

United Nations Expert Mechanism on the Rights of Indigenous Peoples

06 August 2021

Country Engagement Finland

Follow-up response to the Draft Amendments to the Sámi Parliament Act, May 2021

1. In May 2021, the Government of Finland requested comments from the Expert Mechanism on the Rights of Indigenous Peoples (“The Expert Mechanism”) on a new draft of the Sámi Parliament Act. These comments were requested in the context of follow-up to a country engagement Mission (February 2018) and subsequent Advisory Note (March 2018) of the Expert Mechanism to Finland¹. These are the second set of comments provided by the Expert Mechanism since its Advisory Note of March 2018. Comments were also sent on a further draft in August 2018. These comments should be read in conjunction with the Advisory Note and the first set of comments. The Expert Mechanism had a meeting with representatives of the Sámi Parliament on 2 June to hear its oral views on the content of the current draft.

2. In these comments, the Expert Mechanism provides its view of the conformity of the current versions of sections 3 and 9 of the draft legislation with the rights enshrined in the United Nations Declaration on the Rights of Indigenous peoples (the Declaration): rights, which are also given expression, in the UN human rights treaties. The legal framework for these comments is already set out in the Expert Mechanism’s Advisory Note and is supplemented here with developments in human rights law since that Note, notably from the Human Rights Committee.

3. The Expert Mechanism welcomes the opportunity to comment on this draft legislation and notes that many of its suggestions have already been incorporated into the text.

¹ <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/RequestsUnderNewMandate.aspx>

Section 3

4. In its original Advisory Note the Expert Mechanism suggested that:

- The Sámi Parliament as a representative and implementing institution of Constitutional provisions should play a more prominent role in deciding who is a Sámi for the purpose of registration on the electoral roll.
- Section 3 of the Sámi Parliament Act on the definition of a Sámi should be guided by the primary objective of preserving Sámi culture through enhanced group recognition of who is a Sámi, in accordance with their traditions and customs, as required by sections 17 and 121 of the Constitution and articles 9 and 33 of the Declaration.
- Enhanced group recognition should however include an individual claims process based on non-discrimination, and appeals should take a Sámi culturally-sensitive approach by including in the appeals mechanism indigenous experts or other experts in indigenous peoples' rights and issues.

New Section 3

“The right to be entered in the electoral roll

The right to be entered in the electoral roll is held by persons who regard themselves as Sámi, if the following preconditions are met:

- 1) the person himself or herself or at least one of his or her parents, grandparents or great-grandparents must have learned Sámi as their first language; or
- 2) at least one of the person's parents is or has been registered as eligible voter in elections to the Sámi Parliament held on 1 January 2023 or later.

It is also a precondition for entry in the electoral roll that the other requirements for the right to vote, provided for in this Act, with regard to age, citizenship and population records are met.²

² Draft section 3 as at August 2018, states, “The right to be entered in the electoral roll is held by persons who regard themselves as Sámi, if the following preconditions are met:

5. In comparing the current version (third version received by the Expert Mechanism) of section 3 with the second version of section 3, the Expert Mechanism welcomes the retention of the clarification in the Explanation of the Legislation that the criteria defining who is a Sámi only relates to the right to vote in the elections of the Sámi Parliament and not who should be regarded as Sámi in the first place. Thus, the presence of an individual on the electoral roll would not confer other rights except for the opportunity to vote and stand as a candidate in the elections for the Sámi Parliament.

6. The Expert Mechanism welcomes the retention of the requirements for both self-identification, as Sámi, together with objective criteria, and the affirmation that the subjective requirement must be accompanied by one or other of the two objective criteria for an individual to be recognised as a Sámi for the purposes of this legislation. The Expert Mechanism also welcomes the removal of the precondition from the original legislation that allowed for the entry of ethnic Finns on the electoral role, who are not considered Sámi by the Sámi Parliament.³ All of these changes contribute towards enhancing the role of the Sámi Parliament, and thus enhancing group recognition, in establishing who is Sámi for the purpose of the electoral role, as suggested by the Expert Mechanism.

