Department of Law  
Spring Term 2019  

Master’s Thesis in Environmental Law, especially on Indigenous Participation Rights  
30 ECTS  

Sámi Influence in Decision-Making Processes  
Consultation, Consent or Somewhere In-between?  

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Abstract

International human rights committees and special rapporteurs on the situation for indigenous peoples have criticised Sweden for the domestic treatment of Sámi people and for not fully complying with indigenous rights on participation and consultation under international law. Participatory rights and consultation duties for indigenous peoples are important as they function as means of ensuring indigenous influence in decision making, giving effect to their substantive rights to land resources and culture. Swedish law acknowledges rights for Sámi people to be consulted in decision making. However, these peoples still do not have effective influence on issues that affect them in their role as indigenous peoples. As the extraction of natural resources and industrial and other development projects continues, the protection of indigenous Sámi rights in Swedish law need to guarantee that Sámi people have enough influence over land issues and in decision-making processes on matters that concern them. With their traditional knowledge, indigenous peoples may have an important role in environmental management and in efforts on climate change adaptation.
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## Abbreviations and Acronyms

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<td>County Administrative Board</td>
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<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<td>FPIC</td>
<td>Free, Prior and Informed Consent</td>
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<td>HRC</td>
<td>Human Rights Committee</td>
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<td>ICCPR</td>
<td>United Nations International Covenant on Civil and Political Rights</td>
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<td>ILO 169</td>
<td>International Labour Organisation Convention 169 Concerning Indigenous and Tribal Peoples</td>
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<td>SEPA</td>
<td>Swedish Environmental Protection Agency</td>
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<td>UNDRIP</td>
<td>United Nations Declaration on the Rights of Indigenous Peoples</td>
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1 Introduction

1.1 Background

Indigenous Sámi people and their situation in Sweden concern legal issues relating to land rights and rights to their culture and traditional practices. In order for Sámi people to exercise these rights, it is important that these people can participate in decision-making processes on issues that concern them and that consultation takes place in such matters. Consultation in decision making is, essentially, about who should participate and have influence in these processes. This involve mechanisms for consultation to take place, and which relevant matters consultation shall encompass. Swedish law provides some possibilities for Sámi people to be consulted in different matters. For example, consultation takes place with Sámi people in their role as a national minority and as affected stakeholders in certain situations.

In September 2017, the Government of Sweden launched a proposal on the duty to consult Sámi people.¹ The proposal outlines a framework for a new legislative act aimed at promoting and strengthening Sámi influence in decision making. Having influence over their own affairs and participation in decision making on issues that affect them and their traditional lifestyles needs to be enforced in order for Sámi people to effectively safeguard their rights and ensure their legal status as indigenous peoples. This is of importance for Sámi people in Sweden and for other indigenous peoples world-wide.

Indigenous participation rights under international law cover a broad field of mainly procedural rights, with the aim to ensure influence for indigenous peoples on issues that affect them. Several international human rights committees and special rapporteurs have directed criticism against Sweden for the domestic treatment of Sámi people. The critique from the international community mainly concern that, as the extraction of natural resources and industrial and other development projects continues, national legislation in Sweden is inadequate and does not guarantee that Sámi people have enough influence in decision-making processes on land issues and other issues that concern them.² Against this background, it is interesting to analyse and discuss legal issues regarding the duty to consult Sámi people and the concept of consultation with these peoples in a Swedish legal context.

² For an in-depth outlining and discussion on the international critique, see Section 2.5.
1.2 Aim of Study
The aim of this study is to investigate if and how Swedish law guarantee Sámi influence in decision making and meaningful consultation on issues that affect them. This study will additionally, to a limited amount, outline and discuss the relationship between the protection of indigenous peoples’ rights and environmental. Indigenous peoples’ rights to participation and influence in decision making on issues that affect them can be implemented in different ways. In Sweden, Sámi influence is mainly recognised through consultation (samråd). For example, Sámi people are to be consulted in their role as a national minority group and as affected stakeholders under Swedish law. However, the understanding and meaning of this procedure varies as provisions regulating consultation are found in different legislative acts. Therefore, the first question this thesis will explore is what the duty to consult or, in more general terms, consultation with Sámi people means in a Swedish legal context.

The first question give rise to other legal issues related to consultation with Sámi people and the amount of influence these people shall have in decision making. One central part of the duty to consult Sámi people concern which matters are considered of particular importance to them, and thereby being subject to consultation requirements. Hence, the second question this thesis will explore is which issues affecting Sámi people are included in the duty to consult. Here, the thesis will also identify and discuss other relevant issues concerning Sámi influence and consultation in Swedish law.

1.3 Scope and Limitations
From a legal perspective, the concept of decision making cover a broad range of questions on, for example, how certain decisions are to be made, the content and outcome of decisions and how decisions may be appealed and, if so, by whom. The scope of this study is limited to the amount of influence certain actors have in decision making, in this case focusing on Sámi peoples’ opportunities for participation and influence in decision making on issues that affect them and their traditional lifestyles. The second question of this study is mainly focused on whether matters related to environmental protection and efforts on climate change adaptation may be included as issues subject to consultation with Sámi people. The legal issues identified and discussed relating to the concept of consultation are limited to issues regarding the implementation of international obligations and the consequences of corporate consultation duties.
In addition to the consultation duties under environmental and administrative law in Sweden, the Plan and Building Act (law 2010:900) also contain provisions on consultation. These provisions include consultation requirements at municipality's issuance of, among other things, a general plan and a detailed plan. Although the municipalities and municipal self-governance are relevant for the situation of Sámi people in Sweden, this study will not delve into these municipal affairs, but will instead focus on the state's responsibility as a whole.

Regarding the protection of indigenous rights under international law, this study will not discuss the protection of human rights in the European Convention on Human Rights (ECHR). Sweden has signed and ratified the ECHR, however it does not contain a general rule on the right to participation or any explicit protection for the rights of minorities or indigenous peoples. In a European context, the rights of Sámi people will instead be discussed in light of the protection, in their role as a national minority, under the Council of Europe's Framework Convention for the Protection of National Minorities.

1.4 Method and Material

This study will use the method of traditional legal practice (rättsdogmatik) and by applying and analysing legal sources explore the questions outlined in Section 1.2. The study analyses legislation, preparatory work and case law to conclude what consultation with Sámi people mean in a Swedish legal context. Existing legislation in Sweden constitutes the basis for the analysis, focusing on consultation duties and procedures with the Sámi Parliament, consultation with Sámi people in their role as a national minority and as affected stakeholders under environmental law. To understand the meaning of these legally binding sources, relevant preparatory works and other investigations and case law are studied. In support of discussions and arguments, legal doctrine is used based on textbooks, articles and doctoral dissertations.

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3 In spite of this, Article 8 on the right to privacy and family life, has included some protection for minorities' special lifestyles and the issue of participation may have a role in assessing whether or not a violation can be established. For example, see Case Noack and Others v. Germany, European Court of Human Rights, Decision on Admissibility, 46346/99 (20/05/2000). Case found inadmissible.


5 F. Korling and M. Zamboni, Juridisk metodlära, (Studentlitteratur AB Lund 2013) 21-25.
The Governmental proposal on the duty to consult Sámi people (Ds 2017:43) will be described and analysed in certain parts, especially relating to which matters the consultation duty encompasses. This study will also analyse a practical example, illustrating how Sámi people can participate and have influence in practice, based on a case study of the management model of the Laponia World Heritage Site. The management model of Laponia World Heritage Site stands out as one of the few, if not the only, example where indigenous Sámi people have gained influence in the decision-making process regarding environmental protection. Material used in this regard comes from the legislative framework governing the Laponia management and investigations regarding Sámi influence in Laponia.

International law relevant for indigenous rights will be outlined and discussed as an international standard on these matters. This enable for making comparisons between international law and provisions in Swedish law. In this regard, a methodological question concerns the legally binding status of international provisions in a national legal context in Sweden. In general, conventions are legally binding, whilst declarations are non-binding agreements. Sweden takes a dualistic approach, meaning that obligations under international law need to be implemented in national legislation to be applicable. This is important to keep in mind for the outlining and discussion on the relationship between international standards and national implementation efforts. This thesis will not take a firm point on this relationship here, but instead will this be discussed continuously throughout the text. To further highlight the legal status of international provisions and some of the issues indigenous Sámi people are facing in Sweden, recommendations and statements from international bodies will be outlined and described. Although recommendations are not legally binding, Sweden has as an acceding party accepted to regularly submit reports and undergo periodic reviews. International case law from the Human Rights Committee (HRC) will additionally be discussed to concretise the meaning and understanding of consultation duties and participation rights in practice.

6 The Laponia governance model is today listed as a learning example in how the nationally determined environmental goal on Storslagen fjällmiljö (grand mountain environment) can be achieved. See Sveriges Miljömål, Förvaltningen av Laponia (25th of April 2017). Available at: http://sverigesmiljomal.se/larande-exempel/forvaltningen-av-laponia/
7 For example, see Appeal Court of Övre Norrland assessment in Case T 214-16 Swedish State v. Girjas sameby (2018-01-23), 14.
Additionally, answering these questions is supported by an analysis through the lens of a conceptual framework to decision-making processes based on social studies in anthropology. This allows for having a deep understanding of the role Sámi people have in decision making and the interdependence between different key actors. Statements and reports from Sámi and indigenous representative groups will be used to highlight the interests of Sámi peoples and the understanding of consultation from the perspective of this indigenous people’s group.

1.5 Outline
This thesis begins with providing a background to the topic of this study by describing the situation for Sámi people in Sweden, their rights and interests and also by outlining central issues regarding Sámi influence in decision making on issues that affect them. This is outlined in Chapter 2. Chapter 2 also include a discussion on the international criticism directed towards Sweden and a discussion on the Governmental proposal on the duty to consult Sámi people. The international standard for indigenous rights under international law will be analysed in Chapter 3, focusing on indigenous participation rights. In Chapter 4 will indigenous people’s involvement in decision making on environmental protection be discussed and the role of indigenous peoples in climate change adaptation will also be briefly highlighted.

Thereafter, in Chapter 5, Swedish law relevant for Sámi influence and consultation with Sámi people will be outlined and analysed. The aim of Chapter 5 is to answer the first question of this study concerning the meaning of consultation in a Swedish legal context. In Chapter 6 will then the second question of this study be answered, regarding matters and activities that may affect Sámi people and their livelihoods, focusing especially on efforts on environmental protection and climate change adaptation. Finally, in Chapter 7, this study ends with providing a general conclusion based on the findings of the study. Each chapter begins with a short introduction and ends with a summary. In attempting to take into account the perspective of Sámi people, the author makes no claim to have a final say on these matters. The aim is to try, in the best possible way, to highlight the Sámi perspective and interest in a legal context. It is of utmost importance that the Sámi agenda, which issues and interests that are highly relevant and important, ultimately are formulated and determined by the indigenous Sámi people themselves. Any inaccuracies or ambiguities in the wording, assumptions or statements are the responsibility of the author.
2 Sámi Influence in Decision Making

2.1 Introduction
This chapter aims at providing a background to the study on Sámi influence in decision making, by identifying and outlining relevant issues central for the investigation. The chapter starts by providing a conceptual framework to decision making and decision-making processes, related to the role and influence Sámi people have on matters that affect them. Thereafter, the situation for Sámi people in Sweden will be described. This will include a historical background and development on the domestic treatment of Sámi people in Sweden. Finally, Sámi influence in decision making and the duty to consult Sámi people will be described, focusing on the Governmental proposal (Ds 2017:43). This part includes an outlining of criticism from international bodies, providing insights on activities that may affect Sámi people.

