UiO : Faculty of Law
University of Oslo

Law and order Sápmi

Realising Indigenous Land Rights through the Finnmark Estate

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Table of contents

1 Introduction and methodology

1.1 Background

Indigenous rights and the rights of the Sami people are an important but controversial debate in Norway. Following the Alta conflict in the 1970s and 80s, indigenous rights became a hot topic in Norway. Land rights, language, and remedy for the Norwegian government's violations of civil and cultural rights during the assimilation policy were placed on the political agenda. Upon recommendations from the Sami rights Committee (Samerettsutvalget), Norway ratified ILO Convention 169 in 1989. Subsequently, the Sami Parliament was established and Sami rights were adopted into the constitution. Twenty years later, in 2005, the Finnmark Act was adopted and transferred 95% of all the previously state- owned uncultivated land in Finnmark County to the Finnmark Estate (hereafter FeFo or the Estate) -- a body established by the act. The Finnmark Act aspired to move the ownership of land previously claimed by the state, to the hands of the population of Finnmark.

According to ILO C 169 article 14.2, states are to "take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession[1]". Following advice from the Sami rights Committee, and through consultations with the Sami Parliament, the Finnmark Commission (hereafter the Commission) was established through the Finnmark Act. The Commission is to map land rights and assess claims of land rights in the previously state-owned areas. The Commission renders their mapping of land rights through geographically limited reports, with a possibility for appeal to the Finnmark Land Tribunal (hereafter the Tribunal).

The Commission has been mapping land rights since 2008, by assessing claims filed by local rights claimants. By the end of 2017, the Commission have only found an acknowledged ownership rights in one case.[2] In 2016, the Commission received criticism from the UN Special

[1] "Ilo-Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries : June 27, 1989," *Folkerettslig tekstsamling / Magnus Buflod, Knut Anders Sannes og Kristoffer Aasebø (red.)* (2006).

[2] Gulgofjord in Varanger, FeFo Rapport 6 field Varanger, later opposed by the Finnmark Estate.

Rapporteur on Indigenous Peoples' Rights for not recognising individual or collective Sami ownership or user rights beyond the rights granted to all inhabitants of Finnmark.[3]

In January 2017, the Finnmark Land Tribunal rendered their decision in the Nesseby Case, a land rights case from Eastern-Finnmark. The Tribunal sided with the plaintiffs, granting the local Town Association the right to manage the un-cultivated areas surrounding Nesseby. The Estate appealed the case to the Norwegian Supreme Court. The Commission are currently mapping land rights in inner-Finnmark, considered as the Sami heartland. The decision of the Supreme Court will certainly shape future jurisprudence in Inner-Finnmark.

Illustration 1 shows state-owned land or state commons in Norway in 1983. Whereas such lands are sparingly scattered in southern parts of the country, almost the whole of Finnmark is coloured green. Now, FeFo administers the same areas that were managed by the Norwegian State through Statens Skoger (later Statsskog, the State owned forest enterprise) in 1983, on behalf of the population of Finnmark. The Finnmark Act was created with aspirations to correct past wrongs against the Sami and the former colonial land management policy. Even so, the lack of accepted ownership rights by FeFo and the Commission makes ownership of Finnmark today almost identical to the map in illustration 1. The structure and name of the owner may have changed, but has the Act changed local and indigenous land rights?

In this master project, I will examine whether the FeFo system, including the Finnmark Commission and the Finnmark Land Tribunal, is an appropriate and effective land rights mechanism for indigenous people. I evaluate the suitability of the system: (1) in regards to the Finnmark Act and the preliminary work leading to the act; (2)in regard to Norway's international obligations under ILO C. 169, and (3) in regards to the stakeholders in Finnmark and "users" of the law.

[3] Victoria Tauli Corpuz, "Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Human Rights Situation of the Sami People in the Sápmi Region of Norway, Sweden and Finland," (United Nations Human Rights Council, 2016).

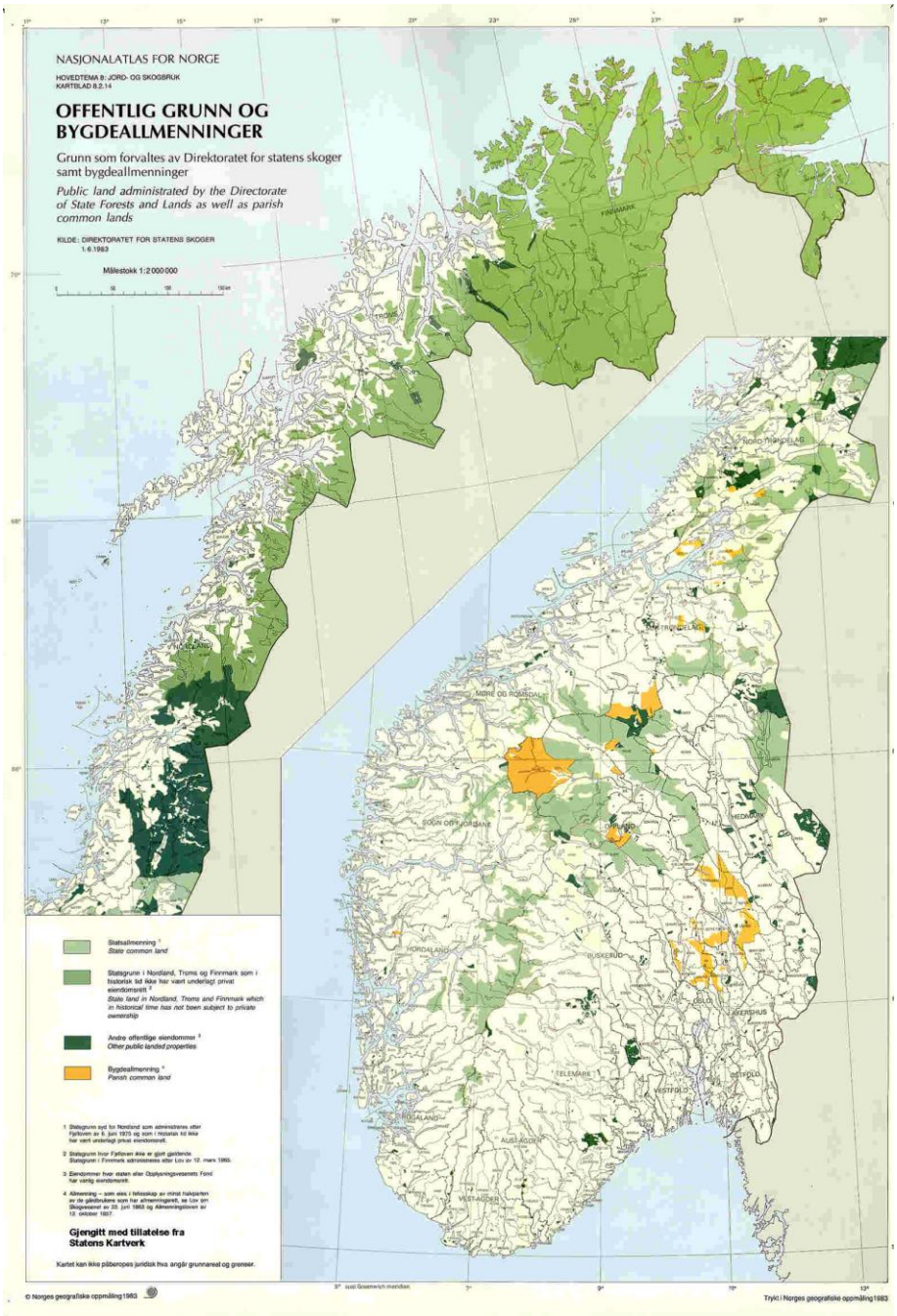

Illustration 1

1.2 Methodology

For my thesis, I chose to rely on legal analysis of international law, domestic law, case law, and preliminary work to answer research questions 1 and 2 and qualitative interviews and statistical data for question 3.

1.2.1 Legal analysis:

To answer whether or not the Finnmark Act and its operationalization through the FeFo system provides an appropriate and effective land rights mechanism for indigenous people, I have used legal analysis. The appropriateness and effectiveness of the act according to research questions (1) and (2) entails the use of different types of sources. Question (1) involves use of national legal sources, including Sami legal tradition, while (2) involves international sources as international human rights law. Both questions, however, are interlinked. The nature of human rights law is to restrain state practice, thus also relating it to domestic law. Furthermore, recognition of Sami rights in Norway have developed in correlation to the development of international indigenous rights.

Examining international law, I have studied the following international conventions that establish rules expressly recognised by states: the International Covenant on Civil and Political Rights (ICCPR), The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the ILO Convention 169. According to Article 31 of the Vienna Law of Treaties, the provisions of such treaties are to be interpreted in good faith in accordance to their ordinary meaning and in light of their object and purpose[4]. In addition to the text of the conventions, instruments relating to the treaties, or agreements in connection to the treaty made subsequently, are also to be used in interpretation. Therefore, I have interpreted the provisions of these Conventions through international jurisprudence from the Covenant bodies such as, the Human Rights Committee, and the ILO three-part committee (hereby referred to as the ILO committee), as well as the opinions from these bodies.

Human rights instruments like the ICCPR are binding to Norwegian law through the Norwegian Human Rights Act. The Act does not include ILO 169, but the Convention is strengthened in Norwegian law through the *principle of presumption*. For a discussion on the relation between international law and Norwegian law, see section 2.3.

The most relevant instruments of domestic law are the Finnmark Act and the jurisprudence of the Commission and the Tribunal. However, disagreements on how to operationalise the law

[4] "Vienna Convention on the Law of Treaties : 23. May 1969," *Global and Regional Treaties* (2016). Article 31.1

and jurisprudence by the Act's bodies can be appealed to the Norwegian Supreme Court. Supreme Court jurisprudence trumps that of the Commission and Tribunal, and therefore the Svartskogen Case is essential for my argument.

I have dedicated much time to studying the preliminary work leading up to the Finnmark Act. The Norwegian Official Reports (NOUs) written by the Sami Rights Committees from 1984-2004, position documents from the Sami Parliament and the propositions to the law in 2003 and 2005. These sources are essential for answering question (1), because they inform us about the context of expectations the Act was meant to fulfil, which is relevant for the interpretation of the object and purpose of the Act.

1.2.2 Interviews

In addition to studying the land right mechanisms under FeFo through theory and jurisprudence, I wanted to study how stakeholders in Finnmark perceive land right struggles within the FeFo system. To what degree do those who directly deal with, or use, the Finnmark Act perceive the FeFo system as satisfactory, and do they feel that the land rights mechanisms work as expected? To answer this, I have conducted eight interviews with stakeholders. I conducted the interviews as *semi-structured interviews*, with the aim of gaining insight into the source´s description and interpretation of how the FeFo system of management and the land rights processes work. A semi-structured interview, as defined by Kvale and Brinkmann, is not characterised as an open conversation, nor is it based on a narrow or closed survey.[5] I conducted the interviews as free but structured conversations and based on questions given to the sources in advance with additional follow up questions from me.

