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## Consultations as a tool.

### The Finnmark Act – an example to follow?

This presentation is based on the work I am doing together with Hans-Kristian Hernes at the Institute of Political Science, University of Tromsø. For those of you, who are not familiar with the Norwegian context, let me, before I concentrate on the main subject 'Consultations about the Finnmark Act', call attention to a few historical points.

#### *Background*

What part of the country are we talking about? The Finnmark Act covers the largest and the northernmost county of Norway, an area of the size of Denmark. Up till this Act came into force, the Norwegian state considered itself as the owner of the land in Finnmark, which is 95% of the land area in question. This land was managed by a certain state entity called *Statskog*. Based on the new Finnmark Act, passed in the Norwegian Parliament in June 2005, the land is now transferred to the people of Finnmark, who own the land jointly in a so-called 'Finnmark Estate.'

Some other comments related to the background: Many of you have heard about the Alta/Kautokeino conflict in the 1970s, beginning of the 1980s. The conflict was about the building of a hydro-electric power station on the River Alta. The power station was built, and a saying is that the Sami lost the battle, but won the case. The reason for this is that, due to conflicts, due to demonstrations, civil disobedience and hunger strike, a Sami Rights Commission was appointed. A first stage of the work resulted in a Sami Act (1987), a constitutional amendment (1988) and the establishment of the Sami Parliament (1989). The result from the second stage is the Commission's report from 1997, on land rights in Finnmark County.

#### *The government's bill*

The topic of this presentation is the consultations ahead of the Finnmark Act. In April 2003, the Government had finalised their preparatory work, based on the 1997 Report from the Sami Rights' Commission. On the 4 April 2003 a bill for a new act – the Finnmark Act concerning the land management of Finnmark County (Ot.prp. nr 53/2002-2003, Om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke / Finnmarksloven), was presented. But especially the Sami Parliament was displeased with the bill. The criticism was substantial with regard to the content, the bill lacked a proper identification and recognition of Sami rights. The criticism also covered procedural matters, the process leading to the proposed Finnmark Act. According to international obligations, the Sami Parliament had not been consulted. We have a situation marked by conflict, a bill that is strongly criticised and different opinions about whether the process had been real consultations. The Ministry of Justice referred to the processes of contact with the Sami Parliament and the Finnmark County Council, as a special process of contact (Ot.prp. nr 53 (2002-2003):125). According to the ministry, the parties had been presented with the main solutions and the principal considerations the proposal was based on.

The Sami Parliament, on the other hand, stressed the relevance of ILO 169. In its report to the ILO for the period ending in July 2003, the Sami Parliament highlights procedural issues. A central principle and underlying philosophy of the ILO 169 is the right of indigenous people to be able to speak for themselves and to take part in the decision-making processes as it affects them. The Sami Parliament claimed that the proceedings leading to the proposed Finnmark Act were not in compliance with the consultation and participation articles of the ILO 169.

### *The consultations*

This was triggering a strong focus on the authorities' duty to consult Sami interests, a duty derived from the ILO 169, as the main incentive. Norway was the first country to ratify the convention in 1990. ILO 169 emphasises consultations as a tool for indigenous influence, and the state's duty to consult indigenous peoples. Especially Article 6 is described as a cornerstone of the convention.

In the assessments of the expert committee of the ILO, as an answer to the Norwegian report for the period ending in July 2003, the disagreement between Sami Parliament and the Ministry of Justice is referred to. The committee concludes their review by requesting the government and the Sami Parliament to "renew discussions on the disposition of land rights in Finnmark, in the spirit of dialogue and consultation embodied in Articles 6 and 7 on Convention No. 169."

