The mission of the Centre for International Sustainable Development Law (CISDL) is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

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1. Introduction

The participation of the Roma\(^1\) and the Saami\(^2\) people in public policy decision-making illustrates, to a certain degree, the limits of our concept of democracy and the associated decision-making system – that is, its structure, the choice of political orientations, and the legal norms within States and at the supranational level. It also touches upon the concept of sociocultural pluralism, specifically the manner in which the political decision-making process integrates heterogenous identities and identity based perceptions. The primary motive of the Roma and Saami peoples for participating in public policy decision-making practises is the affirmation of their identities. The existence and recognition of distinct identities is an element of self-affirmation for the population as a whole. In this respect, and in the Roma context, the sociologist Jean-Pierre Liégeois states:

Gypsyism as a manifested political act opens the way towards a proclaimed and assumed Gypsy identity, and simultaneously allows for dissociating from gypsyness which stems from prejudices and stereotypes, that until now has served as an essential reference for the people and institutions the Roma must confront.\(^3\)

An effective participation process can create for individuals a greater sense of belonging to their specific community, as well as contributing to the integration of minorities and indigenous peoples into broader national communities. The capacity to retain one’s specific identity while fully participating in the public life of mainstream society can gradually lead towards the elimination of the contemporary effects of discriminatory practices, such as social exclusion, marginalisation and poverty.\(^4\) Finally, examining the participation of the Roma and Saami peoples in public policy decision-making could reveal more clearly the constructed character of identities, their lack of fixity and the multiplicity of their sources, since, depending on its implementation, participation can be an indicator of the mixed nature of individual identity. Such an examination allows us to get to the root of the problem: that is, the inadequacy of State, European and international democratic systems coupled with the reality of pluralist identities. This inadequacy is caused by the fact that mainstream Western culture historically embedded in these institutions leads to the marginalization of peoples such as the Roma and Saami. This institutional failing constitutes

\(^1\) Jean-Pierre Liégeois, *Roms en Europe* (Strasbourg: Council of Europe Publishing, 2007) at 12, 13 and 27-35. The Roma people are a minority within several continental European States. They constitute the largest minority within the European Union. They represent approximately 7 to 9,000,000 persons, distributed across approximately 40 States. Several names have been given to these people, such as Travellers, Roma Romani or Gypsy. We have chosen to favour that of Roma, which includes, for the purposes of this article, several identities, notably those of Sinti (in Germany), Roma (in Eastern Europe, United States, and Canada), Kaale (in Finland and Spain), and Romanichaals (in England) and Travellers (in Scotland). Generally please see: Joy Kanwar, “Preserving Gypsy Culture Through Romani Law In America” 24 Vt. L. Rev. 1265 at 1269.

\(^2\) The Saami (or Sami) people are an indigenous people whose territory, known as *Sápmi*, is located in Northern Scandinavia (in Norway, Sweden and Finland) and on the Kola Peninsula, Northwestern Russia. They represent approximately 70,000 people: Saami Parliament, *The Saami – an Indigenous People in Sweden* (Västeras: Edita Västra Aros, 2007) at 5. Other sources put this number at 80,000 people, see for example: Sunna Kuoljok, *Saami history* (Tryckparken AB: Gällivare, 1998) at 8.

\(^3\) Jean-Pierre Liégeois, supra at note 1 at 228 [our translation].

a barrier to the creation of a constructive relationship between peoples living in the same territory, thus preventing the building of a common future.

This reality necessitates a renewed vision of participation of minorities and of indigenous peoples in public policy decision-making that distances itself from fear-laden concepts such as secession or “government by the minorities.” We suggest, on the contrary, conceiving political participation as a space for dialogue, exchange, enrichment and accommodation between peoples. The success of such participation obliges the legal system (national, international and European) to ensure that these groups can participate both as citizens of the State in question, but also as members of a culturally distinct minority or indigenous group.

The legal normativity that establishes a right to participation in political decision-making for minority and indigenous peoples tends to reproduce the illusion of integration within democratic societies. The reality, however, is that the overriding importance conferred on the interests of the dominant group confines participation by marginalized groups to the periphery of the system. With this in mind, our goal is to present a relatively precise picture of the current avenues available to the Roma and Saami peoples for participation in public policy decisions. We begin with an overview of the existing forums for participation available to these two peoples (Section 1). We will then present the legal foundations of such participation (Section 2), providing as assessment of the system throughout.

2. Spaces for political participation by the Roma and Saami

Participatory forums are spaces for dialogue, recognition and “self-affirmation.” In principle, they allow a people, as well as its individual members, to make choices, create common projects and adopt a vision for achieving these goals. In short, they are instruments of self-determination. With respect to the Roma and Saami peoples, these forums are of several orders. As spaces for expression, debate and affirmation, they can be political, independent, national, supranational, artistic, alternative, or built on the same model as lobbies. In order to highlight their impact in terms of participation, we have grouped them into two categories: institutional forums and emerging forums.

2.1 Institutional Forums

There are two types of institutional forums: firstly, national and international political forums, and secondly, non-governmental forums. The former are created by states or inter-state supranational organisations, while the latter are initiated by the people and their representatives. Unlike emerging forums, institutional spaces for dialogue exercise a more or less official representation of the voice of the Roma or Saami peoples.

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6 That is, the groups of individuals who come together in political communities, be they indigenous, non-indigenous, minority or majority.
2.1.1. The National and Supranational Political Forums

The Roma and Saami have two options for political representation: National or supranational institutions, which are common participatory forums. They are used for building and regulating common societal objectives. However, there are also exclusive forums, formed solely to receive Saami or Roma delegates designated by members of these two peoples to represent their interests. Participation of these peoples in national or supranational institutions is problematic at best. These organisations are not equipped with a designated number of seats reserved for Saami or Roma representatives, which would allow them, being a numerical minority, to attain meaningful representation.

The Saami people are not represented within the European Parliament, nor have they been represented in national parliaments, with the exception of Norway. Therefore, although no Finnish party has adopted a specific policy on Sami representation, the country’s Parliamentary Committees are collaborating with Saami representatives. In Sweden, the Saami are not represented in the National Parliament and, for the most part, they refuse to collaborate with national political parties, considering them to be biased. In fact, the creation of the Saami Parliament in Sweden coincided with the emergence of Saami political parties and Saami interests within certain national political parties’ platforms throughout the country. The participation of the Saami is developing differently in Norway:

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7 With regard to the Saami people: Norwegian, Swedish, Finnish or Russian Parliaments. As for the Roma people: European Union Member States. For both peoples at the European level, it is the European Parliament.