These were the questions sent in advance (translated from Norwegian to English here):

1. Could you tell me how you experience the Finnmark Estate as manager of the uncultivated areas of Finnmark? Are you involved in commercial or other use of such areas, and in such use, how do you perceive the work of the Finnmark Estate?
2. What are your thoughts on the work done by the Finnmark Commission and the Land Tribunal's work mapping land rights to uncultivated areas in Finnmark? I would like

[5] Steinar Kvale et al., *Det Kvalitative Forskningsintervju*, 3. utg., 2. oppl. ed., Interview[S] Learning the Craft of Qualitative Research Interviewing (Oslo: Gyldendal akademisk, 2015).

to hear about your experiences with the Nesseby-Case and how you felt the FeFo system handle the case. What do you think of the jurisprudence of the Commission and the Tribunal, both in this case and on a general basis?

I formulated the questions in such a way to invite the source to connect them to their own experiences and share their own opinions. They are open enough to give space for reflection of personal experiences but also narrow enough to keep the conversation on topic. In retrospect, question one might have invited too many anecdotes from sources about their experiences using uncultivated areas, which ultimately took time away from discussing the more controversial and pertinent question of land rights and jurisprudence. Still, it gave the interview a comfortable start and helped to lighten the mood and build trust.

1.2.2.1 Choice of sources

I conducted my interviews in the spring of 2017. I did two interviews with legal scholars who are involved in the land rights processes, -- Øyvind Ravna and Kirsti Strøm Bull -- two with Sami politicians, one with the director of the Finnmark Estate, and three with citizens of Nesseby who were involved in the Nesseby Case.

I conducted interviews with representatives from two opposing parties in the Sami Parliament of Norway -- Silje Karine Muotka from *Norske Samers Riksforbund (NSR)* and Egil Olli from *Arbeiderpartiet*. One of the parties is an independent Sami political party and the other is the Sami Parliament group of the Norwegian labour party, which is one of the largest political parties in the Norwegian Parliament. I chose these representatives and parties because they traditionally occupy a differing position on the question on Sami land rights, which helps to highlight different aspects of the discussion. Of interest is also the fact that, whereas NSR has traditionally been one of the forces pushing the debate on Sami land rights, Arbeiderpartiet was in government at the Norwegian Parliament and the Sami Parliament when the Act was adopted. Egil Olli served as President of the Sami Parliament in the years after the adoption and has been helpful in explaining how the Sami Parliament and the labour party in Finnmark perceived the process leading up to adoption of the law. Because of his family relation to FeFo Director, Jan Olli, the weight of the interview with Egil centred on the process and aspirations leading up to the adoption and the first years of implementation, instead of FeFo management today. Silje Karine Muotka has been an active voice for many years in the debate on Sami rights, both through local Sami associations and through NSR.

Section 5.2 of the thesis is based on interviews done with local stakeholders from Nesseby who are involved in the Nesseby case. I chose to anonymize the names of the informants from Nesseby. They did not request to be anonymous, but I chose to do so due to the somewhat controversial nature of the debate on land rights in Finnmark. I think there is a difference in voicing your opinions on issues as sensitive as land rights conflicts as an expert or politician, or as a concerned individual in a small community.

Jan Olli has been allowed to respond to criticism of FeFo, providing me with the opinions of the Estate on management, rights of use, and rights of ownership, as well as the Nesseby case and why they chose to appeal to the Supreme Court. The interview with Jan gave me insights into FeFo's understanding of their mandate and the object and purpose of the Act. FeFo's opinions stand as a counterpoint to the opinions voiced by legal scholars, Kirsti Strøm Bull and Øyvind Ravna. Ravna has also worked as the legal advisor for the town association of Nesseby in the Nesseby case.

All my sources are people involved in land rights cases in Finnmark, either directly like Jan Olli, Ravna, and the respondents in Nesseby, or indirectly like the Sami politicians. Many of them are Sami and, if not, they have worked with Sami rights throughout the years. My sources probably have a more positive view on Sami rights than the majority of the population in Finnmark. Even if the group in this respect could be considered homogenous, I think that the selection has been relevant for research question (3) *how do the people involved in the land rights cases see the FeFo system.*

1.2.3 Public opinion

In addition to the interviews, I have utilised the report "Finnmarkslandskap i endring" written by the Norwegian research institute, Norut, in 2015. The report is a quantitative analysis of the degree of trust in FeFo by the population in Finnmark. The report gave me the opportunity to say something about the institutional trust in FeFo, apart from the opinions stated in the interviews. It also gave me the opportunity to expand the work of Norut by identifying two conflicting ideologies in their group of *conditional supporters*. I address this in section 5.3.

1.2.4 Subjectivity and ethics.

I have no commercial or directly personal interests in any outcome of the mapping of land rights in Finnmark. Neither are any of my family or close associates involved in such rights struggles. I am interested in the material out of scientific curiosity, not political sympathies. However, the

debate on Sami land rights have at times been heated in Finnmark, and, as a Sami growing up in the region when the debate was in its most heated period, it is impossible to not have some pre-existing sympathies or antipathies going into this material.

Science should be objective, not subjective, in its conclusions. However, all scientists are subjects and, to some extent, underlying values held by the scientist could determine what types of questions we investigate and which theories resonate with us.[6] It is the responsibility of the scientist to limit such personal bias. Bias could lead the scientist to interpret responses given by sources in a way that fits with the bias and agenda of the scientist.

Because I have written down the interviews by hand, the likelihood of biased interpretation was probably higher than it would have been had I taped the interviews. To counter this likelihood, I have methodically triangulated the responses I have received in my interviews by studying press releases, news articles, and opinion pieces by my sources to confirm that the views I had perceived were correct. The relatively small number of informants, and the fact that several are involved in the debate on land rights in some way, made this possible.

1.3 The structure of the thesis

Section two of the thesis introduces the Act's structure, its object and purpose, and the Finnmark Estate system. It also discusses the process leading to the adoption of the Act. Section 3 discusses the land rights mechanisms in the Act and the role of ethnicity in the Act. Section 4 centres on the human rights using the Nesseby Case and the Special Rapporteurs criticism of FeFo as context. In 4.1, I present the case before I let the FeFo director present the Estate's perspective on the case in 4.2. In Sections 4.2.3 and 4.3, I present criticism of the Estate's account and discuss the case in relation to international human rights, referring to the ICCPR and the ILO Convention 169, before I conclude on *RQ 2* in 4.5. Section 5 is devoted to interviews and public opinion. I present popular opinion and the framework given by Broderstad et. al in "Finnmarkslandskap i Endring" in 5.1. In Sections 5.2 and 5.3, I give turn to the local population of Nesseby. I link my interviews to the findings of Broderstad et. al, in an effort to expand their work by introducing my concepts of the *compromise oriented* and the *rights oriented* ideologies found in the Sami rights debate. In section 6, I discuss my research questions in light of my findings and then end with a summary in 6.4, as well as some comments on the rights process ahead.

[6] Kvale et al., *Det Kvalitative Forskningsintervju*, 250.

1.4 Definitions

In this project, I am examining indigenous land rights in a Norwegian legal, cultural, and political context. Some of the Norwegian terms relevant for the subject are hard to translate to corresponding English terms without distorting the meaning of the term to some degree. In this section, you will find these terms defined, explained, and contextualised, as well as the usage of these words in the text to correspond to these concepts.

"Utmark/meacchi": non-cultivated areas. The Act transferred control of such areas from the Norwegian government/Statsskog, to FeFo. These are the areas under contestation when discussing land rights cases under the Act. "Utmark" is referred to as "uncultivated areas", or "outback". There is a difference between utmark (non-cultivated areas) and villmark (wilderness). Even if utmark are not cultivated, the areas people traditionally use them for harvesting resources.

"Bygdelag": A bygdelag is an association of inhabitants in small Norwegian towns. In the Nesseby case, the Nesseby Bygdelag functions as a plaintiff in the case. I will translate this term to Town Association (or TA). However, it is more common that a "bygdelag" is involved in facilitating local use of uncultivated areas, than being in courtrooms. In the Nesseby-case, the TA serves both of these functions.

Samerettsutvalg: will be referred to as Sami rights committees or simply SU I and SU II. The SU`s work resulted in policy whitepapers, called Norsk Offentlig Utredning or Norwegian Public Reports. These will be referred to as NOU.

Indigenous peoples: I will not do a discussion on the definition of indigenous peoples in this thesis. I use the Cobo-definition, which is the basis for the definition given in ILO 169, article 1. [7]

2 The Finnmark Act and the Finnmark Estate System

[7] Jose R. Martinez Cobo, "Study of the problem of discrimination against indigenous populations" (E/1982/34).

"*The case is special, both because it in its nature is about making old wrongs right towards the indigenous people of the land, but also because the process in itself have been unique, not to say historic"* – Trond Helleland, representative of the Conservative Party, and head of the Committee of Justice in the Norwegian Parliament.

In April 2003, the Norwegian government's Ministry of Justice and Police delivered their proposition to *law on legal relations and management of the natural resources on Finnmark.*[8] Even if the proposition acknowledged the tensions regarding land rights and the pressure subjected to Sami interests, the proposition lacked provision on how to actually map and protect Sami land rights.[9] An assessment on the proposition in light of International law made by Graver and Ulfstein for the Ministry of Justice, concluded due to the lack of such provisions, the proposition were not fulfilling Norway's obligations to international law instruments as the ILO 169[10]. The Sami Parliament were not consulted in the process, and this was considered a violation of ILO 169[11].

Due to the amount of criticism facing the proposed law, the Committee of Justice in the Norwegian Parliament (not to be confused with the Ministry of Justice of the government) began consultations with the Finnmark County Council and the Sami Parliament. These consultations and negotiations resulted in the final proposition to the law. Such a consultation process were new in Norwegian legislation.

According to the Committee of Justice, the responses of the direct consultations on the proposition and to the NOU of 1997, which formed basis for the law, could be divided into three groups. 1: The responses aiming to strengthen Sami rights, which were given by the Sami Parliament and by Sami municipalities- and bodies in the hearing of the NOU. 2: The responses from the Finnmark County Council and the municipalities along the coast of Finnmark. These responses were sceptical to strengthening Sami rights but positive towards an increase in local

[8] *Om Lov Om Rettsforhold Og Forvaltning Av Grunn Og Naturressurser I Finnmark Fylke (Finnmarksloven)*, vol. nr. 53 (2002-2003), Ot. Prp. ... (Trykt. Utg.) (Oslo: Departementet, 2003).

[9] Øyvind Ravna, "Forslaget Til "Finnmarkslov" Og Bygdefolks Rettigheter," *Finnmarksloven - og retten til jorden i Finnmark* (2013)., p. 153

[10] Hans Petter Graver; Geir Ulfstein, "Folkerettslig Vurdering Av Forslaget Til Ny Finnmarkslov," ed. Justis- og politidepartementet (2004).

[11] Else Grete Broderstad, "The Finnmark Estate: Dilution of Indigenous Rights or a Robust Compromise?," *The Northern Review* 39 (2015): 12.

self-determination, and 3: The responses from ministries and governmental bodies, which were concerned with maintaining state control over the land in Finnmark, regardless of which solution the Norwegian Parliament were to adopt.[12]

Both the Sami Parliament and the Finnmark County Council supported the final proposition, innst.O.nr. 80. The Act was adopted by Odelstinget,[13]in the Norwegian Parliament on the 24th of May 2005.

In the interview with Egil Olli, who was a representative for the labour party in the Sami Parliament at the time,[14] postponing the process and conducting consultations with the County Council and the Sami Parliament were of utter importance. The consultations gave the interested parties the opportunity to negotiate solutions that all bodies could accept. Postponing the process for the consultations also provided more time to find common ground between the Sami Parliament and the Finnmark Labour Party. The fact that the Finnmark Labour Party gave their support to the proposition from the Committee of Justice on their annual meeting in 2004 influenced the representatives of Labours parliamentary group in the final process of adoption of the Act[15].