2.2 Decision Making and Decision-Making Processes
Decision making is ultimately the way in which human societies are formed. Decision making may be regarded as a basic mechanism in societies, responsible for creating the distributions of resources and the use of land and water.9 From the perspective of anthropological human geography, it has been stated that:

‘The location of people and artefacts such as towns, fields, factories and roads, reflecting their social, economic and cultural activities, may be regarded as a consequence of innumerable decisions made by individuals acting either independently or, more commonly, as members of complex groups.’10

Decision-making processes can be complex, involving different steps constituting the procedure leading up to a final decision. Rather than viewing these steps isolated from each other, it may be more accurate to conceptualise decision-making processes as being formed by a series of distinctive but interdependent steps.11 The series of steps taking place in decision-making processes generally begins with an initial identification of goals or objectives, culminating in the evaluation of alternative strategies prior to the selection of a particular course of action.12

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Legal decision making involve general norm decisions and decisions in individual cases. In situations when a norm decision is made by official authorities, the judicial review in courts and by other official authorities serve as a guarantee for, among other things, fundamental freedoms and rights, ensuring that these are not being eroded by regulations issued at a lower level. In cases of individual decisions that can be appealed, the judicial review by courts function as a control mechanism for ensuring that the protection of fundamental rights and freedoms have been observed in the decision making.

In Sweden, official authorities may decide on matters that affect businesses, individuals and groups of people. This also affect Sámi people and their daily livelihoods. The Government of Sweden formulates proposals, such as the proposal on the duty to consult, in efforts to get goals on the political agenda. The County Administrative Boards (CAB) are a key actor for Sámi people and their livelihood on a daily basis, representing the Government as an official authority on a regional level. However, Sámi people are usually not directly involved in the decision making on questions that the CABs handles. In order for Sámi people to maintain and develop their culture, it is important for Sámi communities to have influence in decision making affecting them and their traditional lands.

Lack of influence in decision making that affects Sámi people is a major concern, especially in relationship to the continued increase of state-approved projects concerning extractions of natural resources and in other industrial and development areas. International criticism directed against the domestic treatment of Sámi people highlights that the legal protection of the rights of the Sámi in their role as indigenous people is currently not fully satisficing in Sweden. By not having an efficient say and participating in decision-making processes on matters that affect them, the rights and perspective of indigenous Sámi people risk being disregarded.

14 In one case, the Appeal Court of Övre Norrland examined a condition in a license agreement by the County Administrative Boards (CAB), obligating persons belonging to Sámi villages to reach an agreement with private land owners prior to certain hunting activities. The Court concluded that the CAB had not had the authority to decide on the condition at hand. As the CAB lacked authority to decide on the matter without support in legislation, the person could not be convicted for a hunting crime based on the breach of the condition. See Appeal Court of Övre Norrland, Judicial decision in Case B 564-13 (2014-09-23) page 5 and 9.
15 Regulation (2017:868) with the County Administrative Board Instruction.
16 M.B. Hagsgård, Renskötselrätten och de allmänna intressena av samisk kultur och renskötsel i nationalparker och naturreservat, Report to the Swedish Environmental Protection Agency (2016).
17 For more on this, see international critic outlined and discussed in Section 2.5.2.
2.3 Situation for Sámi People in Sweden

Sámi people, one of the world's indigenous peoples, originally lived in Sápmi where they lived on hunting, fishing and reindeer herding. Reindeer herding is a central feature of the Sámi traditional way of living and is a vital part of the Sámi culture. Sápmi, the Land of the Sámi, crosses the state national borders of four countries; Sweden, Norway, Finland and northern Russia. Crucial elements of Sámi lifestyles have been infringed by the implementation of borders in this region. Nowadays, Sámi people still live in Sápmi and also in many places, working in all kinds of professions.

Sámi people have historically been considered by official authorities to be incapable of handling their own affairs. Statements can be found from the beginning of the 20th century, describing Sámi as people of low cultural level, less developed compared to the majority agricultural society and without the ability to take decisive actions. The lawyer and legal jurisprudence historian Tomas Cramér, together with later studies, has shown how this policy permeated Swedish legislation into our days. Sámi people were subjected to legal abuse following the CABs taking their traditional land, leading to the traditional land of Sámi people being stolen and their rights inflicted. This procedure was motivated on the ground that Sámi people were at such low cultural level that they could not possess land. People with lower cultural levels were considered to be weaker and unable to withstand groups with higher cultural level in the competition for common resources. The treatment of Sámi people was supported on a ‘scientific basis’, based on racial biology developed in Sweden meanwhile.

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20 Bishop Bergqvist stated in 1908, “Just as the Lapps never played any outward political part, they have not had the capability to take any decisive initiative for the development of their interior conditions. The little culture they possess has been given them from outside, i.e. from the peoples by whom they were subjected. Themselves they always played a more passive part and adapted themselves to the arrangements made by ‘authority’ for their benefit.” The statement is found, with no further explanation for why, in H Lundborg and S Wahlund (eds), The Race Biology of The Swedish Lapps Part I (Almqvist & Wiksell: Uppsala 1932).
21 U-J. Dahre, Ursprungsfolk i internationell politik och rätt (Studentlitteratur Lund 2005) 184.
24 These ideas were partly implemented through the establishment in 1922 of the State Institute for Racial Biology in Uppsala. Although the racial biology studies were later terminated, both attitudes and politics were still based on the belief that the Sámi people were an inferior people’s group, unable of taking advantage of their own interests. See U J. Dahre, (2005) 185-6 and S Bruchfeld and P-A Levine, Tell Ye Your Children... A book about the Holocaust in Europe 1933-1945 (The Living History Forum, Stockholm 2012), 52.
Discriminatory state-sanctioned actions were also undertaken related to reindeer husbandry, causing a division between groups within the Sámi community. After the adoption of the Reindeer Herding Act of 1928, it was declared that the remaining rights of the Sámi people would go to members of a sameby (Sámi village)25 engaged in reindeer husbandry. Non-reindeer herding Sámi people were through this establishment excluded. Consequently, they did not get to have a say in exploitation projects affecting the Sámi cultural area throughout the 20th century. Reindeer Sámi and non-reindeer herders Sámi share similar historical background and traditions. However, legally speaking, the last-mentioned group have been further excluded, residing in an area they do not have any influence over.

Racism against and contempt for Sámi people has occurred for a long time in Sweden. This is expressed by Sámi people being subjected to abusive treatment, patronizing racist comments and discrimination based on their ethnic affiliation. The racism and contempt that Sámi people are exposed to have links to racist ideas and colonial structures, but offensive comments and special treatment are also based on prejudices about Sámi people and ignorance of Sámi history and culture.26 State policy in Sweden on matters relevant for the Sámi people was however never expressly or actually based on racial ideas in its approach. Sámi policies was not aimed at denying all support for Sámi people. Reindeer herders would not have to save themselves by abandoning their traditional livelihood and transitioning into agricultural farming. On the contrary, politicians wanted to preserve their traditional livelihoods with its associated cultural aspects. Nevertheless, the decision making was so deeply infected with understandings based on cultural hierarchy and racial ideas that it led to severe consequences for Sámi people.27

2.4 Sámi Peoples’ Rights and Legal Status

For a long time, Sámi peoples’ rights to land and water has, to varying degrees, been recognised by the Swedish state. The rights for Sámi people to land and traditional livelihood has been statutory through reindeer herding legislation, and have since been codified through the concept of reindeer herding rights (renskötselrätt). Unlike other rights of usage, the reindeer herding right is not based on contracts or agreement. Instead,

25 The term ‘sameby’ literally means ‘Sámi village’, but is more accurately a geographically delimited community of Sámi reindeer herders. A Sámi village is a geographical area but also a legal entity.
26 Forum för levande historia, Rasism mot och diskriminering av samer. Available at: https://www.levandehistoria.se/fakta-fordjupning/olika-former-av-intolerans/rasism-mot-av-samer
this right is based on indigenous historical claim, or immemorial (urminnes hävd).28 This makes it a special type of right, regulated mainly in the Reindeer Herding Act (Rennäringslagen, RNL, law 1971:437). Reindeer herding is a central part of Sámi culture and is exclusively to be conducted by Sámi people.29 However, this does not mean that the right resides in all Sámi people in practice.

The reindeer herding right applies to certain specific persons since the condition for someone who wishes to exercise reindeer husbandry is, with some exceptions, that the person needs to be a member of a Sámi village.30 Members of a Sámi village are entitled to engage in reindeer husbandry in their particular area, including building and setting up facilities they need for their reindeer herding, in addition to fishing and hunting rights.31 Sámi villages and reindeer herders influence and authority over the land they use for reindeer herding is limited by provision in legislation, enabling for the state to limit the use of land for Sámi villages and reindeer herders.32

Sámi people have also been recognised as one of the five national minorities33 in Sweden and thus have the right to develop their culture and to strengthen and develop their language. According to the law on national minorities and minority languages (Minority Act, law 2009:724), official authorities shall promote the opportunities for the national minorities to maintain and develop their own culture in Sweden. Minority legislation in Sweden aim to protect and promote national minorities, their language and culture and strengthen their opportunities for influence.34 As a national minority, Sámi people shall have opportunities to acquire, use and develop their mother tongue and develop their own cultural identity. Compliance with their rights as a national minority in Sweden must be secured and provide opportunities for influence and participation.35 Also, Sámi people have a special status as indigenous peoples.36

28 S. Spiliopoulou Åkermark and M. Talah, Samernas rätt till deltagande och samråd - Fysisk planering och infrastruktur (Svenska Avdelningen av Internationella Juristkommissionen 2007) 11.
31 Section 9 RNL. Reindeer herding may be conducted in specific areas that are made up of annual and winter pasture grounds, see Section 3 RNL. Coherent with the right to reindeer pasture is also the right to move the villages’ reindeers between the different parts of the village's pasture area (Section 23 RNL).
33 Acknowledged national minorities in Sweden are the people groups of Jews, Roma, Sámi, Swedish-Finnish people, and tornedalingar. See Section 2 Minority Act.
The Swedish Parliament stated in 1977 that Sámi people are an indigenous people’s group which, according to international law, require a cultural special treatment in Sweden.\(^{37}\) In 1993, the Sámi people became politically organised in their own political establishment in Sweden, the Sámi Parliament.\(^{38}\) Since 2011, the Swedish Constitution states that ‘the opportunities of the Sámi people [...] to preserve and develop a cultural and social life of their own shall be promoted.’\(^{39}\) This provision does not create any enforceable rights for Sámi people. Instead, enforceable rights appear in Chapter 2 of the Instrument of Governance. However, it does not impose a constitutional protection of the duty to consult Sámi people.\(^{40}\)

### 2.5 Sámi Influence and the Duty to Consult

#### 2.5.1 International Criticism

Sweden has on several occasions received international criticism for not fully complying with provisions under conventions and declarations, aiming at securing the rights of Sámi people. The critic outlined in the following regards specifically the compliance with indigenous peoples’ rights in ensuring the level of influence acknowledged and established under international law and in alliance with the needs of Sámi people. The UN Committee on the Elimination of Racial Discrimination (CERD-Committee) have directed criticism against Sweden for extensive activities relating to Sámi interests taking place without Sámi representatives having had the opportunity to influence the decision in question. The critique mainly concerns that, as the extraction of natural resources and industrial and other development projects continue, Swedish law is inadequate and does not guarantee that Sámi people have enough influence over land issues and in decision-making processes that concern them.\(^{41}\) The CERD-Committee has also pointed out that Sweden does not respect Sámi rights to land and water.

The Human Rights Committee (HRC), monitoring the International Covenant on Civil and Political Rights (ICCPR), has criticised Sweden regarding deficiencies in providing opportunities for indigenous Sámi people to influence decision on issues concerning

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\(^{37}\) See Prop. 1976/77:80 *Om samernas ställning som urfolk*.

\(^{38}\) The Sámi Parliament is the representative body for the Sámi, where the authority of the parliament is described in the Sámi Parliament Act (Sametingslagen, law 1992:1433). Prop. 1992/93:32, 32.

\(^{39}\) Chapter 1 Section 2 Paragraph 6 Instrument of Government.


\(^{41}\) Committee on the Elimination of Racial Discrimination - Concluding observations on the combined twenty-second and twenty-third periodic reports of Sweden (CERD/C/SWE/CO/22-23), 6 June 2018, 3.
Additionally, the UN Special Rapporteur on the rights of indigenous people, James Anaya, have in a report criticised Sweden especially over the lack of say Sámi people have over applications for prospecting, mining, forestry and wind power projects. The current Special Rapporteur, Victoria Tauli-Corpuz, stated in a report from 2016 that there is a current need to improve the ability for the Sámi people to have influence in decision-making.