8 “Proposals regarding separate seats for Saami in the national parliaments have been presented from time to time, but have not yet been considered in Finland, Sweden or Norway. This has also not been a prioritised demand by the Saami organisations”; Eva Josefsen, “The Saami and the National Parliaments – Channels for Political Influence”, Galdu Cala, n°2/2007, at 14.

9 The Saami people have never had an elected representative in the Parliaments of Finland or Sweden, but have had elected representatives to the Parliament of Norway. Although the situation is different in each of the three States, this reveals, generally speaking, a very limited inclusion of Saami representatives within the parties and the national parliaments of Sweden, Norway and Finland. As Eva Josefsen indicates: How the Saami make use of this direct channel varies from country to country. In Sweden the Saami have historically rejected national parties as an appropriate alternative for promoting Saami issues. In Norway, however, the ties have been closer. This division showed up even at the first Saami Congress in Trondheim in 1917, where among the Swedish Saami there ‘was an overwhelming majority for a policy independant of party politics’. Finnish Saami participate in national parties to a greater extent than in Sweden, but appear to make less aggressive use of these channels than the Norwegian Saami. The fact that the electoral channels have been used differently can, at least to some extent, be due to the states’ policy vis-à-vis the Saami being different in the three countries, with the result that the Saami societies have developed differently. (Footnotes omitted) Eva Josefsen, supra at note 8 at 14.

10 The author reveals three factors which explain this situation: “Saami influence on decisions in national elected bodies depends on several factors. One of these is how concerned the national parties are about Saami policy issues, and to what extent they have incorporated this into their platform. Another variable is the involvement of the Saami, and how actively the members work on establishing Saami policy issues on the party policy agenda. This also includes whether Saami are nominated and elected to national parliaments on the basis of Saami policy viewpoints adopted by the parties” Ibid. at 23.

11 Ibid. at 15-16, and at 23-25.
where Saami representatives have already been elected to the National Parliament, and are involved in both national and Saami parties.\footnote{Ibid., at 16-17, and at 23-25.}

The Roma people are represented in certain national governments, but the impact of this representation varies with each State and is mostly negligible. They have deputies in the European Parliament\footnote{Since 2004, deputies of Roma origin have been elected to the European Parliament, notably Lívia Járóka (Roma deputy of Hungary), Viktória Mohácsi (Roma deputy of Hungary) and Juan de Dios Ramirez-Heredia (Roma deputy of Spain).} and within certain national parliaments,\footnote{Jean-Pierre Liègeois, supra at note 1 at 219 and 220.} such as in Hungary, Slovakia, the Czech Republic and Romania. This representation is developed either through "infiltration" into the national parties, or by the establishment of Roma parties.\footnote{The Roma Party in Romania for instance, called Partida le Romenge. Such a Roma Party also exists in Slovakia.} Finally, we note that although representation is increasing in Eastern European States, the same cannot be said about their Western counterparts, creating disproportionate representation for the Roma in the two regions. This reality demonstrates the limits of a democratic system based on the promotion of the interests of the majority of a more or less homogeneous people. Yet homogeneity becomes an artificial construct when, in fact, by people we really mean peoples.

Political forums of representation specific to these two peoples, such as the Saami Parliaments in Norway, Sweden and Finland,\footnote{Eva Josefsen, supra at note 8 at 18-22.} or the Roma Parliaments in the Czech Republic,\footnote{The Roma Parliament of the Czech Republic was established in 2004. It has the status of a civic association that Roma organisations and associations can join. Its principal representation body is the General Assembly. On this issue, please see: http://www.romea.cz/english/index.php?id=servis/z_en_2004_0061.} ensure the political representation of Saami and Roma citizens and their participation in decision-making within States. Their mandate is national and differs from traditional political arenas, such as national parliaments, due to the specificity of the message they deliver and the independent representation they ensure.\footnote{In fact, representation within national parliaments takes place within political parties of a more general mandate.} The creation of these institutions is fundamental to the expression of the will of the members of these peoples.

In the same spirit, at the supranational level a number of international organizations have, under pressure from members of indigenous peoples or the Roma people, created forums where dialogue can occur concerning the interests of these groups. The UN Permanent Forum on Indigenous Issues (UNPFII)\footnote{For more information regarding the Permanent Forum, refer to its website: http://www.un.org/esa/socdev/unpfii/index.html.} or the European Roma and Travellers Forum\footnote{For more information regarding the European Roma and Travellers Forum, refer to its website: http://www.ertf.org/en/index.html.} are examples of such spaces.\footnote{These forums are first and foremost places for listening and debate between aboriginal people or between the Romani. They are conducive to the emergence of common points of view and demands specific to the indigenous people or to indigenous peoples in general.}
members of the Roma people on issues that affect them in particular. Furthermore, they reinforce and promote the identity of these peoples internationally.\(^{21}\)

### 2.1.2. Non-Governmental Forums

Non-governmental forums are built within, and in connection to, civil society. In this sense, they are independent from states and international organisations, unlike national or international political forums. They constitute structured civil organisations. According to Liègeois:

> […] innovation, in developing [Roma] organisations arises both as an avoidance of the non-Roma, allowing the Roma to take their future into their own hands and acts as a protection mechanism to allow for innovation… that is, to organize itself in relation to others in order to remain distinct and able to act on their own dynamism and own wishes. But it is also a form of appropriation, since the “structures” are imitated from other groups. […] In order to remain as Roma, it is necessary to get organized, and to get organized with any chance of success against non-Roma means learning to use the same tools as them and, in order to do so, accepting values and ways of doing which modify the ways of being.\(^ {22}\)

Non-governmental forums include Roma or Saami organisations that have the status of non-governmental organisation (NGO)\(^ {23}\) at the international level, for instance at the United Nations and within specialised institutions such as ECOSOC or the Council of Europe. These NGOs can participate in decision-making at the international level, either by

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\(^{22}\) Jean-Pierre Liègeois, supra at note 1 at 224 [our translation].

\(^{23}\) There are also many NGO’s working on behalf of the Roma but are not composed of Roma members. These external NGO’s work very hard to improve the Roma living conditions but their contributions may not always benefit the Roma. According to Timmer:

Due to high rates of poverty, violence, and discrimination, the Roma (or Gypsy) population in Hungary is clearly seen as a “problem population.” As such, in recent years, there has been a great proliferation of nongovernmental organizations (NGOs) working with and for this subordinated minority. In their work, NGOs use specific discursive strategies that clearly maintain the Roma as problems in need of solutions. In this article, I focus specifically on the manner in which well-meaning organizations, due to constraints from external forces, rely upon stories of discrimination and an overemphasis on poverty. In doing so, they construct the Roma as “needy subjects.” Such a construction is problematic because (1) it often deprives the aid recipient of agency, (2) it obscures in-group differentiation and projects a homogenized identity focused on the most marginalized members of the group, and (3) it does not solve a double bind facing the agencies, whose continued funding and recognition rely upon continued reinforcement of differentiated rather than integrated status for those they try to serve. Given NGOs’ growing role in delivering services and serving as a voice for marginalized people such as the Roma, recognizing and resolving this double bind is a critical task for European NGOs - and for the funding sources that support them - if they want to be effective in achieving their stated goals.

holding observer status, 24 or by exerting pressure on governments. They also act as independent supervisory bodies of States’ policies.