2.1 The structure of the Finnmark Estate

The Estate is an independent legal body defined to operate as a landowner and manager of the uncultivated lands. A board comprising 6 people leads the Estate, three of which are representatives of the Finnmark County Council and the other three are representatives of the Sami Parliament[16].

[12] Justiskomiteen, *Innst.O.Nr. 80 (2004-2005), Innstilling Fra Justiskomiteen Om Lov Om Rettsforhold Og Forvaltning Av Grunn Og Naturressurser I Finnmark Fylke (Finnmarksloven)*, 2005, 6.

[13] From 1814 to 2009 the Norwegian Parliament were divided into two chambers, Odelstinget and Lagtinget. I will not go into detail on this arrangement in this paper. More information could be found on the web-pages of Store Norske Leksikon (Norwegian Encyclopedia). Gisle, Jon: «Odelstinget» (2013, 29. juni), https://snl.no/Odelstinget; Gisle, Jon. (2013, 29. juni). «Lagtinget, https://snl.no/Lagtinget. Both downloaded 26. april 2017 from Store Norske Leksikon

[14] Olli were later to become President of the Sami Parliament from 2005-2007, and were the first chairman of the Finnmark Estate from 2006-2007.

[15] Egil Olli, interview by Aslak Heika Hætta Bjørn, 2017.

[16] *Lov Om Rettsforhold Og Forvaltning Av Grunn Og Naturressurser I Finnmark Fylke*. §7

2.1.1 The Finnmark Commission and the Finnmark Land Tribunal

Chapter five of the Act establishes the Commission and the Tribunal. The Commission, according to §29, is supposed to map user- and ownership rights to the lands of the Finnmark Estate, based on *current national law*. The Commission is to consist of a chairperson that meets the requirements of a Supreme Court judge, as well as four Commission members, whereas two must meet the requirements of district court judges. The Commission communicates their decisions through geographically based reports. The FeFo board is obligated to make a decision concerning these reports on whether or not the board agrees with the Commission's conclusions (§34). Until now, the board has accepted all but one of the conclusions given by the Commission. A special court was also established, the Finnmark Land Tribunal, to consider disputes concerning rights that arise in the aftermath of the Commissions' concluding reports (§36). If rights claimants appeal the Commission's conclusions to the Tribunal, the Estate is the legal subject defending the Commission's conclusion. Therefore, the Estate has been party in several cases, both in the Tribunal and the Supreme Court.

The fact that the Commission and the Tribunal are to give their conclusions based on *current national law*, and not *current Norwegian law*, is to reflect that their conclusions are to be based on not only Norwegian legal tradition, but also Sami legal custom and international law.[17]

2.2 General provisions of the act

In this section I will analyse the object and purpose of the Act, as expressed through §1-5 in its chapter on general provisions.

2.2.1 § 1. Object and purpose

§1 of the Finnmark Act states:

"*The purpose of the Act is to facilitate the management of land and natural resources in the county of Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Sami culture, reindeer husbandry, use of non-cultivated areas, commercial activity and social life"*[18].

[17] *Innst.O.Nr. 80 (2004-2005)*, 18.

[18] *Finnmarksloven*. Translation by the Lovdata foundation, downloaded from the University Library of the University of Oslo, http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-085-eng.pdf.

The paragraph states that there are three purposes of the act: (a) to conduct a balanced and ecologically sustainable management of Finnmark, (b); that the management of resources should benefit the residents of the county, and (c) that the management should particularly protect Sami culture, as the resources are the material basis of the culture.

Purposes (b) and (c) represent what I call the *regionalist*- and *Sami dimensions* of the Act. However, these dimensions were controversial in the process prior to adoption.

In the original proposition presented from the Ministry of Justice and Police in 2003, § 1 included a reference to the interests of the general public.[19] Special interest groups like the Norwegian hunting and fishing association, as well as the Socialist Left party supported this reference. In the consultation process, both the Sami Parliament and the County Council of Finnmark opposed the reference to the interests of the general public and it was removed from the final proposition. The Justice Committee sided with the Sami Parliament and County Council because (1) the Act is to specifically regulate the interests of the inhabitants of Finnmark and the Sami;[20] and (2) the public's right to harvest renewable resources in Finnmark is sufficiently secured in chapter 3 of the law[21] regulating the use of renewable resources. According to the Committee, the object and purpose of the Act is to clarify the legal status of the Sami in Norway[22]and to protect the material basis for Sami culture. Thus, it was appropriate to limit the paragraph on the object and purpose to the inhabitants of Finnmark. Due to the wording of the clause and the objectives stated in the preliminary work, I would argue that the regionalist and Sami dimensions are the core objectives of the Act.

2.2.2 §3. The relation to international law

§ 3 of the Act states that the law works within the limitations given by ILO Convention 169, and that the law should be used in accordance with provisions on indigenous peoples and

[19] Øyvind Ravna, "Finnmarksloven Er Vedtatt : Om De Vesentligste Endringene I Loven I Forhold Til Regjeringens Lovforslag," *Finnmarksloven - og retten til jorden i Finnmark* (2013): 168.

[20] *Innst.O.Nr. 80 (2004-2005)*, 32.

[21] Everyone have the right to harvest of renewable resources in Finnmark, but in times of scarcity or other situations where the harvest of a resource must be limited, local communities, then the inhabitants of Finnmark will be prioritised. Se chapter 3 of the Finnmark Act.

[22] *Innst.O.Nr. 80 (2004-2005)*, 1.

minorities found in international law and with provisions in agreements with foreign states on fishing in bordering rivers.

Norwegian law is based on the *dualist principle* concerning provisions of international law. This means that provisions of international law are not seen as binding national law until they are incorporated or transformed into Norwegian law through national legislation.[23] §26 of the Norwegian Constitution is the basis for this approach, which states "treaties on especially important cases are to be seen as binding after the Parliament has given their consent". [24] However, the *principle of presumption* modifies this dualism between international and Norwegian Law. The principle makes the presumption that national law complies with international legal provisions and therefore, one should interpret domestic legal rules in such a manner that would not conflict with international law.

However, international human rights treaties have a special standing in Norwegian Law due to the Human Rights Act, as well as article §92 of the constitution, which states that State authorities are to respect and secure human rights the human rights treaties that are binding for Norway. The Human Rights Act of 1999 stipulates that the European Convention of Human Rights, the ICCPR, the ICESCR, the Convention on the Rights of the Child, and the Convention on Elimination of all forms of discrimination against Women have the status of Norwegian law. In occasions of conflict, these treaties are to be given priority over other Norwegian law.[25] The list is exhaustive with the notable omission of ILO Convention 169 from the list. ILO Convention 169 is however ratified and binding to Norway, and therefore supported by §92 of the Norwegian constitution.

What does it then entail when the Act states that the law works *within the limitations given by ILO Convention 169*? Skogvang refers to this as an example of *sector monism*, when international law trumps Norwegian law in a limited legal sector.[26] Skogvang argues that the "partial incorporation" of ILO 169 in §3 of the Act requires that, within the legal and geographical scope of the Act, ILO 169 is to be seen as binding Norwegian law. And, in cases

[23] Susann Funderud Skogvang, *Samerett*, 2 ed. (Oslo: Universitetesforlaget, 2009), 50..
[24] *Kongeriket Noregs Grunnlov*, (17.5.1814).
[25] *Lov Om Styrking Av Menneskerettighetenes Stilling I Norsk Rett (Menneskerettsloven)* (21.05.1999).
[26] Skogvang, *Samerett*, 52.

of contradiction, ILO 169 should trump the contradicting provisions of the Act.[27] In an article originally published in 2005, Øyvind Ravna also seem to support Skogvang's view.[28]

The comments from the Justice Committee can shed some light on the intended interpretations of the provisions. Due to "the uncertainty on how to interpret" the provisions of ILO 169, the committee saw the Convention as unfit for incorporation in the Act. When the committee nevertheless chose to "partially incorporate" ILO 169 into §3, it was due to pressure from the Sami Parliament. The partial incorporation also demonstrates how international human rights law is a part of the background of the law. We should interpret the relationship in such a way: limitations given by ILO 169 entails that if certain provisions of the Act are shown to be in conflict with provisions in ILO 169, the convention is to be given priority. If, however, the law lacks certain provisions to fulfil provisions in the ILO 169, it will be the responsibility of Norwegian legislators, not the courts, eventually to make new provisions for the law.[29] The courts can thus not use the ILO convention to "build" the Act further.[30] It seems clear from the Committee's comments that the purpose of §3 is to set an order of priority or weight between provisions of the Act and ILO 169 when provisions direct conflict and not to establish ILO 169 as binding national law within the scope of the Act.

3 Land rights provisions: Mapping and recognition of existing rights.

§5 in the general provisions chapter of the Act covers the relationship to existing rights and is the basis for land rights in the act. §5 of the act states:

[27] *Samerett*, 124.

[28] «Finnmarksloven er vedtatt. Om de vesentligste endringene i loven i forhold til regjeringens lovforslag i Ot.prp. nr. 53 (2002-2003)» originally published in Kart og Plan in 2005. Here referenced through Ravnas anthology from 2013. Ravna, "Finnmarksloven Er Vedtatt : Om De Vesentligste Endringene I Loven I Forhold Til Regjeringens Lovforslag.".

[29] *Stjernøya Case - Hr-2016-2030-A*, Stiftelsen Lovdata (2016).

[30] *Innst.O.Nr. 80 (2004-2005)*, 33..

"*Through prolonged use of land and water areas, the Sami have collectively and individually acquired rights to land in Finnmark.*

This Act does not interfere with collective and individual rights acquired by Sami and other people through prescription or immemorial usage. This also applies to the rights held by reindeer herders on such a basis or pursuant to the Reindeer Herding Act.

In order to establish the scope and content of the rights held by Sami and other people on the basis of prescription or immemorial usage or on some other basis, a commission shall be established to investigate rights to land and water in Finnmark and a special court to settle disputes concerning such rights, cf. chapter 5.

The provision can be divided into three clauses. The first clause, states that the Sami people have acquired rights to land in Finnmark; the second states that rights acquired through prescription or immemorial use are to be respected, and the third establishes the Finnmark Commission and the Land Tribunal. I`ll address each clause in the following paragraphs.

3.1 Sami land rights

The first clause of §5 was added to the proposition after the consultations in 2004 and 2005. The clause contains three important recognitions. First, the clause gives political recognition to the fact that the Sami have acquired land rights in Finnmark, and that these rights might not yet have been recognised.[31] Second, the clause states that Sami traditional use, even if different in nature from the agriculturally based use frequently found in Norwegian tradition, can indeed constitute land rights through the doctrine of *immemorial usage*. This is an important recognition. For a long part of Norwegian legal history, there was an established fact that traditional Sami land use could not give rise to land rights because it was not intensive enough to classify as anything other than *innocent* use of nature. This doctrine was challenged by the Brekken case in the Norwegian Supreme Court in 1968, which stated that Sami use (reindeer herding in this case) was indeed of such a nature that it could constitute rights and was not simply protected by the Norwegian *allemannsrett* (Freedom to roam).[32]

[31] *Innst.O.Nr. 80 (2004-2005)*, 36.