The international critique described in this section stresses that Sweden has inadequate legislation that does not guarantee that Sámi people have enough influence over land issues and in other issues that affect them in their role as indigenous peoples. The critique entails that national legislation and implementation work, aiming at protecting indigenous rights of the Sámi people, is not fully consistent with the international agenda that Sweden have acknowledged to comply with. The CERD-Committee has additionally emphasized existing deficiencies in the amount of influence Sámi people have in decision-making, especially in relationship to the principle of free, prior and informed consent.

2.5.2 Increased Sámi Influence

Several attempts and steps have been taken in Sweden to ensure and protect the rights of Sámi people. In a preparatory work on increased Sámi influence it is stated that legislation on reindeer husbandry should take its starting point from the perspective of Sámi people. Based on their regional and natural conditions, Sámi people and the Sámi villages themselves should be in charge of developing and maintaining Sámi industries (samiska näringar). In order to achieve this, it was proposed that Sámi people, as far as possible, should be given increased influence over the administration of reindeer husbandry and of support granted to reindeer husbandry, leading to a number of governmental tasks were transferred from the CABs to the Sámi Parliament. However, these changes do not entail a complete transfer of the reindeer husbandry administration in its entirety to the Sámi Parliament.

42 Concluding observations of the HRC - Sweden (CCPR/CO/74/SWE), 24 April 2002.
45 In its latest review in 2018, the CERD-Committee expressed concern about the insufficient legislation to fully guarantee the right to free, prior and informed consent and for the protection of the rights of the Sámi people to their traditional lands, see Committee on the Elimination of Racial Discrimination (CERD/C/SWE/CO/22-23) 3.
46 Prop. 2005/06:86 Ett ökat samiskt inflytande.
47 Prop. 2005/06:86, 33-34.
These changes mainly include the transfer of tasks, previously conducted by the CABs, limited to internally Sámi matters.\textsuperscript{48} Tasks and decision making on issues that often have a connection to disputes with landowners and other land users have not been transferred to the Sámi Parliament. Thus, issues relating to land use in reindeer herding areas continues to be administered by the CABs. It is still the CABs that make decisions regarding, among other things, the granting of rights of use land above the cultivation boundary and on reindeer pasture areas.\textsuperscript{49} No provision has been drafted obligating the CABs to always hear the Sámi Parliament before deciding on issues that may affect Sámi people and their interests. Neither has a general obligation for other authorities to hear the Sámi Parliament on issues concerning Sámi interests been introduced.

In order to promote Sámi influence on matters that affect them, the Government of Sweden launched in September 2017 a proposal on the duty to consult Sámi people. The proposal was drafted partly based on international comments directed towards Sweden, concerning the domestic treatment of Sámi people. The aim with the proposal is to ‘promote and strengthen Sámi peoples’ influence over their own affairs in decision-making processes.’\textsuperscript{50} More precisely, the aim is to strengthen participatory rights of the Sámi Parliament and other representatives of Sámi people, ensuring the right for these peoples to be consulted on issues that concern them. The proposal outlines a general framework, applicable in addition to existing consultation obligations under current legislation.

According to the proposal, Sámi participation or influence shall be enabled through consultation. In numerous cases, the Sámi Parliament have stated that they are not being consulted in matters that directly affect the Sámi population and which are handled by other authorities.\textsuperscript{51} The proposal does not fully specify the meaning of the consultation procedure with Sámi people or the amount of influence they shall have. Sámi representatives and civil society organisations have highlighted that the proposal in its current form is problematic as it does not take any major considerations to Sámi interest in their role as indigenous peoples. Among other things, it has been pointed out that there are problems with establishing only a general requirement for consultation under

\textsuperscript{48} Following the changes, the Sámi Parliament now handles a number of tasks relating to the exercising of authority (myndighetsutövning). It is mainly concern issues of registration, appeals of Sámi village decisions and the handling of various support and compensation efforts.

\textsuperscript{49} Prop. 2005/06:86, \textit{Ett ökat samiskt inflytande}, 33-34.

\textsuperscript{50} Government of Sweden, (Ds 2017:43) 38-40.

administrative law.\textsuperscript{52} Additionally, the proposal contains certain vague formulations which may lead to concerns for Sámi people when it comes to the interpretation at official authorities.\textsuperscript{53} At the time of writing, the proposal has not been made into national legislation.

\subsection*{2.6 Summary}

This chapter have described how the situation for the Sámi people in Sweden have developed over time, focusing on Sámi influence and participation on matters that affect them. Sámi people have been recognised as an indigenous people’s group and a national minority in Sweden. It is the Sámi people themselves that have been driving the development, both nationally and internationally, to get this recognition. With these recognitions follows that Sámi people have rights, but there are still shortcomings in how these rights are respected.\textsuperscript{54} The issues regarding Sámi influence and participation on matters that affect them have been highlighted based on a historical background and international critics and also described in the light of the Governmental proposal on the duty to consult the Sámi people. Although there have been some improvements in recent years relating to the situation of the Sámi people in Sweden, these people still undergo struggles in having their rights acknowledged and their culture respected by the state.\textsuperscript{55} Sweden has ratified several international conventions from the United Nations and the European Council, acknowledging indigenous rights to land, culture and participation in decision making that concern these peoples. Next chapter discusses some of these indigenous rights under international law.

\textsuperscript{52} For example, see Civil Rights Defenders, Comments on governmental proposal (Ds 2017:43) 4. Available at: https://www.regeringen.se/4ae3dc/contentassets/8f4e22a24d8841c1bc1e15817ee4b28c/civil-right-defenders.pdf.


\textsuperscript{54} Forum för levande historia, Rasism mot och diskriminering av samer. Available at: https://www.levandehistoria.se/fakta-fordjupning/olika-former-av-intolerans/rasism-mot-av-samer.

3 International Indigenous Rights Law

3.1 Introductory Remarks
This chapter outlines international law protecting the rights of indigenous peoples, focusing on indigenous rights to participation and consultation on matters that affect them under international law. Two conventions and one declaration are of particular interest: the International Covenant on Civil and Political Rights (ICCPR), the Framework Convention for the Protection of National Minorities (Framework Convention) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This chapter starts by analysing UNDRIP, as it is the only one out of these three international agreements that specifically aims at recognising and protecting the rights and interests of indigenous peoples. This section will also include a brief discussion regarding the Convention concerning Indigenous and Tribal Peoples in Independent Countries no 169 (ILO No 169 or ILO-Convention), as it also takes into account rights specifically of indigenous peoples. However, Sweden have still not ratified the ILO-Convention.

Thereafter, provisions under ICCPR and the Framework Convention will be analysed and discussed. Although these conventions do not contain specific rights for indigenous peoples, they are of relevance for these peoples in their role as minority groups and as individuals belonging to these groups. Finally, two cases from the HRC will be studied, aiming at providing examples from case law on the consultation duty in an international context.

3.2 Indigenous Rights to Participation and Consultation

3.2.1 Principle of Free Prior and Informed Consent
International law recognises special interests and rights of indigenous communities.\textsuperscript{56} The right to self-determination is a fundamental basis for indigenous rights, enabling for indigenous peoples to drive their economic, social and cultural development, as well as to manage and use their traditional lands. This right shall be granted to these peoples and is interconnected with other indigenous rights.\textsuperscript{57} For indigenous rights to be effective in practice, it is also necessary to enable for effective participation for these peoples in vital

\textsuperscript{57} Art. 3-4 UNDRIP.
decision-making processes that concern them and their situation, as a central part of their sets of rights. 58

UNDRIP recognises indigenous peoples' right to influence decision making on issues that concern them, codified in the form of the principle of free, prior and informed consent (FPIC-principle). According to Article 18 UNDRIP, indigenous peoples have the right to participate in decision making on matters which would affect their rights. 59 Furthermore, it is stated in Article 19 UNDRIP that states shall ‘consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions.’ Consultation and cooperation shall take place before the adaptation and implementation of legislative or administrative measures that may affect indigenous peoples. It is the state that are under the obligation the consult indigenous peoples on these matters. The aim with the consultation procedure is to obtain their ‘free, prior and informed consent’. 60 As indicated, this shall be obtained prior to the adoption of measures that may affect indigenous peoples.

UNDRIP was adopted in 2007 by the general assembly of the United Nations in the form of a resolution and the provisions are outlined in a declaration. 61 Part of the criticism from international bodies against Sweden particularly concern inadequate implementation of FPIC at national level. Although the declaration as such is not a binding act, the FPIC-principle is today considered to constitute international customary law. 62 The relevance of FPIC is furthermore supported by the fact that the principle forms a crucial part of the legal framework for indigenous rights, obligating state parties to ensure that indigenous peoples have effective influence in matters that affect them.

In recent years, the principle of the duty to consult indigenous peoples have been established as one of the cornerstones of international indigenous rights law. 63 The duty to consult indigenous peoples is not necessarily to same as the FPIC-principle. Whilst ultimately deriving from FPIC, the duty to consult may arguably be seen as a way to further develop and implement indigenous peoples right to influence decision making.

59 Art. 18 UNDRIP.
60 Art. 19 UNDRIP.
Participatory rights and consultation duties are important as they function as means of ensuring indigenous influence in decision making, giving effect to their substantive rights to land resources and culture.\textsuperscript{64} Furthermore, Article 32 (2) UNDRIP recognises that states shall consult with indigenous peoples concerned, in order to obtain their free, prior and informed consent, ‘prior to the approval of any project affecting their lands or territories and other resources’. States shall engage in consultation procedures particularly regarding projects connected ‘with the development, utilization or exploitation of mineral, water or other resources.’\textsuperscript{65} Whilst Article 19 UNDRIP recognises that states shall consult indigenous peoples before the adaptation of legislative and administrative measures, Article 32 (2) UNDRIP widens the coverage of states’ consultation duty, including also decision making regarding the approval of projects affecting indigenous lands or resources. Thus, consultation with indigenous communities shall also take place prior to granting of permissions for resource exploration or developments projects on their traditional lands.\textsuperscript{66}

3.2.2 Degree of Influence

Sweden has signed and was also a driving force in the negotiations prior to the adoption of UNDRIP.\textsuperscript{67} At the adaptation of UNDRIP, Sweden recalled that the provision under Article 19, on the state obligation to consult and cooperate with indigenous peoples, can be realised in different ways.\textsuperscript{68} It is stated that this can be done, for example, through a consultation procedure between indigenous organisations and governments, or through participation in democratic processes. The statement from Sweden is still valid, for example regarding the Government's view on the FPIC-principle, referred to in Article 19 and which has come to be used more in international contexts.\textsuperscript{69} The Government’s view is that the FPIC-principle is an important method or principle in order to ensure genuine consultation and dialogue, however not entailing a collective right of veto.\textsuperscript{70}

\textsuperscript{64} M. Åhrén, \textit{Indigenous Peoples’ Status in the International Legal System}, (Oxford University Press 2016) 202-205.

\textsuperscript{65} Art. 32 (2) UNDRIP.


\textsuperscript{67} IWGIA, (2018), 30.


\textsuperscript{69} Government of Sweden, (Ds 2017:43) 17.