The Saami Council and the International Romani Union (IRU) are two NGOs that hold observer status with the United Nations. According to the Saami Council mission statement:

The Saami Council is a voluntary Saami organization (a non–governmental organization), with Saami member organizations in Finland, Russia, Norway and Sweden. Since its foundation in 1956 the Saami Council has actively dealt with Saami policy tasks. For this reason the Saami Council is one of the indigenous peoples’ organizations which have existed longest. The primary aim of the Saami Council is the promotion of Saami rights and interests in the four countries where the Saami are living, to consolidate the feeling of affinity among the Saami people, to attain recognition for the Saami as a nation and to maintain the economic, social and cultural rights of the Saami in the legislation of the four states. (Norway, Sweden, Russia and Finland). This objective can be achieved through agreements between these states and the bodies representing the Saami people, the Saami parliaments. Saami Council renders opinions and makes proposals on questions concerning Saami people’s rights, language and culture and especially on issues concerning Saami in different countries. 25

The IRU’s mandate is to protect Roma interests within European and international forums. A Roma Parliament 26 exists within the IRU and this organisation also has a European regional satellite, which is the European Committee of the IRU. This Committee, created in 1991, has the mandate to participate in programs and projects that present an interest to Roma, Sinti and Gypsy peoples in Europe, in collaboration with various regional gypsy and non-gypsy organisations. Through the IRU and its European Committee, Roma people have at their disposal two means of representation and collaboration with inter-state supranational organisations. 27 The Roma people also have access to other non-governmental organisations such as the Standing Conference for Co-operation and Co-ordination of Romani Associations in Europe, which has permanent observer status at the Council of Europe. Its mandate is the cooperation and creation of a network of Romani organisations. 28

However, in the same manner as national forums for participation specific to these two peoples, Saami and Roma NGOs intervene in the process of decision-making within the confines of their own mandates, that is, the protection of Saami or Roma interests. Therefore, they do not systematically take part in the construction of common decisions affecting the broader society. Rather, they intervene in the decision-making process only when the decision is liable to affect Roma or Saami interests, highlighting the fact that their interests are treated as independent and hermetic with respect to mainstream society’s general and common interests.

24 This has been the case for numerous indigenous organisations who participated in the drafting of the United Nations Declaration on the Rights of Indigenous Peoples for instance, such as the Saami Council.
25 http://www.saamicouncil.net/?deptid=1124
26 On this point, see http://ling.kfunigraz.ac.at/~rombase/cgi-bin/art.cgi?src=data/hist/current/self-parl.en.xml.
27 For more information regarding the International Romani Union, consult its website: http://www.unionromani.org.
28 On NGOs and Roma political organisations, see, Jean-Pierre Liègeois, supra at note 1 at 211-231.
The willingness of the Roma and the Saami to participate in decision-making forums is clear, especially when the objective is strengthening their own governance. This movement surfaced tangibly in the 1970s and has intensified over time. Under pressure from Roma and Saami groups, classical political forums, such as national parliaments, have created facilities to integrate some minority representation. However, generally speaking, the involvement of these peoples tends to occur in forums designed to represent their specific interests. These structures collaborate with various levels of government. Nevertheless, their main function is to promote a separate participation -- one that does not correspond with the common administration of the national space, nor towards common dialogue or decolonization.  

2.2 Emerging forums

As discussed above, traditional participatory forums – and in particular, political forums -- are deficient in several respects. National parliaments show signs of restrained efficiency with regard to the representation of minorities, mainly due to the fact that the electoral system is based on the principle of majority rule. Furthermore, spaces for representation specific to these two peoples only allow narrow participation. As a result, new spaces for dialogue between minority and majority stakeholders have tended to emerge. One of the most prevalent and effective of these emerging spaces is the judicial forum, both at the national and supranational level.

2.2.1. National and Supranational Judicial Forums

Judicial forums are alternative spaces for political participation in contemporary society, and are used by numerous groups who otherwise lack political representation, such as indigenous people and minorities. These groups seize judicial authorities when their claims are not heard or embraced by legislative powers. Both national and international judicial forums receive claims from the Roma and the Saami regarding issues of identity recognition, distinct culture and lifestyle.

There are several examples of the Roma and the Saami resorting to the judicial system for the recognition of their rights. The 1982 *Alta Dam* case in Norway provides one example. Although that case did not prevent the construction of a contested dam, it did provide the Saami with visibility in the political and judicial institutions of Norway, as well as in Sweden and Finland, and finally, on an international scale through recourse to the *European Commission of Human Rights.* The Supreme Court of Norway did in fact recognize, through the *Alta* case, that the Saami are an ethnic minority in Norway and thus benefit from the protection established in Article 27 of the *International Covenant on Civil and Political Rights.* The same Court gave an innovative interpretation of the right of access to territory in the *Selbu* case in 2001. In that case, the Supreme Court recognized the right of reindeer

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breeders to graze their animals on land belonging to private owners. In so doing, the Court also discussed the historical use of the lands by the Saami, the unique nature of nomadism, and the realities of reindeer breeding. In addition, it took into account oral evidence.  

That same year, the Supreme Court of Norway also rendered the *Svartskog* decision on October 5, 2001, recognizing that the Saami community had acquired collective ownership of the lands in dispute, due to their immemorial usage.

Likewise, in Sweden, the Supreme Court in the *Taxed Lapp Mountain Case* of 1981 recognized that the Saami people have a land right of usage, despite their nomadic way of life. The Court specified that this right is not based on Swedish law, but rather on immemorial land use. However, the Court rejected the existence of a Saami right of ownership and affirmed that the Swedish State retained ownership of the lands in question. Consequently, the Saami people have the right to raise reindeer, hunt, and fish on this land, but they do not have a complete property right. While the Court stated that traditional land use, even though nomadic, could be used to demonstrate the existence of title in some instances, there was no evidence to support such a conclusion in this case.