7. The Expert Mechanism notes that the only change in section 3 from the second draft received by the Expert Mechanism is the addition of a temporal period. The date 1 January 2023, is the time by which at least one of the parents, of the person seeking entrance on the roll, must be registered as an eligible voter. This temporal addition appears to address the Human Rights Committee's findings of violations by Finland under its individual complaints procedure in two Decisions⁴ adopted

1) the person himself or herself or at least one of his or her parents, grandparents or great-grandparents must have learned Sámi as their first language; or

2) at least one of the person's parents must be or have been included in the electoral roll for the Sámi Delegation or the Sámi Parliament.

Another precondition is that the other requirements for the right to vote with regard to age, citizenship and population records are met.”

³ See Concluding Observations of the Human Rights Committee: CCPR/C/FIN/CO/7. The original draft read, “that he is a descendent of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp”.

⁴CCPR/C/124/D/2668/2015, CCPR/C/124/D/2950/2017

subsequent to the Expert Mechanism's Mission and Advice⁵. The Committee had found violations of the Sámi peoples' right to effectively participate in public affairs by the extension of the electoral role to 97 new electors, thus adversely affecting the representative value of the Sámi Parliament. The Committee also found that their effective enjoyment of the right to internal self-determination requires that indigenous peoples be afforded with the capacity to define group membership and in applying the Covenant made specific references to articles 3, 33, 9 and 8 of the Declaration.

8. In February 2021, the concluding observations of the Human Rights Committee expressed its concern that these Decisions had not been implemented⁶. The Committee states, "On the contrary, the decisions of the Supreme Administrative Court of 5 July 2019, reinstating 97 individuals to the electoral role that the Electoral Committee of the Sámi Parliament had removed, appear to run counter to the Views of the Committee." The approach by the Human Rights Committee builds upon that of the CERD in 2012 and 2017 in the context of its review of periodic reports of Finland⁷, and referred to by the Expert Mechanism in its Advisory Note.

9. The Expert Mechanism welcomes this new temporal element in the draft legislation to the extent that it goes some way towards implementing the Human Rights Committee's Decisions⁸ and enhances the role of the Sámi Parliament in defining who is Sámi for the purposes of the electoral role.

New Chapter 5

⁵ See Explanation of the Legislation, English version.

⁶ CCPR/C/FIN/CO/7

⁷ CERD/C/FIN/CO/20-22 (2012) and CERD/C/FIN/CO/23 (2017). The CERD expressed its concern that the definition adopted by the Supreme Administrative Court gave insufficient weight to the Sámi people's rights, recognized in the United Nations Declaration on the Rights of Indigenous Peoples, to self-determination (art. 3), in particular their right to determine their own identity or membership in accordance with their customs and traditions (art. 33), as well as their right not to be subjected to forced assimilation or destruction of their culture (art. 8) (art. 5 of the Convention). It recommended that, in defining who is eligible to vote for Members of the Sámi Parliament, the State party give due accord due weight to the rights of the Sámi people to self-determination concerning their status within Finland, to determine their own membership, and not to be subjected to forced assimilation.

⁸ The process of follow-up on the implementation of these Human Rights Committee Decisions is not yet completed.

10. The Expert Mechanism welcomes the addition of a new Chapter in the draft legislation, Chapter 5, which proposes the establishment of an Appeals Board, a new independent and autonomous judicial body. It notes that members of the board will be proposed by the Sámi Parliament for government appointment, that the Board will be independent and autonomous, relative to the Election Committee of the Sámi Parliament that decides on electoral roll matters, and also relative to the other bodies of the Sámi Parliament. It will be fully resourced by the State. It notes that its independence is assured, *inter alia*, by the fact that a member or deputy member of the Sámi Parliament or the Election Committee, or a person employed by the Sámi Parliament may not sit on the Appeals Board. The Expert Mechanism also notes that the Board will be made up of a Chair, a legal member and two expert members and notes the explanation for the need for expertise the English version of the Explanation of the Legislation. The Expert Mechanism would expect this body to be able to detect any discrimination or arbitrariness in the process. The Appeals Board now proposed would operate under the auspices of the Sámi Parliament.

11. For the Expert Mechanism, the establishment of this Appeals Board satisfies the Expert Mechanism's advice on establishing an individual claims process based on non-discrimination, taking a Sámi culturally-sensitive approach.