The degree of influence affected indigenous peoples shall have on state decisions is a central question in the enactment of the duty to consult these peoples.71 FPIC does not imply a general right of veto for indigenous peoples. Indigenous influence can vary from a minimum consultation procedure to giving their full consent, but may also end up somewhere in-between. Among legal scholars, the debate continues regarding the relationship between consultation and consent, i.e. the degree of influence indigenous people should have on matters that affect them. One interpretation on the duty to consult is that state must ‘seek but not necessarily reach an agreement with indigenous communities.’72 On the other end of this spectrum lies the view, in the light of the conclusions of human rights monitoring bodies, that indigenous peoples ‘have a right to give or withhold consent, with a qualified right to veto in cases where decision may significantly jeopardize their livelihoods.’73 In practice, the duty to consult may be implemented in various ways between different countries and jurisdictions.74

Arguably, the greater the extent and the negative impact of a decision or a procedure have or may have for indigenous people, the more far-reaching obligation the state should have to seek consensus solutions. In such situations, this obligation differs to an arrangement in which a group is generally prepared to give their views, for example in the capacity of affected stakeholder or as a representative of a minority group.75 Although FPIC does not constitute a general right to veto, it is in my view crucial that indigenous people should have a right to give or withdraw their consent in certain situations. For example, this should be enabled in decision making on resource exploitation that risk disable the continuous livelihood for indigenous peoples based on their lifestyles or practices.76 In addition to the provisions under UNDRIP, described in this section, the ILO-Convention No 169, adopted in 1989 by the International Labour Organisation, outlines a framework of rights for indigenous and tribal people. The ILO-Convention will be briefly discussed in the following.

73 For example, see Poma Poma v. Peru, Communication No. 1457/2006/UN Doc.CCPR/C/95/D/1457/2006, 27 March 2009.
75 M. Åhrén, (2016), 225.
3.2.3 ILO-Convention No 169

Article 6 of ILO-Convention No 169 recognises the right for indigenous and tribal people to participate and to be consulted in decision making concerning them. Only a small number of states have signed and ratified the ILO-Convention, signalling that there is still a reluctance to follow legally binding obligations ensuring rights of indigenous peoples.\(^7^7\) Although there is an existing gap in the ratification of the ILO-Convention, it may be of relevance as it is frequently being considered of relevance outside of the ILO-system by UN committees and regional bodies.\(^7^8^\)

Sweden has since the adoption of the ILO-Convention had a two-folded approach to the ratification and incorporation of the Convention and its provision into national legislation. The Government of Sweden have announced that the work is in progress towards entering the ILO-Convention. At the same time, the Government has expressed that the ratification of the ILO-Convention ultimately is a matter for the Swedish Parliament to resolve on.\(^7^9^\) The ILO-Convention has been under the Sámi agenda in Sweden for a long time. The Sámi Parliament have in their mining policy stated that they will not go along with the advancement of any new mining projects until the ILO-Convention has been ratified by the Swedish Parliament. Despite this, Sweden still has not yet ratified the ILO-Convention. In the following will other international agreements be outlined and discussed, starting with ICCPR followed by the Framework Convention. Although these two conventions do not specifically aim at protecting indigenous rights, they are of relevance for indigenous peoples and applies to these peoples in their role as individuals and as members of minority groups.

3.3 Indigenous Peoples, Minorities and Individuals

The provisions under ICCPR aim at protecting fundamental rights for individuals and individuals belonging to minority groups. According to Article 25 ICCPR, every citizen shall have the right and opportunity to participate, without any distinctions and without unreasonable restrictions, in the management of public affairs directly or through freely


\(^7^8^\) See B. Saoul, (2016) 6.

\(^7^9^\) Governmental response on recommendation 146.7 following the Universal Periodic Review of Sweden in January 2015 in UN Council on Human Rights, Council document A/HRC/29/13/Add.1. The government's position on the matter was repeated in the 4th report in June 2016 to the European Council under the Framework Convention on the Protection of National Minorities.
chosen representatives. Article 25 ICCPR should be read in conjunction with Article 27 ICCPR, which states that:  

‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’

The subject protected by Article 27 ICCPR are individuals belonging to minority groups. However, the wording ‘in community with the other members of their group’ give a certain collective dimension to the protection. The rights and interests of indigenous people under ICCPR, applicable to Sámi people, are to be ensured for these people as individuals and as individuals belonging to a minority group. ICCPR provides rights that state parties are to ensure and protect. A restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole.

Article 27 ICCPR is formulated as a negative obligation for states as minorities ‘shall not be denied [certain] rights’, imposing on states not to interfere with the exercise of these rights. Article 27 ICCPR regards cultural integrity and the right to enjoy one’s own culture. The right to enjoy one’s own culture cannot be determined in abstract but has to be placed in context.

These provisions under ICCPR protect minorities and not indigenous peoples distinctly. Although Article 27 ICCPR to a limited degree aim at protection minority rights in a more collective sense, the primarily aim is for individuals to enjoy minority rights. The aim is to ‘protect the right of individuals to choose freely the degree to which they remain ethnically separate or integrated into the national society.’

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80 Art. 25 ICCPR.
82 Art. 27 ICCPR.
83 Ibid.
87 This is based on the formulation that the rights are to be enjoyed ‘in community with other members of their group’, see Article 27 ICCPR.
88 Art. 27 ICCPR. Barsh writes that ‘the concept of minority rights focuses on entrenching the legal equality of minorities with other citizens, as well as limited autonomy with respect to language, culture and religion.’ See R.L. Barsh, (2007) 834.
In an European context, one of the most comprehensive treaties designed to protect the rights of individuals of national minorities is the Council of Europe's Framework Convention for the Protection of National Minorities.\(^89\) Article 15 of the Framework Convention provides that state parties shall create necessary pre-conditions for the effective participation of people belonging to national minorities in their cultural, social and economic life and public affairs, in particular those affecting them.\(^90\) Effective participation can contemplate the inclusion of minorities in the preparation, implementation and evaluation of national and regional development plans and programs that may affect them directly. The concept of effective participation also include consultation on issues that may directly affect minority groups.\(^91\)

As stated initially in Chapter 2, Sámi people are both a national minority and an indigenous people’s group in Sweden. In general, international law provide a more comprehensive recognition of the rights of indigenous peoples in comparison to the rights of minority groups. With the legal status as indigenous peoples follows a legal regime specifically aiming at protecting the rights and interests of people belonging to these groups. Despite this, the rights of indigenous peoples are also in general applicable to these groups in their role as minorities and as individuals adhering to such groups. The duty to consult, outlined and discussed in Section 3.2, can arguably influence the interpretation of older, binding conventions, aiming at ensuring and enabling for indigenous people to participate and influence decision-making processes on issues that concern them.\(^92\) In the following will two cases from the HRC be outlined and discussed.

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\(^90\) Art. 15 ICCPR.


3.4 Two Examples of the Duty to Consult from the HRC

The aim of this section is to highlight the state duty to consult indigenous peoples based on two cases from the HRC. It also shows that the rights and interests of indigenous peoples are, to a certain extent, considered and enforced also under the protection of the rights of ICCPR. HRC monitors ICCPR by reviewing regular reports of state parties and provides general comments on the interpretation of the Covenant. HRC also monitors the Covenant through decisions based on individual complaints. Sweden have ratified the Optional Protocol, empowering the HRC to receive and process individual complaints.\(^\text{93}\)

In the case \textit{Länsman et al v Finland}\(^\text{94}\), the HRC gave its opinion on a procedure for granting permission for quarries on the mountain Etelä-Riutusvaara. In order to examine whether a violation of Article 27 was at hand in the case, the HRC referred to the extensive consultation process prior to the licensing and the fact that the scope of the activity was limited in regards of quantity and in working methods. In the case, HRC stated:

\begin{quote}
‘A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right in Article 27.’\(^\text{95}\)
\end{quote}

In the case, Sámi people had primarily claimed their rights based on the cultural significance of the mountain, rather than the importance for reindeer husbandry.\(^\text{96}\) Based on the statement from the HRC in the case, Article 27 ICCPR does not guarantee absolute protection. Rather, a certain degree of the infringement is required in order to constitute a violation. The HRC found that no violation had occurred in the case. However, it was recognised that similar economic activities could in some cases make it impossible for any possibilities of conducting reindeer husbandry for the Sámi people.\(^\text{97}\)

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In such situations may it be necessary that the duty to consult indigenous peoples are enforced, in order for indigenous peoples to have an effective say on the matter at hand.

The HRC have in a latter case examined the situation regarding participation issues and consultations with indigenous peoples. The case *Apirana Mahuika et al v. New Zealand*\(^98\) concerned fishing rights in the Waitangi area in New Zealand. The HRC highlighted in the case that state parties should take positive legal actions in order to guarantee for minority groups to effectively participate in decision making that concern them, stating that:

‘[…] the enjoyment of the right to one’s own culture may require positive legal measures to ensure the effective participation of members of minority communities in decisions which affect them. [...] the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.’\(^99\)

In order for indigenous people’s group to enjoy their rights under ICCPR, state parties may be required to actively provide positive legal measures to ensure the effective participation of indigenous communities in decisions which affect them.\(^100\) The HRC noted in the case that the state party had undertaken a thorough process of consultation in order to secure broad support from the indigenous Maori people to a nation-wide settlement and regulation of fishing activities. Maori communities and national Maori organisations had been consulted and their proposals did affect the result of the arrangement. The settlement was enacted only following the Maori representatives’ reporting that substantial Maori support existed for the settlement.\(^101\) In other cases, a formal and limited consultation, only for the consultation procedure in itself, can hardly be sufficiently in line with the obligation under the provisions of ICCPR.\(^102\)
3.5 Summary
Several international agreements that Sweden has signed and ratified, both binding conventions and non-binding declarations, contain provisions regarding indigenous participation rights and consultation with indigenous peoples. Based on these, Sweden has obligations towards Sámi people not only in domestic law but also under international law. Consultation duties and participatory rights can be found in UNDRIP and also in several other international human rights conventions. Whilst UNDRIP is a non-binding declaration and many states, including Sweden, remain reluctant to ratify the ILO-Convention No 169, the rights of indigenous peoples under other conventions are central for the duty to consult as a mean to protect indigenous rights. Case law and recommendations from international bodies monitoring other conventions are arguably also of significance for the development of indigenous peoples right to participation.

4 Indigenous Peoples’ Rights under International Environmental Law

4.1 Introductory Remarks
International agreements in previous chapter sets out obligations for states to protect human rights and the rights of indigenous peoples, focusing in this study on rights to participation and the duty to consult indigenous peoples. These international agreements are supplemented by the Convention on Access to Information, Public Participation and Access to Justice in Environmental Issues, generally referred to as the Aarhus Convention. The Aarhus Convention entered into force in 2001 and was ratified by Sweden in May 2005.103 This chapter begins by discussing certain provisions under the Aarhus Convention. Thereafter, indigenous people’s role in environmental management and development will be discussed, based on the Rio Declaration. This chapter ends with a discussion on indigenous people’s role in efforts on climate change adaptation, in the light of certain provisions under the Paris Agreement.

103 See Prop. 2004/05:65 om Århuskonventionen.
4.2 Environmental Protection and Indigenous Rights

The Aarhus Convention links together issues on environmental protection with rules for the protection of human rights. Article 6 (2) of the Aarhus Convention states that ‘the public concerned shall be informed [...] early in an environmental decision-making procedure, and in an adequate, timely and effective manner.’ Thus, the Aarhus Convention deals with the relationship between citizens and their governments in the environmental field. The Convention contain obligations on transparency requirements for official authorities in their contact with citizens. Based on the Aarhus Convention, citizens have the right to receive environmental information, to influence environmental decision making and to appeal environmental decisions. The information shall be given, inter alia, on proposed activities and the application on which a decision will be taken. Furthermore, Article 6 (6) explains that the information should include an overview of the main options considered by the applicant. Article 6 (4) clarifies that each party ‘shall provide for early public participation, when all options are open and effective public participation can take place.’

The Aarhus Convention does not guarantee specific rights for indigenous people groups but applies to these people in their role as the concerned public. However, obligations that states have under the Aarhus Convention are formulated based on the protection for future generations, deriving from Principle 10 of the Rio Declaration. Therefore, it is necessary to look closer at the role indigenous peoples have in environmental protection under the Rio Declaration. The Rio Declaration is one of the five agreements that were decided upon at the UN’s second major environmental conference – the UN’s Conference on Environment and Development (UNCED) - which was held in Rio de Janeiro in 1992.