In *Chapman v. United Kingdom*, the European Court of Human Rights had to decide what rights a woman possessed with regard to living in a caravan according to her tradition as a Roma on her own land. The majority accepted,

...that there has been an interference with the enjoyment of a home, as well as with private and family life since what was in issue was a traditional way of life. This way of living includes not only the right to have a certain kind of home but also the right to maintain identity as a Gypsy and lead a life in accordance with that tradition. The Court held that Article 8 implied positive state obligations to facilitate the Gypsy way of life. However, in the present case, it applied the exception of Article 8 (2) that the interference was “necessary in a democratic society”, since the land inhabited by the Gypsy family was the subject of environmental protection and therefore a wide margin of discretion was to be accorded to national authorities in planning issues.  

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32 See Mattias Ahrén, “Indigenous Peoples’ Culture, customs, and traditions and Customary Law – The Saami People’s Perspective” (2004) 21 Ariz. J. Int’l & Comp. L. 64, at 101: [...] the Supreme Court stated that the test must be adapted to the Saami people’s – and the reindeer’s – ways of using the land, as well as to other conditions necessary for reindeer husbandry. The Court acknowledged that the Saami people have traditionally pursued a nomadic lifestyle and that the test applied when deciding whether a party has acquired a legal right to land through agriculture – or other forms of more permanent land use – cannot be automatically transferred to traditional Saami livelihoods, such as reindeer husbandry. Rather, one must recognize that reindeer husbandry requires large land areas, and that the areas utilized may vary from year to year, depending on wind, weather and supply of pasture. Reindeer do not necessarily graze in the same area year after year. The Court stated that even though the reindeer herders might utilize the outer areas of their herding territories only to a limited extent, one must recognize that these areas might still be necessary for continued reindeer husbandry. This characteristic of reindeer herding, taken together with the Saami people’s nomadic lifestyle, led the Norwegian Supreme Court to conclude that it cannot be a prerequisite for acquiring legal rights to land that the reindeer have grazed there every year. The Supreme Court considered the topography of the land and concluded that it would have been unnatural if the reindeer had not traditionally roamed the whole land area in dispute, rather than simply parts of it, as the title holders argued.


34 *Chapman v. The United Kingdom* (Application no. 27238/95) 2001 ECHR

35 http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=673056 Furthermore, the Court recognizes a possible future consensus amongst the member States of the Council of Europe regarding the special needs of
Four similar cases were decided in the same way by the Court. The experience of the Roma in judicial spaces illustrates the degree to which they are isolated from the larger society, as members of the judiciary openly demonstrate their bias. In *Sentence of the Court of Cassation on prejudices against Roma people*, a judge from a lower Italian court refused compensation to a Roma man who had been falsely accused and detained for attempted murder because being “the head of a Roma clan constitutes in itself a serious fault.” The Court of Cassation overturning the decision of the lower court, stated that the Universal Declaration of Human Rights and the European Charter clearly prohibit discrimination based on race and affirmed that members of a nomadic group cannot be discriminated against due to their unique way of life.

The Roma have defended their rights in national as well as European courts. The number of cases dealing with discrimination is overwhelming; however, the participation of the Roma in these institutions of mainstream society is helping to remove the embedded systemic biases of judicial institutions and members of the judiciary. Seizing the judicial space positions the claimants of both peoples as participants in the creation of norms.

It is a minority and an obligation to protect their security, identity and lifestyle, which may lead to a different outcome in a similar. There have been a number of important developments in this area. In 1998, the European Commission against Racism and Intolerance issued a General Policy Recommendation (No. 3) combating Racism and Intolerance against Roma/Gypsies. The Organisation for Security and Co-operation in Europe (OSCE) issued its “Report on the Situation of Roma and Sinti in the OSCE Area” (2000) and, following that, an “OSCE Action Plan on Improving the Situation of Roma and Sinti within the OSCE area” (2003). The Framework Convention for the Protection of National Minorities by the Council of Europe binds the signatory states to submit a report to the Council of Europe containing "full information on the legislative and other measures taken to give effect to the principles set out in this framework Convention" (Article 25). All these developments point to a consensus among European states regarding the special needs of minority groups.

Thomas and Jessica Coster v. UK, John and Catherine Beard v. UK, Jane Smith v. UK, Thomas Lee v. UK.

CASE 3801 Court of Cassation - Fourth Criminal Section, Italy 07.07.2008.

Ibid.

Judicial bias where the Roma are concerned is also detected at the European level. Uzunova writes: At first, the European Parliament adopted a resolution urging Italian authorities “to refrain from collecting fingerprints from Roma, including minors ... as this would clearly constitute an act of direct discrimination based on race and ethnic origin.” Italian authorities refused to comply with the recommendation and, instead, submitted detailed explanations of their policy, assuring that only unidentifiable persons--those lacking Italian or European identity documents--would be fingerprinted. Upon reviewing the policy, the European Commission (EC) found that there was no evidence of intentional discrimination or of seeking data based on ethnic origin. The EC, in effect, reversed the admonition by the European Parliament and placed a stamp of approval on the measure. What made this reversal in the official position of European authorities seem even worse to outside observers was the almost complete lack of transparency regarding the additional information submitted by the Italian government and the reasoning used to reach the EC’s conclusion. Human rights organizations proceeded to request an explanation of the EC’s position but were, apparently, unsuccessful. (Footnotes omitted)


Numerous and varied meanings coexist under the term of “judicialization.” As underlined by an author: “Judicialization is an important manifestation of contemporary political life (...) but it results from a variety of causes, takes different forms, and can lead to entirely heterogeneous results from one political system to the other.” It remains that for several authors, it is a matter of the “expansion of judicial power” to repeat the title of a reference work on the subject, or again of the “growth of judicial power,” meaning the ascent to power or
also positions national and supranational judges as arbitrators and cofounders of the legal norm, thereby influencing political decision-making. Jacques Commaille also emphasizes this phenomenon.

Whether emerging or institutional, the importance of these forums for members of the Saami and Roma peoples lies in the opportunity they provide for members to exercise their role as citizens of a State, while affirming their own district identities within the State. Nevertheless, despite the multiplicity of these forums, participation as it presently exists has the disadvantage of restricting participation of Saami or Roma to specific cultural, economic or social issues, rather than engaging them in the creation of a common national public policy that is inclusive of their interests within the broader society. This produces a disjointed approach, failing to link specifically Roma or Saami interests to interests of a national scope, to which they are nonetheless frequently connected. A perfect example of the lack of inclusiveness is the fact that, although the Roma have an extensive legal history and tradition, complete with jurisprudence, it is never incorporated to any extent into the existing legal structures. According to Weyrauch, when it comes to the extensive body of Roma law:

reviewers have tended to focus exclusively on the descriptive details of Romaniya, almost in a spirit of wonderment that such an extraordinary legal system can exist unnoticed by the world of scholarship. Continental legal scholarship seems especially to be entrenched in the conception that law without sanction by the state is unthinkable, that there ought to be a uniform definition of law governing across the board and relegating any other phenomena to custom.