[32] Øyvind Ravna, "Samenes Rett Til Land Og Vann, Sett I Lys Av Vekslende Oppfatninger Om Samisk Kultur I Retts- Og Historievitenskapene," *Finnmarksloven - og retten til jorden i Finnmark* (2013): 50-51.

However, in the Trollheimen case of 1981 The Supreme Court denied that the use of land by Sami reindeer herders could fulfil the criteria of regular and intensive use necessary to constitute customary and immemorial use, as the criteria were to be interpreted in light of the intensity of traditional Norwegian agricultural use of land. This view was upheld in Norway, south of Trondheim, until the Selbu case of 2001.[33] In northern Norway, cases such as the Svartskogen case of 2001 have established that even if different than traditional agricultural use of nature, Sami use could constitute land rights and title due to the doctrine of immemorial usage. That this view is recognised through § 5 of the Act signals that the legal developments made in cases such as Selbu and Svartskogen are being solidified in courts and also by legislators.

Clause two of §5 states that the Act cannot interfere with collective and individual rights acquired by Sami and other people. There are two interesting points in this clause. The first is the fact that the Act is not supposed to interfere with rights acquired, and the act is not supposed to give rise to "new rights". When interpreted together with the first clause, this clause can tell us something about what kind of change in the political and legal status quo, the Act is meant to be. The Act is not a political secession of state-owned lands to the Sami and Norwegian population of Finnmark. I interpret it as a political and legal recognition of three facts: 1) Sami (and local) use of land might constitute land rights through customary immemorial use; 2) while these land rights exist, they might not have been respected in previous management;[34] and 3) while these rights exist, they might not be mapped yet. New rights are not given, but the means to map and respect existing rights are made.

The second clause also states that interference should not be made in the rights acquired by *Sami and other people*. This formulation underscores the fact that the recognition that there might be unmapped land rights and the land rights mechanisms of the law do not discriminate on accounts of ethnicity. Even if the law is based on the need for clarifying the rights status of the Sami in Finnmark,[35] all land rights provisions and land rights mechanisms can be used to the same extent by inhabitants of the county with Norwegian or other ethnicities.

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[33] Kirsti Strøm Bull, "The Selbu Case- Summary," *Norsk Retstidende* (2001): 11.

[34] This insight is reflected for instance in NOU 1993, and in the Norwegian governments proposition Ot.prop.53 to the Finnmark act in 2003, stating that "on these grounds it is by current right hard to conclude that the State´s ownership could sustained" p. 45.

[35] *Innst.O.Nr. 80 (2004-2005)*, 1.

The third clause of §5 establishes the Commission, as well as the Tribunal. The rules of the Commission and the Tribunal are found in chapter 5 of the Act.

3.1.1 "Ethnically indifferent" ethnic rights

According to Egil Olli, was crucial that the land rights procedures are indifferent of ethnicity. A concern that the Sami would get rights at the expense of the Norwegians living in Finnmark was the source of much of the opposition to the law for both the general population of and the opposition within the Labour Party in Finnmark. According to Olli, the Sami Parliament used great resources in the drafting process to meet people living in non-Sami dominated areas, such as the coast of Finnmark. They took feedback and provided information about the Act and its guarantees of non-discrimination. Olli sees non-discrimination between ethnicities in the law as the "lifeline" of the work for the Act, as it was critical for public and political acceptance of the law. Informant 1 from Nesseby, and Silje Karine Muotka tell of the same experience.

Even if Olli claims that the ethnical indifference of the Act is its lifeline, there are certain aspects of the Act that are dealing with the ethnic power balance. The board constitution of the Estate (§7) present a shift in the power balance between the majority and minority ethnic groups. The Sami get the same amount of representatives as the Norwegian population, even if they constitute a minority of the population of Finnmark.

§ 10 states special rules in the treatment of cases concerning changes in land use. In events where a minority of at least two oppose changes in land use due to Sami culture or society, the minority can demand that the Sami Parliament treats the case[36]. Further, in cases of disagreement, when three of the board members are in favour of changes to land use, the opposing three board members can demand that the board treat the case once more and with special rules of voting. If the case is concerning change to use of land in the traditional Sami municipalities of Karasjok, Kautokeino, Nesseby, Porsanger, or Tana, one of the board members representing the county council has to abstain from voting. If the case concerns

[36] The Sami Parliament does however not have any legislative or executive power.

change in the rest of Finnmark, one representative of the Sami Parliament has to abstain from voting.

An individual Sami in Finnmark is allowed to vote for their preferred representatives in both the County Council elections and the elections of the Sami Parliament, whereas non-Sami individuals are excluded from voting in the Sami Parliament elections. One could therefore argue that each Sami in Finnmark has, through the equal Sami representation in the FeFo board, and through their "double vote" in elections, more influence in policy relative to a non-Sami. I am not posing a criticism of this arrangement, but rather pointing out that these provisions show that the Act actually is not indifferent to ethnicity, but rather a compromise in power between the ethnic groups of Finnmark.

Ethnic group rights are also directly addressed in §5 of the act[37], and indirectly by the reference to ILO 169 in §4. When mapping land-rights in Finnmark, the Commission and the courts must address Sami legal custom, and therefore we cannot dismiss talk about ethnicity as superfluous

This has led to some criticism from certain actors in public debate, such as the organisation for Ethnical and Democratic Equality.[38] I will not go into an extensive debate on the legitimacy of minority rights, as this is not within the scope of this thesis. However, minority rights are often justified by referring to the fact that the minority is in a constant situation of being numerically outnumbered by the majority population. This is especially important in the indigenous context, as we could also suppose that there are certain more or less constant conflicts of interest between the indigenous people and the majority population.[39] The minority population is thus in a situation where they are permanently outnumbered in regards to political power and how their fundamental interests are dependent on the interests of the

[37] "*Through prolonged use of land and water areas, the Sami have collectively and individually acquired rights to land in Finnmark"- Lov Om Rettsforhold Og Forvaltning Av Grunn Og Naturressurser I Finnmark Fylke.§5*

[38] Etnisk demokratisk likeverd. http://www.edl.no/

[39] As the indigenous people have a distinct way of living, and want to maintain this. Jose R. Martinez Cobo, "Study of the problem of discrimination against indigenous populations" (E/1982/34).

majority. Minority rights provide a safeguard for the rights of the indigenous people, giving them a sense of stability in how their interests are protected[40].

Article 2.2 of CERD states that "States parties shall… take special and concrete measures to ensure… protection of certain racial groups and individuals belonging to them to guarantee the full and equal enjoyment of human rights and fundamental freedoms,"[41]warranting such minority groups' rights for certain racial groups, as long as unequal or separate rights are not maintained when the aims they are to achieve have been realised. International human rights law thus accept such minority rights as legitimate means.

4 The land rights conflicts and human rights.

In 2011, the former Special Rapporteur on the Situation of Indigenous Peoples, James Anaya, noted that the extent to which the Act would genuinely advance Sami self-determination and resource rights would be determined by how it was implemented in the long run[42].

In 2016, even if the process for identifying rights in the entire County of Finnmark had yet to conclude, the current Special Rapporteur expressed concern. The Commission and the Estate found, almost exclusively, no grounds for recognizing Sami individual or collective ownership rights beyond the usage rights already granted to all inhabitants in Finnmark. And, according to the Rapporteur's understanding, these conclusions were motivated by a view that the Norwegian State, through active and extensive dispositions of land and resources in the investigated fields, is seen to have precluded property or usage rights for the local population.[43]

The Special Rapporteur was of the view that the State's earlier dispositions as the claimant of property rights in Finnmark should not be considered to create law in order to support FeFo ownership of land rather than local ownership, as many Sami communities were severed from their resources and lands as a result of the government's assimilation policies towards the Sami.

[40] Will Kymlicka, *Multicultural Citizenship : A Liberal Theory of Minority Rights*, Oxford Political Theory (Oxford: Clarendon Press, 1995).

Else Grete Broderstad, Nils Oskal, and Jarle Weigård, "Nord-Norske Og Samiske Interesser : Rettsliggjøring Og Folkestyre," in *Hvor Går Nord-Norge, Tidsbilder Fra En Landsdel I Forandring* (, 2011: Orkana Akademisk 2011), 325.

[41] United Nations, "International Convention on the Elimination of All Forms of Racial Discrimination: 21 December 1965," *The Core Human Rights Treaties* (2014).

[42] See A/HRC/18/35/Add.2, para. 44

[43] Report A/HRC/33/42/Add.3, par.24

The debate on whether Sami land rights are sufficiently protected through rights of use to the lands under FeFo ownership and management, or if indigenous land rights protection entails ownership rights (or rights corresponding to those of an owner) seems to be the central conflict in the Act land-rights regime -- in domestic courts and for the question of realisation of human rights. In this chapter, I will address this tension using the critique of the Special Rapporteur and the Nesseby-case as points of departure before I in section 4.2 discuss the dichotomy of rights of use v. rights of ownership in an International HR context.

4.1 The Nesseby-case and the FeFo Response

In its mapping report on Nesseby, presented on 13 February 2014, the Commission concluded that the local population of Nesseby had an independent right, based on custom and immemorial use, to several forms of use in the contested area. The population had used the area in good faith for over a hundred years. These rights, however, did not warrant any rights of ownership, management, or exclusivity beside those governed by §22 and 23 of the Act.[44] The Norwegian government had according to the Commission for the last 150 years acted as both regulator and as a private owner of the land. Moreover, even if this view of ownership and the factual regulating practice might have been both legally faulty in hindsight and inconsequential, it had cemented through government practice as a *festnet forhold* or cemented condition.[45] Therefore, all claims of exclusive rights of use and management should be discarded, because the Estate and its legal predecessors (the Norwegian government, then Statsskog) had acquired rights of management and such management happened through the framework given by the Act.

The Commission and the Estate can show jurisprudence from the SU1, as well as from the Stjernøya-case -- a land-rights case that had been appealed from the Tribunal to the Supreme Court in 2016, in which the Supreme Court stated that the state's previous legal and actual dispositions to the lands in Finnmark are to be included as property law elements when assessing claims of land-ownership on account of immemorial use.[46]

[44] Including the right of inhabitants of a municipality to fish, gather bird eggs and feathers, and gathering of firewood. Finnmarkskommisjonen, "Rapport Felt 2, Nesseby," (2013), p 122.

[45] This view is found by the SU1 of 1993: Kari Husabø et al., *Rett Til Og Forvaltning Av Land Og Vann I Finnmark : Bakgrunnsmateriale for Samerettsutvalget ; Avgitt Til Justis- Og Politidepartementet Desember 1993*, vol. NOU 1993: 34NOU 1993:34, Norges Offentlige Utredninger (Oslo: Statens forvaltningstjeneste, Seksjon statens trykning, 1993).

[46] *Hr-2016-2030-A*, HR-2016-2030-A (2016).

The TA filed a claim on 12 August 2014 to the Land Tribunal, claiming that the local population had exclusive rights to use in the contested area that included rights of use and management, as well as the rights to revenue made by sales of hunting and fishing licenses.[47] As can be seen, the conflict in the case is whether or not the local population has rights of management based on custom and immemorial use, or if the Norwegian state has acted with such an owner's dispositions in the area that the local population's possible rights of management have been extinguished.

