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Sami Impact on Decision-making in Sweden
*– an analysis of present possibilities for participation
and consultation in relation to international
obligations*

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Contents

SUMMARY	1
SAMMANFATTNING	2
PREFACE	3
ABBREVIATIONS	4
1 INTRODUCTION	5
1.1 Background	5
1.2 Purpose and Reserarch Questions	5
1.3 Research Methodology and Outline	6
1.4 Material	7
1.5 Delimitations	7
1.6 Litterature Review	8
2 ABOUT THE SAMI	9
2.1 Introduction	9
2.2 Status as an Indigenous People	9
2.3 Traditional Territory and Activities	11
3 INTERNATIONAL OBLIGATIONS	15
3.1 Introduction	15
3.2 International Agreements	15
3.2.1 <i>Instruments Applicable to the Sami</i>	15
3.2.2 <i>Instruments Applicable to Indigenous Peoples</i>	16
3.2.3 <i>Instruments Applicable to Minorities</i>	18
3.2.4 <i>Instruments Applicable to Anyone</i>	19
3.3 Fundamental Concepts	21
3.3.1 <i>Self-determination</i>	21
3.3.2 <i>Participation and Consultation</i>	22
3.3.3 <i>Free, Prior and Informed Consent</i>	24
4 SAMI IMPACT ON DECISION-MAKING IN SWEDEN	26
4.1 Introduction	26
4.2 Reindeer Husbandry	26
4.3 Minerals	27
4.4 Forestry	28

4.5	Minority Matters	30
4.6	Legislation and other Government Matters	31
4.7	Environmental Assessments	32
4.7.1	<i>Introduction</i>	32
4.7.2	<i>Strategic Environmental Assessments</i>	33
4.7.3	<i>Specific Environmental Assessments</i>	35
4.8	Planning of Land and Water Areas	38
5	CRITICISM AND DISCUSSIONS	42
5.1	Introduction	42
5.2	International Critique Against Sweden	42
5.3	Discussions Regarding a Special Order of Consultation	43
5.3.1	<i>Certain Sami Political Questions (Ds 2009:40)</i>	43
5.3.2	<i>Consultation in Matters that Concern the Sami (Ds 2017:43)</i>	44
5.4	Discussions Regarding the Nordic Sami Convention	48
6	ANALYSIS	51
6.1	Introduction	51
6.2	International Obligations	51
6.3	Present Possibilities	52
6.4	Grading	56
6.5	Evaluation	57
6.6	Final Comments	58
	SUPPLEMENT A	59
	SUPPLEMENT B	60
	BIBLIOGRAPHY	61
	TABLE OF CASES	66

Summary

The traditional territory of the indigenous Sami people stretches into Sweden, Norway, Finland and Russia. Sami culture is strongly connected to reindeer husbandry, which requires vast and coherent land where the reindeer can access natural pasture without disturbances. This thesis examines present possibilities for Sami in Sweden to impact decision-making processes regarding use of land and natural resources within their traditional territory, as well as analyses these possibilities in relation to Sweden's international obligations regarding Sami self-determination.

Self-determination is widely acknowledged as customary international law and is therefore binding for all states. Self-determination entails a right for indigenous peoples to self-government in internal and local affairs, as well as a right to participate in decision-making regarding matters that affect them. The right to participation has given rise to a duty for states to conduct good faith consultations with indigenous peoples in order to obtain their agreement or consent. The duty is well-established in international law, but it is disputed whether or not consent is required in order to proceed in the matter. The principle of FPIC has gradually evolved within international law over the last 20 years. The principle is particularly important in relation to control over land and natural resources. It has been argued that the principle is an essential part of the right to self-determination, as projects in indigenous peoples' territories impede on their right to decide their own priorities.

At the time of writing, Sweden does not have a special order of consultation with the Sami. After repeated criticism from several international human right bodies during the last 15 – 20 years, Sweden appointed two separate investigations in order to investigate the question regarding consultation. Proposals were made in 2009 and 2017, but none of them has led to any legislative additions or amendments due to extensive critique from various remittance instances. This means that the Sami have to rely on other mechanisms for participation and consultation in various legislative acts and other regulations. The analysis demonstrates that these mechanisms provide possibilities for impact on decision-making processes regarding use of land and natural resources to some extent. However, these opportunities are not secure or sufficient enough to ensure the Sami right to participation and fulfil Sweden's duty to consult them. Therefore, my conclusion is that Sweden does not fulfil its international obligations towards the Sami.

Sammanfattning

Den samiska ursprungsbefolkningens traditionella territorium breder ut sig över delar av Sverige, Norge, Finland och Ryssland. Samisk kultur är starkt kopplad till rennäringen, som kräver vidsträckta och sammanhängande marker där renen ostörd kan få tillgång till naturbete. Den här uppsatsen undersöker nuvarande möjligheter för samer i Sverige att påverka beslutsprocesser rörande användning av mark och naturresurser inom deras traditionella territorium, samt analyserar dessa möjligheter i relation till Sveriges internationella skyldigheter gällande samiskt självbestämmande.

Rätten till självbestämmande är allmänt erkänd som internationell sedvanerätt och därför bindande för alla stater. För ursprungsbefolkningar innebär rätten till självbestämmande en rätt till självstyre i interna och lokala angelägenheter, samt en rätt att delta i beslutsprocesser i frågor som rör dem. Rätten till deltagande har gett upphov till en skyldighet för stater att genomföra konsultationer i god tro med ursprungsbefolkningar för att nå överenskommelse eller erhålla samtycke. Skyldigheten är väletablerad inom internationell rätt, men det är omdiskuterat huruvida samtycke krävs för att processen ska kunna fortskrida. Principen om fritt och informerat förhandssamtycke har gradvis utvecklats inom internationell rätt de senaste 20 åren. Fritt och informerat förhandssamtycke är särskilt viktigt i relation till kontroll över mark och naturresurser. Det har argumenterats för att principen är en nödvändig del av rätten till självbestämmande eftersom utvecklingsprojekt inom ursprungsbefolkningars traditionella territorier inskränker deras rätt att bestämma sina egna prioriteringar.

I skrivande stund har Sverige ingen speciell konsultationsordning med samer. Efter upprepad kritik från flera internationella organ för mänskliga rättigheter under de senaste 15 – 20 åren har Sverige i två omgångar tillsatt utredningar som granskat konsultationsfrågan. Förslag lämnades år 2009 respektive år 2017, men på grund av omfattande kritik från olika remissinstanser har inget av förslagen lett till några legislativa tillägg eller ändringar. Således är samerna hänvisade till mekanismer för deltagande och konsultation som är spridda över flertalet lagar och andra regleringar. Sammanfattningsvis visar analysen att dessa mekanismer erbjuder vissa möjligheter för samerna att påverka beslutsprocesser rörande användning av mark och naturresurser, men att dessa inte är tillräckligt tillförlitliga eller långtgående för att säkerställa samernas rätt till deltagande och uppfylla Sveriges skyldighet att konsultera dem. Av detta drar jag slutsatsen att Sverige inte uppfyller sina internationella skyldigheter gentemot samerna.

Preface

This thesis marks the end of my time as a law student, but also the beginning of a new chapter of my life.

I would like to start with thanking my supervisor professor Annika Nilsson for guidance and valuable opinions during this process. I would also like to thank Dr. Shea Esterling and Dr. Elizabeth Macpherson at University of Canterbury for introducing me to international indigenous law.

I am also grateful for the incredible support from my friends and family, especially for the love and patience of my mother Corinne who is always just a phone call away. To Hamish, thank you for being there for me in every possible way during these months and for always making me laugh.

Christchurch, 24 Maj 2019

Nanna Holmgren

Abbreviations

Ds	Departementsserien (ministry publication series)
EIA	Environmental Impact Assessment
EU	European Union
The European Code of Good Practice	The Code of Good Practice for civil participation in the decision-making process
FPIC	Free, Prior and Informed Consent
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO 169	International Labour Organization convention number 169
MÖD	Mark- och miljööverdomstolen
NJA	Nytt juridiskt arkiv
Prop.	Proposition (government bill)
The Aarhus Convention	The Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

1 Introduction

1.1 Background

Indigenous peoples across the globe still exercise traditional activities within territories that their ancestors have inhabited since time immemorial. Their traditional lifestyle is often strongly connected to use of land and natural resources. In an increasingly modern world where the once vast areas of uninhabited and untouched land are shrinking, the question is how indigenous peoples will be able to maintain their culture and a more or less traditional way of life. The only indigenous peoples in Europe resides in an area that stretches into Sweden, Norway, Finland and Russia. Sami culture is strongly connected to reindeer husbandry that depends on conditions set by nature. Therefore, the Sami are vulnerable to resource exploitation and other changes in the landscape. The question is if there is room for indigenous peoples, such as the Sami, in this ever-changing world.

1.2 Purpose and Research Questions

The purpose of this thesis is to analyse present possibilities for the Sami in Sweden to impact decision-making processes regarding use of land and resources within their traditional territories, in relation to international obligations regarding self-determination for indigenous peoples. The overarching question is:

To what extent does Sweden fulfil its international obligations regarding the right for Sami to impact decision-making processes that affect use of land and natural resources within their traditional territory?

In order to fulfil the purpose and answer the overarching question, the following research questions have been chosen:

What international obligations does Sweden have towards the Sami as an indigenous people when decisions are made regarding use of land and natural resources within their traditional territory?

What possibilities do the Sami have to impact decision-making processes regarding the use of land and natural resources within their traditional territory in Sweden?

1.3 Research Methodology and Outline

The purpose of this thesis is not only to establish the present legal situation in Sweden through examining possibilities for the Sami to impact decision-making processes regarding land and resources, but also to analyse the selected mechanisms in relation to international obligations. Claes Sandgren, professor in civil law at Stockholm University in Sweden, has called this an analytical legal method¹. This entails that the analysis can be built upon a wide range of material that does not constitute applicable law.² The analysis of this thesis is therefore built upon Sami interests in land and natural resources for their cultural activities, international obligations for Sweden in relation to the Sami, international critique towards Sweden regarding Sami participation in decision-making processes, national proposals for a special order of consultation with the Sami in Sweden and the intergovernmental negotiations of the Nordic Sami Convention between Sweden, Norway and Finland.

The thesis consists of six chapters. The first chapter is introductory and establishes the framework for the following research. Chapter two creates a foundation for knowledge and understanding of the Sami as an indigenous people, as well as their traditional territory and activities. The third chapter examines international agreements and fundamental concepts relevant for indigenous peoples' right to impact decision-making processes regarding use of land and resources within their traditional territory. The instruments are examined in the following order: Instruments applicable to the Sami, to indigenous peoples, to minorities and to anyone. The fourth chapter investigates present possibilities for the Sami in Sweden to participate in decision-making processes regarding use of land and resources within their traditional territory. The examination includes instruments that are considered relevant for the purpose of this thesis and follows the same structure as chapter three. The fifth chapter explores recent developments in the discussions concerning Sami participation. The study begins with the international critique that motivated these changes, followed by an introduction to two proposals for a special order of consultation with the Sami in Sweden made in 2009 and 2017 and the initiative to a Nordic Sami Convention between Sweden, Norway and Finland. The sixth and final chapter analyses the findings of this research, answers the initial questions and addresses the overarching issue which formed the basis for this thesis.

¹ Swedish: Rättsanalytisk metod.

² See Sandgren (2015) p. 45–47.

1.4 Material

This thesis is composed by chapters that serve different purposes and is therefore built on a wide range of material. The background information regarding the Sami has been collected from Sami information centers as well as legal doctrine written by Christina Allard and Bertil Bengtsson that are experienced within Sami Law in Sweden. A majority of the examined international instruments are not legally binding for Sweden, but they are relevant in order to create an understanding for the developments within international law. Legal doctrine from James S. Anaya, Cathal M. Doyle and Ben Saul that are prominent authors within international law has been used in order to describe the fundamental concepts that have developed through the examined international instruments. Mattias Åhrén is a lawyer of Sami decent specialized in international law. I have included some of his comments regarding the fundamental concepts, but further exploration into his discussion on how these applies to the Sami would be interesting. The Code of Good Practice for civil participation in the decision-making process (the European Code of Good Practice), described in chapter 3.3.2, serves as a point of reference when the mechanisms are examined in the analysis.

In order to describe the present possibilities for the Sami to impact decision-making processes in Sweden, I have used classical legal sources such as legislation, government bills, precedents and legal doctrine. Regarding the use of case law, it shall be noted that a majority of the mechanisms examined do not have precedents in relation to them and that I have only included precedents that are relevant in relation to the mechanisms for participation and consultation. Regarding the consultation duty in the Minority Act 2009, I have used an academic article published in the Arctic Review on Law and Politics in order to link the mechanism to use of land and natural resources so that I could include the instrument in my analysis. Criticism towards Sweden, remittance responses regarding the proposals for a special order of consultation with the Sami and official letters from Sami representatives regarding the Nordic Sami Convention are used in order to place the mechanisms examined in this thesis into a context.

1.5 Delimitations

This thesis focuses on mechanisms for participation and consultation in decision-making processes regarding use of land and natural resources. It does not examine all opportunities to impact. Neither the right to appeal, nor a discussion regarding principles that control the process of administrative

authorities are included. The purpose of this thesis is to analyse the examined mechanisms in relation to international obligations. Comparisons with the situation in other states where the Sami resides are obviously of interest in the matter, but the scope of this thesis has not permitted me to include such references other than in relation to the Nordic Sami Convention. Furthermore, it has not been possible to describe more than the most recent international criticism towards Sweden and the main features of the statements issued by the remittance instances regarding the proposals for a special order of consultation with the Sami.

1.6 Literature Review

International discussions regarding indigenous peoples have evolved considerably during the last 30 years. Some milestones are the development of the International Labour Organization convention number 169 (ILO 169) in 1989, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 and the World Conference on Indigenous Peoples in 2014. Legal scholars around the world have researched the status of indigenous peoples in the international legal system. New duties for states have been and are being developed in order to ensure human and special rights for indigenous peoples.

In contrast, legal doctrine in the area of Sami Law is limited in Sweden. Literature and academic articles often concern Sami customary rights such as reindeer husbandry, fishing and hunting. However, it seems like the question regarding Sami impact on decision-making processes has gained more attention recently. Perhaps because the proposal for a special order of consultation made in 2017 was heavily criticized. For example, workshop was organized in March 2019 in order to gain new perspectives on how guidance from the Swedish Environmental Protection Agency can be developed in order to ensure that Sami villages can impact environmental assessments.³ This provides some indication of the relevance of the topic.

Environmental assessments contain possibilities for the Sami to impact decision-making processes, but there are also other mechanisms found in the Swedish legal system that can be of use to the Sami. My thesis analyses participation and consultation mechanisms in order to evaluate to what extent Sweden fulfils its international obligations.

³ See Stockholm Environment Institute, Workshop: Miljöbedömningar ur ett renkötselperspektiv, <<https://www.sei.org/events/workshop-miljobedomningar-ur-ett-renkotselperspektiv/>>, accessed 20 May 2019.

2 About the Sami

2.1 Introduction

This chapter examines the Sami in order to determine their status as an indigenous people, where their traditional territory is located and what their cultural activities require in terms of land and natural resources. The purpose is to create a foundation for the following discussion concerning their right to impact decision-making processes regarding land and resources within their territory.