In June 2003, the Norwegian Parliament's Standing Committee on Justice required an independent assessment from the Government. This assessment from November 2003 was carried out by two legal experts. They concluded that the bill on important points did not fulfil the requirements in international law. The government responded with a new inquiry published in February 2004. Based on this report the government claimed that the bill was in accordance with international law, but an identification of rights was needed. The situation became even more tense, the government had a "hot potato" in their hands. Thus, the Standing Committee on Justice invited the Sami Parliament and the Finnmark County Council to consultations on the law proposal. It must be stressed that this is a unique way of dealing with legislative measures, meaning preparation of legislation. In a Norwegian context, the act is a result of a unique political process. This procedure has never been used before neither in the order of business of the Norwegian Parliament, nor in the involvement of external institutions in the decision-making processes. It is a fundamental new mode of treatment of the legislative measures in the Norwegian Parliament.

ILO 169 is a basic premise for the consultations. A main premise in the ILO 169 is a claim for equal exchange of arguments with a view to reach consensus between state authorities and the indigenous people concerned. It is not a demand for consensus, but an object of achieving agreement. Article 6 instructs the state to establish different tools in order to secure indigenous peoples' rights to participation, but does not elaborate on the concrete content and the scope or extent of the consultation duty. However, ILO-practice has contributed to concretize the provisions. The concept of consultations has been elaborated on in ILO practice, by the expert bodies of ILO. One example is a statement in 1999 from the ILO three-part committee and the ILO board (representations) on a complaint against Colombia concerning among others emission of petroleum exploration activities in the U'wa-territory. The ILO states:

The Committee considers that the concept of consultation with the indigenous communities that might be affected with a view to exploiting natural resources must encompass genuine dialogue between the parties, involving communication and understanding, mutual respect

and good faith, and the sincere desire to reach a consensus. A meeting conducted merely for information purposes cannot be considered as being consistent with the terms of the Convention.

Our point of departure is that this type of consultations between indigenous peoples and authorities are of special interest. Why? In order to answer, in order to focus on the possibilities arising from consultations, we link the process on the Finnmark Act to three principal debates. The first is why consultations are suitable in public decision-making processes. Due to a lack of experience it was not obvious that consultations should be something else than hearing/inquiries. It can be added that in Norway we have a long tradition to involve affected parties through inquiries and bargaining on corporative arenas. The second important debate is a well-known debate about indigenous self-determination, and consultations as a way of implementing self-determination. Consultations are viewed as a tool - what are the advances? Concerning the third debate, we find this case important because we can pay scientific attention to real deliberation processes. Deliberative democracy has so far been mainly a theoretical debate within democracy and political theory. Here we study an empirical case. Due to time limits, it is not possible to supplement or go into details about these principal debates. Nor am I giving a theoretical presentation, but I can mention that we do distinguish analytically between the concepts of argumentation and bargaining. This has to do with how we view and assess the prospects and possibilities of consultations. By argumentation we underline the force of the arguments. Arguments contribute to more stable solutions and more legitimate results. We claim that the connection between consultations and arguments becomes particularly visible with regard to indigenous policy. As opposed to argumentation, there is bargaining where the results are dependent on resource control and strategic action. Illustrative is wage negotiations. However, it should also be added that in real life there is always a mix of arguments and strategic action.

Without going into details, when assessing conditions like institutional framework, process and dialogue, we have been looking at patterns of participation and the role of participants. It can be mentioned that the Sami Parliament and especially the president was active in the forefront. The Parliament appeared as united, position and opposition joined forces as opposed to the Finnmark County Council and the committee.

One important question is how the consultations should be carried out, and what should distinguish them from hearings or inquiries. The leader of the Justice committee, the county mayor and the president of the Sami Parliament underlined the authorities' duty to consult the Sami. But they had no plan for carrying out the consultations. However, the Sami Parliament was during all the consultations active in defining and adopting the concept of consultation. The Parliament was prepared and presented several papers among others on the duty of the state to consult. It could be said that "the road develops as one moves along." According to ILO 169, it is the indigenous peoples that carry the right to be consulted, but as stated by the president of the Sami Parliament; good and legitimate domestic political considerations require that also the county council should be consulted. This consideration also coincides with ILO 169, referring to "in a form appropriate with the circumstances."