The Tribunal's decision, given in January 2017, concluded in favour of the TA. The Tribunal accepted that the state's previous legal and actual prepositions were in fact elements to consider in the case, but they should be considered on Sami legal premises, citing jurisprudence in both the Svartskogen and Stjernøya cases.[48] In the Svartskogen-case, the Supreme Court had granted the local population of Manndalen, a coastal Sami settlement in Troms, ownership over the uncultivated area of Svartskogen due to immemorial use. The Supreme Court had focused on elements of Sami legal custom, as collective use and lack of distinction between ownership and use of land.[49] The Tribunal argued that drawing from Svartskogen, there must be the possibility for the local population of another small town in coastal-Sami areas to have retained an original right to manage resources and their rights of use, even if the land is considered to be owned by the Norwegian State.[50] In the Nesseby-case, ownership rights the TA did not claim ownership rights, and therefore the Tribunal did not address the question. One can only speculate on what the Tribunal would have concluded if ownership rights were to be addressed, but the weight given to the reasoning in Svartskogen might offer some indications.

4.2 Why did the Estate appeal to the Supreme Court? Answers from FeFo

According to Olli, the Estate has no prestige in keeping contested areas under FeFo ownership and administration.[51] The Estate has a legal, not a political approach to land rights cases. This means that if a claim is well grounded and supported by solid documentation, the Estate will accept giving up their ownership. However, if there are reasonable doubts concerning the factual validity of a claim, he thinks that the claim legal system should settle the claim.

The fact that the conclusions of the Commission and the Tribunal differed implies uncertainty towards the facts and the weight of these facts in the decision. The Act was adopted to correct

[47] *Judgement of the Land Rights Tribunal 23.01.2017/the Nesseby Case*, 3 (2017).

[48] *Judgement of the Land Rights Tribunal 23.01.2017/the Nesseby Case*, 61.

[49] *Svartskogen Case*, Rt.2001-1229 (2001). I will return to a discussion of Svartskogen and Sami legal custom in 4.4.3

[50] *Judgement of the Land Rights Tribunal 23.01.2017/the Nesseby Case*, 61.

[51] Jan Olli, interview by Aslak Heika Hætta Bjørn, 2017.

the wrongs of the past, but if the Estate is unsure about the facts of a rights claim, they risk committing yet another wrong.[52] Appealing to the Supreme Court will give the case one more treatment and, considering of the facts.

4.2.1 Consequences in land management and future jurisprudence

Olli also underscore that the conclusion of the Tribunal might lead to major consequences in land management in Finnmark. A scheme where the local population has the right to manage the resources on land owned by the state is new to Finnmark. If the conclusion enters into force, it might shape jurisprudence to favour a somewhat alien land rights regime, and this is an argument for trying the conclusion in the Supreme Court.[53]

FeFo is concerned that recognising the rights of a certain local group or community in an area will negatively affect others who have rights in the same area but who, for certain reasons, did not make a claim towards the Commission.[54] There is, for example, no guarantee that local management will secure the rights of neighbouring towns and the general public to use the area -- rights that would be ensured if FeFo were to administer the area.

In the Nesseby-decision, the Tribunal states that they cannot exclude the possibility that other residents in the area or in surrounding areas might have rights that were not claimed in the mapping process. The Tribunal brought the issue up in the court proceedings of the case, but neither the plaintiffs nor the defendants saw this as a relevant issue.[55] If there are un-mapped rights in the area, these will have to be claimed through the Norwegian legal system.

I would argue that it would be contradictory to the whole rights mapping system of the Act if we give such considerations too much weight. The system might get stuck in a circular and unfortunate status quo where Sami villages and TAs cannot get acknowledgement of their customary rights, because these rights might conflict with potential existing but still un-claimed rights of others. The Commissions mapping procedure is based on actual claims made by actual people; these are the rights that are being considered. While there is a burden for other potential rights holders that they have to bring their claims through the legal system, it is the way the system is designed to work. If we to accept that there is a Commission dealing with rights claims actively brought by rights claimants, we must also accept that the rights of the claimants are acknowledged.

[52] "Derfor Anker Vi Dommen," news release, 2017.
[53] "Derfor Anker Vi Dommen."
[54] "Derfor Anker Vi Dommen."
[55] *Judgement of the Land Rights Tribunal 23.01.2017/the Nesseby Case*, 71.

According to Olli, there are two important aims of the Act: to right previous wrongs, but also to create a sense of settlement and closure on rights to land and water in Finnmark. It is important that FeFo fulfil the second aim and create an atmosphere of calm in Finnmark. Any dimension of doubt and uncertainty in land-rights settlement would counteract such an aim. It is therefore important that the highest legal institution in Norway deal with uncertain cases.

4.2.2 FeFo response to the critique of the special rapporteur

As mentioned in the introduction to chapter 4, the Special Rapporteur on rights of indigenous peoples has criticised FeFo and the Commission for basing their conclusions in land-rights mapping on the state's earlier active dispositions in Finnmark. Rather, "(the) starting point for any measures to identify and recognize indigenous peoples' land and resource rights should be their own customary use and tenure systems."[56]

In response to this critique, Olli points to the findings of the SU1 and the jurisprudence of the Stjernøya Case[57]. The Estate is to act in accordance to national law, which includes conclusions of the Commission, the Tribunal, and the Supreme Court. If FeFo did not consider the state's past active dispositions in Finnmark as relevant momentum, as the Supreme Court has ruled that they are, the Estate would be acting politically by ignoring relevant dimensions of Norwegian law and that would be out of the Estate's mandate[58].

Olli stresses that the Act is a recognition of the Sami people's ownership in Finnmark, but also a compromise between Sami interests and the interests of the Norwegian population of Finnmark.[59] The Act changed the legal conditions in favour of the Sami people, for example by recognising Sami traditional use as a basis for rights in §5 and the representation of the Sami Parliament in the FeFo board. The Special Rapporteur fail to see that the Estate in itself is a tool for realising Sami self-determination, due to the increase of Sami power in relation between the Sami Parliament and the "Norwegian" County Council on the board[60].

[56] Victoria Tauli Corpuz, "Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Human Rights Situation of the Sami People in the Sápmi Region of Norway, Sweden and Finland," (United Nations Human Rights Council, 2016).

[57] See section 4.1

[58] Jan Olli, "Fn, Fefo Og Finnmarksloven," news release, 2016.

[59] "Interview with Jan Olli, Head of the Finnmark Estate."

[60] "Fn, Fefo Og Finnmarksloven."

The Act has thus severely increased the political and legal situation of the Sami people in Finnmark. But there is a difference between the status of the Sami people at large and of one individual Sami or a Sami Town Association. There will always be differing views on which policies are "the best" for Sami society, within both Sami society and the county at large. The fact that the Estate does not always agree with individual Sami groups does not mean that the Estate is acting in contradiction to Sami interests, Olli argues in a press release in 2016.[61]

4.2.3 Criticism of the FeFo account

To Olli's claim that local management of the kind that would result of the Nesseby-case is unknown to Finnmark, we should note that even if he is right in this account, such management is known in Norwegian law and policy. The High Lands Act of 1975 regulates the management of the "state commons" in Norway south of Nordland County[62]. These commons and resources beside logging and hydropower are today primarily managed locally, through "fjellstyrer", or mountain councils of five, elected by the municipality council on four year cycles[63]. Such a solution were discussed in by the Sami Rights Committee in the preliminary to the Act, and I will return to how this solution might have played out in section 4.4.2

Another point that should be addressed is how the Estate by §1 of the Act operationalises the *Sami dimension* of §1. According to Olli, the establishment of the Estate in itself is the operationalisation of this provision[64]. Sami representation in the board, and knowledge of Sami interests and traditions in the Estate organisation ensures that Sami interests are better off than before the adoption of the act.

However, the Estate board by the end of 2017, the board has not concretised what a management as a basis for Sami culture, reindeer herding, and use of non-cultivated areas… actually is[65]. Instead, the board has interpreted §1 to mean that they should operate in a manner to the best for the population of the county, focusing on first two purposes of §1. The board operationalise the *regionalist dimension* of the act, while what the *Sami dimension* of the act demand of the FeFo, is not elaborated or operationalised of the Estate.

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[61] "Fn, Fefo Og Finnmarksloven."

[62] *Judgement of the Land Rights Tribunal 23.01.2017/the Nesseby Case*.

[63] *Lov Om Utnytting Av Rettar Og Lunnende M.M. I Statsallmenningane (Fjellova)*., ~~§ 3~~Chapter 3

[64] See 4.2.2

[65] Else Grete Broderstad, Eva Josefsen, and Siri Ulfsdatter Søreng, "Finnmarkslandskap I Endring- Omgivelsenes Tillit Til Fefo Som Forvalter, Eier Og Næringsaktør," ed. Norut (Alta: Norut, 2015), 117.

This interpretation relates to negative public opinion on the Estate in Finnmark. Many respondents to the survey conducted by Broderstad et al in 2011[66] perceived FeFo as a body protecting the rights of the Sami minority at the expense of the rights of the majority population. To avoid such a perception, FeFo insists that all of their management is to the best of the population of the county at large, both Sami and Norwegian[67].

There are however cases where there is a clear conflict between the interests of the Norwegian and the Sami society. One recent example is the Nussir-controversy, where the FeFo board treated a change in use of land in relation to the establishment of a copper mine in the Kvalsund Municipality. The copper mine is located in areas used for reindeer herding. The reindeer herders, Sami civil society and the Sami Parliament have expressed strong opposition. The FeFo board did however approve of the change in land use, arguing that the mine would contribute to the population of Finnmark at large, by supplying the county with tax revenue and jobs[68]. The board was split, but due to the voting rules of §10 of the Act, one of the Sami Parliaments board members had to abstain from voting, giving the County Council board members a majority.

Did the board act in accordance with §1 of the act in this a case, when the interests of the Sami society represented through the Sami Parliament were overruled? The Sami community saw the planned mine as a threat to Sami culture and reindeer herding, but when §1 is interpreted in a way where the *Sami dimension* of is not concretised and operationalised, any conclusion seems arbitrary with the current FeFo interpretation of the provision. This leads to a situation where the Estate might fail to secure Sami interests, which should lead us to the conclusion that the Estates interpretation of §1 is flawed.

4.3 Human rights discussion

In this section I will address the conflict between rights of use through FeFo and rights of ownership by discussing article 27 of the ICCPR and jurisprudence of the Human Rights Committee. The discussions in 4.3 and 4.4 will lead to my conclusion on Research question (b) in section 6.2.

[66] I will return to this survey in 5.1

[67] Broderstad, Josefsen, and Søreng, "Finnmarkslandskap I Endring- Omgivelsenes Tillit Til Fefo Som Forvalter, Eier Og Næringsaktør," 117.

[68] Eilif Andreas Aslaksen, Schanche, Tor Emil, Porsanger, Nils John, "Sier Ja Til Omstridt Gruvedrift," *NRK Sápmi* 2017.

4.3.1 Article 27 of the ICCPR

As mentioned in section 2.3.2 the ICCPR is incorporated in Norwegian law through the Human rights act, and is thus given a special standing in Norwegian law beyond the *presumption principle*[69]

Article 27 states that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[70]

I will discuss three points in article 27. First, the article states that minorities shall not be denied the right to enjoy their culture, in community with others. This means that even if article 27 is a right to be claimed by individuals, it also a collective right for the minorities, giving rise to group rights. Furthermore, the wording, "should not be denied" could be interpreted as just providing a negative protection of cultural rights, committing the states to practice tolerance, and refrain from interference[71]. However, the HRC have in General Comment 23 on art. 27 stated that even if the article is expressed in negative terms, article 27 might give obligations to positive measures by the state party to protect minority's culture. The article acknowledges that culture is a "right" and not to be denied, and in situations where minority's culture might be under pressure, a lack of positive measures might deny minorities their right to culture by leaving the culture to expire[72]. This is further backed by the individual/collective dimension of art. 27. The individuals' right to enjoy their culture in community with other members of their group are depending on the protection of the community and their culture[73].