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41 Ibid. at 63-107.
42 Please see: Lua Kamál Yuille, “Nobody Gives a Damn About the Gypsies: The Limits of Westphalian Models for Change” (2007) 9 Or. Rev. Int’l L. 389 at 425, The author states: …by privileging aspects of subaltern identity while ignoring others, the definitional structures of human rights’ operational tools establish the abnormality of complex intersecting identities and anti-essentialist realities. For example, under the minority rights regime the only components of identity are culture, language, and religion. Thus, it is anomalous to see one’s self in terms of race, color, ethnicity, gender, nationality, culture, language, religion, sexuality, profession, experience, and/or et cetera. Relevant to the current discussion, it is equally aberrant for the Roma not to see themselves in these terms.
3. The National and Supranational Legal Foundations of Participation in the Decision-Making Process – A Roma and Saami Perspective

The absence of space reserved for representation of these two peoples and their visions of the world within the classical institutions of public policy participation demonstrates that the phenomena of colonization and subordination have present-day repercussions, mainly in the absence of an inclusive societal project suitable for the majority as well as minorities or indigenous people within States and internationally. In fact, the Romani people have in many respects the characteristics of a nation. They have a common history, language and culture, and they are increasingly recognized in international organizations. The absence of a territory, however, creates conceptual problems. Legal theory has no means of coping with a nonterritorial “foreign” legal system within national borders. 44

Given this situation, it is instructive to examine the legal foundations of their participation in the decision-making process, first with respect to supranational law and then domestic law, upon which a more inclusive system could be built.

3.1 The Participation of Indigenous and Minority Peoples in Supranational Law

Supranational law develops within various levels of governance. We will therefore deal with the international legal order, the European legal order, as well as the multilateral legal relationships, in this case between Scandinavian States.

3.1.1. International Legal Order

The international legal order treats the participation of Roma and the participation of Saami peoples differently. The participation of the former is regulated by standards relating to the rights of minorities and the latter by norms relating to the rights of indigenous people. The tensions caused by the discrepancy between rights held by minorities as opposed to indigenous peoples continue unabated. According to Daes:

Bearing the conceptual problem [of distinguishing indigenous peoples from minorities] in mind, I should like to suggest that the ideal type of an “indigenous people” is a group that is aboriginal (autochthonous) to the territory where it resides today and chooses to perpetuate a distinct cultural identity and distinct collective social and political organization within the territory. The ideal type of a “minority” is a group that has experienced exclusion or discrimination by the State or its citizens because of its ethnic, national, racial, religious or linguistic characteristics or ancestry. ... From a purposive perspective, then, the ideal type of [a] “minority” focuses on the group's experience of discrimination because the intent of existing international standards has been to combat discrimination, against the group as a whole as well as its individual members, and to provide for them the opportunity to integrate themselves freely into national life to the degree they choose. Likewise, the

44 Ibid at 687.
ideal type of “indigenous peoples” focuses on aboriginality, territorality, and the desire to remain collectively distinct, all elements which are tied logically to the exercise of the right to internal self-determination, self-government, or autonomy.\textsuperscript{45}

3.1.2. Political Participation of Minorities and International Law

Two legal instruments recognize the political participation of minorities. The first is the \textit{Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities}.\textsuperscript{46} This instrument, adopted by the General Assembly of the United Nations on December 18, 1992, states in Article 2, that:

\[\ldots\]

2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.

3. Persons belonging to minorities have the right to participate effectively in \textit{decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live}, in a manner not incompatible with national legislation.

4. Persons belonging to minorities have the right to establish and maintain their own associations.

\[\ldots\]

[emphasis added]

The other document recognizing the political participation of minorities is the \textit{International Covenant on Civil and Political Rights}. Article 1 of the \textit{Covenant} recognizes peoples’ right to self-determination.\textsuperscript{47}

Pursuant to these two provisions – Article 1 of the \textit{Covenant} and Article 2 of the \textit{Declaration} – the participation of minorities in international law seems to be conceived largely


\textsuperscript{47} Article 1, common to both international Covenants provides:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.
through collaboration with national governments, by the infiltration of existing structures, and by the creation of specific structures.

Article 2(2) of the Declaration is a vague provision and does not propose any framework for collaboration between minorities, governments and existing political structures (such as the creation of a number of seats within national parliaments for deputies from minority populations residing in a State’s territory or structures that are more representative of the sociocultural diversity which exists within the States). In addition, it is apparent from these provisions, notably from Article 2(3) of the Declaration and Article 1 of the Covenant, that the international rights of minorities seem to prioritize the participation of these groups regarding precise questions concerning their culture or territory. It would appear that the law takes as a starting point the principle that they can neither contribute to nor enrich broader societal objectives.

International law concerning minorities seems at a loss when trying to conceive of and incorporate the heterogeneous identities of contemporary minority communities into its legal structure. In fact, any serious efforts at strengthening protection for minorities under supranational law seem unlikely in the short term. According to Kymlicka:

…unfortunately, the prospects for reform of the framework of international norms are poor. There is no support at the UN for revisiting the issue of the rights of minorities. Furthermore, the one serious attempt that has been made at a regional level to address the distinctive issues raised by national minorities—namely, the European norms developed by the OSCE and Council of Europe—has retreated to a more cautious defense of generic integrationist minority rights.48

### 3.1.3 Political Participation of Indigenous Peoples and International Law

Article 1, common to both the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights, also applies to indigenous peoples, and Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples recognizes the right of indigenous peoples to self-determination at the domestic level. Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples also supports the political participation of indigenous peoples.50 More importantly, the Declaration itself is the result of collaboration between indigenous peoples and States. It is therefore an example of direct participation in the construction of legal norms and an illustration of quasi-complete participation since it is a bottom up rather than a top down cooperation, as is often the case.51 Unlike minorities, the collaboration between indigenous

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49 Article 3, United Nations Declaration on the Rights of Indigenous Peoples provides: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
50 Article 18, United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, September 13, 2007, online: http://www.un.org/esa/socdev/unpfii/en/drip.html: Indigenous peoples have the right to participate in decision making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.
peoples and State representatives is less vague and more organised. Perhaps indigenous peoples have claimed, to a greater degree, a right to participation and are considered to have greater legitimacy in exercising it. In fact, consultation, and hence participation, can be seen pursuant to Article 6 of Convention 169 of the International Labour Organization\(^{52}\) and Article 30(2) of the United Nations Declaration on the Rights of Indigenous Peoples.\(^{53}\)

However, this model of participation remains limited to some degree, since it preserves the divide between global interests and indigenous interests, especially those that are related to ancestral territories and resources. International instruments do not systematically accommodate the heterogeneity of majority and indigenous interests by integrating indigenous views and values into laws that apply generally, rather than specifically to indigenous interests. In this sense, international instruments do not reflect the potential for indigenous views and values to enrich the interests of society as a whole.