2.2 Status as an Indigenous People

The Sami define themselves as an indigenous people.⁴ Sweden acknowledged them as such in 1977 when it was stated that the Sami have a distinct position in relation to both the majority of the population and to other minority groups.⁵ This was confirmed in 2011 through an amendment of the Swedish Constitution 1974⁶, where the Sami are described as a people and not only as a minority group.⁷

The distinction between Sami and other national minorities is relevant since minorities do not have the same rights as indigenous peoples. While indigenous rights focus on maintaining and developing their societies *parallel* to the majority society, minority rights focus on retaining and developing their identities as an *integrated part* of the majority society. Indigenous rights are often also collective instead of individual.⁸ As described in relation to the Sami in chapter 2.2, indigenous peoples have a special connection to their traditional territory since their culture is often connected to the use of land and natural resources.

A majority of indigenous peoples prefer to use their own name for their particular group. However, the term ‘indigenous peoples’ is used when these groups engage in legal matters and in relation to institutions since rights and obligations are connected to it. For example, certain rights to land, water and natural resources can be entitled to those who are recognised as indigenous.

⁴ See Sametinget: FN och urfolken <<https://www.sametinget.se/1097>>, accessed 3 March 2019.

⁵ See prop. 1976/77:80 p. 107.

⁶ Swedish: Regeringsformen (1974:152).

⁷ See chapter 1 article 2 paragraph 6 of the Swedish Constitution.

⁸ Compare prop. 2009/10:80 p. 189 – 190 (emphasis added).

Additionally, companies can be obliged to negotiate with indigenous groups in order to gain access to resources in traditional areas and obligations can be placed on the government.⁹ Therefore, it is necessary to define which groups shall qualify as indigenous.

The term ‘indigenous peoples’ is defined differently in various national legal systems. The definition depends on factors such as history, culture, politics and society. Efforts have been made within the international community to establish a universal definition of the term, but so far it has not been possible to reach consensus due to linguistic difficulties and political sensitivity. The term must be broad enough to include approximately 370 million individuals organised in around 5000 diverse groups spread across 90 different countries, while at the same time be narrow enough to be meaningful and not enable misuse. Some states prefer to use their own national term or simply recognise the group as a minority.¹⁰

An official definition of the term is not offered in international law, but a common understanding exists regarding what groups shall qualify. The original and most used definition was established by the then UN Special Rapporteur Martinez Cobo. The core elements of the so-called Cobo-definition have generally been repeated in later introduced instruments. An example is ILO 169 from 1989.¹¹ The convention defines ‘indigenous peoples’ as

“peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”.¹²

This means that the group’s legal status in national legislation is irrelevant. The definition does not take a state-based approach since it is not necessary for the group to be governed by special domestic laws. Effects of colonialism are taken into account since it is not expected that the group has retained all of their institutions, but situations where colonialism did not occur are also covered since the establishment of state boundaries is an alternative criterion to conquest or colonisation. The creation of the convention involved

⁹ See Saul (2016) p. 23 – 24.

¹⁰ See Saul (2016) p. 22 – 26.

¹¹ See Åhrén (2016) p. 143 – 145.

¹² See article 1.1.b of the ILO 169.

consultations with indigenous peoples. It has been suggested that the definition may reflect customary international law.¹³

The most recent international instrument concerning indigenous peoples is UNDRIP from 2007. It does not define ‘indigenous peoples’ but notes that indigenous peoples have a right to decide their own identities and procedures of belonging.¹⁴ ILO 169 also regards self-identification as fundamental.¹⁵ The criterion is important in order to prevent states from denying the legal existence and rights of indigenous groups, but the term would risk misuse if it was the only factor.¹⁶

2.3 Traditional Territory and Activities

The Sami inhabit an area called Sápmi which stretches into Sweden, Norway, Finland and Russia. Their hunting and gathering ancestors were the first occupants of the region, where they have lived for thousands of years.¹⁷ Sápmi constitutes a geographical area¹⁸, as well as a cultural and linguistic community. Sweden does not calculate the population based on ethnicity, but approximately 25 000 – 35 000 out of 80 000 – 100 000 Sami individuals live on Swedish territory. Most of them resides in the counties of Norrbotten and Västerbotten, and along the Scandinavian mountain range.¹⁹

The traditional Sami area in Sweden is roughly considered the same as the reindeer husbandry area. Reindeer husbandry is, apart from hunting and fishing, the most important Sami customary use of land and natural resources. Reindeer husbandry is carried out in an area that constitutes between 34 and 50 percent of Sweden. The area covers the counties of Norrbotten and Västerbotten, about 80 percent of the county of Jämtland and smaller parts of the counties of Dalarna and Västernorrland. Depending on factors such as availability of good pasture, it varies how frequently or intensively an area is used.²⁰

The Sami’s strong connection to the reindeer was likely established when the animal was domesticated for the needs of the household, but hunting, fishing and handicraft still remain important sources of income.²¹ Swedish legislation

¹³ See Saul (2016) p. 28 – 29.

¹⁴ See article 33 of the UNDRIP.

¹⁵ See article 1.2 of the ILO 169.

¹⁶ See Saul (2016) p. 26; article 33 of the UNDRIP; article 1.2 of the ILO 169.

¹⁷ See Allard (2006) p. 24.

¹⁸ See supplement A for a map of Sápmi.

¹⁹ See Sametinget, samerna i Sverige, <<https://www.sametinget.se/samer>>, accessed 16 April 2019.

²⁰ See Allard (2006) p. 24 and 328.

²¹ See Allard (2006) p. 24, 33 and 328.

is organized so that the reindeer husbandry right constitutes the basis for other Sami rights such as hunting, fishing, construction of facilities used for the reindeer herding and logging for specific purposes connected to reindeer herding, house hold needs or handicraft.²²

The reindeer husbandry right is a collective right that applies to the whole Sami population. The right cannot expire since it is founded upon prescription from time immemorial, not on agreements.²³ However, a person must be of Sami decent and a member of a Sami village in order to exercise his or her reindeer husbandry right and the other rights connected to it.²⁴ A person is a member in a Sami village as long as he or she participates in the reindeer husbandry, has previously been a full-time reindeer herder or is married or a child to a member of the village. Other persons can be admitted as members, but this is up to each Sami village to decide.²⁵ The result is that most Sami cannot exercise reindeer husbandry, and subsequently other traditional activities such as hunting and fishing, as these activities are based on that right. As an example, only 4054 individuals or some ten percent of total Sami population owned reindeer in 2004.²⁶

The divide between reindeer herding Sami and non-reindeer herding Sami means that the majority of the Sami population does not have recognized and codified customary rights.²⁷ It is unclear if certain customary rights such as hunting and fishing still exist separately from the reindeer husbandry right.²⁸ It is possible that Sami individuals without membership in a Sami village could claim rights to hunting and fishing based on other legislation than the Reindeer Husbandry Act 1971 such as prescription from time immemorial. Otherwise, these persons have to enter into agreement in order to hunt and fish.²⁹

A Sami village is both a geographical area³⁰ and an economic association that acts on behalf of its members in matters concerning reindeer husbandry.³¹ There are 51 Sami villages in Sweden.³² Each Sami village has its own reindeer husbandry area. The area consists of year-round-areas; in which reindeer husbandry is allowed during the whole year and winter-pasture-

²² Compare article 15 - 25 of the Reindeer Husbandry Act 1971.

²³ See article 1 of the Reindeer Husbandry Act 1971; Bengtsson (2004) p. 21.

²⁴ See article 1 and 6 of the Reindeer Husbandry Act 1971.

²⁵ Compare article 11 and 12 of the Reindeer Husbandry Act 1971.

²⁶ See Allard (2006) p. 24, 73, 327 and 329.

²⁷ Compare Allard (2006) p. 24 and 73.

²⁸ See Allard (2006) p. 258.

²⁹ See Bengtsson (2004) p. 50.

³⁰ See supplement B for a map of the Sami villages in Sweden.

³¹ See article 6, 7, 9 and 10 of the Reindeer Husbandry Act 1971.

³² See Allard (2006) p. 329.

areas; in which the activity can be carried out between October 1 and April 30.³³ Reindeer husbandry is carried out both on land owned by the state and private actors. The most disputed areas are the winter-pasture-areas since they are often located on privately owned forested land closer to populated areas.³⁴

Indigenous peoples are dependent on land, water and other natural resources in order to sustain their traditional way of life.³⁵ Reindeer husbandry is closely connected to Sami culture. It is based on traditions that date back thousands of years. The reindeer herder has to adapt to conditions arising both due to nature and the animals' needs. Access to natural pasture is essential for the sustainable herding of healthy reindeer. Different pasture areas are used during different seasons depending on their characteristics. Paddocks are used in order to collect, separate, mark and butcher animals. Specific and sometimes very old routes are used in order to transfer reindeer between these areas.³⁶

History has shown that the Sami can be repressed from their traditional areas when the state prioritizes other uses of the land which are deemed more important.³⁷ Today, reindeer husbandry is competing with other activities in most areas. Environmentally hazardous activities such as mining and logging causes stress for the reindeer on the calving grounds with a risk for damage and deprivation for the reindeer herders as a result.³⁸ Reindeer are easily frightened animals that are sensitive towards disturbance, especially during calving season and transfer between pasture areas.³⁹

Reindeer husbandry and Sami culture is under the responsibility of the Sami Parliament, which is both an administrative authority and a democratically elected body.⁴⁰ The Sami Parliament consists of 31 members appointed through elections. After a suggestion has been left by the authority, one of the members is chosen as president by the Swedish Government.⁴¹ It is only Sami individuals⁴² that are allowed to vote in the elections and candidate to the

³³ See article 3, 6 and 8 of the Reindeer Husbandry Act 1971.

³⁴ See Allard (2006) p. 328.

³⁵ See Allard (2006) p. 15.

³⁶ See samiskt informationscentrum, Med renen som levebröd, <<http://www.samer.se/rennaring>>, accessed 5 May 2019.

³⁷ Compare Bengtsson (2004) p. 33 – 34.

³⁸ See Allard (2006) p. 328.

³⁹ See samiskt informationscentrum, Med renen som levebröd, <<http://www.samer.se/rennaring>>, accessed 5 May 2019.

⁴⁰ See chapter 1 article 1 of the Sami Parliament Act 1992; chapter 2 article 2 of the Sami Parliament Act 1992; article 1 of the Ordinance with Instructions for the Sami Parliament 2009.

⁴¹ See chapter 2 article 2 of the Sami Parliament Act 1992.

⁴² See chapter 1 article 2 of the Sami Parliament Act 1992 regarding who is defined as Sami.

Sami Parliament.⁴³ The Sami Parliament also has a board and committees responsible for preparation of different matters.⁴⁴ The authority shall take initiative to and make proposals for activities and measures in order to promote Sami culture. Its special responsibilities include to participate in societal planning and to ensure that Sami needs are met, including the reindeer husbandry interest in relation to exploitation of land and water.⁴⁵ While the Sami Parliament shall care for Sami and reindeer husbandry interests in general, a Sami village shall represent its members in questions regarding the reindeer husbandry right or the members' mutual interest in other questions regarding the reindeer husbandry.⁴⁶

⁴³ Compare chapter 3 article 3 and 8 of the Sami Parliament Act 1992.

⁴⁴ See chapter 2 article 4 and 5 of the Sami Parliament Act 1992.

⁴⁵ See chapter 2 article 1 of the Sami Parliament Act 1992.

⁴⁶ Compare chapter 2 article 1 of the Sami Parliament Act 1992; article 10 paragraph 2 of the Reindeer Husbandry Act 1992.

3 International Obligations

3.1 Introduction

This section examines international agreements that are relevant for indigenous peoples' right to impact decision-making processes, especially regarding use of land and natural resources within their traditional territories. The purpose is to demonstrate how discussions regarding indigenous peoples has evolved within the international community and to examine what international obligations Sweden has towards the Sami. Focus lies on the concepts of self-determination, participation, consultation and free, prior and informed consent (FPIC) that have been developed through the examined international instruments. The chapter finishes with a closer study of these concepts since they are central in relation to possibilities for indigenous peoples to impact decision-making processes.

3.2 International Agreements

3.2.1 Instruments Applicable to the Sami

The *Nordic Sami Convention* is an international agreement that deals exclusively with the Sami. It is the result of negotiations between representatives from the governments of Sweden, Norway and Finland, as well as Sami representatives from these states. The convention has not been ratified by Sweden and it is unclear how the process will continue.⁴⁷ However, the convention can at least be viewed as an expression of how the discussion has developed between the Sami and the three states. More information regarding the development of the convention is found in chapter 5.3. References in this thesis are always made to the Swedish version of the convention text.

The purpose of the Nordic Sami Convention is to confirm and strengthen the rights of the Sami so that they can, for example, develop their culture and livelihood with the smallest possible interference of national borders.⁴⁸ The right to self-determination is recognised as a right for the Sami to determine their own economic, social and cultural development. Self-determination can be fully exercised in internal matters but is otherwise limited to a right to be

⁴⁷ See chapter 5.3 for more information on how the discussions regarding the Nordic Sami Convention have evolved.

⁴⁸ See article 1 of the Nordic Sami Convention.

consulted in matters of special importance to them.⁴⁹ The Sami have proposed the removal of the paragraph that limits self-determination to self-government and consultations.⁵⁰

The Sami Parliament shall be consulted regarding legislation, decisions or other measures that might be of special importance to the Sami. Information regarding such a decision-making process shall be sent to the Sami Parliament as soon as possible. Consultation shall be performed in good faith and pursue agreement or consent from the Sami Parliament prior to the decision.⁵¹ Other Sami stakeholders such as Sami villages and other organizations shall be consulted in matters that might concern them, if there are reasons for it.⁵² States and other actors that manage government owned property shall consult or otherwise actively involve the Sami in the management of natural resources that concern them.⁵³

3.2.2 Instruments Applicable to Indigenous Peoples

The *UNDRIP* was adopted by the United Nations (UN) General Assembly in 2007. The resolution was confirmed and consolidated by the UN member states during the World Conference on Indigenous Peoples in 2014.⁵⁴ Although the declaration does not constitute a binding instrument, it does express the political will of the international community. The rights recognized through the UNDRIP constitutes minimum standards for the survival, dignity and well-being for indigenous peoples.⁵⁵ Their right to self-determination includes a right to determine their political status and to pursue their economic, social and cultural development.⁵⁶ Indigenous peoples shall be able to freely exercise their traditional and other economic activities.⁵⁷ They shall also be able to determine priorities and strategies for the development or use of their land and territories and other resources.⁵⁸

⁴⁹ See article 4 of the Nordic Sami Convention.

⁵⁰ See Samiskt Parlamentariskt Råd, skrivelse (1.6.2-2018-830), till Sverige, Norge och Finlands regeringar, 7 juni 2018.

⁵¹ See article 17 of the Nordic Sami Convention.

⁵² See article 18 of the Nordic Sami Convention.

⁵³ See articles 32 of the Nordic Sami Convention.

⁵⁴ Compare Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples (A/RES/61/2), UN General Assembly, 25 September 2014.

⁵⁵ See article 43 of the UNDRIP.