Principle 22 of the Rio Declaration acknowledges that indigenous peoples have a vital role in environmental management and development because of their knowledge and traditional practices. In the achievement of sustainable development shall the interests of indigenous peoples be recognised and supported by states and effective participation shall be enabled. Indigenous peoples’ traditional knowledge and lifestyles are fundamental for the preservation of biological diversity and the protection of natural and cultural values related to achieving a sustainable environment and development.

105 Ibid.
106 Principle 22 of the Rio Declaration on Environment and Development.
Although the Rio Declaration constitutes a so called ‘soft law’ legal instrument, which, in principle, is not of a legally binding status, the Rio Declaration contains a number of important principles which are of fundamental importance under international environmental law, in particular the principle of sustainable development. However, it does not create legally binding obligations for states to ensure certain rights for indigenous people groups. Despite this, the Rio Declaration, followed by the Aarhus Convention recognises and establishes a link between environmental protection and indigenous rights under international human rights law. It may therefore be argued that the Aarhus Convention and its provisions, together with the development on the duty to consult indigenous people, constitute an important basis for interpreting this state duty. Also, the connection between environmental protection and indigenous rights may arguably come to have an important role in protecting the natural environmental and the rights of indigenous peoples, especially in the light of environmental issues such as climate change.

Additionally, the Convention on Biological Diversity (CBD) was the first international instrument to recognise the rights of indigenous peoples and other local communities to the intangible elements of their cultures. Article 8(j) of the CBD-Convention states:

“Each Contracting Party shall, as far as possible and as appropriate:
(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;”

The provision under Article 8 (j) CBD obliges state parties, when taking national measures, to respect, preserve and maintain traditional knowledge, innovations and practices by indigenous and local communities. Article 10 (c) CBD is also of relevance for the protection of the natural environment where, among others, indigenous peoples live and operate, stating that:

‘Each Contracting Party shall, as far as possible and as appropriate:
(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;’

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108 Art. 8 (j) CBD.
109 Art. 10 (c) CBD.
Traditional knowledge is, among other things, ‘accumulated knowledge by indigenous peoples and other local communities on the dynamics of ecosystems from which they have traditionally drawn a livelihood’.\(^{110}\) Kept alive through cultural practices, it contain accumulated knowledge and experiences on ‘devised ways of managing living resources to ensure their long-term survival’.\(^{111}\) Spiritual beliefs and worldviews of indigenous peoples world-wide, as well as for Sámi people, are rooted in connections to land and nature.\(^{112}\) Indigenous peoples possess knowledge and experiences that may be used in scientific research processes to fully understand endangered ecosystems and animal species as well as is decision-making processes regarding the management of environmentally protected areas.

### 4.3 Indigenous Peoples and Climate Change Adaptation

In previous section, the relationship between environmental protection and indigenous rights have been highlighted, indicating that indigenous peoples can have an important role in efforts on environmental management and actions taken to protect the natural world. Also, indigenous peoples can have an important role in climate change adaptation. The aim of this section is the further discuss the role indigenous people have, or may have, in efforts on climate change adaptation, based on the Paris Agreement and an international development emerging, acknowledging how climate change affect indigenous people groups.

Under the framework of the UN’s Climate Convention, the member states adopted in December 2015 the so-called Paris Agreement on climate issues.\(^{113}\) The Paris Agreement established the global goal on adaptation.\(^{114}\) Adaptation is all human efforts to lessen the impact of climate change on human or natural systems.\(^{115}\) This goal aims at enhancing adaptive capacity, strengthening resilience and reduce vulnerabilities to climate change. Adaptation action should follow a ‘participatory and fully transparent approach’ and furthermore ‘be based on and guided by the best available science and, as appropriate,

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111 Ibid.
113 Paris Agreement adapted 12 December 2015 at the United Nations climate conventions 21st state party meeting, report FCCC/CP/2015/10/Add.1.
114 Art. 7.1 Paris Agreement.
115 M. Doelle, (2009), 40-43.
traditional knowledge, knowledge of indigenous peoples’. Today, adaptation has become central to research and the social discourse on sustainability and climate change. Adaptation is seen to a greater extent as a necessity and somewhat desirable. At the same time, understandings of the concept of adaptation are somewhat limited. There are few studies describing how adaptation takes place in practice and it is unclear whether, how, by whom, and where adaptation takes place. Adaptation is largely about power and relationships, and questions about adaptation should therefore not only be viewed from an instrumental perspective.

The Paris Agreement highlights the involvement of indigenous peoples as one important step in finding adaptive solutions to climate change related issues. Indigenous peoples can therefore have an important role in the adaptation process. In the Arctic region, thus in Sápmi and where Sámi people may live, this role relates especially to these people's understandings of the impacts of climate change in the region. Climate change affects everyone. Although being a global problem, climate change has particular adverse effects on indigenous people’s groups, depending upon the climate for their livelihoods. Climate change can have both direct and indirect effects on indigenous traditional livelihoods. Related to the situation for the Sámi people, rapid weather changes caused by climate change can impact the ability for reindeer and other animals to find food which directly have implications for indigenous Sámi livelihood connected with hunting and herding. In having a close relationship to the land where they have lived for thousands of years and developed knowledge and cultural traditions, this may indirectly affect Sámi societies, culture and health.

Additionally, in support of acknowledging the role of indigenous peoples and providing opportunities for indigenous influence in climate change adaptation processes, there is an international approach emerging taking into account the consequences of climate change and how these changes affect indigenous peoples.

116 Paris Agreement Art 7.5.
118 Sámi Parliament, Kan och borde- renskötseln anpassa sig? (2016-11-04). Available at: https://www.sametinget.se/94551
120 Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya - The situation of the Sámi people in the Sápmi region of Norway, Sweden and Finland (A/HRC/18/35/Add.2), page 17.
121 A. Stepien, ‘Arctic Indigenous Peoples and the Challenge of Climate Change’ in E Tedsen et al (eds), Arctic Marine Governance: Opportunities for Transatlantic Cooperation (Springer Berlin 2014) 73.
One example of this international development is the Inuit Petition concerning the alleged violations of the Inuit’s human rights resulting from global warming caused by greenhouse gas emissions from the United States.\textsuperscript{122} Arguably, this give rise to a connection between climate change efforts and human rights for indigenous peoples. Another example comes from the indigenous Waorani people, Amerindians from the Amazonian Region of Ecuador, that in April 2019, won a legal case against the Ecuadorian government.\textsuperscript{123} Half-a-million acres of the rainforest was protected by the victory from oil drilling activities, a landmark recognition for indigenous rights and our climate. In the judicial decision, three governmental bodies were found to have failed to adequately consult the Waorani community before putting their territory up for sale.\textsuperscript{124} This may be seen as a step forward for governments and court systems respecting indigenous peoples’ right to decide what happens to their lands.

4.4 Summary

This chapter has described the link between the protection of indigenous rights in international law and the protection of the environment and access to information in environmental decision making. It has been shown that the Aarhus Convention, based on provisions and principles of the Rio Declaration, functions as a supplementary tool in the recognition of indigenous rights, especially relevant for their participatory rights. Indigenous peoples can have an important role in environmental management and development. The use of traditional knowledge is central for the protection of vulnerable ecosystems and also for efforts taken to achieve climate change adaptation.


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5 Consultation with Sámi People in Swedish Law

5.1 Introductory Remarks

This chapter aims at answering the first question of this thesis, by analysing the meaning of the duty to consult or consultation with Sámi people in Swedish law. The state duty to consult Sámi people in Sweden is generally considered as an obligation that originates from law outside the national legal system. In this sense, international legal obligations can be understood as ‘foreign’ as the duty to consult derives from obligations under international law and various human rights’ treaties. Consultation procedures is one way of how Sámi influence and participating in decision making can be implemented and exercised. However, Sweden have not yet adopted any agreements or legislative act including provision on specific consultation duties with Sámi people. Although it lacks an explicit consultation duty, Sámi people are not entirely devoid of influence.

This chapter will start by analysing consultation requirements with the Sámi Parliament. This is followed by a discussion on consultation with Sámi people as a national minority, including a discussion on the differences between minority rights and indigenous rights. Thereafter, consultation procedures based on Sámi people as affected stakeholders will be analysed. This part focuses on consultation requirements under the Environmental Code and the Mineral Act. Finally, the management model of Laponia World Heritage Site will be described and analysed as one example of how indigenous Sámi influence may be organised and enabled in practice, in environmental management of protected areas.

5.2 Consultation with the Sámi Parliament

Swedish law has certain provisions aiming at ensuring that the Sámi population, represented by the Sámi Parliament, can give their point of view in governmental matters on issues that concern Sámi people. In its public administration role, the Sámi Parliament comments on legal proposals and other matters sent to them from the Government and other state authorities (remisser). The Government is obligated to obtain information and opinions (yttranden) from competent public authorities when preparing government

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matters. To the extent matters concern the interests of Sámi people, this includes contacts with the Sámi Parliament. However, these processes are dependent on there being a specific governmental matter at hand. It does not include opportunities for exchange of information and opinions on general matters or on a regular basis. The Sámi Parliament are therefore depended on the Government proceeding with an errand in order to have a say in issues that affect Sámi people.

Consultation duties limited to procedures and exchange of information only with the Sámi Parliament may come with the consequence of some parts of the Sámi population being excluded from the opportunity of having a say in matters that affect them. The described consultation provisions do not define Sámi people or the Sámi population, neither does the Reindeer Herding Act (RNL). In the preparatory work to RNL, it is stated that people who are considered as Sámi according to the definition of the Sámi Parliament Act, also are to be regarded as Sámi in the application of RNL. A requirement for someone to exercise the reindeer herding right is that the person is Sámi. The definition under the Sámi Parliament Act is based on self-identification, meaning that someone needs to consider himself or herself to be Sámi. In addition to this, one of the alternative requirements must be at hand in order for the person who considers themselves Sámi to be considered as such under the legislative act. The requirement forming the basis for the assessment of whether someone has provided enough evidence supporting the claim that the person is of Sámi origin must in other cases, based on the preparatory work to the RNL, be determined through case law by courts. This definition may lead to some Sámi people not being able to take part in the voting or be elected in the Sámi Parliament, thus not being able to have their voice heard or represented within the Sámi Parliament.

It is not just the Government that are to consider information and opinions deriving from the Sámi people. Indigenous people in many countries have been recognised some degree of protection and supervision as minorities. This is also the case regarding Sámi people in Sweden.

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128 Chapter 7 Section 2 Paragraph 6 Instrument of Government.
130 Section 1 Paragraph 3 RNL.
131 Prop. 1992/93:32, 92-93
5.3 Consultation with Sámi People as a National Minority

The Minority Act provides that administrative authorities in Sweden have a general obligation to consult with Sámi people and other national minorities. According to Section 5 of the Minority Act, administrative authorities (förvaltningsmyndigheter) shall give the national minorities opportunities to influence questions that affect them and, as far it is possible, consult (samråda) with the minorities in such matters. This obligation aims at promoting conditions necessary for national minorities to maintain and develop their culture and to provide opportunities for effective participation in decision making, when decisions concern questions that are important to them. Sámi people are one of the national minorities in Sweden and the duty to consult is therefore applicable to consultation efforts with Sámi people in their role as a national minority. Through a legislative change in 2018, consultation shall take place with minorities, and no longer only with representatives of minorities. Thereby, the provision aims at minorities in Sweden and applies to Sámi people in general, thus not only with the Sámi Parliament.

The duty to consult is central for the realisation of the agenda on promoting opportunities for national minorities to participate and influence decision making. The responsibility is on the state to ensure that these groups have sufficient influence and that consultation takes place. Consultation shall be done by administrative authorities, through a structured dialogue so that the official agency can be able to consider their views and needs in their decision making. This entails that the authorities must design procedures in a way so that a dialogue can be conducted with the national minorities.