General Comment 23 also states that the term "culture" is to be interpreted broadly, as "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples"[74]. Therefore, article 27 might give rise to positive legal measures for protection of such cultural manifestations, possibly including land rights. The HRC have through jurisprudence in for example the *Illmari Länsman* and *Lubicon*

[69] *Lov Om Styrking Av Menneskerettighetenes Stilling I Norsk Rett (Menneskerettsloven)* § 3

[70] "International Covenant on Civil and Political Rights: December 16, 1966," *Folkerettslig tekstsamling / Magnus Buflod, Knut Anders Sannes og Kristoffer Aasebø (red.)* (2016).

[71] Manfred Nowak argues that the negative protection of art. 27, particular prohibit all forms of assimilationist pressure. Manfred Nowak, *U.N. Covenant on Civil and Political Rights : Ccpr Commentary*, 2nd rev. ed. ed., Ccpr Commentary (Kehl: N.P. Engel, 2005), 662.

[72] UN Human Rights Committee,, *Ccpr General Comment No. 23: Article 27 (Rights of Minorities)*, 1994. par 6.1

[73] *U.N. Covenant on Civil and Political Rights : Ccpr Commentary*, 657.

[74] *Ccpr General Comment No. 23: Article 27 (Rights of Minorities)*. Par 7

Lake Band stated that such a positive measure might be to protect material cultural manifestations, as hunting and reindeer herding, from private third parties, as corporations[75].

If we look to §1 of the Finnmark act, "the purpose of the Act is to facilitate the management of land and natural resources in the county of Finnmark… for the benefit of the residents of the county and particularly as a basis for Sami culture, reindeer husbandry, use of non-cultivated areas, commercial activity and social life"[76].

§1 clearly gives rise to land rights, both through the broad definition of culture, and through the explicit mention of use of un-cultivated areas. Whether land rights include ownership or management rights of lands, or if simply rights of use are sufficient, is neither defined by §1 of the Act or art 27 of the ICCPR.

I interpret general comment 23 to such an understanding that land rights are not an aim in itself, but means to protect cultural manifestations as fishing, hunting, or for instance reindeer herding. This is further elaborated in the *Illmari Länsman v. Finland* case, where Sami reindeer herders accused the state for violations of art 27 when allowing for a mining project in areas used by them for reindeer herding. The HRC does not problematize the fact that management of the area is done by the Finnish state, but whether if the Finish management actually secure the reindeer herders' right to enjoy their traditional livelihood. Protection of the traditional activities carried out on the land, are thus more important than rights to the land in itself. If rights of use secures indigenous peoples right to do their traditional activities in their traditional lands, then rights of use might be sufficient to fulfil article 27.

Chapter 3 in the Finnmark Act, on use of renewable resources on the ground of the Estate, as well as the listing of Sami traditional activities in §1, give an obligation to the Estate to safeguard traditional Sami use of the land and resources in Finnmark[77]. The right of the Sami to use land, is further protected by the power balance and the voting rules in the FeFo board according to §7 and §10[78]. However, in cases were these voting rules are relevant[79], we should suppose that there are already existing rights of some nature, because if there were no customary

[75] *U.N. Covenant on Civil and Political Rights : Ccpr Commentary*, 663.

[76] *Finnmarksloven*. Translation by the Lovdata foundation, downloaded from the University Library of the University of Oslo, http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-085-eng.pdf.

[77] Such rights of use are also protected by the reindeer-herding act. "Lov Om Reindrift (Reindriftsloven)," *Norsk lovtidend. Avd. I* 2007, nr. 6 (2007).

[78] See section 3.1.1.

[79] Where there is disagreement between representatives of the Sami Parliament and the County Council on change in land use.

Field Code Changed

use of land in the area that could constitute rights, there would not have been a conflict between the Sami and the Norwegian board members. However, large parts of the un-cultivated areas of Finnmark are still not mapped, so potential rights of ownership and use in these areas are not yet acknowledged. This is the situation in the Nussir-controversy. Securing Sami rights to use, therefore also entails a mapping of rights and Sami presence in the FeFo-board is not sufficient[80]. In my section on ILO 169, I will further discuss land rights mapping and human rights law.

4.4 The ILO C.169 and realisation of indigenous land rights /ownership v. rights of use.

The ILO 169 has been an essential part of Norwegian Sami policy since Norway signed the Convention in 1989. In this section I will discuss the act in relation to the Convention, especially articles 8, 14 and 34.

Article 14 of the ILO 169 is on land rights. The Article states that

*14.1 The rights **of ownership and possession** of the peoples concerned over the lands which **they traditionally occupy shall be recognised**. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to **use lands not exclusively occupied by them,** but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.*

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

4.4.1 The right to ownership and possession.

If we look to article 14.1 of the ILO C 169, the provision states two kinds of land rights.

[80] Kirsti Strøm Bull, "Finnmarksloven- Finnmarkseiendommen Og Kartlegging Av Rettigheter I Finnmark," in *Finnmarksloven,* ed. Nils Oskal and Hans-Kristian Hernes (Oslo: Cappelen Akademisk, 2008), 162.

The first sentence, states that the State should recognise the indigenous people's ownership and possession rights to the lands they traditionally occupy. The second sentence state that the indigenous people should have rights of use in areas not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. We are thus talking of the ownership rights, and rights of use.

In the last section on ICCPR art 27, I discussed whether rights of use, could protect the material basis for indigenous people's culture sufficiently. In defining ownership or possession rights, the ILO´s expert panel have stated that even if ownership in the sense of a title is in accordance with the convention, this is not an absolute requirement. If we look to the discussion given on ownership rights by the Sami Rights Committee in NOU 1997, the committee states that the essence for fulfilment of the ownership and possession rights, are that the indigenous people are given the opportunity to exercise the powers that we normally associate with the term "owner"[81]. This would include rights to use the resources of the land, but also the right to manage these resources in a way an owner could, for example the opportunity to prevent others of using the resources you own or manage in a way corresponding to an owner[82].

The ILO Committee of Experts have defined the lands indigenous people traditionally occupy as "(the) lands where indigenous and tribal peoples have lived over time, and which they want to pass on to future generations[83]. As we can see, there are no criteria of exclusivity in the expert committee's definition, it sufficient that the indigenous people have lived there over time. The wish to pass the areas on to future generations, also entails a sense of permanence in the area, as well as cultural belonging to the areas in question; I interpret this as areas the indigenous people are tied to through their use of resources, their traditional livelihoods, history and religion or spirituality. Skogvang argues that a criterion of domination could also be applied; even if the indigenous people might not exclusively have used the area, their use have been dominating in relation to other groups use[84]. In the debate on the Finnmark Act, two separate procedures for fulfilling such ownership rights have been discussed. I will address them in the next sections.

[81] Tor Falch and Samerettsutvalget, Naturgrunnlaget for Samisk Kultur : Utredning Fra Et Utvalg Oppnevnt Ved Kronprinsregentens Resolusjon 10. Oktober 1980 : Avgitt Til Justis- Og Politidepartementet Januar 1997, (Oslo: Statens forvaltningstjeneste, Statens trykning, 1997). 36.

[82] Skogvang, *Samerett*, 141. Ownership rights do not presuppose that the owner uses the resources alone, but they should include the opportunity to exclude others, if the owner sees it fit.

[83] International Labour Organization, *Indigenous & Tribal Peoples' Rights in Practice- a Guide to Ilo Convention No. 169*, ed. International Labour Organization (2009), 97.

[84] Skogvang, *Samerett*, 137.

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4.4.2 Fulfilling ownership rights through Sami and local management

In the consultations up to the adoption of the Finnmark Act, the Sami Parliament stressed that a land rights regime of the act, would have to map which areas of Finnmark that could be categorised as areas where the Sami would have ownership or possession rights according to art. 14.1, and which areas rights of use would be sufficient[85]. One could imagine a solution where areas with a Sami majority would be under a different kind of administration, where for example the Sami Parliament had the opportunity to act with powers corresponding to those of an owner. In 1997, a minority of 5 of the 16 members of the Sami Rights Committee suggested such a *Samisk grunnforvaltning*[86], a legally separate body to work parallel to *Finnmark grunnforvaltning* (which were realised through the final act as the Estate). The Sami land management were to be a voluntary owner and management regime for municipalities with a Sami majority. In municipalities who chose to join, the Sami land management, not FeFo, would own and manage the un-cultivated areas. The Sami Land Management board would consist of three representatives from the Sami Parliament, and two from the County Council, making the Sami representatives the majority in managing the lands owned by this body[87].

The majority of the SU did however vote in favour of a unitary land management body for Finnmark. Members argued that a unitary land management body with equal representation of the Sami Parliament and the Finnmark County Council, paired with municipality and town/siida[88] based management of the non-cultivated areas, would realise opportunities corresponding to possession for the Sami[89]. The SU suggested both municipality based management of resources through the democratically elected municipality council, and local management through TAs. The suggestions were not included in the first proposition to the act from the government. The government then argued that a unitary management would better secure an ecological "sustainable management of the resources"[90]. The arrangement did also not end up in the final proposition to the act in 2005.

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[85] *Innst.O.Nr. 80 (2004-2005)*, 18.

[86] Translates to «Sami land management»

[87] Falch and Samerettsutvalget, *Naturgrunnlaget for Samisk Kultur : Utredning Fra Et Utvalg Oppnevnt Ved Kronprinsregentens Resolusjon 10. Oktober 1980 : Avgitt Til Justis- Og Politidepartementet Januar 1997*. 238-40.

[88]

[89] Falch and Samerettsutvalget, *Naturgrunnlaget for Samisk Kultur : Utredning Fra Et Utvalg Oppnevnt Ved Kronprinsregentens Resolusjon 10. Oktober 1980 : Avgitt Til Justis- Og Politidepartementet Januar 1997*. 236-37.

[90] *Om Lov Om Rettsforhold Og Forvaltning Av Grunn Og Naturressurser I Finnmark Fylke (Finnmarksloven)*, nr. 53 (2002-2003), 99.

Some inhabitants of Finnmark see this as an example of a paternalistic attitude from the state, that continues today. See section 4.4

When arrangements as local siida or outback councils were not included in the law, both Sami politicians and legal scholars have expected that management and ownership rights would be realised through the Commission's work, in line with the Supreme Court's conclusion in the Svartskogen Case[91]. Legal scholar Øyvind Ravna has claimed that FeFo are standing in the way of local management and settlement of land rights in Finnmark, when not accepting the conclusion of the Tribunal[92]. Silje Muotka of NSR has supported the claim of the TA, urging the Estate to try local management and criticised FeFo for not trusting the TAs ability to manage their local resources.