⁵⁶ See article 3 of the UNDRIP.

⁵⁷ See article 20 of the UNDRIP.

⁵⁸ See article 32 of the UNDRIP.

In internal matters, a right to autonomy or self-government follows upon the right to self-determination.⁵⁹ In non-internal matters that would affect their rights, indigenous peoples have a right to participate in the decision-making.⁶⁰ States have a duty to consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their FPIC before adopting and implementing legislative or administrative measures that may affect them.⁶¹ Sweden voted in favour of the declaration, but at the same time explained that the state does not interpret FPIC as a veto. However, the principle or method was still regarded as important in order to ensure effective consultation or dialogue.⁶²

The *ILO 169* from 1989 is the only international agreement open for ratification that deals exclusively with rights of indigenous peoples. The organization behind the convention promotes social justice and supports human and labour rights. It has been working with indigenous rights since the 1920s.⁶³ Sweden has not ratified the convention and is therefore not bound by it. However, the intention of doing so has been expressed repeatedly.⁶⁴ The ILO 169 affirms that human rights and fundamental freedoms apply to indigenous peoples.⁶⁵ It also creates a duty for states to adopt additional measures in order to safeguard indigenous peoples, including their culture and environment.⁶⁶

Governments are required by the ILO 169 to consult indigenous peoples, in particular through their representative institutions, regarding legislative or administrative measures which may affect them directly. Consultations shall be conducted in good faith and with the aim to reach agreement or consent to the proposed measures. Governments are also required to establish means so that indigenous peoples can participate at all levels of decision-making in elective institutions and bodies responsible for policies and programmes that concern them.⁶⁷ Indigenous peoples have a right to exercise control, to the

⁵⁹ See article 4 of the UNDRIP.

⁶⁰ Compare article 18 of the UNDRIP.

⁶¹ See article 19 of the UNDRIP.

⁶² See Ds 2017:43 p. 17.

⁶³ See International Labour Organization, Indigenous and tribal peoples <<https://www.ilo.org/global/topics/indigenous-tribal/lang--en/index.htm>>, accessed 10 April 2019; International Labour Organization, Mission and Impact of the ILO <<https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>>, accessed 10 April 2019.

⁶⁴ Compare e.g. Universal Periodic Review submitted by Sweden to the Human Rights Council (A/HRC/29/13/Add1.), 19 June 2015 and Fourth Report submitted by Sweden pursuant to Article 25 of the Framework Convention for the Protection (ACFC/SR/IV(2016)004, 1 June 2016.

⁶⁵ See article 3 of the ILO 169.

⁶⁶ See article 4 of the ILO 169.

⁶⁷ See article 6 of the ILO 169.

extent possible, over their own economic, social and cultural development. They shall be able to decide their own development priorities affecting, for example, the lands that they occupy or use. Plans and programmes for national and regional development which may affect them directly require participation in the formulation, implementation and evaluation of the project.⁶⁸ Indigenous peoples' right to natural resources connected to their lands includes a right to participate in the use, management and conservation of these resources and shall be specially safeguarded.⁶⁹

3.2.3 Instruments Applicable to Minorities

Sweden is party to the Council of Europe *Framework Convention for the Protection of National Minorities* from 1995. It is the first legally binding multilateral instrument focusing on protection of national minorities. Its purpose is to specify legal principles for the protection of these groups. The convention does not define the term 'national minorities', but the Sami are recognized as such by Sweden.⁷⁰ State parties shall support necessary conditions for persons belonging to national minorities to maintain and develop their culture and preserve essential elements of their identity, including language, traditions and cultural heritage.⁷¹ State parties shall also create necessary conditions for effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, especially in those affecting them.⁷²

The explanatory report attached to the convention provides the following examples of measures that can be adopted in order to ensure the effective participation of minorities. First, to conduct consultations with national minorities regarding legislation or administrative measures likely to affect them directly. Second, to involve national minorities in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly. Third, to cooperate with national minorities in order to assess the possible impact on them of proposed development projects. Four, to provide effective participation in decision-

⁶⁸ See article 7 of the ILO 169.

⁶⁹ See article 15 of the ILO 169; compare article 13 paragraph 2 of the ILO 169.

⁷⁰ See comment number 10 regarding Objectives of the Framework Convention and Approaches and comment number 12 regarding Approaches and Fundamental Concepts in the Explanatory Report attached to the Framework Convention for the Protection of National Minorities; article 2 of the Minority Act 2009.

⁷¹ See article 5 of the Framework Convention for the Protection of National Minorities.

⁷² See article 15 of the Framework Convention for the Protection of National Minorities

making processes and elected bodies both at national and local levels. Last, to outsource decision-making to local forms of government.⁷³

3.2.4 Instruments Applicable to Anyone

Sweden is party to the UN *International Convention on the Elimination of all forms of Racial Discrimination (ICERD)* from 1965. The convention contains measures against discrimination based on race, colour, descent or national or ethnic origin.⁷⁴ The Committee on the Elimination of Racial Discrimination monitors the convention.⁷⁵ A non-binding, general recommendation regarding indigenous peoples was adopted by the committee in 1997. State parties are recommended to provide possibilities for indigenous peoples to develop economically and socially in a way that is compatible with their culture and to ensure that members of indigenous peoples are able to effectively participate in public life to the same extent as others. State parties are also recommended to obtain an informed consent from indigenous peoples' before making decisions that directly relate to their rights and interests.⁷⁶

Sweden is party to the UN *International Covenant on Civil and Political Rights (ICCPR)* from 1966. All peoples have the right to self-determination, which includes a right to freely determine their political status and freely pursue their economic, social and cultural development. State parties shall promote the realization of this right.⁷⁷ Every citizen, directly or through chosen representatives, shall have equal rights and opportunities to participate in public affairs.⁷⁸ Individuals that are part of ethnic, religious or linguistic minorities shall not be denied the right to, among other things, enjoy their own culture and use their own language together with other members of their group.⁷⁹ The Human Rights Committee monitors the convention.⁸⁰ A non-binding, general comment regarding rights of minorities was adopted by the committee in 1994. It states that culture, especially for indigenous peoples, can include a particular way of life that is associated with the use of land and resources. Cultural rights protected under article 27 of the ICCPR may include traditional activities such as fishing or hunting, or the right to live in

⁷³ See comment number 80 regarding article 15 in the explanatory report attached to the Framework Convention for the Protection of National Minorities.

⁷⁴ Compare article 1 of the ICERD.

⁷⁵ See article 8 of the ICERD.

⁷⁶ See notes 4 and 5 of the general recommendation number 23 – indigenous peoples, adopted by the CERD, 18 August 1997.

⁷⁷ See article 1 of the ICCPR.

⁷⁸ See article 25 of the ICCPR.

⁷⁹ See article 27 of the ICCPR.

⁸⁰ Compare article 28 of the ICCPR.

certain areas protected by law. The enjoyment of those rights may require protection through positive legal measures and measures to ensure effective participation for members of minorities in decisions which affect them.⁸¹

Sweden is party to the UN *International Covenant on Economic, Social and Cultural Rights (ICESCR)* from 1966. Exactly as according to the ICCPR, it recognizes that all peoples have the right to self-determination that includes a right to freely determine their political status and to freely pursue their economic, social and cultural development. The realization of this right shall be promoted by the state parties.⁸² The Committee on Economic, Social and Cultural Rights monitors the convention.⁸³ The committee has adopted two non-binding, general comments that are relevant for the purpose of this study, as described below.

The first comment was adopted in 2009 and regards the rights for anyone to take part in cultural life according to article 15 paragraph 1 a of the ICESCR. Cultural rights are an important part of human rights. State parties should take measures in order to guarantee that indigenous peoples can exercise their right to take part in cultural life. Their existence, well-being and full development includes the right to lands, territories and resources which they have traditionally owned, occupied or used. Indigenous peoples should be allowed and encouraged to participate in development and implementation of legislation and policies that affect them. State parties should respect the principle of FPIC.⁸⁴

The second comment was adopted in 2017 and regards state obligations in relation to business activities. Business activities are important for the realization of economic, social and cultural rights since they create employment opportunities and enable development. However, indigenous peoples are often disproportionately affected by business activities. Particularly in relation to exploitation of lands and natural resources. State parties should therefore ensure that impact assessments consider the effects on indigenous peoples' right to land and resources. Businesses should consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their FPIC before proceeding with activities. They should also take

⁸¹ See note 7 of the general comment number 23 – the rights of minorities, adopted by the HRC, 26 April 1994.

⁸² See article 1 of the ICESCR.

⁸³ Compare UN Economic and Social Council, Resolution 1985/17, 28 May 1985.

⁸⁴ See note number 1, 36, 37 and 55 (e) of the general comment number 21 – right for everyone to take part in cultural life of the ICESCR, 21 December 2009.

measures in order to ensure that indigenous peoples share the benefits generated by activities developed within their traditional territories.⁸⁵

Sweden is party to the UN Economic Commission for Europe *Convention on access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention)* from 1998. The convention connects human rights and the environment. It is built upon the idea that increased participation by the public will result in an improved environment. It is unique since it creates duties for state parties in relation to the public.⁸⁶ The objective of the convention is to ensure that the public has access to information, is able to participate in decision-making and has access to justice in environmental matters.⁸⁷ It ensures public participation in the following situations: First, in decisions on specific activities. Second, in the preparation of plans, programmes and policies relating to the environment. Third, during the preparation of executive regulations and/or generally applicable legally binding normative instruments. The procedures require, among other things, that information is shared with the public early in the process, that sufficient time is allowed for the public to consider information and prepare for their participation and that all options are still open when the participation takes place. State parties shall encourage prospective applicants to identify the public concerned, provide information and engage in discussions with these parties before applying for a permit. The result of public participation shall be considered as far as possible in the decision-making.⁸⁸

3.3 Fundamental Concepts

3.3.1 Self-determination

The principle of self-determination is widely acknowledged to constitute customary international law, perhaps even *jus cogens*. This means that it is a peremptory norm, possibly of the highest rank in international law.⁸⁹ Self-determination is affirmed by the general human rights instruments ICCPR and ICESCR. It applies to all peoples and includes a right to freely determine their political status and to freely pursue their economic, social and cultural development. State parties are obliged to promote the realization of these

⁸⁵ See note number 1, 8 and 17 of the general comment number 24 – state obligations under the ICESCR in the context of business activities, 10 August 2017.

⁸⁶ See prop. 2004/05:65 p. 18.

⁸⁷ See article 1 of the Aarhus Convention.

⁸⁸ See article 6 – 8 of the Aarhus Convention.

⁸⁹ See Anaya (2004) p. 97.

rights.⁹⁰ The Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination have clarified that the right to self-determination applies equally to indigenous peoples.⁹¹ The adoption of the UNDRIP proves that the international community shares this view since it repeats the right to self-determination as it is phrased in ICCPR and ICESCR in relation to indigenous peoples.⁹² The Nordic Sami Convention confirms that the right to self-determination applies to the Sami.⁹³

3.3.2 Participation and Consultation

The political form of self-determination is called self-government. The combination of democracy and cultural identity form a *sui generis* version of the norm in relation to indigenous peoples.⁹⁴ The UNDRIP affirms that indigenous peoples have a right to self-government in matters relating to their internal and local affairs.⁹⁵ The right to self-government includes participation for indigenous peoples in all decisions that affect them.⁹⁶ The right for indigenous peoples to participate in decision-making regarding matters that affect them is recognized by the ILO 169 and confirmed through the UNDRIP.⁹⁷

Four different levels of participation are described in the *European Code of Good Practice* that was created in 2009 by the Conference of International Non-Governmental Organisations of the Council of Europe. Even if the guidance is applicable to anyone, it is relevant as it can be used to understand the concepts of participation and consultation. The lowest form, information, constitutes one-way communication from an authority. The next form, consultation, is defined as an initiative where authorities ask for opinions on a specific topic or activity. This usually requires authorities to give information on current developments and ask for comments, views and feedback. The next form, dialogue, builds upon shared interests and can be initiated by either party. It consists of frequent and regular meetings that can result in mutual strategies, recommendations or legislation. The highest form, partnership, means cooperation and shared responsibilities in all steps of the decision-making process. Generally, a higher form of participation is more

⁹⁰ See article 1 of the ICCPR; article 1 of the ICESCR.

⁹¹ See Doyle (2015) p. 131 – 132.

⁹² See article 3 of the UNDRIP.

⁹³ See article 4 of the Nordic Sami Convention, Swedish version.

⁹⁴ See Anaya (2004) p. 129 and 150 – 151.

⁹⁵ See article 4 of the UNDRIP.

⁹⁶ See Anaya (2004) p. 129 and 150 – 151.

⁹⁷ See article 18 of the UNDRIP; article 6 of the ILO 169.

relevant in the beginning of a process when problems are identified, and the plan is established.⁹⁸

The right to participation has given rise to a duty for states to consult indigenous peoples that is well-established in international law.⁹⁹ The duty for states to conduct good faith consultations with indigenous peoples regarding legislative or administrative measures that may affect them directly is established by the ILO 169 and confirmed by the UNDRIP.¹⁰⁰ The Nordic Sami Convention affirms that the duty for states to conduct good faith consultations applies to the Sami.¹⁰¹ The purpose of consultations with indigenous peoples is to obtain agreement or consent from them prior to decision-making.¹⁰² This means that it is not sufficient to merely provide an indigenous group with information on an already made decision. Indigenous peoples need access to relevant information and knowledge, but a genuine opportunity to impact decision-making is only possible if they are also fully engaged in the discussions.¹⁰³

Consultation mechanisms ensure participation in decision-making processes, but it does not guarantee impact on the content of the decision if there is no requirement to reach agreement or consent.¹⁰⁴ The Nordic Sami Convention accepts the full expression of self-determination in completely internal affairs, but limits it to a right to be consulted in matters or relevance to the state or the majority of the population. The convention text reflects the view that Sweden, Norway and Finland have expressed before the convention was created: Whenever a consultation does not result in agreement, the opinion of the state succeeds. This implies that the Sami have a right to participate in decision-making processes, but not to decide the result.¹⁰⁵ This is where the discussion regarding FPIC becomes relevant.

⁹⁸ See section IV.i in the Code of Good Practice for Civil Participation in the Decision-Making Process (CONF/PLE(2009)CODE1).

⁹⁹ See Anaya (2004) p. 154; Åhrén (2016) p. 135.

¹⁰⁰ See article 6 of the ILO 169; article 19 of the UNDRIP.

¹⁰¹ See article 17, 18 and 32 of the Nordic Sami Convention, Swedish version.

¹⁰² See article 6 of the ILO 169; article 19 of the UNDRIP; article 17 of the Nordic Sami Convention, Swedish version.

¹⁰³ See Anaya (2004) p. 154 – 155.

¹⁰⁴ Compare article 6 of the ILO 169; article 19 of the UNDRIP; article 17 of the Nordic Sami Convention, Swedish version.

¹⁰⁵ See article 4 of the Nordic Sami Convention, Swedish version; compare Åhrén (2016) p. 133 – 135.

