formal laws and regulations but which have a broader scope. Public awareness and involvement in wetland management are other important aspects. It is interplay between those instruments which determines the conservation and the wisely use of wetlands.

From the above, it can be concluded that a review of the implementation of the Convention and the wise use guidelines, confined to laws and institutions, is in itself very fruitful to emphasize its central role. The basic issue is firstly to define the conservation and wise use issue with regard to wetlands nationally and secondly to determine the role of laws and institutions in solving those problems and whether it is necessary to amend existing legislation to enable solving such problems.

The methodology used in the Dutch wise use review is a good example which should be considered to be used more widely. The main operational evaluation criteria are:

- nature conservation;
- resource use; and
- institutional arrangements.

Within those evaluation categories the position of laws and institutions can be determined as a part of the overall conservation and wise use of wetlands. This review should be carried out periodically, e.g. in connection with the Ramsar Conferences.

The Danish approach to the implementation of Ramsar Convention - the same approach has been followed in Germany - clearly emphasizes that an essential element in wetlands conservation is the introduction of a general protection of wetlands to the extent that no changes may be made to such ecosystems without the authorization of the regional authorities. The introduction of such general protection levels in national legislation would constitute a minimum level in terms of legislation. Furthermore, an essential element in legislation would be to stipulate how and in what manner conservation and wise use interests must be balanced legally, and which also makes it possible to appeal to a higher conservation authority. The stipulation of a balance of interest framework is important to ensure that the

resolutions to comparable problems are similar. Finally the legislation must be integrative in its approach.

A more precise formulation of the wise use guidelines - the current guidelines compare to a “shopping list” in which anyone can find something relevant - would be helpful for a review process.

The extensive listing of Ramsar areas in Denmark clearly underlines the importance of such areas for the legal implementation of the Convention and the necessity to review laws which may affect such sites. Because of the differences in philosophy of listing areas, it is however not likely that this could become universally accepted. Also planning on all levels of government appears to be an indispensable instrument which is comparable to laws and institutions.

Finally it should be emphasized that a decisive element in conserving and wisely using wetlands is addressing not only the activities on the wetlands themselves but the activities and developments which have an impact on the ecosystem. A review e.g. based on the above mentioned methodology should attempt to identify the issues and the role of laws and institutions.

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