3.1.4. The Participation of the Saami and Roma Peoples in European and Multilateral Law

There are two leading documents in this area. The first is the Framework Convention for the Protection of National Minorities, which is of general application. The second, a text of specific application, is the draft Nordic Saami Convention. The Framework Convention for the Protection of National Minorities applies both to the Saami people as well as to the Roma. It illustrates a predisposition within European States in favour of ensuring participation for national minorities in public policy, as per Articles 4 and 15. Article 4 advocates the political equality between persons belonging to national minorities with those belonging to the majority, and Article 15 states that the “Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.”\(^{54}\) This provision promotes the consultation of national minorities;

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\(^{52}\) Article 6, Convention n°169 provides:
1. In applying the provisions of this Convention, governments shall:
   (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
   (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
   (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

\(^{53}\) Article 30(2), United Nations Declaration on the Rights of Indigenous Peoples provides:
States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

collaboration for the development of plans and programmes; cooperation with state authorities; effective participation in decision-making and electoral processes; and the establishment and implementation of decentralization programmes. The Framework Convention thus provides for broad participation within the context of the Council of Europe, although its legal force and implementation remain limited.

Unlike the Framework Convention, the draft Nordic Saami Convention is intended specifically for the Saami people. It proposes a participatory framework that is innovative and precise, involving extensive participation of the Saami in the decision-making process. However, the participation of members of the Saami people remains confined within the economic, social and cultural interests of the Saami identity and does not extend to the broader goals of the three State Parties to the Convention.

Consequently, both indigenous peoples and minorities have a right of participation recognized in supranational law that is both collaborative and independent vis-à-vis government structures. However, supranational law also promotes limited participation concerning the broader interests of mainstream society as well as ex post facto participation, engaging the Saami and Roma after a decision has been taken.

Nevertheless, supranational law grants a more favourable place to indigenous peoples in matters of participation. First, the right of indigenous peoples to participation in the decision-making is more organized, especially through the imposition of a duty to consult that does not exist for minorities. Second, the Saami people may soon have a very innovative participation framework if the draft Nordic Saami Convention is adopted. Such a legal instrument is unique among indigenous peoples and does not exist for the Roma minority in Europe. It would therefore seem that from a supranational legal point of view, the Saami people, being indigenous peoples, have a greater legitimacy in matters of participation in decision-making than the Roma people. This is not to say that the position of the Saami within international and European structures is not problematic. In fact,

although the representatives of the Saami people had urged the members of the European Convention to include a special provision in the text on the framework

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55 Article 80 of the Framework Convention for the Protection of National Minorities provides:

80. This article requires Parties to create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them. It aims above all to encourage real equality between persons belonging to national minorities and those forming part of the majority. In order to create the necessary conditions for such participation by persons belonging to national minorities, Parties could promote – in the framework of their constitutional systems – inter alia the following measures:

– consultation with these persons, by means of appropriate procedures and, in particular, through their representative institutions, when Parties are contemplating legislation or administrative measures likely to affect them directly;
– involving these persons in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly;
– undertaking studies, in conjunction with these persons, to assess the possible impact on them of projected development activities;
– effective participation of persons belonging to national minorities in the decision making processes and elected bodies both at national and local levels;
– decentralised or local forms of government.


and structure of the European Union on the right of the Saami people as an indigenous people to maintain and develop their own society, language and culture, no such guarantee appears in the final version of the treaty.”

Moreover, States see the Saami people as a homogeneous people who are established on a fixed territory. On the contrary, the Roma people have neither this homogeneous image, nor a uniform and defined territory, maximizing the feeling of insecurity experienced by States. This model of participation therefore confirms the dichotomy that exists between indigenous people and minorities. As much as this dichotomy can be justified from the point of view of territorial rights, it is surprising from a democratic point of view, since individuals sharing a defined space should have an equal opportunity to define the political direction of this space.

3.2 Domestic Law and the Participation of Saami and Roma Peoples

In general, domestic law organizes public policy participation in two ways. It takes place primarily through institutions that represent the Saami and Roma peoples but can also occur within government institutions.

3.2.1. Consultation of Saami and Roma Institutions During Public Policy Decision-Making Process

Representation of the points of view of the Saami or Roma people during the consultation that precedes decision-making by governments at the domestic level is very difficult to attain. We will draw upon two Scandinavian examples, that of the Saami Parliaments and that of the Finnish Advisory Board on Romani Affairs, as examples of this process.

3.2.2. Saami Parliaments

The Saami people are underrepresented within Scandinavian National Parliaments; rather, their representation occurs through separate structures called Saami Parliaments. In 1980, the Norwegian administration publicly recognized the issues surrounding the Saami people, following the Alta revolts. The “Alta process” began with the appointment, in 1984,

58 Although this homogeneity represents an ideal and unreal image, as we have seen concerning participation in Paragraph 1 of Section 1 of this article.
59 Indigenous people defined as been present on the territory since time immemorial and having a particular attachment to their ancestral territories.
61 By “Alta process” we mean all of the developments that followed the Alta revolts at the end of the 1970s and in 1980. These revolts took place following the Norwegian Government's decision to build a hydro-electric dam in the Alta river (Alta-Kautokeino), the major consequence of which would be the flooding of ancestral lands, particularly suitable for the grazing of reindeer. The revolts included protests, particularly in Oslo, and
of a committee on the rights of the Saami. This process culminated in the creation of a Saami Parliament and the constitutional recognition of the Saami as a culturally distinct group. The process also underwent a form of internationalization, since it had an impact in Sweden and Finland through the creation of Saami Parliaments in each country respectively.

The creation of Saami parliaments illustrates the right of peoples to self-determination in a domestic context, without the right to secession. Swedish, Norwegian and Finnish Governments consult the Saami parliaments for advice, in a way allowing for the participation of the Saami in the decision-making process. Because the inner workings of the three parliaments are similar in Norway, Sweden and Finland, we base the following analysis of the limits of participation on the Saami Parliament of Norway.