3.3.3 Free, Prior and Informed Consent

The principle of FPIC is particularly important in relation to control over lands, territories and natural resources. The concept was developed through the general recommendation¹⁰⁶ regarding indigenous peoples issued in relation to ICERD, which encourages states to obtain an informed consent from indigenous peoples before proceeding with decisions affecting them. The adoption of the UNDRIP confirms the development of FPIC through its various references to the norm.¹⁰⁷ States shall, among other things, strive to obtain FPIC from indigenous peoples before adopting legislative or administrative measures that may affect them.¹⁰⁸ The same is required before approving any projects that affect indigenous peoples lands, territories or other resources, in particular projects related to the development, utilization or exploitation of minerals, water or other natural resources.¹⁰⁹

FPIC includes a procedural obligation to conduct consultations with the aim to achieve consent, as well as a substantive requirement to respect the outcome of such consultations. International legal bodies focusing on indigenous peoples have been generally consistent in their recommendations after the adoption of UNDRIP. The duty for states to consult indigenous peoples not only requires the act of seeking consent, but to guarantee that it is obtained or secured. A genuine decision by an indigenous group to grant their informed consent is only possible if the group has had a previous opportunity to consider alternatives and determine their priorities.¹¹⁰

The right to self-determination is the primary source of the obligation of the state to obtain consent before proceeding with development projects in or near indigenous peoples' territories. The two concepts reinforce each other as an indigenous group exercises its right to self-determination when it chooses to withhold consent. FPIC is an essential part of self-determination as projects in indigenous peoples' territories impede on their right to decide their own development priorities. The Human Rights Committee has stated that the requirement for consent follows upon a self-determination-informed right of indigenous peoples to participate in decisions that affect them, as well as to maintain their culture and lifestyle. This includes a right to continue to benefit

¹⁰⁶ See chapter 3.1.4 for more information regarding the general recommendation on indigenous peoples issued in relation to ICERD.

¹⁰⁷ See Doyle (2015) p. 126 and 140; see note 4 (d) of the general recommendation number 23 – indigenous peoples, adopted by the CERD, 18 August 1997; compare article 10, 11, 19, 28, 29 and 32 of the UNDRIP.

¹⁰⁸ See article 19 of the UNDRIP.

¹⁰⁹ See article 32 of the UNDRIP.

¹¹⁰ See Doyle (2015) p. 131 – 132.

from their traditional economy, which requires that culturally significant economic activities are not constrained.¹¹¹

¹¹¹ See Doyle (2015) p. 127, 130 – 132.

4 Sami Impact on Decision-making in Sweden

4.1 Introduction

This chapter investigates present possibilities for the Sami in Sweden to participate in decision-making processes regarding use of land and resources in their traditional territories. The examination follows the same structure as chapter 3.2 and includes instruments that are relevant in relation to use of land and natural resources. It begins with one platform for participation and two consultation mechanisms that applies exclusively to the Sami, continues with a consultation duty that applies to minorities and finishes with three general instruments for consultation and participation that apply to authorities, organizations, individuals and the public.

4.2 Reindeer Husbandry

Sweden is divided into counties. Every county has a County Administration Board, led by a county governor, that is responsible for government administration.¹¹² This includes to facilitate the development of the county, enable cooperation between relevant actors in the county and coordinate different societal interests.¹¹³ One of the things that the County Administrative Boards shall facilitate is development of the reindeer husbandry. This includes to support development projects and to monitor the reindeer husbandry-interest within societal and environmental planning.¹¹⁴

Several County Administration Boards have special bodies that are responsible for decision-making in certain matters.¹¹⁵ The County Administration Boards in Norrbotten, Västerbotten and Jämtland have a delegation responsible for reindeer husbandry matters.¹¹⁶ These delegations

¹¹² See article 1 and 11 of the Ordinance with instructions for the County Administration Boards 2017.

¹¹³ See article 1 of the Ordinance with instructions for the County Administration Boards 2017.

¹¹⁴ See Länsstyrelsen: Rennäringsdelegationer, <<https://www.lansstyrelsen.se/norrbotten/forening/natur-och-miljo/djur/rennaring.html>>, accessed 26 March 2019.

¹¹⁵ Compare article 14 – 19 of the Ordinance with Instructions for the County Administration Boards 2017.

¹¹⁶ See article 1 of the Ordinance regarding Reindeer Husbandry Delegations 2017; article 16 of the Ordinance with instructions for the County Administration Boards 2017.

are responsible for decision-making in matters determined by their respective County Administration Board.¹¹⁷ This includes overarching decisions regarding reindeer husbandry and grants of usufructuary rights on land owned by the government.¹¹⁸ The Reindeer Husbandry Delegations consist of seven members elected by the County Administrative Board. The county governor is the president of the delegation. Three members shall be reindeer husbandry practitioners and therefore also members of a Sami village. The Sami Parliament shall be consulted in the election of these members.¹¹⁹ The delegation is able to make decisions when the president and at least three members, of which at least one Sami representative, are present.¹²⁰

4.3 Minerals

Exploitation of natural resources causes environmental damage, including but not limited to drastic changes of landscape, contamination and disturbances of the surroundings.¹²¹ Permits to process minerals are valid for 25 years and are usually extended ten years at a time without any application being required.¹²² The Mineral Act 1991¹²³ and the Mineral Ordinance 1992¹²⁴ contain certain possibilities for the Sami to participate in decision-making regarding the examination and processing of certain minerals on land belonging to the discoverer or to someone else.¹²⁵

An examination permit is required in order to search an area for certain minerals.¹²⁶ The Sami Parliament shall be given an opportunity to leave comments on applications for examination permits if the area is used for reindeer herding.¹²⁷ Permission is generally granted if there is reason to believe that such minerals can be found in the area in question.¹²⁸ Permits last for three years and can easily be extended.¹²⁹

An approved work plan is required in addition to an examination permit in order to search for minerals. The work plan shall, among other things, clarify

¹¹⁷ See article 2 of the Ordinance regarding Reindeer Husbandry Delegations 2017.

¹¹⁸ See prop. 2005/06:86 p. 63.

¹¹⁹ See article 3 and 4 of the Ordinance regarding Reindeer Husbandry Delegations 2017.

¹²⁰ See article 5 of the Ordinance regarding Reindeer Husbandry Delegations 2017.

¹²¹ See Michanek & Zetterberg (2017) p. 522.

¹²² See chapter 4 article 7 and 8 of the Mineral Act 1991.

¹²³ Swedish: Minerallagen (1991:45).

¹²⁴ Swedish: Mineralförordningen (1992:285).

¹²⁵ See chapter 1 article 1 of the Mineral Act 1991.

¹²⁶ See chapter 3 article 1 of the Mineral Act 1991.

¹²⁷ See article 3 of the Mineral Ordinance 1992.

¹²⁸ See chapter 2 article 2 of the Mineral Act 1991.

¹²⁹ Compare chapter 2 article 5 and 6 of the Mineral Act 1991.

that those affected by it can impact its content through objecting to it.¹³⁰ Holders of special rights, such as for reindeer husbandry, that are affected by the project shall receive the work plan so that they can express their written opinion regarding it. The work plan can be shared with the Sami village that the affected reindeer herders are members of.¹³¹ A translation of the work plan into Sami shall be attached under certain circumstances.¹³² Inconveniences for the reindeer herders are accepted to a certain level. As long as their inconvenience does not exceed the interest of the permit holder to examine the area for minerals, the process will not be stopped by the regulatory authority.¹³³

Once an examination permit has been granted and a work plan has been accepted, the only form of participation that remains for the Sami, according to this framework, is the right to be informed. The Sami Parliament shall receive the examination permit and the work plan if the area concerned is used for reindeer herding.¹³⁴ The affected holders of a reindeer herding right shall be informed of when the examination starts and ends.¹³⁵ If a permit to search for minerals is extended, the decision to do so shall be shared with the Sami Parliament.¹³⁶ A decision to grant permission to process minerals on an area used for reindeer husbandry shall be sent to the Sami Parliament.¹³⁷

4.4 Forestry

Reindeer husbandry is often exercised on forest covered land close to the mountain range.¹³⁸ The Forestry Act 1979¹³⁹ contains a duty for property owners to consult concerned Sami villages prior to logging in areas used for reindeer husbandry during the whole year.¹⁴⁰ This area is spread across the counties of Norrbotten, Västerbotten, Jämtland and Dalarna.¹⁴¹ The Swedish

¹³⁰ See chapter 3 article 1 and 5 of the Mineral Act 1991.

¹³¹ See chapter 3 article 5 a of the Mineral Act 1991.

¹³² Compare chapter 3 article 5 b of the Mineral Act 1991.

¹³³ Compare chapter 3 article 5 d of the Mineral Act 1991.

¹³⁴ See chapter 3 article 5 c of the Mineral Act 1991; article 6 and 9 b of the Mineral Ordinance 1992.

¹³⁵ See chapter 3 article 5 e and 5 f of the Mineral Act 1991.

¹³⁶ See article 8 of the Mineral Ordinance 1992; compare chapter 2 article 6 and 7 of the Mineral Act 1991.

¹³⁷ See article 22 of the Mineral Ordinance 1992.

¹³⁸ See Skogsstyrelsen, samråd skogsbruk – rennäring inför avverkning, <<https://www.skogsstyrelsen.se/lag-och-tillsyn/skogsvardslagen/samrad-skogsbruk--rennaring/>>, accessed 18 April 2019.

¹³⁹ Swedish: Skogsvårdslagen (1979:429).

¹⁴⁰ See article 20 of the Forestry Act 1979.

¹⁴¹ See article 3 of the Reindeer Herding Act 1971.

Forest Agency has been selected, through the Forestry Ordinance 1993¹⁴², to issue guidelines regarding these consultations.¹⁴³

Logging can normally be carried out by the property owner without any permission being required, as long as the Swedish Forest Agency is notified and provided with certain information.¹⁴⁴ When the forest is located in an area where reindeer husbandry can be exercised during the whole year, the owner must explain measures planned in order to meet the reindeer husbandry interest.¹⁴⁵ Logging can only be performed in the year-round-areas if it does not cause such substantial loss of pasture for the reindeer that the possibilities to hold the allowed number of animals is affected and the disruption does not make gathering and/or transfer of the herds impossible.¹⁴⁶ When the forest is located close to the mountain range and forestry measures can affect interests of significant importance for the reindeer husbandry, the owner needs a permit from the Swedish Forest Agency in order to cut down trees for purposes other than development of the forest.¹⁴⁷ The application for such a permit shall include information regarding measures planned in order to meet the reindeer husbandry interest.¹⁴⁸ The authority shall, among other things, take the reindeer husbandry interest into account when making a decision regarding issue of such a permit.¹⁴⁹

Before logging is carried out within the year-round-areas, the property owner shall consult concerned Sami villages.¹⁵⁰ The property owner shall always provide an opportunity for consultation when the planned measures will affect a forest with hanging lichens, pasture where the reindeer can rest during transfer, paddocks used for measures connected to reindeer husbandry, or a transfer route. The possibility of consultation shall also be provided if the designated area will exceed 20 hectares when combined with adjacent areas which have previously been cleared or are newly planted. This limit is reduced to 10 hectares in forests close to a mountain range. The purpose of these consultations is to prevent conflicts of interests and stimulate the development of solutions. The Sami can explain what the reindeer husbandry requires and express their opinions regarding the planned measures, while the property owner can gain knowledge of the reindeer husbandry and understand

¹⁴² Swedish: Skogsvårdsförordningen (1993:1096).

¹⁴³ See article 24 of the Forestry Ordinance 1993.

¹⁴⁴ See Michanek & Zetterberg (2017) p. 491.

¹⁴⁵ See article 14 of the Forestry Act 1979.

¹⁴⁶ See article 13 b of the Forestry Act 1979.

¹⁴⁷ See article 2 b and 15 of the Forestry Act 1979.

¹⁴⁸ See article 16 of the Forestry Act 1979.

¹⁴⁹ See 18 b of the Forestry Act 1979.

¹⁵⁰ See article 20 of the Forestry Act 1979.

what has to be taken into consideration when measures are planned.¹⁵¹ Consultations need to be documented in writing. It is recommended that owners of large forest covered properties conduct consultations at least once a year.¹⁵²

4.5 Minority Matters

In 2010, the Swedish Constitution 1974¹⁵³ was amended to establish a general duty to facilitate possibilities for the Sami and minorities to maintain and develop their culture and social life.¹⁵⁴ The Minority Act 2009¹⁵⁵ develops this duty into a requirement to take active measures in order to ensure that the culture and language of national minorities, including the Sami, will survive and develop.¹⁵⁶ Administrative authorities shall provide a possibility for national minorities to impact decision-making in matters that concern them and consult with them to the furthest extent possible in these matters.¹⁵⁷ Other opportunities to impact decision-making processes shall be offered in addition to consultations.¹⁵⁸ The intention behind the constitutional amendment in 2010 and the adoption of the Minority Act in 2009 was to further implement the Council of Europe Framework Convention for the Protection of National Minorities.¹⁵⁹

During the preparation of the Minority Act 2009, the Court of Appeal noted that ‘matters of concern’ is a broad concept and suggested that it should be delimited to, for example, ‘questions regarding their language, culture and social life’. The concept remains broad in the legislative text, but the intention is to target areas where the municipalities have certain obligations to its citizens. The legislator mentioned education, youth, elderly care, libraries and other cultural activities as examples.¹⁶⁰ However, it has been argued that ‘matters of concern’ should always include use of land and resources within Sami traditional territory. The Sami are an indigenous people as well as a national minority, and reindeer husbandry is strongly connected to their

¹⁵¹ See Skogsstyrelsen, samråd skogsbruk – rennärning inför avverkning, <<https://www.skogsstyrelsen.se/lag-och-tillsyn/skogsvardslagen/samrad-skogsbruk--rennaring/>>, accessed 18 April 2019.

¹⁵² See Karnov internet, the Forestry Act 1979, article 20, annotation 48, accessed 18 April 2019.

¹⁵³ Swedish: Regeringsformen (1974:152).

¹⁵⁴ See chapter 1 article 2 paragraph 6 of the Swedish Constitution 1974.

¹⁵⁵ Swedish: Lag (2009:724) om nationella minoriteter och minoritetsspråk.

¹⁵⁶ See article 2 and 4 of the Minority Act 2009; prop. 2008/09:158 p. 126 – 127.

¹⁵⁷ See article 2 and 5 of the Minority Act 2009.

¹⁵⁸ See prop. 2017/18:199 p. 93.

¹⁵⁹ See prop. 2009/10:80 p. 191; prop. 2008/09:158 p. 28.

¹⁶⁰ See prop. 2008/09:158 p. 69 – 70.

culture. To provide the Sami with a possibility to impact such decisions would therefore constitute an important measure in order to ensure that Sami culture is maintained and developed.¹⁶¹

The consultations shall take the form of structured dialogue with the minority so that the administrative authority can effectively take their opinions and needs into account.¹⁶² Not only representatives, but also unorganised members of the minority group shall be consulted. The dialogue shall be mutual, equal and trustful. The administrative authority shall plan the consultations so that it is clear what the purpose of the dialogue is and what expectations are placed on the participants. The information shall be sent out to the participants well in advance of the consultations so that all parties can participate on equal terms. The intention is that the authority should consider the outcomes of the consultation sessions to the furthest extent possible. This means that the minority shall be consulted at a stage when it is still possible for the authority to consider their opinions. It is not enough to simply provide information on finalised decisions or measures. The European Code of Good Practice¹⁶³ served as guidance when the consultation mechanism was developed.¹⁶⁴

4.6 Legislation and other Government Matters

The remittance procedure provides a possibility for authorities, municipalities, organisations and individuals to participate in decision-making regarding legislation and other government matters. The opportunity applies equally to the Sami and can be important in order for them to impact regulations which affect use of land and resources within their traditional territory.