One problem with the consultation duty under the Minority Act is that there are no further instructions or policies on how consultation should be done in practice. In the preparatory work, it is stated that the provision contains a clarified description as consultation shall be implemented through a structured dialogue. In my view, this clarification still leaves a margin of interpretation for official authorities in creating settings that are sufficiently in line with the provision. Additionally, the preparatory work provides that the Government has left it up to state official authorities and the

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139 Art. 5 Paragraph 2 Minority Act.
municipalities to adapt their work routines to be able to contribute to the empowerment of the national minorities. However, in a study from 2019, it was found that it exists a ‘widespread uncertainty among state officials as to the concrete meaning of the duties placed upon them, including a perceived lack of knowledge, competence and routines’ relating to the implementation of the duty to consult Sámi people. The lack of clear policies and instructions on how consultation with Sámi people should be conducted, might lead to issues in the application and implementation of the duty to consult these peoples.

Minority rights stipulate some protection for Sámi people to participate and influence decision making on issues that concern them. In the preparatory work to the Minority Act it is recognised that minority groups are both rights bearers and experts on their own situation. Therefore, they should be listened to and understood as a source of knowledge on how certain efforts and actions can take form in order to improve the situation for the minority group. However, international law protecting the rights of indigenous peoples and the critique from international bodies highlights that Sámi people are not guaranteed rights in their role as indigenous peoples. The problem is that the provision under the Minority Act only considers Sámi people in their role as a national minority, not as indigenous peoples.

The protection under the Minority Act puts Sámi people together with other national minorities. Being association with the concept of minorities may intervene to some extent with the legal protection of Sámi rights as an indigenous people’s group. This has been shown to have implications on the state’s duty to consult these people and the application and evolvement of Sámi rights in Sweden. This still causes problems for individuals and groups that claim their status as indigenous peoples and the status is been contested by states. In the following, the relationship between minority and indigenous rights and the bases for these rights will be discussed.

5.4 Indigenous Rights and Minority Rights

Minority rights are in nature individual. In comparison, indigenous rights are group rights. Indigenous peoples have generally not sought equality, but rather a certain degree of collective territorial autonomy.¹⁴⁸ Fundamental rights to land and water in the areas where these people have traditionally lived are based on the argument that a sufficient amount of territorial sovereignty is crucial for the enjoyment of their distinctive ways of living. Indigenous peoples have generally justified the claim for specific rights based on the uniqueness of their cultures and the gravity of their situation.¹⁴⁹ The historical background and the description of the situation of Sámi people in Chapter 2 shows that the treatment of Sámi people in Sweden have had severe consequences for these people, even to this day. Other minority groups in Sweden have also undergone forced replacements, discrimination and hate-speech offends.¹⁵⁰ However, in contrast to minorities, Sámi people have a special relationship with the land and natural environmental in the areas they traditionally have lived and continues to live in.

The uniqueness of the Sámi culture and their special relationship to the land creates a basis for Sámi people, in their role as indigenous people, for being the best and most legitimate custodians of their traditional lands.¹⁵¹ This idea has gained increasing legitimacy at the international scene, especially relating to environmental protection.¹⁵² Traditional lifestyles of Sámi people are closely connected and dependent upon the surrounding natural landscape. Reindeer husbandry is one of several ways of how the traditional lifestyle of Sámi people is dependent on the surrounding landscape, functioning ecosystems and fairly predictable weather changes. This relationship is a central and unique for the Sámi people, and also a core feature of indigenous communities world-wide.¹⁵³

¹⁴⁹ Ibid.
¹⁵⁰ The state treatment of the Roma people, taken as one example, have been described in a government white paper. It is recognised that a white paper describing history is an important starting point for strengthening the work of Roman human rights. See Government of Sweden, The Dark Unknown History: White Paper on Abuses and Rights Violations Against Roma in the 20th Century, Ds 2014:8 (Nordstedts Juridik 2015). From a Sámi perspective, a similar white paper from the state has sometimes been requested to make visible and compile abuses and discrimination against the Sámi people. However, no white paper or truth commission have been outlined on the Sámi situation in Sweden. See Sámi Parliament, Vitbok om romer (2014). Available at: https://www.sametinget.se/71399.
¹⁵² For example, the Rio Declaration, discussed in Section 4.2, recognises that indigenous people have a vital role in environmental management and development, because of their traditional knowledge.
5.5 Consultation with Sámi People as Stakeholders

5.5.1 Environmental Code
In addition to consultation with the Sámi Parliament and with Sámi people in their role as a national minority, consultation can be based on these peoples’ role as affected stakeholders (sakägare). Relevant provisions are found within national environmental law and this section focuses on consultation requirements in the Environmental Code (law 1998:808) and the Mineral Act (law 1991:45). As this section describes consultation with Sámi people under environmental law, it is noteworthy to highlight that the Mineral Act was adopted to promote exploitation of mineral resources in Sweden. Thus, in comparison to the Environmental Code, the Mineral Act is not fundamentally based on environmental concerns or aiming at ensuring a sustainable development.

Through amendments entered into force on January 1 2018, new rules on environmental assessments, including environmental impact assessments (EIA), was introduced under the Environmental Code. The purpose of an environmental assessment is to integrate environmental aspects into planning and decision-making so that a sustainable development is promoted. Chapter 6 of the Environmental Code include provisions on the identification, description and assessment of environmental effects when planning and deciding on plans and programs (strategic environmental assessments) and activities and measures (specific environmental assessments). These procedures require the drafting of an EIA, engagement in consultation (samråd) and the consideration of environmental effects in the decision-making process.

In the strategic environmental assessment, the official authority or the municipality shall consult certain actors concerning if significant environmental impact can be assumed (undersökningssamråd) and how the EIA should be delimited (avgränsningssamråd). These consultation procedures shall take place with the municipalities, CABs and other authorities which, due to their particular environmental

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157 Chapter 6 Section 1 Paragraph 2 of the Environmental Code.
158 Environmental effects (miljöeffekter) are defined as direct or indirect effects that are positive or negative, temporary or persistent, cumulative or non-cumulative and which arise in short, medium- or long-term period on, inter alia, people groups and human health, certain animal- and plant species, land, water, air, climate, landscape and cultural environment. See Chapter 6 Section 2 of the Environmental Code.
159 Additional requirements for the authority to undertake in the strategic environmental assessment are stated in Chapter 6 Section 9.2-9.4 Environmental Code. For more on what the EIA in the strategic environmental assessment shall include, see Chapter 6 Section 11 Environmental Code.
responsibility, can be assumed to be concerned by the plan or program. The Sámi Parliament may be consultation in their role as an official authority in strategic environmental assessments. There is however no requirement that this should be done in every situation or specifically in situations affecting traditional Sámi areas or livelihoods.

A party intending to conduct an activity or measure shall in the specific environmental assessment consult with the CAB, supervisory authority and individuals that can be assumed to be especially affected by the activity or measure. Specific environmental assessments regarding operations and measures shall be made by the party intending to conduct an activity or take an action. Sámi individuals, such as reindeer herders, can be in such position that a party needs to consult with Sámi villages in the affected area. However, an affected Sámi individual or reindeer-herding community are in these situations treated like any other stakeholder, even when traditional Sámi lands are impacted. Only acknowledging affected stakeholders in the Environmental Code entails that Sámi people are not recognised in their status as indigenous peoples and as specific right holders. This is problematic as these people are not only a local interest group, but rather the approach to indigenous groups are congruent with their rights to land, resources and culture. Also, the duty to consult is largely limited to consultation with affected Sámi villages in the areas where activities are planned to take place. Thereby, other Sámi people risk not being covered by the obligation to consult.

The main target of the environmental assessment is the environmental impact of a project. It is stated in earlier preparatory work that issues regarding the impact on the environment must come in at an early stage and be included in the decision making throughout the process up to a permit decision. Furthermore, it is stated that this procedure can contribute to the discovery of knowledge gaps as well as to a generally increased knowledge and understanding of environmental, health and natural resource issues in society. However, the consultation procedure does not necessarily involve all aspects relevant to Sámi people and affected Sámi villages, since consultation under the Environmental Code are restricted to environmental matters.

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160 Chapter 6 Section 24.2 Environmental Code.
161 Chapter 6 Section 23 Environmental Code.
5.5.2 Mining Act

The Mining Act do not contain provisions to accommodate for any special rights relevant to Sámi people, and existing mining policies do not appear to be sufficient to protect Sámi interests and their rights over lands affected by mining.\(^{166}\) Also, the Mineral Act contain few requirements for mining companies to carry our consultation. Amendments made in 2014, increased to some degree the requirements between mining companies and affected stakeholders for sharing information and having dialogues at an early stage of the development. This especially aimed at facilitating the opportunities for participation for Sámi people and other national minorities.\(^{167}\) Before any exploration is carried out in accordance with an exploration permit, a work plan must first be approved.\(^{168}\) Affected reindeer-herding community, among other stakeholders, must be informed of this work plan and may respond in writing.\(^{169}\) Additionally, in order to engage in mining and its related activities, environmental permits are required under the Environmental Code.\(^{170}\) This enables for Sámi people and other affected stakeholders to be consulted in the context of the environmental assessment.\(^{171}\) However, this comes in late in the process and affected Sámi villages may only stress the need for mitigation, since the exploitation permit under the Minerals Act has already been granted.\(^{172}\)

The conceptual framework to decision making described in Section 2.2 highlights that decision making is not just a one-way procedure but rather consists of a multitude of processes, interacting from an initial spark of action to a final decision being made. As such, consultation with Sámi people needs to be exercised in a way that enable for these peoples to have influence, starting from an early stage and that enables for participation throughout the whole process. Only conducting late consultation procedures, such as in the granting of mining permissions, risk not fully taking into account for the rights and perspectives of indigenous Sámi peoples.

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\(^{166}\) See Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya - The situation of the Sámi people in the Sápmi region of Norway, Sweden and Finland (A/HRC/18/35/Add.2) 6 June 2011, 15-16.

\(^{167}\) Prop. 2013/14:159 Bättre information och tydligare ansvar vid mineralprospektering.

\(^{168}\) Chapter 3 Sections 5-5 d Mineral Act.


\(^{170}\) Chapter 9 Section 6 Environmental Code.


\(^{172}\) Ibid.
Prior to exploitation of resources on traditional territories, states ought to, at a minimum, engage in good faith consultations procedures with potentially affected indigenous people’s groups. Arguably, such consultation procedures should not only encompass environmental impact, but also property rights and indigenous Sámi rights. Consultation procedures considering only environmental impacts, may risk not considering how efforts also may affect the reindeer-herding right and other rights relevant for Sámi social and cultural well-being. In the next section follows an analysis of the management model of the Laponia World Heritage Site. The aim is to provide an example of Sámi influence and consultation with these peoples in practice, especially relating to environmental management of protected areas.

5.6 Sámi Influence in Practice: Laponia

5.6.1 Laponia: A World Heritage Site
Nature conservation and the protection of natural and cultural values involve efforts on setting up special protected areas, which continues both globally and nationally in Sweden. A major part of the world’s protected areas include lands owned or claimed by indigenous peoples. Although indigenous rights have been strengthened in recent decades, indigenous peoples around the world still struggle for influence over the management of protected areas on their traditional lands. Sweden has a long history of nature conservation policies and management arrangements of protected areas, with generally low levels of local influence and control and little consideration of traditional and local knowledge.

The management of the Laponia World Heritage Site stands out as one example of indigenous Sámi people participating and influencing decision making regarding the management of protected areas. Sámi influence have been enabled through the establishment of the Laponiatjuottjudus association. Sámi villages in the association are

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175 It can be questioned whether such an approach still is the most suitable and effective in protection. Nature does not have boundaries in the sense a protected area usually is set up. For example, if a protected area is kept intact but surrounding areas are badly affected, this may all in all have cumulative bad effects on the entire biosphere and for the ecosystems.
in majority, which gives opportunities to influence decision making in practice. This is an important feature, although it might be of a symbolic gesture, as decisions are to be made in consensus between all parties of the association. Consensus decision making is however a key element to the association as it may necessitate for efforts taken to build trust and relationship and understanding between the different parties. Many customs, having developed in the reindeer herding community of Sámi villages, rely on cooperation given the harsh environment in which they undertake their difficult work.178 Thus, this relates to how decisions are generally made within Sámi communities.