4.4.3 Fulfilling ownership rights through jurisprudence and Sami legal custom

The second Sami right committee concludes in their NOU of 2007 that the areas that Sami in Norway should have ownership right to under ILO 169, are the areas where Sami use have been conducted in a way that they fulfil the conditions for land rights under immemorial use in accordance with national law and Sami legal custom[93]. Such a conclusion rests on Norwegian jurisprudence through the Svartskogen case, and article 34 of the ILO C 169, stating that the nature and scope of the measures taken to operationalise the convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country. Basing the classification of occupied lands on Norwegian indigenous rights jurisprudence makes it possible to operationalise the provision in a way well known to Norwegian courts. The classification also fulfils article 8.1 of the ILO convention, which states that in applying national law and regulations to indigenous peoples, due regard should be given to their legal custom or customary laws. Due to such an understanding the land rights regime of the Act fulfils article 14.1 of the Convention, as the Commission and the Tribunal are supposed to make their judgements with due regard to Sami legal custom. The Tribunal seems to support such a view in their jurisprudence from the Stjernøya case, and the Nesseby Case[94]. Thus, utilisation and understanding of Sami legal custom, Sami use of nature and Sami legal method becomes a condition for fulfilling the ILO 169.

[91] "As if Manndalen is more of a Sami community than Nesseby?", Øyvind Ravna asked rhetorically in interview, referring to FeFos opposition to the TAs claim for management rights in Nesseby.

[92] Interview with Ravna

[93] Jon Gauslaa and politidepartementet Norge Justis- og, *Den Nye Sameretten : Utredning Fra Samerettsutvalget : Utredning Fra Et Utvalg Oppnevnt Ved Kongelig Resolusjon 1. Juni 2001 : Avgitt Til Justis- Og Politidepartementet 3. Desember 2007 : B. A : Del I - Innledning, Del Ii - Gjeldende Rett, Del Iii - Utvalgets Vurderinger Og Forslag, Kapittel 12-15*, vol. B. A (Oslo: Departementenes servicesenter, Informasjonsforvaltning, 2007), 233.

[94] *Judgement of the Land Rights Tribunal 23.01.2017/the Nesseby Case*, 32 (2017).

Sami legal custom have been used as sources of law in the Supreme Court about land rights in the Selbu case and the Svartskogen case. Both cases had to decide to whether Sami traditional use could give rise to land rights by immemorial use (in Norwegian *alder tids bruk*). Immemorial use is in Norwegian law based on three conditions, there must have been a certain use, the use have been over time and the use must have been conducted in good faith[95].

According to these two cases, these conditions must be interpreted in light of Sami legal custom, and not simply Norwegian court jurisprudence. For example, when assessing the criteria of certain use, one must keep in mind that traditional Sami use of land typically is less intensive and leaves fewer traces in nature than Norwegian agriculture based use. Reindeer herding is for example less intensive than cattle, as larger areas are used. Harvesting of pinewoods and other resources for household use also leaves fewer marks than cultivating of land for agriculture.

The good faith criterion must also take into account Sami legal customs, as the traditional collective ownership of resources, a lighter relationship to formal owner pretentions, and a focus on oral agreements rather than written contracts. Collective use of resources through the Sami siida system[96] means that Sami legal custom also has different legal subjects than traditional European law, and the collective ownership/use also degrade the importance of individual formal ownership. Lack of insights into Sami legal custom could lead to situations where Sami are granted rights of use to areas Norwegians would have been granted ownership rights on the same conditions, setting Sami rights claimers in a worse situation than claimants of the majority population[97].

Practical and historical relations, as language barriers, might have led to misunderstandings between Sami users of land and Norwegian state agents. One could also show to examples where use of land has continued despite state orders out of mistrust toward state authorities as well as disregard of state management when not in line with local custom. Such historical relations complies courts to lighten the criterion of good faith, especially if the State did not initiate a certain degree response against the use[98].

The Norwegian Supreme Court have from the early 2000s referred to Sami legal custom in several land rights cases, lightening conditions for immemorial use as good faith and intensity. Such respect for Sami legal custom should also be important in the mapping process of Sami traditional areas in Finnmark, as in Inner-Finnmark and Nesseby.

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[95] *Selbu Case*, Rt. 2001-769, 788-89 (2001). *Svartskogen Case*, Rt.2001-1229, 1241 (2001).

[96] Skogvang, *Samerett*, 90.

[97] *Svartskogen Case*, 1252.

[98] Kirsti Strøm Bull, *The Svartskogen Case : Norsk Retstidende 2001 Page 1229* (Oslo: S.n., 2004), 3-4.

4.4.4 ILO jurisprudence

In NOU 2007:13 the Sami Rights Committee refers to two cases from the ILO complaint bodies; the Huichol Case from Mexico, and the "Thule Tribe" Case from Greenland. In the Huichol case, the Huichol tribe brought a land claim to the Agrarian Tribunal of the State of Nayarit in Mexico in 1993. After the Agrarian Tribunal dismissed the claim, the National Trade Union of Education Workers (SNTE) brought the case before the ILO committee[99]. In the Danish case, the indigenous Uummannaq settlement were forced to move due to expansion of an American air force base on Greenland. The tribe went to court in Danish Østre-Landsret, a regional court in 1996, claiming compensation and land rights. The regional court accepted the claim of compensation, but rejected the claim on land rights. The tribe appealed to the Supreme Court, and made a communication ILO committee.

In both cases, the ILO found no violations of article 14. The ILO Committee found that article 14.2 and 14.3 were sufficiently fulfilled, as there existed procedures for resolving land claims, and through those procedures the governments took necessary steps to identify and protect the indigenous land rights. The procedures in these cases were the existence and access to a regional court and an agrarian court[100]. The Committee does not set demands for the competence of these courts on indigenous issues, but emphasise that they are available for the indigenous people, and that they are able to solve land rights grievances. The Committee stated in the Huichol case, that it was not the purpose of the Committee to decide on the individual case, but rather if bodies enabling such procedures for indigenous people existed. Whether article 14.1 is fulfilled in the individual case, is not assessed by the committee.

[99] Øyvind Ravna, *Finnmarksloven - Og Retten Til Jorden I Finnmark* (Oslo: Gyldendal juridisk, 2013), 439-41.
[100] Ibid. 441

4.5 Is the land rights regime of the Finnmark Act in accordance Human Rights?

Is the operationalisation of the land-rights regime of the Finnmark Act in accordance with human rights? Due the wide margin of appreciation given by article 34 of the ILO Convention, and the jurisprudence of the ILO Committee, I would argue that the Finnmark Act, and the operationalisation of the act, is in accordance with article 14 of the ILO 169. The Commission and the Tribunal are accessible tools for indigenous people to clarify land rights claim. If the regional court of the Danish case and the Agrarian Court of the Mexican case are sufficient land rights mechanisms, then the Commission and the Tribunal fulfil article 14, as the committee have concluded that land rights regimes less extensive than the Finnmark Act regime, are in accordance with the Convention.

However, regardless of the structurally based ILO jurisprudence we should discuss whether the Finnmark Act regime fulfils the object and purpose of international human rights provision on land rights. Does the Estate regime secure that the Sami people's rights of *ownership*, *possession* and *use of land* in Finnmark is recognised? I argue that it depends on how the bodies of the regime operationalise the act. I would conclude that it might, but at the present stage, it offers no guarantee

In 4.3.1 I discussed whether Sami land rights could be realised by granting TAs and practitioners of Sami traditional livelihood rights of use, but not rights of management or possession. I would argue that it would not, as long as the Sami dimension of §1 of the Act is not concretised and operationalised into clear management strategies to secure Sami culture by the Estate. This is clearly illustrated by the Nussir-controversy. Without strategies on how to actually protect Sami interests dependent on the use of un-cultivated land in Finnmark, there is no guarantee against "trade-offs" where economic development weights heavier than Sami interests, especially not in the areas where the Sami members of the board might be outvoted due to the voting procedures of the act[101]

Concerning the process of mapping land rights, I would also argue that the Estates flawed interpretation of § 1 leads to negative consequences.

[101] See section 3.1.1

In the Nesseby-case, the Tribunal argues that article 8 of and 14.1 of the ILO Convention 169 compels the court to give significant attention to Sami legal custom[102], and this makes the Tribunal side with the TA. On the other side, the Estate has appealed the case to the Supreme Court, due to political concerns of calm and unitary management[103], and uncertainty concerning the nature and weight of the States dispositions in the area, and the nature and weight of Sami legal custom in the decision[104]. Now, that the Estate utilises the opportunity of appeal, given to them by the Act, is of course legally acceptable. But the differing view on Sami legal custom between the Tribunal and the Estate in the case (and in other cases) seem to point to a trend where the Estate sets the for accepting land rights claims and Sami legal custom higher than the Supreme Court did in the Svartskogen Case. Nesseby and many other areas in Finnmark are characterised by at least the same level of Sami occupation, use and activity as Manndalen, the town concerned in the Svartskogen case[105]. If the Estate sets the bar higher than Supreme Court jurisprudence, in order to achieve political goals as a sense of settlement and calm in Finnmark and to ensure public support for the Estate, I would argue that the system is not working in to promote the object and purpose of article 8 or 14 of the ILO 169. If the Estate fall into such a modus operandi, it is easier to realise these rights in the Norwegian legal system, making the land rights regime of FeFo flawed or even expendable.

5 Stakeholders and conflict lines, results of interviews.

In this section I will present the responses from my interviews in Nesseby. First, I will present certain aspects on public opinion concerning the Finnmark Estate and the Finnmark Act in Finnmark, presenting the findings of Broderstad et al in the Finnmarkslandskap i Endring report of 2015. I will then present the responses from my interviews in Nesseby, before I try to contextualise these responses with the findings of Broderstad, as well as drawing up were the conflict lines exist in my material.

[102] *Judgement of the Land Rights Tribunal 23.01.2017/the Nesseby Case*, 51-52.

[103] See section 4.2.1

[104]Kristin Bjella; Christopher B. Eriksen, 2017.

[105] Referanse som backer samisk bosetning i Nesseby, enten fra Nessebysaken, eller for eksempel fra Steinar Pedersen.

5.1 Public opinion and narratives

In the 2015 report "Finnmarkslanskap i endring[106]" published by Northern Norwegian research institute Norut, Else Grete Broderstad, Eva Josefsen and Siri Ulfsdatter Søreng map the trust of the Finnmark Estate through a questionnaire answered by 953 respondents in Finnmark county in 2011[107]. The report shows that of all the respondents, just 13% had a large amount of trust in the Finnmark Estate. In comparison, 48 % of the respondents had a large amount of trust in the Norwegian Parliament, indicating that the Estates general institutional trust, the trust linked to the symbolic perception people associate with the institution low compared to other institutions in the Norwegian political system were alarmingly low. In fact, almost half of the respondents are also in favour of terminating the FeFo system.

However, the specific trust, people's perception and experience of the actual management policy and strategies of FeFo[108], were at a much higher level. Respondents agreed with propositions regarding FeFo's actual management strategies, as the proposition "should FeFo give the population of Finnmark priority in events of resource scarcity?" [109]. Furthermore, the survey showed that the more contact with- or first-hand knowledge the respondents have of FeFo, the more positive their attitudes are to both the institution and the strategies. The fact that people had a high amount of specific trust in FeFo management strategies, but such a low institutional trust in the Finnmark Act and the Finnmark Estate as an institution, led to the conclusion that popular opinion on the Finnmark Estate had to be shaped by something other than the actual management done by the Estate. The report points to processes leading to the adoption of the Finnmark act in 2005, and especially the debate on Sami land-rights, as an explanation of what had formed the popular perception of the Estate[110], and that narratives concerning those processes still shaped the perception of the Estate in 2011.