The Swedish Constitution 1974¹⁶⁵ requires that information and opinions are obtained from concerned authorities in the preparation of government matters. Information and opinions shall also be acquired from municipalities, organisations and individuals as necessary.¹⁶⁶ The Sami Parliament shall be contacted when government matters concerning Sami interests are prepared,

¹⁶¹ See Kløcker Larsen & Raitio (2019) p. 9 – 10.

¹⁶² See article 5 of the Minority Act 2009.

¹⁶³ See chapter 3.2.2 for more information regarding the Code of Good Practice for Civil Participation in the Decision-making Process.

¹⁶⁴ See prop. 2017/18:199 p. 93.

¹⁶⁵ Swedish: Regeringsformen (1974:152).

¹⁶⁶ See chapter 7 article 2 of the Swedish Constitution 1974.

as it is the administrative authority responsible for developing Sami culture and ensuring that Sami interests are taken into account.¹⁶⁷ Sami organisations and individuals shall be consulted in addition to the Sami Parliament as necessary.¹⁶⁸ The Sami Parliament is obliged to respond to the request, as it is an administrative authority under the government, while it is voluntary for other remittance instances.¹⁶⁹

The duty to obtain information and opinions during the preparation of government matters is a characteristic and important part of Swedish decision-making that applies to all decisions taken by the government. There are no regulations for how the duty is to be fulfilled, but guidance for the legislative process has been defined through constitutional established practice. The process is usually written, alternatively a meeting can be arranged.¹⁷⁰ The time frame is not determined by any binding regulations, but it should be long enough to ensure the remittance instances are given a real possibility to evaluate the proposals. Guidelines for the governmental working process recommend that the time frame should not be shorter than three months, even if there is room for flexibility in critical and urgent matters.¹⁷¹

The remittance procedure can increase the quality of decision-making by the government and perhaps even parliament.¹⁷² When the remittance responses have been received regarding a proposal, the Government Offices compile the information in order to create a clearer picture of the situation. The opinions raised will be used as a foundation should the proposal be further developed, and the potential future government bill will include a presentation of the remittance responses.¹⁷³

4.7 Environmental Assessments

4.7.1 Introduction

Environmental assessments are used in order to identify, describe and assess environmental effects. The purpose is to integrate environmental aspects in

¹⁶⁷ See chapter 2 article 1 of the Sami Parliament Act 1992; article 1 of the Ordinance with Instructions for the Sami Parliament 2009.

¹⁶⁸ Compare chapter 7 article 2 of the Swedish Constitution 1974.

¹⁶⁹ See chapter 12 article 1 of the Swedish Constitution 1974.

¹⁷⁰ See prop. 1973:90 s. 287; Eka et al. (2018) p. 327 – 328.

¹⁷¹ See NJA 2018 s. 743.

¹⁷² See NJA 2018 s. 743.

¹⁷³ See Statsrådsberedningen Promemoria 2003:2 (reviderad 2 maj 2009) Svara på remiss – hur och varför. Om remisser av betänkanden från Regeringskansliet p. 6.

planning and decision-making, for a sustainable development.¹⁷⁴ Strategic environmental assessments relate to more general and future-focused plans and programmes, while specific environmental assessments relate to certain activities and measures.¹⁷⁵ Both processes contain opportunities for authorities, organizations, individuals and the public to express opinions and leave comments which may be of use to the Sami in order to impact decisions regarding their traditional territory. These mechanisms will be examined below.

National legislation relating to environmental assessments has been shaped by the European Union (EU), and influenced by international agreements. The EU has issued two directives on environmental assessments, one relating to plans and programmes¹⁷⁶ and another to activities and measures¹⁷⁷. The latter has been amended through a separate directive¹⁷⁸. There is also a directive that concerns public participation in the creation of plans and programmes¹⁷⁹. The Aarhus Convention¹⁸⁰ establishes the international foundation for the right of the public to access information, participate in decision-making and access justice in environmental issues. The Espoo Convention contains international requirements for Environmental Impact Assessments (EIA).¹⁸¹

4.7.2 Strategic Environmental Assessments

A strategic environmental assessment shall be conducted by an authority or municipality that creates or changes a plan or programme required by legislation or other statute, if the project is assumed to have a significant environmental impact.¹⁸² The government can determine the environmental significance of certain activities generically.¹⁸³ For example, plans and

¹⁷⁴ See chapter 6 article 1 of the Environmental Code 1998.

¹⁷⁵ See prop. 2016/17:200 p. 71-72.

¹⁷⁶ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

¹⁷⁷ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

¹⁷⁸ Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

¹⁷⁹ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

¹⁸⁰ See chapter 3.1.4 for more information regarding the Aarhus Convention.

¹⁸¹ See prop. 2016/17:200 p. 57 and 63.

¹⁸² See chapter 6 article 3 of the Environmental Code 1998.

¹⁸³ See chapter 6 article 4 of the Environmental Code 1998.

programmes that relate to forestry, fishing, energy, industry or use of land, are considered to always have a significant environmental impact.¹⁸⁴ Otherwise, the significance needs to be investigated by the authority or municipality.¹⁸⁵

The investigation includes identification of factors for and against a significant environmental impact, as well as consultations if it has not already been possible to establish the need for a strategic environmental assessment.¹⁸⁶ Consultations shall be held with municipalities, County Administrative Boards and other authorities that can be assumed to be affected by the plan or programme because of their special environmental responsibility.¹⁸⁷ Exactly which authorities are to be consulted has to be decided in each individual case due to the differing nature of plans and programmes. The purpose of consultations at this stage is to gather the information required to determine whether the plan or programme can be assumed to have a significant environmental impact. Information regarding the project needs to be sent to all parties prior to the consultation if it is to be conducted efficiently. The Swedish Environmental Agency¹⁸⁸ has created guidelines regarding what shall be included in the information.¹⁸⁹

If the authority or municipality determines that a strategic environmental assessment shall be conducted, it shall conduct consultations in order to determine the scope and detail of the EIA.¹⁹⁰ Consultations shall be held with municipalities, County Administrative Boards and other authorities that can be assumed to be affected by the plan or programme because of their special environmental responsibility.¹⁹¹ The Swedish Environmental Protection Agency has stated, with reference to the Aarhus Convention and the Espoo Convention protocol regarding strategic environmental assessments, that individuals and the public should be given an opportunity to express their opinion at this stage of the process. However, the Swedish Government has deemed it sufficient that authorities and municipalities be free to consult the public concerned, as there is a possibility for the public and individuals to express opinions regarding the EIA in a later stage in the process. Consultations shall be conducted as early as possible. Information regarding

¹⁸⁴ See article 2 of the Environmental Assessment Ordinance 2017.

¹⁸⁵ See chapter 6 article 5 of the Environmental Code 1998.

¹⁸⁶ See chapter 6 article 6 of the Environmental Code 1998.

¹⁸⁷ See chapter 6 article 6 of the Environmental Code 1998.

¹⁸⁸ Swedish: Naturvårdsverket.

¹⁸⁹ See prop. 2016/17:200 p. 89.

¹⁹⁰ See chapter 6 article 7 and 9 of the Environmental Code 1998.

¹⁹¹ See chapter 6 article 10 of the Environmental Code 1998.

the proposal and the reasons behind it need to be sent to all parties prior to consultations in order for the sessions to become meaningful.¹⁹²

After the consultations have been completed, the authority or municipality shall create an EIA.¹⁹³ The EIA and the proposal for the plan or programme shall be made accessible to the public, as well as to the municipalities and authorities that can be assumed to be especially affected because of their special environmental responsibility. The parties shall be informed of how they can access the documents, as well as how and when they can leave comments on it. The time set aside for comments shall be reasonable.¹⁹⁴ The public is defined in line with the Aarhus Convention and means those who are affected by, likely to be affected by or have an interest in the decision. Non-governmental organizations are also included in the term.¹⁹⁵ The authority or municipality shall then consider both the EIA and comments received, before the plan or programme can be adopted or used as a foundation for new regulations.¹⁹⁶

4.7.3 Specific Environmental Assessments

A specific environmental assessment shall be made for activities and measures that require certain forms of permissions, if the project can be assumed to have a significant environmental impact.¹⁹⁷ The government can determine the environmental significance of certain activities generically.¹⁹⁸ For example, mining and windmills are considered to always have a significant environmental impact.¹⁹⁹ The significance can also be determined by the operator if they consider the activity or measure to have such an impact, or if the activity requires special permission due to it being environmentally hazardous. In other cases, the operator shall investigate the significance.²⁰⁰ The purpose of the investigation is to determine whether or not a specific environmental assessment must be created.²⁰¹

¹⁹² See prop. 2016/17:200 p. 95 – 96.

¹⁹³ See chapter 6 article 9 of the Environmental Code 1998.

¹⁹⁴ See chapter 6 article 15 of the Environmental Code 1998.

¹⁹⁵ See Karnov internet, the Environmental Code 1998, chapter 6 article 15, annotation 211, accessed 7 March 2019; compare article 2.4 and 2.5 of the Aarhus Convention.

¹⁹⁶ See chapter 6 article 9 of the Environmental Code 1998.

¹⁹⁷ See chapter 6 article 20 of the Environmental Code 1998.

¹⁹⁸ See chapter 6 article 21 of the Environmental Code 1998.

¹⁹⁹ See article 6 of the Environmental Assessment Ordinance 2017; compare chapter 4 article 11 – 16 and chapter 21 article 13 – 14 of the Environmental Examination Ordinance 1998.

²⁰⁰ See chapter 6 article 23 of the Environmental Code 1998; compare and chapter 9 article 6 a of the Environmental Code 1998.

²⁰¹ See prop. 2016/17:200 p. 109.

The operator shall compile information on the project and conduct consultations with the County Administrative Board, regulatory authority and individuals that can be assumed to be especially concerned by the activity or measure.²⁰² The intention is to include individuals living in the area and others that will be especially concerned.²⁰³ Nothing prevents the operator from conducting consultations with more parties than what is mandatory.²⁰⁴ The purpose of the consultations at this stage is to create a better foundation for the County Administrative Board when it is to decide whether or not the activity or measure can be assumed to have a significant environmental impact.²⁰⁵ The consultations shall address questions regarding the possible environmental impact, as well as the content and structure of the EIA.²⁰⁶

The parties participating in the consultation shall receive information on the activity or measure, such as any significant environmental effects which can be assumed and how negative effects are to be prevented, hindered, counteracted and repaired. The information shall have the required scope and detail to allow the parties to form an opinion of whether or not the activity or measure can be assumed to have a significant environmental impact.²⁰⁷ The information shall be provided by the operator well in advance of the consultations.²⁰⁸ The definition of ‘well in advance’ needs to be determined on an individual basis, but the purpose is to give all parties sufficient time to prepare so that the consultations can be more fruitful.²⁰⁹

If a specific environmental assessment is required, the operator shall conduct consultations regarding the delimitations of the EIA.²¹⁰ The consultations shall address the location, scope and form of the activity or measure, environmental effects which can be assumed to be caused by the activity or measure in itself or as an effect of external circumstances and the content and form of the EIA.²¹¹ The operator shall consult the County Administrative Board, regulatory authority and individuals can be assumed to be especially concerned by the activity or measure. Other government agencies, municipalities and the public shall also be consulted if they can be assumed to be affected by the project.²¹² The consultations shall be an integrated part

²⁰² See chapter 6 article 24 of the Environmental Code 1998.

²⁰³ See prop. 1997/98:45 p. 57 Del 2.

²⁰⁴ See prop. 2016/17:200 p. 113.

²⁰⁵ See prop. 2016/17:200 p. 114.

²⁰⁶ See chapter 6 article 24 of the Environmental Code 1998.

²⁰⁷ See article 8 and 9 of the Environmental Assessment Ordinance 2017.

²⁰⁸ See chapter 6 article 25 of the Environmental Code 1998.

²⁰⁹ See prop. 2016/17:200 p. 114.

²¹⁰ See chapter 6 article 28 of the Environmental Code 1998.

²¹¹ See chapter 6 article 29 of the Environmental Code 1998.

²¹² See chapter 6 article 30 paragraph 1 of the Environmental Code 1998.

of the creation of the EIA.²¹³ The scope and form of the consultations must be determined based on the character, extent and effects of the activity.²¹⁴

The operator shall initiate consultations and provide information to all participating parties well in advance of both the creation of the EIA and the final application for permission.²¹⁵ The information that the operator shall share with the participating parties must meet the same requirements as that is to be provided during the investigation process. The purpose is that the parties shall be able to formulate an opinion regarding the scope and detail of the EIA.²¹⁶ If no previous consultation has been conducted, which means that there has been no investigation of the environmental impact, this shall be included in the information shared with the parties prior to the consultation at this stage of the process.²¹⁷ It is possible for the operator to coordinate the consultations regarding both a significant environmental impact and the scope of the EIA by expanding the circle of participating parties during the former category of consultations.²¹⁸

The purpose of the consultations is to provide a possibility for affected parties to impact a project early in the process. Insufficient consultations can result in the EIA being disapproved and the application being dismissed or refused.²¹⁹ This thesis does not examine appeal as a possibility for impact, but it shall be noted that failure to conduct adequate consultation can sometimes be compensated for at a later stage of the process. Whether or not this is possible is to be determined on an individual basis.²²⁰ The decision shall take the character and extent of the activity, as well as the public and individual interests affected, into consideration.²²¹

The EIA shall be published on the official website of the authority and in at least one local newspaper. If the permit application shall be made public as well, it shall be published together with the EIA.²²² This is to ensure that the information is accessible over time and spread widely.²²³ The public announcement shall include information regarding where and during which

²¹³ Compare MÖD 2002:15.

²¹⁴ Compare MÖD 2015:35.

²¹⁵ See chapter 6 article 31 of the Environmental Code 1998.

²¹⁶ Compare article 8 and 9 of the Environmental Assessment Ordinance 2017.

²¹⁷ See chapter 6 article 30 paragraph 3 of the Environmental Code 1998; compare chapter 6 article 23 and 24 of the Environmental Code 1998.

²¹⁸ See chapter 6 article 24 paragraph 2 of the Environmental Code 1998.

²¹⁹ Compare MÖD M 1859–14 (dom den 24 november 2014).

²²⁰ Compare MÖD 2002:39.

²²¹ Compare MÖD 2003:88.

²²² Compare chapter 6 article 41 of the Environmental Code 1998; article 20 of the Environmental Assessment Ordinance 2017; prop. 2016/17:200 p. 140.