The scope of the powers of the Saami Parliament of Norway is indicated in Section 2(1) of the Saami Act of Norway. This provision states that, “the business of the Sameting includes any matter that in the view of the parliament particularly affects the Saami people.” From this provision, it appears that the scope of the power is vast, since the Parliament can intervene in all domains that affect the Saami people, especially since the Parliament is the recipient of public funds devoted to Saami culture and Saami organisations, and has the authority to redistribute these funds. Other areas of responsibility generally attributed to the Saami Parliaments encompass the promotion of Saami language and culture.

gave the Saami question a national and international dimension, both from a political and legal point of view. On this point, see A. Somby, “The Alta Case in Norway: A Story about How Another Hydro-electric Dam Project was Forced Through Norway”, Thematic Review 1.2 Dams, Indigenous People and Vulnerable Ethnic Minorities, December 1999, at 4 and 5.

Creation through a Norwegian law, The Act Concerning the Saami Parliament and Other Saami Legal Matters, also called the Saami Act of June 12, 1987.

Article 110 a, Constitution of Norway: “It is the responsibility of the authorities of the State to create conditions enabling the Saami people to preserve and develop its language, culture and way of life.”

The first Saami parliament came into being in Norway. It was inaugurated on October 9, 1989, in Karasjok. The objective is to allow the Saami people of Norway to safeguard and develop their language, culture and way of life. Subsequently, Sweden also created a Saami parliament through the Saami Parliament Act of December 15, 1992. The goal of this parliament is to help develop a living culture. The Saami Parliament of Sweden was inaugurated on August 26, 1993 in Kiruna and is composed of 31 representatives. On July 17, 1995, the Finnish Parliament adopted a series of constitutional laws that recognized the Saami people as indigenous people. As a result, Article 17 was introduced into the Constitution of Finland dealing with the rights of the Saami people to maintain their own culture and language. A Saami Parliament in Finland is also created by Act No 974/95. It is based in Inari and is composed of 21 representatives.

On the functioning of the Saami Parliaments: Despite the existence of three different entities in each of the States, the rules in matters of designation, of vote and of mandate are quite similar. In each of the States with a Saami Parliament, the representatives are designated by means of an election and only members of the Saami people, nationals of the State, can participate, as a candidate or as a voter. The direct elections within these three parliaments are held every four years. In order to hold the status of voter with the Saami Parliament, one must be registered on the Saami electoral lists. To qualify, one must be 18 years old and over, consider oneself to be Saami, speak Saami as a mother tongue or have at least one parent, grand-parent or great-grand-parent who speaks or spoke Saami as a first language. In 2001, 9,923 people were counted as voters at the Saami Parliament of Norway, 6,721 were enrolled in the Swedish records and 65% of them moved for the election. In Sweden, the government reserves itself a means of intervention: the president of the Saami Parliament is appointed by the Government, see John Trygve Solbakk, The Saami People – A Handbook, (Karasjok: Davvi Girj, 2006), at 176, 195.

and control over the satisfaction of economic and industrial needs related to traditional activities. Finally, the Saami Parliament of Norway has special and additional competences with regard to the administration of lands since the adoption of the *Finnmark Act* in 2007.66

However, the first limit on the scope of the Parliament’s power is based on the mode of its intervention and on what the Norwegian legislator means by “the business of the Sameting.” Section 2(1) of the *Saami Act* indicates:

> [...] the Sameting may on its own initiative raise and pronounce an opinion on any matter coming within the scope of its business. It may also on its own initiative refer matters to public authorities and private institutions, etc. The Sameting has the power of decision when this follows from other provisions in the Act or is otherwise laid down.67

Thus, it can be seen that the participation of the Saami Parliament of Norway in the decision making process occurs through the issuing of opinions or advice. It is up to the central government to what extent, if at all, it will consider these opinions. This constitutes a strong limit to the participation of the Saami Parliaments in public policy decision-making, given that there is no legally binding obligation on the central authorities to implement the proposals of the Saami Parliaments.68 Nevertheless, in the drafting of the new bill, the

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The *Finnmark Act* is a law enacted by the Norwegian Parliament on June 17, 2005, following exchanges between the national authorities, the Saami Parliament of Norway and the Finnmark County Council (regional authority). It recognizes the land rights of the Saami people in Finnmark and transfers their property (45,000 km²) from the State to a new entity, called *Finnmarksjøndommen*, or *Finnmark Estate*. It is a matter of changing this territory from a national property status to a regional or local regime of property, favouring proximity. The *Finnmark Estate* thus solely exercises decision-making in this matter. In Finnmark, the State owned 95% of the territory. Furthermore, this county brings together the greatest number of Saami in Norway. It is therefore a rational transfer. However, the Saami people are not the only ones who occupy Finnmark. A large Norwegian population also inhabits the county. Thus, the role of the *Finnmark Estate* is to reconcile the interests of both groups in matters of territory and natural resource management. This Act allows a form of participation for members of the Saami people, given that the institution which is the owner and manager of the territory, the *Finnmark Estate*, is equally composed of Norwegian and Saami representatives. The *Finnmark Estate* acts under the control of the Control Committee, which is made up of three members. The Saami Parliament, the Finnmark County Council and the King of Norway must each designate a member. As a result, the *Finnmark Estate* cannot act *contra legem*, its budget is controlled and its decisions subject to public audits.

67 Section 2(1), *Saami Act*.

68 An example of implementation of this provision can be cited. It confirms the existing ambiguous relationship, in terms of participation, between the Parliament and the Government of Norway. The Saami Parliament was not in favour of the draft Finnmark Act initially proposed by the Government in 2003 -- a project designed to manage the land of this county. However, that same year, a law on the matter was to be presented at the Norwegian Parliament, but the Government held off on the adoption until later and introduced a new bill to the Saami Parliament. This approach demonstrates that, despite the absence of legal obligation to respect the choices emitted by the Saami Parliament, the government submits to the democratic principle and denies the passage into force of the law at the National Parliament. Nonetheless, in law, the Government has no such obligation. It could therefore legally adopt a law that goes against the choice issued by the Saami Parliament. We also note that in the case of the draft Finnmark Act of 2003, the Saami Parliament was not the only body to be opposed to the project. Norwegian international law experts had invoked a violation of international law provisions. Finally, many other players within the County had marked their
positions of the Saami Parliament were taken into account, on the same basis as those of the Finnmark County Council. In this respect, the Finnmark Act now confers the right to issue guidelines to the Saami parliament of Norway.

A second limit relates to the legal basis on which the creation of Saami Parliaments is based. Their creation, as well as the participation in decision-making that results, is exercised pursuant to the Saami Act. At present, this legislative basis may be called into question by a subsequent law. This foundation will only be reinforced once the draft Nordic Saami Convention is adopted, imposing, in Article 14, the existence of Saami Parliaments in each of the three signatory states (Norway, Sweden and Finland). Until then, this draft legislation remains vulnerable. Finally, it should be noted that the Nordic Saami Convention tends to recognize and ensure a uniform and more incorporated functioning for the three Saami parliaments.