Located in the Northern part of Sweden, the Laponian area cover 9400 km2 and includes four national parks and two nature reserves. Sámi people have lived in and used the area since prehistoric times.179 In 1996, Laponia was inscribed on the UNESCO World Heritage List under the UNESCO Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention). Various cultural and natural heritage sites and object are enlisted on the basis of having particularly high universal value under the criterion established by the World Heritage Committee.180

Laponia is the only World Heritage in Sweden protected as a mixed site for both its natural and cultural values. The living cultural heritage of the reindeer-herding Sámi people was as a central argument for the nomination and inscription of Laponia.181 In the motivation for the establishment of the site, it was stressed that Laponia is one of the world’s last and best preserved examples of an area of transhumance, having been used for reindeer grazing since early stages of human development.182 Reindeer husbandry still takes place throughout the area, and Laponia cover lands of nine active reindeer-herding communities. By being protected under the World Heritage Convention, state parties are required to have an appropriate organisation and adequate legislation to protect and care for their world heritage sites.183

180 World Heritage Convention, Article 11.
183 World Heritage Convention, Article 27.
5.6.2 Management of the Laponia world Heritage Site

In most cases, a municipality or the CAB manages World Heritage Sites in Sweden. The National Heritage Board (Riksantikvarieämbetet) and the Swedish Environmental Protection Agency (SEPA) have a general mandate from the Government to handle and prepare issues following Sweden’s ratification of the World Heritage Convention. The division of responsibilities between official agencies has been deemed to be satisfactory. However, it has been assessed that there is a need to develop the work in certain parts. The Government of Sweden have proposed that the National Heritage Board should be tasked with, in cooperation with other relevant authorities and actors, preparing a national strategy, describing how Sweden works with the World Heritage Convention and how this will be developed in the future.

Since 2013, the Laponia World Heritage is managed by an association called Laponiatjuttjudus, which in Sámi language means the Laponia administration. The association took over the responsibility of the management of the site from previously being managed solely by the CAB of Norrbotten. The purpose of the process was to create a management model where actors in the local area were involved in the protection of national parks and nature reserves. Sámi villages living in the Laponian area are represented in the association and are in majority and decisions are made in consensus. Additionally, the association consists of the SEPA, the CAB of Norrbotten and the municipalities of Jokkmokk and Gällivare. The creation of the association enabled for the CAB and the SEPA to delegate management tasks to the association.

The Laponia Regulation and the Laponia Management Plan describe and regulate the distribution of responsibilities between the parties and between Laponiatjuttjudus and other state and municipal authorities. The CAB of Norrbotten may transfer the task of managing the national parks and nature reserves included in Laponia in accordance

184 Laponia.nu, Laponiaprocessen. Available at: https://laponia.nu/om-oss/laponiaprocessen/
185 Governmental statement, Unescos världsarvskonvention och de svenska världsarvsobjekten (skr 2001/02:171) 9.
186 Ibid.
with the management plan to *Laponiatjuottjudus*. The CAB may also transfer the execution of predator inventories, the task of spreading information about the World Heritage Site, and the upkeep of buildings and trails in the area. However, CAB may not transfer tasks that entail the exercise of public authority. This includes the issuing of permits and exemptions concerning activities in Laponia, supervision, and drafting of predator policy. The management plan prescribes that state and municipal authorities should consult with *Laponiatjuottjudus* on issues that affect or may affect Laponia. All activities in Laponia, including those involving the exercise of public authority, must be carried out in consultation with local actors.

### 5.6.3 Sámi Influence in the Management of Protected Areas

The management model of the Laponia World Heritage Site may lead to better linking of Sámi people and their local communities with regional development efforts and policies, which can contribute to the promotion and preservation of Sámi rights, their interests and culture. Sámi people can have an important role in the northern economies and societies and in regional development, due to their use of land, their involvement in reindeer husbandry, agriculture and food production and also in their connection with regional tourism industries. Improved understandings of the customs of Sámi villages is needed and needs to be reflected more accurately in legislation so that the rights enjoyed by reindeer herders are not extinguished. In this regard, Laponia have potential of standing out as an example of best practice in enabling for Sámi people to influence decision making on matters that affect them and others.

However, the Laponia management comes with some shortfalls in the light of Sámi rights to participation and influence decision making on matters that affect them. The management of the Laponia World Heritage Site aims at strengthening local participation. Sámi communities have gained a relatively strong role in the management association. However, the aim is not explicitly to strengthen Sámi participation. To strengthen Sámi participation and their influence, a further step could be to explicitly outline an aim of improving Sámi influence in decision making, highlighted as an important actor among

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other local actors. Sámi historical presence and traditional livelihoods constituted a central part in the motivation for establishing the Laponia World Heritage Site.\textsuperscript{197} This could be highlighted in their role, not only as affected stakeholder or local actor, but specifically as indigenous peoples. It is important that the interests and rights of indigenous peoples are being recognised and formulated in this process.

Sámi villages in Laponia can participate and influence decision making concerning nature conservation and environmental management in the area. However, they have not gained any significant amount of influence in resource management. Since the CAB may not transfer tasks involving the exercise of public authority, there is still a gap in Sámi influence that does not include all issues with potentially significant impacts on Sámi livelihood and their rights.\textsuperscript{198} Consultation in these matters may provide sufficient opportunities for Sámi influence. The division of responsibilities concerning the exercise of public authority may be relatively unproblematic, if the mechanisms for consultation function as intended.\textsuperscript{199}

5.7 Conclusion

For Sámi people in Sweden, and also for other indigenous people groups world-wide, to have a say in decision making on issues that affect them, participation and influence in decision-making processes is crucial. National legislation in Sweden acknowledges and recognises interests and rights for Sámi influence on their issues and consultation on matters that affect them. Influence is exercised primarily through consultation with the Sámi Parliament as an official authority, with Sámi as a minority group and with affected Sámi villages in permit examinations. However, Sweden have been criticized from international bodies for not fully complying with certain provisions and obligations under international law. The critique is that Swedish legislation does not guarantee enough influence over land-matters and issues that concerns them. It also highlights that Sweden are not living up to the obligations under international law in ensuring the rights of Sámi people as indigenous people.

Consultation under the Environmental Code and the Minerals Act include provisions for corporations or other parties intending to undertake activities or measures to fulfil the

\begin{itemize}
  \item \textsuperscript{198} E. Reimerson, ‘Sami space for agency in the management of the Laponia World Heritage site’, in \textit{Local Environment: The International Journal of Justice and Sustainability} (21:7), 816.
  \item \textsuperscript{199} Ibid.
\end{itemize}
consultation duty. In their application for permission to initiate certain activities, such parties shall include information on how the consultation have taken place and the outcome of such procedures. Thus, the concept of consultation with Sámi people in Swedish law, especially involves corporate consultation with affected reindeer-herding communities.\textsuperscript{200} This form of consultation is not equivalent to the duty to consult indigenous people according to international requirements. This is because the consultation duty in Swedish law neither involve the state or concern consultation with Sámi people as an indigenous people’s group.\textsuperscript{201} The lack of sufficient consultation requirement does not provide efficient possibilities for Sámi people to exercise a real influence on these processes and outcomes. As long as consultation merely means corporate consultation, Sámi people have little influence over resource exploitation, which may potentially have a severe impact on a community’s reindeer herding activities.\textsuperscript{202}

Complying with indigenous rights under international law involves respecting indigenous peoples and affected indigenous communities to have a right to give or withhold their so-called free prior and informed consent.\textsuperscript{203} This right is important, as stated previously, because it functions as a mean of ensuring indigenous Sámi influence in decision making and gives effect to their substantive rights to land, resources and culture.\textsuperscript{204} Implementing and applying the FPIC-principle does however not come without complications. There is no clear legal definition of FPIC and the interpretation vary among different industries and in different parts of the world. In practice, the application of FPIC in ensuring indigenous influence can be devised in different ways.

In conclusion, in order to comply with international indigenous rights law, regarding the duty to consult indigenous peoples, there is a need for legislative clarifications and implementation measures by the legislators and other decision makers to ensure a proper enactment of FPIC into Swedish law.

\textsuperscript{200} C. Allard, (2015) 34.
\textsuperscript{201} Ibid.
\textsuperscript{202} Ibid., 35.
\textsuperscript{204} M. Åhrén, (2016) 202-205.
6 Legal Issues Regarding Consultation with Sámi People

6.1 Introductory Remarks

The main theme of this study has so far been to investigate the meaning and understanding of consultation with Sámi people in Swedish law. On the whole, Sweden has problems in addressing Sámi people as an indigenous people’s group and in acknowledging the rights and interests of these peoples, recognised under international law. An issue with the Swedish legislation is the lack of a clear duty of consultation with Sámi people, based on the FPIC-principle. This chapter will identify and discuss some legal issues relating to the concept of consultation. The aim of this chapter is to answer the second question of this thesis, namely which issues affecting Sámi people are included in the duty to consult. This question is crucial for a wider understanding and interpretation of the duty to consult Sámi people, enabling for these peoples to have influence in decision making on matters that affect them.

This chapter does not aim at outlining a fully in-depth analysis of all the issues that may arise in regards of consultation duties with indigenous Sámi people. Instead, the content of this chapter can be regarded as an approach to further problematise certain issues concerning indigenous people’s rights to participation and influence in decision-making processes. The question this chapter aims at exploring will be discussed primarily in relationship to efforts on environmental protection and climate change adaptation. Hopefully, this chapter can contribute to more discussions and analysis on this topic in future studies.

Firstly, I will analyse the Governmental proposal, focusing on the understanding of which matters that may affect indigenous Sámi peoples. Thereafter, this chapter discusses if efforts and decision making on climate change adaption may be subject to the duty to consult Sámi people. Finally, this chapter ends by identifying and discussing legal issues deriving from the duty to consult Sámi people in Swedish law, especially regarding the implementation of international obligations and the consequences of corporate consultation duties.

6.2 Consultation on Matters that Affect Sámi People

The Governmental proposal on the duty to consult Sámi people was drafted as a response to the recommendations and critical statements from international human rights’ committees. The proposal was also inspired by the Norwegian consultation model and the drafting of the Nordic Sámi Convention. According to the proposal, consultation shall be undertaken, mainly with the Sámi parliament. If necessary, the state must also consult with other Sámi groups, such as reindeer-herding communities and Sámi organisations. If the Government proposal on the duty to consult Sámi people becomes a reality, it may enable for the Sámi Parliament, other Sámi organisations and affected reindeer herding communities to have stronger influence in matters concerning Sámi people.

One important question in this context is to decide which issues it is that can be considered to affect Sámi people. The Governmental proposal do not specify which issues these might be. The proposal states that consultations should take place on issues that particularly concern Sámi people. Issues related to the organisation of reindeer husbandry and other Sámi industries may generally be considered to be included in the matters subject to the consultation obligation. This also include activities and land-use efforts that can particularly affect Sámi traditional lifestyle. Consultation obligation with Sámi people cover situations where these people are affected as stakeholders based on their traditional livelihood, primarily regarding reindeer herding.

In this regard, it may be worth mentioning that matters that concern Sámi people are mainly depending on an initial effort being made, such as a proposal, implementation effort or activity measure. Such matters can also derive from parties taking initiatives to engage in activities that may require specific permissions in order to proceed. Arguably, this highlights that deciding on which matters are subject to consultation procedures, may be a matter in itself that lays outside the reach of Sámi influence. Thus, Sámi people might find themselves in a position where they cannot claim their right to participate and influence decision-making processes, unless initial steps have been taken from another actor.

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The Governmental proposal mentions and make references to the Paris Agreement and its provisions relating to initiatives for climate adaptation and indigenous role in this regard.\textsuperscript{209} A question in relation to this is whether proposals and the implementation of efforts related to protection of the environment and adaptation to climate change can qualify as such matter that Sámi people should be consulted on these issues. The proposal has been inspired and partly based on the Norwegian framework of consultation with Sámi people. In the Swedish Governmental proposal, a reference is further made to the Norwegian framework, highlighting that ‘matters of a general nature that may be assumed to affect the whole society are generally not covered by the consultation obligation.’\textsuperscript{210}

Climate change can be assumed to affect all members of society, however to varying degrees. It can be questioned whether the consultation duty based on the Government proposal will include decision making relating to efforts on climate change adaptation. Whether this is, or should, be the case will be further discussed in the following section. The Government proposal does not seem to have taken a firm position on whether climate change adaptation measures should be included in the consultation obligation. Thus, the reference to the Paris Agreement is somewhat unclear. Hopefully, this issue can be discussed in more detail in the continued work on the outlining of the proposal, particularly through engagement in close dialogue and consultation with the Sámi population.