²²³ Compare prop. 2016/17:200 p. 140.

time comments will be accepted.²²⁴ The public shall have reasonable time, at least 30 days, to leave comments on the EIA.²²⁵ The regulation performs the EU-directive on environmental assessments for activities and measures. The purpose is to ensure effective participation of the public in decision-making processes. The government has noted that some situations might motivate an extended time frame for the possibility to comments, which is why the responsible authority is free to decide the deadline in each individual case.²²⁶ The information emerged during the process will be considered when the permit application is determined.²²⁷

4.8 Planning of Land and Water Areas

The Planning and Building Act 2010²²⁸ provides the legal foundation for the planning of land and water areas.²²⁹ The purpose of the legislative act is to facilitate societal development with equal, good and sustainable living conditions for current and future generations.²³⁰ It contains opportunities for authorities, municipalities, organizations and individuals to express their opinion and leave comments during the development of plans. These mechanisms can be of use to the Sami in order to impact decisions regarding use of land and water within their traditional territory.

There are four different types of planning instruments. General and regional plans constitute guidelines, while local plans and area regulations are legally binding.²³¹ Regional plans and area regulations are less relevant in relation to Sami impact on decision-making processes since the former is not used on land within traditional Sami territory²³² and the latter has a limited scope of application.²³³ Therefore, these instruments will not be discussed further in this thesis.

Municipalities have the right to decide how land and water areas are to be used.²³⁴ As an exception, the government can adopt, change or revoke a local

²²⁴ See chapter 6 article 40 of the Environmental Code 1998.

²²⁵ See chapter 6 article 39 of the Environmental Code 1998; prop. 2016/17:200 p. 134.

²²⁶ See prop. 2016/17:200 p. 141.

²²⁷ See chapter 6 article 43 of the Environmental Code 1998; prop. 2016/17:200 p. 142 – 143.

²²⁸ Swedish: Plan- och bygglagen (2010:900).

²²⁹ See Michanek & Zetterberg (2017) p. 130.

²³⁰ See chapter 1 article 1 of the Planning and Building Act 2010.

²³¹ See Michanek & Zetterberg (2017) p. 491-493; chapter 3 article 3 and chapter 7 article 2 of the Planning and Building Act 2010.

²³² See chapter 2.2 for more information on Sami traditional territory.

²³³ Compare chapter 7 article 1 of the Planning and Building Act 2010; chapter 4 article 42 of the Planning and Building Act 2010.

²³⁴ See chapter 1 article 2 of the Planning and Building Act 2010.

plan or area regulations.²³⁵ The development of a plan-proposal can be assigned to, for example, a consultant or a property owner.²³⁶ Conflicts of interest are common during planning of land and water areas.²³⁷ Both public and individual interests are to be taken into account in decision-making.²³⁸ Different interests should always be balanced against each other in each individual case.²³⁹

A general plan shall be adopted by every municipality.²⁴⁰ The plan shall provide information on development of the physical environment over time and guidance for decisions regarding use of land and water.²⁴¹ It shall also demonstrate how it takes public and individual interests into account and how it implements, for example, national interests and strategies for sustainable development.²⁴² Local plans or area regulations can be used by a municipality in order to determine if an area is suitable for built environment²⁴³ or construction works, as well as to regulate how the area is to be used.²⁴⁴

The plan-procedure can roughly be divided into the creation, exhibition and adoption of the plan.²⁴⁵ The first step that includes a consultation duty and the second step that creates an opportunity to leave comments will be described below in relation to general and local plans. It shall be noted that the Planning and Building Act 2010 is to be applied parallel to the Environmental Code 1998.²⁴⁶ This means that municipalities can be required to expand the scope of consultations so that they comply with those conducted within strategic environmental assessments²⁴⁷ for plans and programmes.²⁴⁸

The municipality shall consult the County Administrative Board, County Council (only regarding general plans), Swedish Mapping, Cadastral and Land Registration Authority²⁴⁹ (only regarding local plans) and other concerned municipalities. Other authorities, national and local organisations

²³⁵ See chapter 11 articles 15 and 16 of the Planning and Building Act 2010.

²³⁶ See Karnov internet, the Planning and Building Act 2010, chapter 1 article 2, annotation 2, accessed 11 March 2019.

²³⁷ See Michanek & Zetterberg (2017) p. 490.

²³⁸ See chapter 2 article 1 of the Planning and Building Act 2010.

²³⁹ See prop. 2009/10:170 p. 159 - 160.

²⁴⁰ See chapter 3 article 1 of the Planning and Building Act 2010.

²⁴¹ See chapter 3 article 2 of the Planning and Building Act 2010.

²⁴² See chapter 3 article 4 and 5 of the Planning and Building Act 2010.

²⁴³ Swedish: Bebyggelse.

²⁴⁴ See chapter 4 article 1 and 2 of the Planning and Building Act 2010.

²⁴⁵ See Michanek & Zetterberg (2017) p. 497.

²⁴⁶ See Michanek & Zetterberg (2017) p. 130 and 497.

²⁴⁷ See chapter 4.6.1 for more information regarding what is required when consultations are conducted within strategic environmental assessments.

²⁴⁸ Compare chapter 3 article 9 and chapter 5 article 11 paragraph 4 of the Planning and Building Act 2010.

²⁴⁹ Swedish: Lantmäterimyndigheten.

and individuals that have a substantial interest in the proposal shall also be given an opportunity to participate in the consultation.²⁵⁰ The municipality is responsible for presenting the content, motivation and consequences of the proposal during the consultations.²⁵¹ The County Administrative Board shall, among other things, represent the interest of the state in the discussions and provide assistance and advice to the municipalities involved in the consultations.²⁵²

The purpose of the consultations is to contribute to transparency, enable influence and improve the foundation of the decision.²⁵³ The intention is to give the proposal democratic legitimacy.²⁵⁴ A real opportunity to impact the decision is only possible if all options regarding the plan are still open when consultations are held. It is common for the municipality to organize a meeting where all stakeholders can participate. The opinions raised during the consultations shall be taken into consideration by the municipality.²⁵⁵ The result of the consultations shall be presented by the municipality in an individual document.²⁵⁶ It shall be motivated when opinions are not met.²⁵⁷ It is possible that insufficient presentation of the consultation outcomes could result in the plan being revoked after appeal.²⁵⁸

When the consultations are over, the municipality shall exhibit the proposal of a general plan for at least two months or keep the proposal for a local plan accessible for examination for at least two weeks.²⁵⁹ The purpose is that the public shall be able to access the proposal and leave comments on it.²⁶⁰ The intention is that the most important objections towards the proposal should already have been made during the consultations.²⁶¹ During the exhibition or examination period, the County Administrative Board shall issue a special statement with an evaluation of the proposal.²⁶² When the time limit is reached, the municipality shall compile the received feedback and present

²⁵⁰ See chapter 3 article 8 paragraph 1 and chapter 5 article 11 of the Planning and Building Act 2010; compare prop. 2009/10:170 p. 182.

²⁵¹ See chapter 3 article 8 paragraph 3 and chapter 5 article 13 paragraph 1 of the Planning and Building Act 2010.

²⁵² See chapter 3 article 10 and chapter 5 article 14 of the Planning and Building Act 2010.

²⁵³ See chapter 3 article 8 paragraph 2 and chapter 5 article 12 of the Planning and Building Act 2010.

²⁵⁴ See prop. 2009/10:170 p. 181.

²⁵⁵ See Michanek & Zetterberg (2017) p. 498.

²⁵⁶ See chapter 3 article 11 and chapter 5 article 17 of the Planning and Building Act 2010.

²⁵⁷ See Karnov internet, the Planning and Building Act 2010, chapter 3 article 11, annotation 68, accessed 11 March 2019.

²⁵⁸ Compare MÖD P 2134–17 (dom den 13 november 2017).

²⁵⁹ See chapter 3 article 12 and chapter 5 article 18 of the Planning and Building Act 2010.

²⁶⁰ See Michanek & Zetterberg (2017) p. 499.

²⁶¹ Karnov internet, the Planning and Building Act 2010, chapter 3 article 12, annotation 69, accessed 11 March 2019.

²⁶² See chapter 3 article 16 and chapter 5 article 22 of the Planning and Building Act 2010.

suggestions based on these comments.²⁶³ If substantial amendments are made after this stage of the process, the municipality must exhibit the proposal again.²⁶⁴ It is then up to the Municipal Council to decide whether or not to adopt the general or local plan.²⁶⁵ The decision to adopt a plan which goes against the results of the consultations or the evaluation of the County Administrative Board risks being revoked in future legal processes.²⁶⁶

²⁶³ See chapter 3 article 17 and chapter 5 article 23 of the Planning and Building Act 2010.

²⁶⁴ See chapter 3 article 18 and chapter 5 article 25 of the Planning and Building Act 2010.

²⁶⁵ See chapter 3 article 19 and chapter 5 article 27 of the Planning and Building Act 2010.

²⁶⁶ See Michanek & Zetterberg (2017) p. 499.

5 Criticism and Discussions

5.1 Introduction

This chapter explores recent developments in Swedish national and intergovernmental discussions regarding Sami participation. At the time of writing, Sweden does not have a special order of consultation with the Sami in force. Such mechanisms have been proposed twice, first in 2009 and then again in 2017. The following text examines the main features of these proposals and the criticism directed towards them, as well as the parallel initiative to an intergovernmental Nordic Sami Convention. The study begins with the international critique that motivated these discussions.

5.2 International Critique Against Sweden

Sweden has continuously received critique from various international bodies regarding the situation for the Sami. Comments have been made in relation to international instruments that create obligations for Sweden towards Sami.²⁶⁷ The most recent critique regarding possibilities for Sami to impact decision-making processes is examined below. The purpose is to provide an understanding for how the discussions have evolved in Sweden.

The Human Rights Committee has directed critique towards Sweden during the last 15-20 years regarding the possibility for indigenous peoples to impact decisions in matters that concern them.²⁶⁸ The committee stated in 2016 that regulations for activities that affect Sami rights and interests, such as resource exploitation and development projects, need to be amended in order to ensure meaningful consultation with the aim of obtaining their FPIC.²⁶⁹ Parallel to the Human Rights Committee, the Council of Europe has repeatedly expressed criticism towards Sweden through its country specific opinions and resolutions. In 2018, the Council concluded that Sami effective participation in decision-making processes needs to be increased and formalized in order to ensure their impact at national, regional and local levels in matters that

²⁶⁷ See chapter 3 for further information about these obligations, instruments and human rights bodies.

²⁶⁸ See Ds 2017:43 p. 15.

²⁶⁹ See the Human Rights Committee – Concluding observations on the seventh periodic report of Sweden CCPR/C/SWE/CO/7, 28 April 2016.

concern their traditional areas.²⁷⁰ The Committee on the Elimination of Racial Discrimination has also issued critique against Sweden multiple times. In 2018, the committee expressed concern regarding the fact that national legislation fails to ensure the Sami right to FPIC, while the state continues to exploit natural resources and establish industrial and development projects.²⁷¹

International critique motivated Sweden to investigate how to increase Sami participation in decision-making processes. This has resulted in two proposals, one in 2009 and another in 2017, for a special order of consultation with the Sami.²⁷² These proposals, and the criticism against them, are examined below.

5.3 Discussions Regarding a Special Order of Consultation

5.3.1 Certain Sami Political Questions (Ds 2009:40)

This proposal was made as a minor part of an investigation concerning a number of political questions related to the Sami. An addition to the Ordinance with instructions for the Government Offices 1996²⁷³ would establish a duty for the Government Offices to consult the Sami Parliament in the preparation of matters that concerned the Sami in particular and that were likely to be of importance to either the Sami culture or other Sami interests. The investigation specifically mentioned use of land and water as important to the Sami. However, the duty would be limited to legislation, ordinances and international obligations. The proposed mechanism was to be understood as an expansion of the already existing remittance procedure²⁷⁴ since the purpose of the consultations would be to reach consensus with the Sami Parliament.²⁷⁵

The investigation noted that the process must provide a chance for the Sami Parliament to have real impact on the procedure. A single information

²⁷⁰ Council of Europe Committee of Ministers Resolution CM/Res/CMN(2018)9 on the Implementation of the Framework Convention for the Protection of National Minorities by Sweden, 12 September 2018.

²⁷¹ 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.

²⁷² Compare Ds 2009:40 p. 101 and Ds 2017:43 p. 12, 33 and 37.

²⁷³ Swedish: Förordningen (1996:1515) med instruktion för Regeringskansliet.

²⁷⁴ See chapter 4.5 for more information about the remittance procedure.

²⁷⁵ See Ds 2009:40 p. 105.

meeting would normally not fulfil the requirements. According to the proposal, the Sami Parliament would have to be informed as early as possible in matters subject to the consultation duty. The Sami Parliament would be able to indicate which matters it wished to be consulted about, but the responsibility for conducting consultations and a right to initiate the process was to lie with the Government Offices. The investigation emphasized that the right to be consulted does not implicate a veto for the Sami. Neither agreement, nor consent would be required from the indigenous group in order for the process to proceed.²⁷⁶

The proposal was completely rejected by a number of central Sami representatives, including the Sami Parliament in Sweden, and received heavy criticism from several other remittance instances. Most importantly, the Sami had not been consulted in the matter. The investigation did not answer to the international critique and also lacked an analysis of Sweden's international obligations. Furthermore, a consultation mechanism only applicable the Government Offices was deemed insufficient. The Equality Ombudsman stated that the proposal did not establish a durable framework that will ensure a real opportunity to impact and participation for the Sami.²⁷⁷

The proposal was not further developed, but discussions regarding consultation with the Sami continued on both a national and international level.²⁷⁸

5.3.2 Consultation in Matters that Concern the Sami (Ds 2017:43)

This proposal was made as the result of investigations entirely focused on consultation with the Sami. The new regulations were suggested to be gathered in a special legislative act. A duty to conduct good faith consultations in order to seek agreement or consent would apply to the government, public administrative authorities, County Administrations and municipalities. It would also include County Administrative Boards and municipal boards. Consultations would be required with the Sami Parliament as a representative for the indigenous people. If there are reasons for it, Sami organizations and Sami villages would also need to be consulted in matters of special importance to them. The Sami would be able to draw attention to

²⁷⁶ See Ds 2009:40 p. 102 and 105.

²⁷⁷ See Ds 2017:43 p. 31 – 32.

²⁷⁸ See Ds 2017:43 p. 32.

matters that require consultation, but the right to initiate the process would lie with the government or authority.²⁷⁹

The duty was proposed to include matters of special importance to the Sami as a people. The intention was to include both regulative and administrative decisions. The category was not further specified in order to avoid delimitation problems associated with detailed regulations, but it was stated that consultation would not be required in matters of a 'trivial nature' or in matters that only affect a few Sami individuals. Examination permits according to the Mineral Act 1991 were provided as an example of matters of a trivial nature since, according to the investigation, examination for minerals does not cause any significant problems for the reindeer husbandry or other use of the land.²⁸⁰

Several delimitations of the duty were made, including an exception for certain matters of an urgent nature or when consultation is obviously unnecessary. A matter is considered to be of urgent nature when, for example, the imposed consultation duty would make it impossible for the authority to meet the regulated time limit for the process of the application. This would include activities that are allowed to proceed six weeks after notice has been given in accordance with the Environmental Ordinance 1998. Consultation would be considered as obviously unnecessary when, for example, several decisions are made by different authorities on a matter. This situation could arise when an industrial project requires a permission to process minerals according to the Mineral Act 1991, an environmental permit according to the Environmental Code 1998 and a building permit according to the Planning and Building Act 2010. However, the exception would not apply if the matter has changed so that it can no longer be said to constitute the same matter that was previously subject to consultation. Consultation would also be considered obviously unnecessary when consultation in a previous similar matter has resulted in an understanding regarding what adjustments or measures need to be taken by a property owner or an operator.²⁸¹

The proposed special order of consultation would apply in addition to present participation mechanisms. Current forms of consultation presume an exchange of well-motivated opinions from both parties. This includes that the authority provides information to, and asks for advice from, another party. The proposed framework was said to differ from the present possibilities of participation as the consultations would be conducted with representatives for the Sami as an indigenous people. The intention with the proposal was that it

²⁷⁹ See Ds 2017:43 p. 43, 46, 62, 98, 101 and 109.