The content of the Finnmark Act is comprehensive. Of special importance is the understanding of international law, due to the fact that other issues are measured against especially ILO 169 as a norm. The debate of the understanding of international law is also important in order to illuminate the distinctive characteristics of consultations. As already mentioned, the government

and the Sami Parliament disagreed about whether the bill was in accordance with international law. According to the Sami Parliament one could not only assume that domestic law coincides with international law. The Sami Parliament managed to get a special provision in the law that could be regarded as a limited incorporation of the ILO169.

Some preliminary conclusions regarding the character of the consultations can be presented. Both with regard to conditions like institutional framework, process and dialogue, we claim that during the process there was room for deliberation. The discussions became important for the results. The three intuitional actors used a relatively long time to discuss standpoints of each other and to agree on formulations. Some points of views were resigned, but alternatives not defined in advance were also looked for. On central topics it is possible to point out that the final law proposal was different from the government's bill. The final solution was approved by the three parties. Still we are careful to regard the outcome as a result of consensus. In the last instance the law proposal was a result of the Justice committee, and a last meeting took place after the fourth consultation, that was clearly a negotiation meeting. During the whole process, a striking feature is the leading role of the Sami Parliament. The consultation process linked to the Finnmark Act can be regarded as a success story, but potential problems can be pointed out. What would have happened if the Norwegian Parliament had had another composition? This process also implies a question of building a relationship of trust. What kinds of relationships were developed between the parties? These questions must stay unanswered here.

### *Concluding remarks*

Based on what I have presented, I will pinpoint some aspects of relevance for other indigenous communities.

As you remember, there were different opinions whether the Sami Parliament had been consulted, and this is a question about the *duty to prior consultations*. The duty to prior consultations has been stressed by ILO bodies. An example is the expert committee on Ecuador's report from 2003, where they state that the articles of the ILO Convention "imply the obligation to develop a process of prior consultations with the indigenous peoples of the country before taking measures that might affect them directly."

A similar point is done with regard to a complaint against Colombia in 1999 concerning emission of petroleum exploration activities, where the ILO says that "the consultations must be prior consultations, which implies that the communities affected are involved as early as possible in the process, including in environmental impact studies." According to the cases of complaint against Ecuador and Colombia and we could add, the ILO assessment on the Finnmark Act process from 2003, consultations must be carried out on all stages in a decision making process. It is not possible for the authorities to invite indigenous peoples to join the process when they are in the final stage or even midway or halfway.

The second point is about the *importance of representative institutions*. In Norway it is the duty of the authorities to consult the Sami Parliament, but of course if a measure affects several groups of Sami, like the reindeer herders or groups of the coastal Sami population, these should also be consulted. In a complaint against Ecuador the ILO-bodies point out that: "In view of the diversity of indigenous peoples, the Convention does not impose a model of what a representative institution should involve, the important thing is that they should be the result of a process carried out by the indigenous peoples themselves. But it is essential to ensure that the consultations are held with the institutions that are truly representative for the peoples

concerned.” In the mentioned complaint issues from Colombia the authorities had divided the area in reserves, and consulted those who were in favour of a development of a water power station. What is important regarding representativity, is that the indigenous peoples themselves must be involved in defining their own representatives.

The third point is the subject of the *consultation duty*. As we have seen in the Finnmark Act process, the subject for this duty became the parliamentary committee in the Norwegian parliament. Comments from ILO-bodies seem to call for such an interpretation. In an ILO-guide to the convention it is stated: “Article 6 requires governments to establish means enabling these peoples to participate at all levels of decision-making in elective and administrative bodies.” The wording “all levels” and the convention’s direct reference to legislative measures, imply that the duty to consult also covers parliamentary bodies like committees, not only governments and public administration.

These procedural aspects in ILO 169 establish a right of indigenous peoples to be consulted and a right to active participation in decision making processes. In addition ILO practice has reinforced the procedural aspects of ILO. This is worth mentioning because it implies new possibilities for indigenous influence, self-determination and co-management, despite different circumstances and state systems.