

**29 August 2018**

## **United Nations Expert Mechanism on the Rights of Indigenous Peoples**

Follow-up response to the Draft Act on the Sámi Parliament, Proposal, July 2018

1. The Expert Mechanism on the Rights of Indigenous Peoples makes the following preliminary comments and requests for clarification on sections 3 and 9 of the draft legislation on the Sámi Parliament. These comments are made in the context of a follow-up request made by the Sámi Parliament subsequent to a country engagement mission to Finland in February 2018. The Sámi Parliament requested the Expert Mechanism to provide comments on the conformity of sections 3 and 9 with the rights enshrined in the United Nations Declaration on the Rights of Indigenous peoples (the Declaration) and the Advisory Note of the Expert Mechanism provided after the mission. The Expert Mechanism reserves the option of commenting further on the draft text following any response to its submission and having received the views of the Sámi Parliament on the proposed amendments. The Expert Mechanism understands that the standing committees of the Sámi Parliament, have given their opinions on the proposed amendments. Unfortunately, however these are currently only available in Finnish and could not be considered in drawing up these preliminary comments.

### **Preamble of draft legislation**

2. In its Advisory Note, the Expert Mechanism suggested that, “the new Sámi Parliament Act should make references, in its preamble, to the relevant Finnish Constitutional provisions.” The Expert Mechanism has only been provided with sections 3 and 9 of the draft legislation in English and it is unclear whether there will be a preamble. The Expert Mechanism would welcome clarification on this point.

3. It would appear (from an informal translation of the entire Finnish version) that there are references to the relevant sections 17 and 121 of the Constitution in a detailed explanation of the draft Act prior to the text itself. The status of this explanatory text is not clear. Neither is it clear whether this explanation will remain in the draft and/or whether it will be considered part of the “travaux préparatoire” and thus eventually used in the interpretation of the Act. The Expert Mechanism would welcome clarification on this point as well as clarification on the legal status of the explanation of each article set out after each article in the draft Act.

### **Article 3**

4. In its 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 role.
- 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 article 9 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.

### **Draft section 3**

5. Section 3 reads as follows, "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 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."

### **Expert Mechanism's comments**

6. The Expert Mechanism considers the amendments as moving towards implementation of the relevant rights in the Declaration. The Expert Mechanism notes that article 3 has been revised to clarify 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. The detailed explanation of the provision thereunder clarifies that entry on the electoral roll does not have other effects on the Sámi with regard to their constitutional rights otherwise belonging to them as an indigenous people. The explanation states that this clarification is designed to ensure consistency of approach across the Nordic Countries for the purposes of the Nordic Sami Convention.

7. The Expert Mechanism notes that this clarification would appear to dispel any confusion over the definition of Sámi for the purpose of the electoral role and the definition of who is Sámi for the purposes of exercising their rights in general. Equally, the addition of the language "if the following preconditions are met" would appear to confirm that the subjective requirement must be accompanied by one or other of the two criteria for an individual to be recognised as a Sámi for these purposes.

8. The Expert Mechanism would welcome an explanation of the effect of the removal of the original subsection 2 of section 3, "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".

9. The Expert Mechanism notes that the explanation before the text of the draft Act (informal translation) states, "it is proposed that the so-called group identification be strengthened by extending the composition of the Election Committee and .....that remedies for decisions of the Electoral Board will be decided by a remedies board that is independent in the activities of the new Sámi Parliamentary Institution." Its decisions will continue to be appealed to the Supreme Administrative Court.

10. The Expert Mechanism notes that the extension of the composition of the Election Committee could potentially improve the Sámi Parliament's role in deciding who is Sámi for the purpose of the electoral role and in enhancing the group recognition requirement of article 9 of the Declaration. The establishment of a "remedies board", could fulfil the suggestion for an individual claims process based on non-discrimination suggested by the Expert Mechanism, assuming it includes indigenous experts or other persons with expertise in indigenous peoples' rights and issues to ensure a fair balance between the preservation of Sámi culture and individual rights to belong to a group.

11. The Expert Mechanism would welcome further information on 1. the extended composition of the Election Committee and 2. the independent “remedies board”, including the representation of Sámi on these bodies and the nature, set up, function and terms of reference of the “remedies board”. It would also welcome clarification on how these amendments would be incorporated into the Act, as it would appear that they are currently only referred to in the explanation before the draft Act.