²⁸⁰ See Ds 2017:43 p. 53 – 56 and 99 – 100.

²⁸¹ See Ds 2017:43 p. 57 – 59.

would give the Sami an opportunity to participate at an earlier stage, provide a possibility for them to develop their opinions and enable mutual understanding between authorities and the Sami. The intention was also that the proposed consultation mechanism would take the form of discussions or negotiations in order to meet the international standard for indigenous peoples. The proposed framework was therefore to extend beyond present consultation mechanisms.²⁸²

Some of the criticised shortcomings of the proposal made in 2009 have been taken into account by the latter investigation. Sami representatives were consulted at the very start of the process. International obligations were considered, as well as some of the international critique. The consultation duty was also expanded in order to apply to a wider range of institutions on a national, regional and local level.²⁸³ As will be described below, the initiative to strengthen Sami participation was welcomed but also criticized on several grounds by Sami representatives and other consulted parties.

The Sami Parliament was positive towards the adoption of a special order of consultation in a separate legislative act but rejected the proposal for several reasons. The authority stated that the framework did not strengthen Sami participation and did not meet the requirements established in international law. Consultations are sufficient when decisions only have a minor impact on indigenous peoples, but their FPIC is required in matters with more substantial impact. The authority also stated that it cannot accept an order that does not provide a right for the Sami to initiate consultations.²⁸⁴ Similar opinions were raised by two Sami organizations called Sáminourra and the Swedish Sami National Association^{285, 286}.

The Federation of Swedish Farmers²⁸⁷ rejected the proposal completely since the consequences of the proposal had not been examined sufficiently. The organization also questioned whether international commitments and critique entailed that Sweden needed to adopt such extensive mechanisms.²⁸⁸ The content of the remittance response was supported by two economic associations consisting of private property owners in the middle and north of Sweden. According to them, the proposal could create more difficult

²⁸² See Ds 2017:43 p. 40 – 42.

²⁸³ Compare Ds 2017:43 p. 12 – 19 and 37 – 38.

²⁸⁴ See Sametinget, remissvar (Dnr. 1.2.1-2017-1209) till KU2017/01905/DISK, 28 november 2017.

²⁸⁵ Swedish: Svenska Samernas Riksförbund.

²⁸⁶ Compare Sáminourra, remissvar till KU2017/01905/DISK, 23 november 2017; Svenska Samernas Riksförbund, remissvar till KU2017/01905/DISK, 21 november 2017.

²⁸⁷ Swedish: Lantbrukarnas Riksförbund.

²⁸⁸ See Lantbrukarnas Riksförbund, remissvar (Dnr. 2017/7987) till KU2017/01905/DISK, 21 november 2017.

contradictions, while expressing that both dialogue and cooperation should be voluntary.²⁸⁹ The proposal was also rejected by Vattenfall AB, a corporation that produces electricity on land often subject to competing Sami interest. The company stated that it would be unnecessary to adopt an order of consultation with the Sami that applies in addition to already existing mechanisms.²⁹⁰

The Equality Ombudsman and the County Administration of Norrbotten were positive towards the purpose of the proposal. However, both remittance instances stated that certain aspects of it needed to be developed in order to avoid uncertainties and disputes. The Equality Ombudsman reacted to the fact that it is up to the authorities to decide when the consultation duty applies and that no appeal mechanism was suggested. It also questioned why activities requiring notice given in accordance with the Environmental Ordinance 1998 would be excluded from the consultation duty since these activities can have a substantial impact on Sami interests.²⁹¹ The Law Faculty at Stockholm University questioned how extensive the duty to consult would actually be since authorities have wide possibilities to interpret when the consultation duty applies.²⁹²

Front Advokater, a law firm that often represents Sami interests, was positive towards the initiative but rejected the proposal on several grounds. The law firm stated that an essential part of Sami participation and impact is to define the problem and that there is a risk that the authorities make a different assessment than the Sami of which matters shall be subject to the consultation duty. Consultations risk being reduced to merely a formality in the process as the proposal neither specified legal consequences of insufficient or non-existent consultations, nor contained a requirement for consent or cooperation. The firm also questioned the exclusion of examination permits from the consultation duty as the search for minerals can in fact cause large problems for the reindeer husbandry and this exception goes against the purpose of consultation because it means that the Sami are not involved at the earliest stage of the process.²⁹³

²⁸⁹ See Norra Skogsägarna, remissvar till KU2017/01905/DISK, 21 november 2017; Mellanskogsägarna, remissvar till KU2017/01905/DISK.

²⁹⁰ See Vattenfall AB, remissvar till KU2017/01905/DISK, 21 november 2017.

²⁹¹ See Diskrimineringsombudsmannen, remissvar (LED 2017/419 handling 3) till KU2017/01905/DISK, 15 november 2017; Länsstyrelsen Norrbotten, remissvar (811-13588-2017) till KU2017/01905/DISK, 20 november 2017.

²⁹² See Juridiska Fakultetsnämnden, remissvar (Dnr SU FV-1.1.3-2991-17) till KU2017/01905/DISK, 17 november 2011.

²⁹³ See Front Advokater, remissvar till KU2017/01905/DISK, 21 november 2017.

Based on the critique described above, it is evident that several aspects of the proposal for a new order of consultation that was made in 2017 needs to be amended or developed.

5.4 Discussions Regarding the Nordic Sami Convention

While the proposals examined above are based on national investigations, the Nordic Sami Convention is the result of discussions between states. The content of the convention has already been described in chapter 3.1.1. Therefore, this section instead focuses on how the discussions have evolved in relation to the proposals issued in Sweden and the progress made within the international community.

Sweden has previously negotiated and ratified two conventions with Norway and one convention with Finland in order to solve the problems caused for the Sami by national borders.²⁹⁴ The draft for a Nordic Sami Convention was created in 2005 by an expert group consisting of representatives for the Sami, as well as for the governments of Sweden, Norway and Finland.²⁹⁵ The Sami Parliamentary Council²⁹⁶, a forum for cooperation between the three Sami Parliaments, recommended the parties to ratify the draft convention. In 2010, it was decided that negotiations regarding a proposal for a Nordic Sami Convention would take place between delegations from all three states with the initial draft as their point of reference.²⁹⁷ The delegations consisted of members from the Government Offices of Sweden, Norway and Finland and the Sami Parliaments in the three states. Negotiations were initiated in 2011.²⁹⁸ In January 2017, the convention text was paraphrased for signing and ratification by the states. Sweden was of the opinion that this marked the end of the negotiations, but the text would also have to be accepted by the Sami Parliament in the three participating states.²⁹⁹

The national proposal for a special order of consultation with the Sami of 2017 included several references to the Nordic Sami Convention and it was claimed that the framework had been created in accordance with the Nordic Sami Convention.³⁰⁰ In November 2017, a number of Sami representatives

²⁹⁴ See Allard (2006) p. 328.

²⁹⁵ See Ds 2017:43 p. 18.

²⁹⁶ Swedish: Samiskt parlamentariskt råd.

²⁹⁷ See Sametinget, Samiskt parlamentariskt råd, <www.sametinget.se/spr>, accessed 2 May 2019.

²⁹⁸ See Ds 2017:43 p. 11.

²⁹⁹ See Ds 2017:43 p. 12 and 18.

³⁰⁰ See Ds 2017:43 p. 19.

emphasized in their remittance responses to the national proposal that the Nordic Sami Convention had not been ratified. In fact, the convention was not even ready for signing since the Sami Parliaments in Sweden, Norway and Finland had not given their opinion on the text and it could still be amended.³⁰¹

In June 2018, the Sami Parliamentary Council contacted the governments of all three states regarding amendments to the convention text. They sought clarification of the eligibility to vote in elections to the Sami Parliament being a Sami internal concern, self-government and consultations not being the only components of self-determination and to what extent exploitation of natural resources should be allowed. It was also argued that the time limit for states to terminate the agreement should be increased.³⁰² Since the council did not receive a response, a second official letter was sent to the governments in December 2018 in which the council emphasized the importance of finalizing the Nordic Sami Convention and insisted that the discussions regarding the proposed amendments must begin.³⁰³

As seen in chapter 3.1, the view on indigenous peoples has developed within the international community parallel to the negotiations regarding the Nordic Sami Convention. The right to self-determination, self-government, participation, consultation and FPIC are all acknowledged by the UNDRIP that was adopted by the UN General Assembly in 2007 and confirmed at the UN World Conference in 2014.³⁰⁴ The same concepts are found in the general comments issued in 2009 and 2017 by the Committee on Economic, Social and Cultural Rights that monitors the ICCPR.³⁰⁵ The Nordic Sami Convention ensures the Sami a right to self-determination, self-government and participation through consultations.³⁰⁶ However, the principle of FPIC has been reduced to a requirement to seek agreement or consent from the Sami during good faith consultations.³⁰⁷ The principle was reduced in the same

³⁰¹ See Sametinget, remissvar (Dnr. 1.2.1-2017-1209) till KU2017/01905/DISK, 28 november 2017; Sáminourra, remissvar till KU2017/01905/DISK, 23 november 2017; Skogssamerna Vuovdega, remissvar till KU2017/01905/DISK, 21 november 2017.

³⁰² See Samiskt Parlamentariskt Råd, skrivelse (1.6.2-2018-830) till Sverige, Norge och Finlands regeringar, 7 juni 2018.

³⁰³ See Samiskt Parlamentariskt Råd, skrivelse (1.6.2-2018-830) till Sverige, Norge och Finlands regeringar, 11 december 2018.

³⁰⁴ Compare Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples (A/RES/61/2), UN General Assembly, 25 September 2014; article 3, 4, 18 and 19 of the UNDRIP.

³⁰⁵ Compare note number 1, 36, 37 and 55 (e) of the general comment number 21 – right for everyone to take part in cultural life of the ICESCR, 21 December 2009; note number 1, 8 and 17 of the general comment number 24 – state obligations under the ICESCR in the context of business activities, 10 August 2017.

³⁰⁶ Compare article 4, 17 and 18 of the Nordic Sami Convention.

³⁰⁷ Compare article 17 of the Nordic Sami Convention.

way in the proposed national framework for a special order of consultation made in 2017.³⁰⁸

³⁰⁸ Compare Ds 2017:43 p. 109.

6 Analysis

6.1 Introduction

The purpose of this thesis is to analyse present possibilities for the Sami in Sweden to impact decision-making processes regarding use of land and natural resources within their traditional territories, in relation to international obligations regarding self-determination for indigenous peoples. My intention in this final chapter is not to comment on everything that has been found, but rather to concentrate my analysis around the questions that have guided my research. First, I comment on Sweden's international obligations towards the Sami when decisions are made regarding use of land and natural resources within their traditional territory. Second, I analyse the present possibilities for the Sami in Sweden to impact decision-making processes regarding use of land and natural resources within their traditional territory. Third, I position the examined mechanisms on the scale introduced through the European Code of Good Practice. Fourth, I evaluate to what extent Sweden fulfils its international obligations in relation to the Sami. Last, I make some final comments regarding the future.

6.2 International Obligations

Neither the international instruments applicable to indigenous peoples, nor the general recommendations and comments issued in relation to indigenous peoples' rights examined in chapter 3.1 are legally binding for Sweden. However, these documents have contributed to the development of legal concepts and duties that emanates from the right to self-determination as discussed in chapter 3.2.

Self-determination is widely acknowledged as customary international law and therefore a binding norm for all states. International human right bodies have clarified that the right to self-determination applies to indigenous peoples. Self-determination entails a right for indigenous peoples to self-government in internal and local affairs, as well as a right to participate in decision-making regarding matters that affect them. The right to participation has given rise to a duty for states to conduct good faith consultations with indigenous peoples in order to obtain their agreement or consent. The duty is well-established in international law, but it is disputed whether or not consent is required in order to proceed in the matter.

The principle of FPIC has gradually evolved within international law over the last 20 years. In 1997, a general recommendation was issued in relation to the ICERD that encouraged states to obtain an informed consent from indigenous peoples before proceeding with decisions that affect them. In 2007, the principle was confirmed through the adoption of the UNDRIP. Since then, international human right bodies such as the Committee on Economic, Social and Cultural Rights have insisted that the consultation duty no longer only requires states to seek consent, but also to guarantee that it is obtained or secured. Sweden has repeatedly received criticism regarding the possibilities for the Sami to impact decision-making processes in matters that affect them. The most recent criticism has included the fact that the state fails to ensure FPIC. Neither the latest proposal for a special order of consultation with the Sami, nor the newly negotiated Nordic Sami Convention contain references to the principle.

FPIC ensures that indigenous peoples are free to determine their own development priorities for use of land and natural resources within their traditional territories. Provided that FPIC is necessary in order to realize self-determination for indigenous peoples, the principle could be considered as an integrated part of that right. This means that the discussion of FPIC is ultimately a question regarding the scope of self-determination for indigenous peoples. Whenever a matter is of the slightest relevance to the state or to non-indigenous peoples, the Sami right to self-determination is reduced to a right to merely be consulted with no ability to control the outcome. This prompts the question of what self-determination without a right to withhold consent is truly worth for indigenous peoples. If self-determination can only be exercised in situations where there is no conflict of interests, does the right exist at all?

It is evident that the Sami have a right to participate in decision-making processes regarding matters that affect them and that this right establishes a duty for Sweden to conduct good faith consultations with the Sami in order to obtain their agreement or consent. Whether or not the principle of FPIC can be considered to constitute an international obligation for Sweden towards the Sami is not something that I aim to conclude upon in this thesis.

6.3 Present Possibilities

Sweden does not have a special order of consultation with the Sami in force at the time of writing. Instead, the Sami have to rely on other impact opportunities found in various regulations. These mechanisms have been

described in chapter 4 and will now be analysed individually before they are placed on the scale established by the European Code of Good Practice.

The Reindeer Husbandry Delegations constitute a possibility for the Sami to impact overarching decisions regarding reindeer husbandry and grants of usufructuary rights. The platform not only ensures Sami participation, but also transfers actual decision-making power to them. This makes it a unique platform for Sami participation within Swedish legislation. However, the mechanism can still be questioned on several grounds. First, it is not obvious why overarching decisions regarding reindeer husbandry and grants of usufructuary rights shall be made by County Administrative Boards and not by the Sami themselves. This is a legal construction that means that the state exercises control over Sami customary rights. Second, the delegations only exist in three out of five counties where reindeer husbandry is exercised. This means that the impact opportunity differs considerably depending on where the Sami village is located. Third, only three out of seven members of the delegation are required to be reindeer herders. Although nothing prevents a Sami from being the chairman, it is likely that the indigenous group will always be underrepresented in the delegation. This will most likely be reflected in the outcome of the decisions. Last, only one reindeer herder needs to be present in order for decisions to be made. This can be questioned since the delegations exist in order to involve the Sami in decision-making.