12. The Expert Mechanism notes that appeals against decisions of the Appeals Board may be lodged with the Supreme Administrative Court, thus maintaining State oversight over the process. Given that the Sámi Parliament itself shall ensure the enjoyment of fundamental rights and human rights and treat all persons without discrimination or arbitrariness (Section 5), and that the new Appeals Board should be in a position to demonstrate discrimination or arbitrariness in its reasoning, the Expert Mechanism questions whether such oversight is necessary and/or compatible with Sámi peoples' right to self-determination (article 3), right to belong to their community in accordance with their traditions and customs (article 9) and their right to determine their own identity or membership in accordance with their customs and traditions (article 33). Indeed, the Explanation of the Legislation also states that the Appeals Board meets the requirements of section 21, subsection 1 of the Constitution, which establishes the requirement of a general right to appeal a decision of a public authority concerning an individual, to a judicial body, even in the absence of the right to further appeal a matter to the Supreme Administrative Court.

13. However, the Expert Mechanism notes that the Human Rights Committee appears to be of the view that a State may exercise powers of oversight over procedures designed to facilitate the operation of indigenous peoples' democratic institutions, assuming such powers are applied carefully, on the basis of reasonable and objective criteria and are consistent with the other provisions of the Covenant, including the principle of internal self-determination relating to indigenous peoples.⁹ In this regard, the Expert Mechanism notes that leave to appeal to the Supreme Administrative Court will only be granted for well-founded claims based on discrimination or arbitrariness.

Section 9

14. In its original Advisory Note, the Expert Mechanism suggested that:

- Amendments to the substantive rights to the Act should include specific reference to the relevant provisions of the Declaration, notably articles 1, 3, 4, 17, 18, 19, 28, 29, and 32.
- The substantive part of section 9 of the Act should provide for the following elements as enshrined in the UNDRIP and entrenched in the Finnish State's emerging practices, as illustrated by the Ministry of Justice's memorandum:
 - 1) pre-negotiation trust building initiatives;
 - 2) good faith in the conduct of the consultation and in the pursuit of FPIC;
 - 3) adequate resources to the Sámi Parliament;
 - 4) equality of arms through the consultation period;
 - 5) balanced capacity of the parties to engage throughout the process;
 - 6) culturally appropriate methods of negotiation;
 - 7) impact assessments (human rights, cultural, environmental, and social) to be carried out when development projects are anticipated;
 - 8) a limitation on measures or projects which may cause "significant harm" to the Sámi people's right as an indigenous people to practice their language, culture and traditional livelihoods and include a definition of what constitutes "significant harm" including "cumulative harm" from competing land use forms (in consultation with the Sámi Parliament), beyond which development projects may not be undertaken;
 - 9) protocols to be drawn up at the end of a process including agreements reached and in the case of opposing views the reasons why they were not taken on board; and
 - 10) a mechanism to monitor agreements and provide redress for non-compliance.

⁹ CCPR/C/124/D/2668/2015, Para 6.10 and 6.11 and CCPR/C/124/D/2950/2017

- The issue of resources, financial and human, should be taken into account with a view to ensuring that the Sámi Parliament has the capacity to effectively negotiate with the Government and other institutions in a balanced way.

New Section 9

“The obligation to cooperate and negotiate

Authorities and other parties handling public administrative tasks shall negotiate with the Sámi Parliament whenever legislation, administrative decisions or other measures that may carry particular importance for the Sámi are under preparation, with a view to reaching a consensus with the Sámi Parliament or obtaining its consent prior to decision-making. The obligation to cooperate and negotiate concerns measures to be implemented in or effectively extend to the Sámi homeland, and any other measures that particularly impact the Sámi language or culture, the status or rights of the Sámi as an indigenous people, when the measures pertain to the following:

- 1) land use;
- 2) management, use, implementation of conservation measures, leasing and assignment of state lands, conservation areas and wilderness areas;
- 3) prospecting for and exploitation of deposits that contain mining minerals, or gold panning in state-owned lands and waters;
- 4) legislative or administrative changes to the occupations belonging to the Sámi form of culture;
- 5) measures related to climate change;
- 6) enhancement of early childhood education and care in the Sámi language and teaching in and of the Sámi language;
- 7) implementation and development of health and social services;
- 8) securing and developing the resources and other operating conditions of the Sámi Parliament; or
- (9) any other similar matters affecting the Sámi language and culture or the status or rights of the Sámi as an indigenous people.”