The participation of the Saami Parliament thus seems well integrated in the Norwegian political system. Nevertheless, it follows the trend proposed by international law concerning the extent of participation by the Saami Parliaments: they only intervene in questions regarding the interests of the Saami people. It is therefore not a global participation in the decision-making, but specialized, consultative role without any legally binding duty on central governments to implement the opinions expressed by the Saami opposition. Consequently, nothing shows that the Government felt bound on the political level by the decisions of the Saami Parliament in particular: John Trygve Solbakk, supra at note 26 at 168.

The guide elaborated by the Ministry of Justice and the Police and the Ministry of Local Government and Regional Development indicates:

The Act was adopted by a large majority of the Storting across party lines on the recommendation of both the Saami Parliament and Finnmark County Council. It thus has a secure democratic footing, which provides a good starting point for the new Finnmarkseidomdenmen and for the forthcoming clarification of rights. We believe that the Finnmark Act will be of benefit to the whole population of Finnmark, to the Saami people and to Norway as a whole.


However, this possibility of participation is also limited:

The Saami Parliament may issue guidelines for assessment of the effects of decisions concerning changed use of uncultivated land on Saami culture, reindeer husbandry, use of uncultivated areas, commercial activity and social life (section 4). The Saami Parliament’s guidelines shall be followed when making such assessments. The guidelines only regulate assessment of the effects of the different initiatives on Saami interests. The guidelines cannot dictate what decisions may be made by the public authorities or Finnmarkseidomdenmen. They do not decide how regard for Saami interests shall be balanced against other interests, such as business development or the need for infrastructure development. The municipality may, for example, adopt a zoning plan pursuant to the Building and Planning Act entailing reallocation of the resources of uncultivated land even if this is at the expense of Saami interests.


Article 14 of the draft Nordic Saami Convention provides, regarding the Saami parliaments:

In each of the three countries there shall be a Saami parliament. The Saami parliament is the highest representative body of the Saami people in the country. The Saami parliament acts on behalf of the Saami people of the country concerned, and shall be elected through general elections among the Saami in the country. Further regulations concerning the elections of the Saami parliaments shall be prescribed by law, prepared through negotiations with the Saami parliaments pursuant to Article 16. The Saami parliaments shall have such a mandate that enables them to contribute effectively to the realization of the Saami people’s right of self-determination pursuant to the rules and provisions of international law and of this Convention. Further regulations concerning the mandate of the Saami parliaments shall be prescribed by law. The Saami parliaments take initiatives and state their views on all matters where they find reason to do so.
Parliaments. Finally, it should be noted that classical Western institutions of representation inspire the structure of the Saami Parliaments and they operate under the principle of voting by majority.

3.2.3. The Finnish Advisory Board on Romani Affairs

The Finnish Advisory Board on Romani Affairs is an institution of cooperation between the Finnish authorities and the 10,000 members of the Roma people established in Finland. It ensures the safeguarding of the interests of this community. It was created in 1956 as the Advisory Board for Gypsy Affairs and exists under its current name since 1990. The Board works under the authority of the Ministry for Health and Social Services.

Regarding participation, two types of competences are attributed to the Advisory Board. First, it must organize the participation of the Roma within Finnish society, organize the development of their living conditions, and present opinions regarding these issues to Finnish authorities. Second, it officially represents Romani interests at the international level and must, as such, cooperate with institutions such as the Council of Europe, the European Union, the Organization for Security and Co-operation in Europe, and the United Nations in order to improve the situation of the Roma people.

In the absence of Roma representation in the National Parliament, the Advisory Board allows public policy participation for the Roma minority of Finland through a specialized consultation right, as well as contributions made to legislation through proposals for reforms. In fact, the Advisory Board has the authority to propose draft laws in order to reform existing law. Nevertheless, it is not a democratic structure of representation, given that its members are appointed by the country’s Council of State and not elected by the Roma people themselves. The Advisory Board consists of an equal number government representatives and delegates from Roma organisations. This greatly differs from Saami parliaments, which were founded on the principle of self-determination. On the contrary, the functioning of the Advisory Board mimics guardianship of the State.

These institutions allow a form of participation for the Roma and Saami peoples in decision-making. Cooperation with officials through specialized parliaments allows the Saami people to benefit from a form of self-determination and independent participation. This structure is more complete and less influenced by the State than what is available to the Roma people. In addition, despite the contributions from these institutions, they do not favour the emergence of a mainstream society that includes the Saami and Roma as full participatory citizens capable of contributing creative and thoughtful solutions to issues of general concern in the States in which they live, and in the international community as a whole.

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72 It should be noted that since then, the Constitution of Finland has also been modified and its Section 17 recognizes the right to practise one’s own language and culture. This section benefits both the members of the Roma people as well as the members of the Saami people of Finland.

73 “Information File - The Advisory Board on Romany Affairs”, winter 1999, Interface n°36, at 12 et seq.

4. Conclusion: Contemporary Regulation of the Participation of the Saami and Roma Peoples -- a Truncated Process

There are currently three levels of legal protection facilitating the participation of minorities and indigenous peoples in public policy decision-making: traditional political rights (right to vote and to be elected), participation through consultation or collaboration (right to prior, free and informed consultation) and the principle of domestic self-determination.

The main problem posed by the contemporary organisation of participation of the Roma and Saami peoples stems from the fact that States do not consider them as people who adhere to different levels of identity: as Roma or Saami, but also as members of mainstream society. States either consider them distinct (hence the limitation of their participation to matters which touch upon their own issues), or as assimilated and thus not requiring space for the expression of a distinct identity.

This reality has two legal ramifications. Legally, instead of recognizing a right to participation and promoting a framework establishing the conditions for equitable participation founded on collaboration, exchange, dialogue and openness, the law in force reproduces isolation, taboos and fears. Thus, the participation of the Roma and Saami peoples generally occurs only after a decision is taken.

Furthermore, participation of the Roma and Saami is confined to matters that concern them specifically and directly – a situation that does not allow them to participate in the construction of new societal norms capable of integrating their own identities and worldviews with those of other groups within that State. This result calls into question the concept of participation in public policy debates as it is implemented in contemporary democratic societies. It is imperative that modern legal structures at the national, regional and international level be flexible enough to accommodate multiple identities – that is, the ability of an individual to simultaneously carry an identity specific to a particular minority group, while equally identifying with the culture of mainstream society or even the many subcultures within the dominant culture. A public policy decision-making process that does not provide space for such a heterogeneity of identities fails to respond not only to the needs of peoples such as the Saami and the Roma, but also to the needs of many others in mainstream society who carry plural identities tied to subcultures that may or may not be recognized by the political structure in place.