### **Obligation to negotiate - Section 9 of the Act**

12. In its 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 Declaration:
  - 1) pre-negotiation trust building initiatives;
  - 2) good faith in the conduct of the consultation and in the pursuit of FPIC; - yes
  - 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.
- 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

### **Draft section 9**

13. Section 9 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.”

### **Expert Mechanisms Comments**

14. The Expert Mechanism considers these amendments as moving towards implementation of the relevant rights in the Declaration. It welcomes many of the additions to this section as indicated below as well as: the extension of the obligation to negotiate to all actors providing public administrative tasks; the obligation to prepare a 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.

15. The Expert Mechanism welcomes the references in the explanation of the draft Act (informal translation of Finnish) to the Declaration largely made in the context of a review of international law. More concrete references to specific articles of the Declaration, at least in the explanatory parts of sections 3 and 9, would contribute further to enforcing the rights in the Declaration through the interpretation of this legislation (assuming that is its function – see para. 3 above).

16. The Expert Mechanism welcomes the emphasis on cooperation as part of the negotiation process. It suggests however that the text could be improved by adopting the language of articles 19 and 32 of the Declaration more closely, which pertain to consultation, in particular the language on “free, prior and informed consent” (FPIC) already referred to in the Ministry of Justice’s Memorandum of 27 September 2017, but with nebulous legal status. While there is a reference to FPIC in the explanation of the section, the legal status of this explanatory section is unclear, and it appears to focus only on limited aspects of this principle. The explanatory section itself states that “the proposed amendment contributes to the implementation of the UN Declaration on the Rights of Indigenous Peoples in Finland”, but the implementation of FPIC would be better ensured by a specific reference to FPIC in the text of the legislation itself.

17. The Expert Mechanism notes that according to the explanatory section if consent is not received and the relevant authority still decides to pursue the project or proposal, the “authorities do not have the right to initiate measures infringing upon the basic and human rights of the Sámi, even with their consent, due to the constitutional obligation of authorities to enforce basic rights and liberties and human rights as well as subsection 3 of the provision.”

18. In this regard, the Expert Mechanism refers to its recent study on FPIC which sets out the limitations on pursuing measures without consent such that: it must be necessary and proportionate, for the purpose of achieving the human rights objectives of the society as a whole and be non-discriminatory (article 46, para. 2); the burden of proof is on the State; it must be accompanied by necessary safeguards, including redressing balance-of-power issues, impact assessments, mitigation measures, compensation and benefit sharing, but also by remedial measures taking into account any rights violations and; there should be a possibility for judicial or administrative review in the event that indigenous peoples wish to challenge that decision (para. 37 – 40, A/HRC/39/62). The Expert Mechanism suggests that these elements are taken into account in the explanatory section to the provision.

19. The Expert Mechanism welcomes the inclusion in the explanatory section of the provision of many of the elements necessary for the purpose of ensuring a FPIC process in accordance with the Declaration. It notes that the “ultimate responsibility for the adequate analysis and consideration of the impacts of the measure in question lies with the authority or other party handling public administrative tasks”. In this context, the Expert Mechanism refers to its recent Study on FPIC (para. 339) which states that “the perspective of the indigenous peoples concerned on the potential broader impact of a decision is the starting point for assessing whether a legislative or administrative measure or any project affecting their lands or territories and other resources affects them.” And that, “Indigenous peoples should have a major role in establishing whether the measure or project affects them at all and, if it does, the extent of the impact. Indigenous peoples may highlight possible harms that may not be clear to the State or project proponent, and may suggest mitigation measures to address those harms.”

20. Thus, the Expert Mechanism would suggest an addition to the explanatory section of the provision to ensure the importance of including the Sámi people’s perspective in assessing and establishing the impact of measures or projects. For this purpose, guidelines on how to conduct impact assessments could also be adopted. Further guidance on what may constitute “significant harm” including “cumulative harm” from competing land use forms, beyond which development projects may not be undertaken, would also contribute towards greater clarity in establishing when FPIC would be required under section 9. In this regard, the Expert Mechanism guides the parties to para 34. of the Study on FPIC, which states and “if a measure or project is likely to have a significant, direct impact on indigenous peoples’ lives or land, territories or resources then consent is required” and that the “Assessment of the impact requires consideration of the nature, scale, duration and long-term impact of the action, such as damage to community lands or harm to the community’s cultural integrity.”

21. Finally, the Expert Mechanism would like to know whether the State has taken into account concerns raised on the issue of the limited financial resources of the Sami Parliament and how it intends to ensure that the obligation to consult is implemented systematically and in a uniform way by the different State authorities.

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

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