Section 9 a¹⁰

“Taking the rights of the Sámi into account in the activities of the authorities and other parties handling public administrative tasks

When planning and implementing any measures referred to in section 9, the authorities and other parties handling public administrative tasks shall, by the means available to them

- 1) promote the upkeep and further development of the Sámi languages and the right and capacity of the Sámi to maintain and enhance their culture, including their traditional livelihoods; and
- 2) reduce the negative effects of their measures on the Sámi languages and the rights and prerequisites of the Sámi to maintain and enhance their own culture, including their traditional livelihoods.

The measures of the authorities and other parties handling public administrative tasks shall not cause more than a minor detriment to the right of the Sámi to maintain and enhance their own language and culture, unless the objective of a measure is justifiable in terms of fundamental and human rights and the means to achieve it are proportionate to the fulfilment of a weighty social need. The authorities and other parties handling public administrative tasks shall not cause considerable detriment to the right of the indigenous Sámi people to maintain and enhance their language and culture, including their traditional livelihoods.

¹⁰ Draft section 9 as at August 2018, states, “The obligation to cooperate and negotiate Authorities and other parties handling public administrative tasks shall negotiate with the Sámi Parliament in order to reach an understanding on or gain consent for any expansive or significant measures that are implemented in or effectively extend to the Sámi homeland and for other measures that particularly impact the Sámi language or culture, the status or rights of the Sámi as an indigenous people, when the measures pertain to the following:

- 1) community planning;
 - 2) the management, use, leasing and assignment of state lands, conservation areas and wilderness areas;
 - 3) applications for licences to stake mineral mine claims or file mining patents;
 - 4) legislative or administrative changes to the occupations belonging to the Sámi form of culture;
 - 5) the development of the teaching of and in the Sámi language in schools, as well as the social and health services; or
 - 6) any other matters affecting the Sámi language and culture or the status of the Sámi as an indigenous people.
- A record shall be prepared of the negotiations.

In planning and implementing the measures referred to in subsection 1, the authorities and other parties handling public administrative tasks shall strive to ensure that significant detriment is not caused to the right of the Sámi to speak their language and practice their culture and traditional occupations, and that the rights of the Sámi as an indigenous people can be secured and promoted.”

In order to identify the possible detrimental effects of the measures, the authorities and other parties handling public administrative tasks shall assess the effects of each measure on the right of the Sámi to maintain and enhance their own language and culture, including their traditional livelihoods. The assessment shall take into account the combined impact of the activities of the different public authorities and the measures taken at different times.”

Section 9 b

“Procedure for cooperation and negotiations

When beginning to work on matters referred to in section 9, the authorities and other parties handling public administrative tasks shall notify the Sámi Parliament at the earliest opportunity. When the planned activities are likely to be more sustained, the notification shall be made in good time before the negotiations are held. The Sámi Parliament shall have the right to obtain a written account of the matter at hand, including of the matters referred to in section 9a and the related plans, ahead of the negotiations.

The Sámi Parliament shall be reserved a reasonable time period to prepare for the negotiations. Cooperation shall be initiated and negotiations shall be conducted in good faith and in a timely manner so that the outcome of the matter can be influenced before the matter is resolved.

Minutes shall be drawn up of such negotiations. The minutes shall record the views of the Parties on the matter and the outcome of the negotiations.”

15. The Expert Mechanism notes that section 9 has been amended and is now split into three long and detailed subsections strengthening the obligation to negotiate and giving more detail on how and when this obligation arises. This is supported by section 5¹¹, which describes the role of the

¹¹ Section 5 ...”In the implementation of Sámi self-determination the Sámi Parliament participates, in accordance with

Sámi Parliament as, inter alia, promoting the implementation of Sámi self-determination in accordance with section 9.

16. In comparing the current version (third version received by the Expert Mechanism) of section 9 with the second version of section 9, the Expert Mechanism welcomes: the retention of the extension of the obligation to negotiate to all actors providing public administrative tasks; the obligation to prepare a detailed record of the negotiation; and the extension of the provision to all far-reaching projects the effects of which extend beyond the Sámi homeland even if they are implemented outside the actual homeland area. The Expert Mechanism welcomes the enhanced protection for Sámi, in that the obligation to negotiate arises when “legislation, administrative decisions or other measures that may carry particular importance for the Sámi are under preparation” as opposed to the earlier draft relating to “expansive or significant measures” for the Sámi.