6.3 Adaptation: Capacity or Excuse for Intrusions?

Global climate change is often regarded as a critical, urgent issue. Despite this, in Sápmi is climate change not perceived as the biggest threat.\textsuperscript{211} Although already experiencing serious impact and effects on Sámi culture, there are measures and strategies that reindeer herders may undertake. Rather, the problem is that the possibilities of turning the strategies into practice are increasingly being restricted. Therefore, a threat today is the fragmentation and loss of various types of reindeer pasture land as a result of the increased intrusions, currently taking place in Sápmi from, for example, competing land use.\textsuperscript{212}

\textsuperscript{209} Government of Sweden, (Ds 2017:43) 17-18.
\textsuperscript{210} Government of Sweden, (Ds 2017:43) 22-23.
\textsuperscript{212} Ibid.
Factors such as competing land use, predators and legislation, can be crucial for the reindeer husbandry's ability to adapt and resist a changed climate.\textsuperscript{213} To carry out reindeer herding, the reindeer herders' knowledge of the reindeers, the pastures and weather and seasonal conditions are important. Equally important is the ability to act on the basis of this knowledge. It is therefore necessary that indigenous Sámi people ought to be enabled to effectively participate and influence decision making on efforts on climate change adaptation. This also shows that the conditions for adaptation are primarily determined by relationships and interactions with other land users and interests, driven by strong economic and political interests.

Despite the positive tone around the concept of adaptation, adaptability can also lead to increased vulnerability.\textsuperscript{214} Sámi culture has a long history of survival through adaptation.\textsuperscript{215} Reindeer herding, which is one of the Sámi traditional industries and central to Sámi culture, has long been described as flexible and adaptable to changing conditions. Adaptation is, and has for a long time been, one of the distinctive features of reindeer herding. However, the adaptability of reindeer husbandry in Sweden has been invoked as a legitimizing factor for continued infringement. In the 17th century, the so-called parallel theory was introduced, according to which arguments were put forward that Sámi and settlers were not in competition because they used different natural resources.\textsuperscript{216} Increased amount of intrusion into Sápmi has been answered by arguments based on that, since reindeer husbandry has handled so much disturbance so far, hardly anything more can make any significant difference.\textsuperscript{217} Additionally, global change processes such as climate change, globalisation and increased demand for natural resources, puts the issue of adaptation in a new light.\textsuperscript{218} It is no longer about adaptation only to changing weather and grazing conditions, but rather to a whole set of decision-making processes.

At the same time as efforts and actions are needed to combat climate change, it is important that Sámi people, as well as other indigenous groups and their rights and

\textsuperscript{214} Ibid.
\textsuperscript{216} Å. Össbo & P. Lantto, \textit{det åsidosatta folket: samerna, renskötseln och de första planerna på en storskalig utbyggnad av vattenkraften i Sverige} (Oknytt 32) 61-87.
\textsuperscript{217} Ibid.
\textsuperscript{218} Sámi Parliament, \textit{Kan - och borde- renskötseln anpassa sig?} (2016-11-04). Available at: \url{https://www.sametinget.se/94551}.
interests, are not overlooked or ignored in the decision-making process. It is necessary to increase the knowledge about how climate change affects Sámi industries and their culture through efforts that stimulates increased flexibility, knowledge transfer and emergency preparedness. Active political decisions and changes in legislation may strengthen Sámi industries and the Sámi culture. Increased influence and consideration of the perspective of Sámi people and their culture should be considered in consultation and decision-making processes. Furthermore, it is necessary to take knowledge-building measures to disseminate and strengthen the knowledge of how climate change and climate change adaptation efforts affect the situation for Sámi people.

6.4 Implementing International Obligations

This section addresses issues relevant for the implementation of the duty to consult indigenous peoples. Sweden have traditionally relied on international law and obligations regarding the duty to consult Sámi people on issues that affect them. In order for the duty to consult Sámi people to become effective, these international obligations need to be fully incorporated into national law so that the rights can be properly enforced in the domestic system. Although Sweden has ratified all major UN Human Rights Conventions, so far only the European Convention on Human Rights has explicitly been incorporated. One issue with this is that international obligations may be seen as ‘foreign’ until incorporated into national legislation, which may explain ‘the reluctance and delay for official authorities and courts to acknowledge and apply international consultation standards with respect to Sámi people’. It may be better supported by national authorities and agencies if the consultation duty is developed and established in national legislation and evolved through case-law. In Canada, taken as one example, the state duty to consult indigenous people’s groups is not primarily an obligation deriving from international law obligations, but rather a duty that has evolved through case-law in national courts.

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220 Ibid.
Currently, the duty to consult Sámi people in Swedish law does not make specific reference to, or is being based on, human rights or indigenous rights. A reason for the lack of further developments on the protection of the rights of Sámi people, may be because Sweden, in adhering to the civil law system, have a relatively weak constitution and generally lack a tradition of bringing out case-law through judicial court decisions as a driving force for the evolvement.\textsuperscript{224} Also, Sweden has a long tradition of hearing affected groups and allowing comments on legislative proposals. Despite this, consultation duties evolving from domestic law may be easier to accept than regulations imposed on national legal systems.

\subsection*{6.5 Corporate Consultation Duty}

As highlighted in Section 2.5, Sweden have received criticism from international bodies regarding the implementation of obligations protecting the rights of Sámi people. Consultation duties for corporations may be regarded as a way of implementing the state duty to consult Sámi people into national legislation. However, the international critique focuses on the responsibility of the state and not directly to the businesses and corporations actively participating in efforts within the Swedish borders. As such, international law aimed at protecting the rights of indigenous peoples is not primarily, or not at all, a duty for corporations to do. Rather, the duty to consult is a state duty.

In some situations, non-state actors are under an obligation to conduct consultation duties prior to undertaking certain activities. Consultation takes place with companies, but in most cases, this happens without guidelines or requirements for consent to be obtained from the Sámi community. This may have consequences for the amount of influence Sámi people have on certain issues. Corporate consultation duty also risk constitution a duty to consult entailing that the company need to carry out the consultation, but not necessarily have to consider what emerges from the procedure. In the absence of effective legal tools, it may be problematic for Sámi people to hold corporations accountable for not considering the outcome of the consultation procedure.\textsuperscript{225}

Whereas the international criticism is directed at the states’ responsibility under international law, this could also damage the credibility of certain industries, unless

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\textsuperscript{224} C. Allard (2018) 40.
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voluntary commitments and actions can be undertaken in the face of the state’s regulatory failures.\textsuperscript{226} While the state is the duty bearer under international law, companies, such as in the mining industry, could also voluntarily respect international norms on indigenous rights, even when not forming a clear part of national law.\textsuperscript{227} The balancing of conflicting interests in permit decisions is generally based on weak and vague formulations regarding the protection of reindeer herding and a priori assumptions about co-existence. The structure leans on granting permission and the conflicts around mines in Sápmi are a logical consequence of a lack of opportunities for Sámi villages to influence the permit examination in other ways.\textsuperscript{228}

### 6.6 Conclusion

The most recent step that have been done to ensure Sámi influence in decision making is through the outlining of the Governmental proposal on the duty to consult Sámi people. If it concerns natural resource development, affected reindeer herders and other Sámi right-holders should be offered consultation, as such activities may affect the situation for Sámi people. However, the duty to consult is limited to be conducted with affected reindeer herder communities. Sámi people that do not engage in reindeer herding thus have no say in these matters, despite the fact that they may also be affected.

Based on the duty to consult indigenous peoples, deriving from international obligations that Sweden has acknowledged to comply with, the state should have a responsibility to create opportunities and procedures that enable for fair and effective participation in decision-making processes by all parties involved. Indigenous worldviews may illuminate the path to sustainable development, taken into account the rights and interests of indigenous peoples and by better understanding the concept of effective participation also from the perspective of these people.\textsuperscript{229} Indigenous peoples, such as the Sámi people, ought to be involved in this through the engagement of representatives from other national, regional and local Sámi organisations, also on efforts taken on climate change adaptation.

\textsuperscript{226} O. Olsson et al., (2019) 9.
\textsuperscript{227} ibid.
\textsuperscript{228} R. Kløcker Larsen et al., ‘Sami-state collaboration in the governance of cumulative effects assessment: A critical action research approach in Environmental Impact Assessment Review, 67.
\textsuperscript{229} OECD, (2019) 3-4.
7 Concluding Remarks

Sweden have not yet adopted any legislative act including provision regarding specific consultation duties towards Sámi people. The Governmental proposal on the duty to consult the Sámi people (Ds 2017:43) may, once adopted, strengthen the opportunities for Sámi influence in decision making on issues that affect them.²³⁰ It is positive that the Government have taken steps to promote Sámi influence in the proposal on the duty to consult the Sámi people. In this process, it is necessary that the assessment takes a broad approach, guaranteeing Sámi influence in decision making on issues that affect them, based on indigenous rights and with the understanding of how it can involve the whole Sámi community and its actors. It is important that all parties involved in consultation procedures understand their role, their responsibility and how the dialogue should progress. This requires mutual participation and incitement to do so by the parties involved.²³¹ It is important to point out in this context that indigenous peoples must be given the opportunity to participate in order to be able to exert influence over their own situation. They must therefore have real and concrete opportunities to influence their situation.

Having influence in decision making concerning resource management and exploitation activities can be based on interests related to ownership of land or artefacts. Indigenous Sámi people living in areas where planned resource exploitation activities take place generally have insights into the possible effects of the planned activity. Through their historical presence and traditional livelihood, these peoples have additionally acquired knowledge reflected in their traditional livelihoods, cultural and social practices. However, traditional lands rights of Sámi people have historically been taken away from them and their rights have still not been granted to a full extent. As land ownership and right based claims have not been available for Sámi people to influence decision making on matters that affect them, other ways of having a say on such matters have evolved. In a Swedish legal context, consultation with the Sámi people is the main feature for ensuring Sámi participation and influence in decision making on issues that concern them.

Consultation is seen as one way in which affected individuals, stakeholders or groups can be granted influence. One the one hand, a positive feature of such consultation procedures is that it can create opportunities for open dialogue where trust and relations can be built upon. Also, it might lead to several perspectives being considered in decision-making processes, laying the foundation for well-thought out-puts and inclusive decision making. One the other hand, the economic situation and power relations in consultation procedures can be uneven. The duty to consult Sámi people is in several situations exercised as a corporation duty in Sweden. Although proper consultations with the state would not allow vetoing of natural resource exploitation, nevertheless on a strategic level, future legislation may be informed by a better balance between the interests of development and those of conserving an indigenous livelihood, such as reindeer herding as one of the cornerstones of Sámi culture.232

Even today, there are examples of how reindeer husbandry adaptability is used as a tool against reindeer husbandry. Reindeer husbandry and mining industry are assumed to be able to co-exist and the conflicts that arise are expected to be solved by the actors themselves, through dialogue in the local arena. Since the power relations between them are asymmetric and consultation procedures in general are not structured in a way that outweighs this imbalance, in practice it becomes the stronger party that sets the conditions while the weaker party, in this case Sámi people, is often forced to non-desirable and costly adaptation measures.

Sámi influence based on their cultural heritage and lifestyles can contribute to an increased and better understanding of the environment in relation to human impact. Learning and education from indigenous heritage culture and traditional knowledge may provide one of the most effective means of reaching a sustainable future and lifestyle.233 This type of knowledge and its significant meaning could be recognized more in current legislation, especially by giving these peoples a greater role in decision making. Similar type of understandings could also be used regarding issues concerning sustainable development on a more global view, especially regarding the consequences of climate change.

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