Reindeer husbandry requires vast areas of land in order for the reindeer to access natural pasture during the whole year. Mining is an environmentally hazardous activity that causes stress for the reindeer on the calving grounds, with a risk for damage and deprivation for the herders as a result. The Mineral Ordinance 1992 contains a possibility for the Sami Parliament to leave comments on an application for an examination permit when the area is used for reindeer husbandry. It shall be noted that a possibility to leave comments given by an ordinance is not the same as a right to be consulted ensured by legislation. It is also unclear what consideration is given to these comments. The Mineral Act 1991 states that reindeer herders can express their opinions regarding work plans that affect them. This is only after an examination permit has been granted and the work plan has been created. It shall also be noted that inconvenience for the reindeer husbandry is accepted to a certain level. The remaining right to be informed during different stages of the process does not constitute a possibility for the Sami to impact the decision-making. At the most, it helps the Sami Parliament and concerned reindeer herders to adapt to already made decisions. The mechanisms described above stand in clear disproportion to the long-term consequences that a permit to process minerals is likely to result in.

Reindeer husbandry is often exercised on land covered in forests that provide pasture for the animals. Logging is another environmentally hazardous activity that causes stress for the reindeer on the calving grounds, with a risk for damage and deprivation for the herders as a result. The Forestry Act 1979 contains a duty for property owners to consult Sami villages prior to logging in areas used for reindeer husbandry during the whole year. The Swedish Forestry Agency recommends a form of consultation that includes a dialogue between the reindeer herders and the property owner in order to foster mutual understanding and a good foundation for coexistence. The consultation duty constitutes a stronger impact opportunity for the Sami than the mechanism in the Mineral Act 2009. However, there are no guarantees that the opinions of the reindeer herders will be taken into consideration by the property owner and there is no legal requirement for consultations regarding areas used for reindeer herding only during the winter.

Cultural rights are an important part of human rights. Both indigenous peoples and minorities have a right to maintain and develop their culture. Possibilities for the Sami to do so shall be facilitated through active measures. The Minority Act 2009 establishes a general duty for authorities to consult national minorities, such as the Sami, to the furthest extent possible in matters that concern them. The legislative text explicitly states that the consultations shall take the form of a structured dialogue and the procedural instructions provided in the government bill are ambitious. The fact that the legislative act was created with guidance from the European Code of Good Practice and in order to implement the Council of Europe Framework Convention for the Protection of National Minorities contributes to the high expectations of the mechanism. However, the consultation mechanism has proven to be of limited worth to the Sami since it is restricted to questions such as education and language. This means that it is completely overlooked that culture, especially for indigenous peoples, can include a particular lifestyle that is associated with the use of lands and natural resources. Reindeer husbandry is strongly connected to Sami culture and requires vast areas of land where the reindeer can access natural pasture during the whole year without being disturbed. The result is that the consultation mechanism cannot be used by the Sami in order to impact decision-making processes regarding use of land and natural resources.

Use of land and natural resources within Sami traditional territory is affected by legislation and other forms of regulations. The remittance procedure contains a duty for the Government Offices to obtain information from concerned authorities, as well as municipalities, organisations and individuals as necessary when legislation and other government matters are prepared. The duty provides a possibility for the Sami Parliament, Sami organizations and

Sami individuals to express their opinion on initial proposals. Although the opportunity to leave comments applies relatively early in the process, it can be questioned if the mechanism is sufficient when matters that especially concern the Sami are prepared. For example, the investigation of a special order of consultation required Sami participation in the development of the proposal, which was then sent to the remittance instances for review.

Strategic environmental assessments contain possibilities to impact plans and programmes that can affect land and resources on Sami traditional territory. The Sami have an interest in participating as early as possible in the process since the assessment will only be conducted if a plan or programme is assumed to have a significant environmental impact. However, there are no guarantees that the Sami Parliament will be able to participate in the first consultations regarding the environmental impact or the second consultations regarding the scope of the EIA, as the participants are determined on an individual basis. Therefore, it is not until later in the process that the Sami are guaranteed a possibility to express their opinions. Sami individuals and organizations have an opportunity to leave comments on the project proposal and the EIA, once it has been created. A possibility to leave comments on an already developed proposal is not the same as being consulted regarding the development of a proposal. The Sami would therefore have a better chance to real impact if individuals and the public were able to express opinions before the EIA is created, as has been suggested by the Swedish Environmental Protection Agency.

Specific environmental assessments create opportunities to impact activities and measures that can affect land and resources on Sami traditional territory. The Sami have an interest in participating as early as possible in the process as the first consultation investigates the possibly significant environmental impact, which determines whether or not an environmental assessment will be made, as well as outlining the initial questions regarding the EIA which will determine core aspects of the project such as the location. However, it is only Sami individuals that are likely to be especially concerned by an activity or measure that are guaranteed to participate in the process at this stage. Other Sami individuals, the Sami Parliament and Sami organizations have to wait until the second round of consultations that focuses on questions regarding the EIA. These Sami representatives must be considered as 'likely to be affected' by projects that concerns Sami traditional territory. Sami individuals and organizations have a possibility to leave comments on the EIA once it has been created, but the chance of actual impact is greater during initial consultations, held prior to the creation of the EIA.

The process for adoption of plans for planning of land and water areas constitutes decision-making on a local level. Impact opportunities are important in order to manage conflicting interests and anchor the decisions among members of the public that will be affected by those plans. The Planning and Building Act 2010 contains a consultation duty regarding the creation of a proposal for plans, as well as an opportunity to leave comments on those proposals. The consultation mechanism provides greater impact opportunity as the consultations are conducted relatively early in the process and often in the form of a meeting. The Sami must be considered to always have a 'substantial interest' in a proposal of a plan that affects their traditional territory. This means that the Sami Parliament, Sami organizations and Sami individuals should always be given an opportunity to participate in consultations regarding those proposals. However, it shall be noted that an opportunity for the Sami to participate in the consultations is not the same as a duty for the municipality to consult them.

6.4 Grading

The mechanisms analysed above in section 6.3 will now be placed on the scale established by the European Code of Good Practice. The purpose is to create a better understanding for what possibilities each mechanism offers the Sami in allowing them to impact use of land and natural resources within their traditional territory. The scale and meaning of each concept have been explained in chapter 3.2.2. There are four different levels of participation: Information, consultation, dialogue and partnership.

The Reindeer Husbandry Delegations involve the reindeer herders in the actual decision-making, but the platform can still be criticised. Therefore, the mechanism is placed between dialogue and partnership that constitutes higher forms of participation. The Forestry Act 1979 contains a duty to conduct consultations in the form of dialogue and is therefore positioned on the middle of the scale between consultation and dialogue. The remittance procedure contains a mechanism that I identify as consultation since the Government Offices have a duty to actively ask for information. The procedure for specific environmental assessments and the Planning and Building Act 2010 contain consultation mechanisms that are placed together with the remittance procedure on the scale. These instruments, as well as the procedure for strategic environmental assessments, also contain opportunities to leave comments on proposals that are placed between information and consultation on the scale since they do not amount to consultations as defined. The Mineral Act 1991 and the Mineral Ordinance 1992 both contain an opportunity to leave comments. The legislative act also contains a right to be informed. The

former is placed between information and consultation, while the latter is placed as information at the bottom of the scale.

It shall be noted that the mechanism in the Minority Act 2009 has not been positioned on the scale. It would have been placed on the middle of the scale next to forestry, as it contains a duty to conduct consultations in the form of dialogue. However, the Sami cannot use this mechanism in order to impact decisions regarding use of land and natural resources, as it is only applied in relation to education and language.

6.5 Evaluation

As established in chapter 6.1, the Sami have a right to participate in decision-making processes regarding matters that affect them and therefore Sweden has a duty to conduct good faith consultations with the Sami in order to obtain their agreement or consent. I would like to begin with pointing out the fact that none of the mechanisms examined in this thesis contain a duty for the state to conduct consultations with the Sami. Instead, it is either authorities, municipalities or private actors such as operators and property owners that are to conduct the consultations.

As described in chapter 6.2, it also varies how well the examined mechanisms ensure Sami participation in decisions regarding use of land and natural resources. It is only the Reindeer Husbandry Delegations that require Sami participation in order for decisions to be made and it is only the consultation duty for property owners in the Forestry Act 1979 that specifically states that Sami representatives are to be consulted. As discussed in section 4.4. and again in 6.2, I do not include the Minority Act 2009 in my considerations, as the Sami cannot make use of the consultation mechanism in relation to use of land and natural resources. The rest of the examined mechanisms merely provide a possibility for the Sami, often coinciding with those available to the general public, to participate in consultations or to leave comments on a proposal. As I have pointed out in relation to several of the mechanisms analysed in section 6.2, a duty to consult the Sami is not the same thing as a possibility for the Sami to participate in consultations or to leave comments on a proposal. If Sami participation was required in order to make decisions, the state would have to ensure that the Sami are able to attend consultations. Among other things, it would raise questions regarding sufficient funding.

The mechanisms that the Sami rely on in order to impact decision-making processes regarding use of land and natural resources in Sweden provides possibilities for impact to some extent. However, these opportunities are not

secure or sufficient enough to ensure the Sami right to participation and fulfil the duty of the state to consult the Sami. Therefore, my conclusion is that Sweden does not fulfil its international obligations towards the Sami.

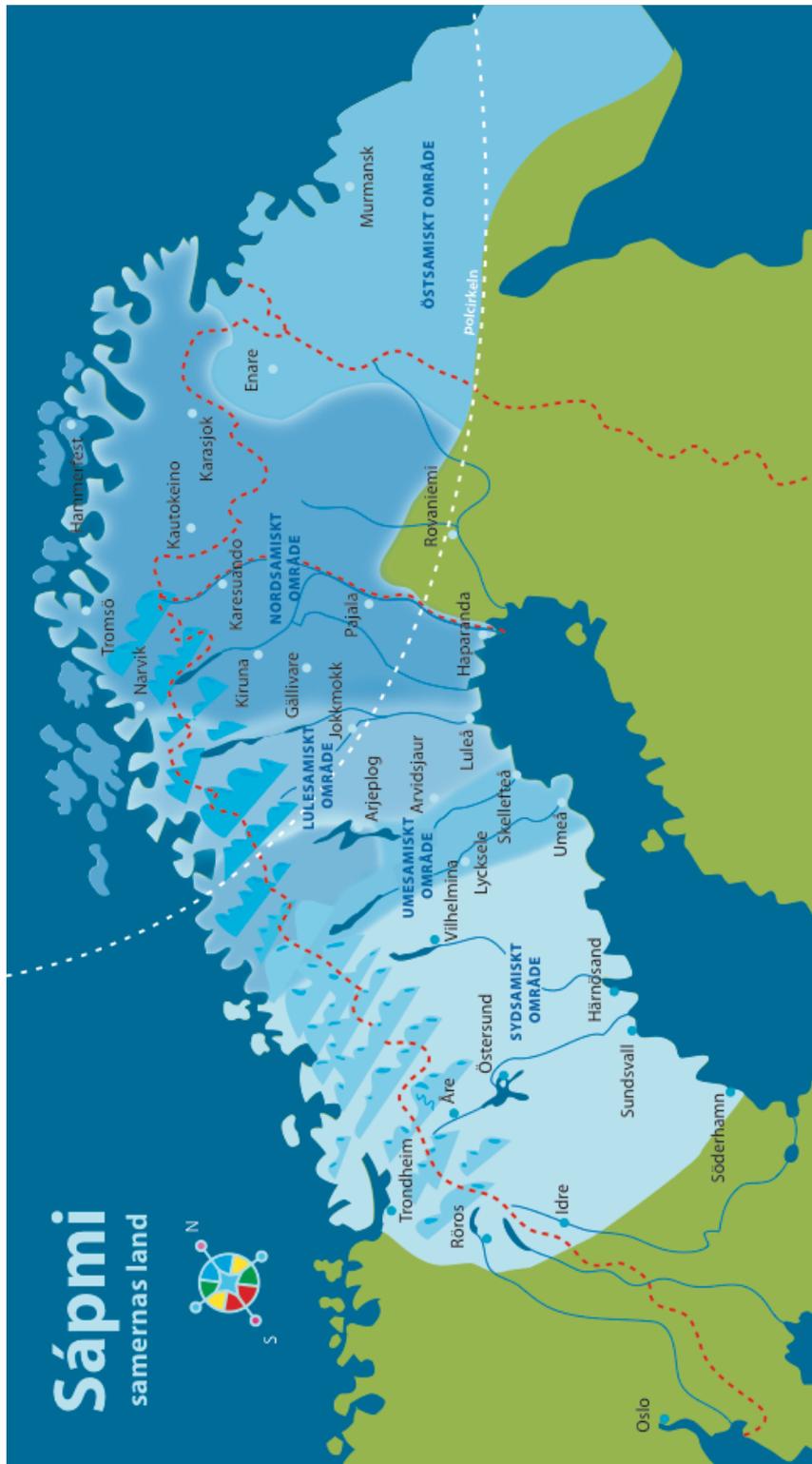
6.6 Final Comments

As explained in chapter 5.2, neither of the criticised proposals for a special order of consultation with the Sami put forward in 2009 and 2017 resulted in legislative amendments or additions. As seen in section 5.3, it is also unclear if the initiative to develop a Nordic Sami Convention between Sweden, Norway and Finland will proceed following the conclusion of negotiations in 2017. The failed national investigations and intergovernmental negotiations prompts the question as to whether there is another way forward for Sweden and the Sami residing within its borders, if only temporary.

With reference to the established international obligations in chapter 6.2, it is evident that Sweden must adopt legislative measures in order to ensure Sami participation in decision-making processes and fulfil the states' duty to conduct good faith consultations with the Sami in order to reach agreement or obtain their consent. However, I believe that future investigations and negotiations that could potentially result in important progress towards the realisation of Sami self-determination cannot be allowed to fail due to disagreement over the requirement of FPIC. The discussion regarding the principle is politically infected since it affects control over valuable land and natural resources, but a right in the form of a veto also sparks questions regarding democracy.

In order to reconcile the interests of the Swedish state and the Sami, value must be created for both parties. I see potential in exploring an option where Sweden, in addition to adopting legislative measures to ensure Sami participation while fulfilling the states' consultation duty, introduces higher requirements for the establishment of activities that affect use of land and natural resources within Sami traditional territory. The idea being that the adoption of more balanced legislation, in addition to providing possibilities for real participation and effective consultation with the Sami, could result in the facilitation of solutions where both parties can be satisfied. Further exploration in this direction and similar alternatives could be valuable. It is needless to say that the development, implementation and evaluation of any alternative solution without Sami participation would be completely inappropriate.

Supplement A ³⁰⁹



³⁰⁹ See samiskt informationscentrum, Karta över Sápmi, <<http://www.samer.se/karta>>, accessed 20 May 2019.

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