17. The Expert Mechanism notes that there is now a closed list of issues upon which the obligation to negotiate may arise. The Expert Mechanism respectfully suggests that a non-exhaustive approach may allow for future situations yet unconsidered but which may fall under articles 19, 29 or 32 of the Declaration.

18. The Expert Mechanism welcomes that taken as a whole section 9 pays increased deference to free, prior and informed consent in this new draft, which should go some way towards implementing the relevant articles of the Declaration. It welcomes that many of the elements necessary for the purpose of ensuring free, prior and informed consent, in accordance with the Declaration, are established in the legislation itself, as opposed to merely in the explanatory section, which originally was the case. Such elements include the requirement to obtain “consent” in section 9 and the requirement to “assess the effects” of measures on Sámi in section 9a. Section 9b sets out the procedure for “cooperation and

Section 9 on the obligation to cooperate and negotiate, in the preparation of and decision-making in matters covered by Section 9. In matters pertaining to its tasks, the Sámi Parliament may submit initiatives and proposals to the authorities, as well as issue opinions, advance and administer Sámi culture, as well as allocate financial grants.”

negotiations”, including the: emphasis on cooperation and good faith; time to prepare for the negotiation; early notification; receipt of information ahead of negotiations; negotiations to be conducted in a timely manner; recording the outcome of the process; possibility of influencing the process as well as; more detail on keeping a record of the negotiation.

19. The Expert Mechanism welcomes the strengthened language in Section 9a including the statement that the measures “shall not cause considerable detriment” as opposed to the last version “shall strive to ensure that significant detriment is not caused” . While the Expert Mechanism respectfully suggests that some clarity of language could help tighten the text, it welcomes the following essential elements that: measures should not cause more than a minor impact on Sámi rights; measures that cause more than a minor impact must be justifiable in human rights terms and amount to a “weighty social goal”; and measures should not cause a detrimental impact on Sámi rights. The Expert Mechanism welcomes that in assessing detrimental impact cumulative impact is included as part of the definition. “The assessment shall take into account the combined impact of the activities of the different public authorities and the measures taken at different times.”

20. However, the Expert Mechanism notes that section 9 does not use the language of the Declaration on free, prior and informed consent, which may leave room for different interpretations on when it is required. The Expert Mechanism thus reiterates its suggestions on this issue expressed in its Advice of August 2018, including that the text could be improved by adopting the language of articles 19 and 32 of the Declaration more closely, in particular the language on “free, prior and informed consent”¹².

21. As set out in the Expert Mechanism’s report on free, prior and informed consent, this concept is not alone to the Declaration. It is also guaranteed through the interpretation of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, by the treaty bodies. As recent as March 2021, in the context of a review of Finland’s seventh periodic report, the Committee on Covenant on Economic, Social and Cultural

¹² See also the Expert Mechanism report on Free, prior and informed consent - A/HRC/39/62

Rights expressed its concern, “at the lack of a legal obligation to conduct consultations with a view to obtaining the free, prior and informed consent of the Sami on matters that affect their lands and resources”, and urged “the State party to strengthen the legal recognition of the Sami as indigenous peoples and the legal and procedural guarantees for obtaining the free, prior and informed consent of the Sami in line with international standards.”¹³ Then in May 2021, the Human Rights Committee expressed its concern, “about reports that vague criteria used to assess the impact of measures, including development projects, on Sami culture and traditional livelihoods have resulted in the authorities’ failure to engage in meaningful consultations to obtain their free, prior and informed consent.” It urged the State to, “Speed up the process of revising the Sami Parliament Act, in particular its sections 3, on the definition of Sami, and 9, on the principle of free, prior and informed consent, with a view to respecting the Sami people’s right of self-determination ... and review existing legislation, policies and practices ... with a view to ensuring, in practice, meaningful consultation with the Sami people to obtain their free, prior and informed consent”.

22. The Expert Mechanism welcomes the opportunity to comment on this draft and to future possibilities of commenting further if necessary.

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¹³ E/C.12/FIN/CO/7