5.2 Interviews conducted with residents of Nesseby

In February 2017 I interviewed three people inhabiting the town of Nesseby, all involved in the Nesseby case to some extent. Two of my informants held positions in TA and were supportive of the TAs claim in the land tribunal. The third source were not a part of the TA, but had served as a witness in the case. The third source opposed the TAs claim

[106] The title could be translated to "Changing landscapes in Finnmark"

[107] Broderstad, Josefsen, and Søreng, "Finnmarkslandskap I Endring- Omgivelsenes Tillit Til Fefo Som Forvalter, Eier Og Næringsaktør.", p 66.

[108] "Finnmarkslandskap I Endring- Omgivelsenes Tillit Til Fefo Som Forvalter, Eier Og Næringsaktør.", p 12

[109] "Finnmarkslandskap I Endring- Omgivelsenes Tillit Til Fefo Som Forvalter, Eier Og Næringsaktør.", p 73

[110] "Finnmarkslandskap I Endring- Omgivelsenes Tillit Til Fefo Som Forvalter, Eier Og Næringsaktør," 80.

Both informants from the TA told that the association was established to be a body of communication between the local population and the authorities. This included for instance at public hearings, and in writing applications. The TA also does community work in non-cultivated areas like clearing tracks for trekking, building lean-shelters, and clearing places for lighting fires, making the outdoors comfortable to use for both tourists and members of the community. By the spring of 2017 the TA consist of forty to fifty members, in a town of around 140 households.

Both of the informants tell that the TA was established with the land-rights mapping process in mind, to be an organ for the local community to claim rights they were of the belief that they had to the renewable resources around Nesseby

5.2.1 On FeFo administration

There have been dissatisfactions locally on the way FeFo is managing the un-cultivated land. Informant 2 express that FeFo is, not taking their traditional local knowledge of wildlife, flora and other renewable resources in the area, seriously. One reoccurring example from both informant 1 and 2 is the administration of grouse hunting.

Even if the limitations on the number of hunters allowed, and the quota on how many birds they can hunt is based on factually sound bird population estimates, the lack of knowledge on local geography and where people actually hunt harms the bird-population according to the locals. FeFo set their quotas on hunters and extraction based on the number of birds, and the size of an area. However, rocky terrain might dominate an area, making much of it inconvenient for hunting, which leads to a higher amount of hunters on a smaller area. Many hunters are comes from other parts of the county, or even county, and displace local hunters. They kill an un-sustainable amount of the bird stock, and FeFo allows this due to the lack of local knowledge. The local knowledge, as well as the possibility to do all-year assessments of the grouse population would benefit resource management. If the town association were to manage these areas, they could solve this problem by making the first week of the hunting season exclusive for local huntsmen[111].

Informant 2 can also tell of other practicalities of FeFo-management that spurs dissatisfaction. For instance, due to caterpillar attacks on birch trees in Finnmark, the quality of harvested firewood in the area has deteriorated. At the same time, the locals now have to pay higher fees for harvesting the firewood now than they had to do when the area were managed by Statsskog.

[111] When confronted with this grievance in interview, Jan Olli of FeFo states that while it is unfortunate that informant 2 feels this way about the estates regulation of small game hunting, there has not been registered any formal complaints from Nesseby.

Informant 2 is also of the belief that the local population sees too little of the revenue FeFo makes selling fishing- and hunting licences.

5.2.2 On the Nesseby case and Land rights

When the Finnmark Commission issued its land-rights report on Nesseby in 2013, they found no exclusive rights of use or ownership. The town association view the conclusion that they have no other rights than other people living in Finnmark as a false claim, and cannot accept that this would be the conclusion for the history books.

Informant 1 does not understand how the local population can have their rights to the area safeguarded, if another body, namely FeFo, governs these rights. According to the informant, FeFo management of the lands will lead to an imbalance in power in the cooperation between the town association and FeFo, as FeFo is both the landowner and the manager of the contested area. Informant 1 thinks that the TA always will have the burden of proof when presenting local suggestions or comments on how to manage the area and its resources in this situation.

Informant 1 does not think that granting management rights to local TAs of outback resources would solve all management issues and rights conflicts. There will without doubt still be conflicts regarding use and rights, for between different TAs. Nevertheless, to quote the informant: "we can live through some arguing". The main point is that the land rights is an important settlement of who should rightly manage the areas and resources of Finnmark, and settling this is more important than political aims as keeping a low level of conflict. To the informant there is both a legal side of the TAs claim; that the people of Nesseby historically have the right to manage their land and resources; and a political side: that resources and areas should be managed as locally as possible.

Informant 2 hopes that if the claim of the TA is acknowledged, the management of the areas and resources will be done in a tighter co-operation between the TA, FeFo and the municipality. He envisions that a cooperation after the model given in the High Lands Act which govern government commons in southern Norway, where local democratically elected high lands councils are set to manage the commons[112]. Such an arrangement would secure effective local representation and control when managing the areas.

Informant 3 does not support the TAs claim. One of his arguments against local management by the TA is of a practical nature. He questions the practical utility the right to manage and control the resources and lands would have for the local community. In terms of revenue, he

[112] See section 4.2.3

thinks that revenue from management would be too low to be of any real importance for the community.

Informant 3 is also of the view that the Act through its chapter 3 already secures the rights to use resources in the un-cultivated areas to a satisfactory degree for both the members of the TA and everyone else in Finnmark. He is concerned that local management rights will not give significant gains to anyone, but could make management of land in Finnmark much more complex. He fears that the TAs claim could set a precedent and lead to a situation where Finnmark instead of being commons, consists of a "patchwork" of local TAs "management zones", making more conflict and bureaucracy, but not giving the local communities much material gains.

5.2.3 The expectations to the Finnmark Act and the introduction of FeFo.

When asking the informants on whether the Finnmark Act had lived up to their expectations, the central discussion centred around to what degree they felt the FeFo regime established by the Act differed from the management regime by Statsskog prior to 2007; whether the Estate represented their interests, if it sufficiently safeguarded Sami interests and self-determination, and the democratic legitimacy of the Estate.

Informant one expressed dissatisfaction with the transition from Statsskog to FeFo. According to the informant FeFo today share too many of the organisational structures, as well as the approach to administration and management of land as Statsskog did. Supposedly, an employee of FeFo in an interview is supposed to have uttered, "I have been an employee of FeFo for the last twenty-five years" (FeFo was established in 2009) - while not confirmed the quote ironically illustrates a continuum between Statsskog and FeFo.

Responding to the claim of the continuum between FeFo and Statsskog, Jan Olli admits that some might be of this opinion, and that it to some extent might be legitimate. He registers that some are displeased with the fact that changing the Statsskog regime into a full new Estate regime takes time. He tells me that FeFo wants to have a tighter dialogue with the people in Finnmark, and are therefore trying to organise more public meetings, and to involve interests as TAs and both traditionally Sami and "ethically neutral" hunter- and fisher's organisations. Olli is of the opinion the contact with the organised parts of the population is working well, even if it is resource intensive. It is harder to get feedback from those that are using the un-cultivated areas, but who are not organised in such associations.

Informant 1 tell of the same experience of not being heard by the authorities in both Statsskog and FeFo, and where local knowledge and local interests are not taken seriously in the land and

resource management. Informant 1 experience the Estate's reluctance to grant land rights to local rights claimants as paternalistic, in a spirit of guardianship. That the authorities are telling the local population that they do not have the capabilities to administer the resources and lands for themselves.

The informant had also conceived the Finnmark Act as a turning point in indigenous land rights policy in Norway, returning control and previously ignored land-rights to the Sami and the local population in Finnmark through the Commission's land-rights mapping. Therefore, the informant had expected the Estate to work as a temporary manager of the un-cultivated lands of Finnmark, until the Commission had mapped the local population's rights to use, own or manage these lands. The informant thinks that by opposing the claim of the TA, and by appealing the conclusion of the Tribunal to the Supreme Court, the Estate is acting in opposition to the object and purpose of the Finnmark Act, and § 5.

To informant 1 the issue of Sami land rights and local land rights are intertwined. Nesseby has a well-documented Sami history, and hunting, gathering, fishing and nomadic use of the outback are important aspects of this history. To the informant, local management of the un-cultivated areas is as a part of de-colonisation, of taking back the control of the area to those who live there. At the same time, the informant tries to use other arguments than Sami rights arguments, to prevent waking wake anti-Sami sentiments against the TA[113].

Informant 3 consider notions about "returning control over our own lands" as romantic, naïve and a-historic. The informant is of the view that such a claim refers to a point in history that has never existed; a romantic pre-modern state, where the people of Nesseby lived secluded from the neighbours and did not have to deal with the Norwegian state. He is of the view that the state in fact have exercised control in the area and that the local population have acknowledged the state for example through official acts as signing lease for use of for hayfields in the contested area. Therefore, he supports the findings of the Commission and the arguments presented by the Estate in the Nesseby Case

He is also opposed to the claim that the Finnmark act sets up FeFo as a temporary manager of land. He is of the view that the best alternative for management of un-cultivated areas in Finnmark, is to treat the areas as state-owned commons, and that FeFo would be the right body to manage these commons. He thinks that FeFo is doing a decent job managing these commons already. The Estate regime is young in a historical perspective, and if there are problems

[113] Muotka of NSR tells of the same experience of downplaying the Sami rights Narrative when arguing for local rights. See section 3.1.1

concerning management, for example concerning small game hunting, they will probably improve over time.

Informant 3 accepts that there might be organisational similarities between the old Statsskog regime, and the regime of FeFo. However informant 3 point to the fact that whereas Statsskog where a body of governmental enterprise and management, the FeFo board is constituted of representatives elected by the County Council and Sami Parliament, granting local representation and democratic legitimacy[114].

The board constitution, with an equal amount of members from the County Council and the Sami Parliament, is also a strengthening of Sami influence in matters concerning un-cultivated lands. Informant 3 sees this as a fair way of balancing Norwegian and Sami interests. According to informant 3, one should keep in mind the importance of "losers consent" when criticising the FeFo board. If one is dissatisfied with the way the FeFo board operationalises the act, one should work politically to replace the board members with other members, which represent your political sympathies better.

Informant two is on the other hand of the opinion that the Estate lacks legitimacy to manage the renewable resources and outback that the local community use today and historically has used, as the local communities are not represented when management decisions are made in the Estate regime. Informant 2 had hoped for a greater amount of involvement of the local communities following the Finnmark Act.

5.3 Tension and grouping

In "Finnmarkslandsskap i endring" Broderstad et al. also does a cluster analysis of the respondents, grouping them into four groups; *the dismissers 1*, the dismissers 2, the "don't knows", and *the conditional supporters*. Of these four groups the *dismissers 1* and the *conditional supporters*, were in 2011 the largest groups. The dismissers 1 show low trust in the Estate and the Finnmark Act, are un-knowledgeable about the Estates work, and are opposed to Sami rights and the Sami Parliament. The conditional supporters on the other hand, are well informed about the Estates organisation and practice, are positive to the codification of Sami rights through law, and were positive to the Finnmark act when the act was adopted. According to Broderstad et al, this group display a "wait and see"- perception of FeFo, they are positive to the Act, but whether they are going to support FeFo in the long run depend on how the Estate

operationalises the object and purpose of the act; how the Estate would work to secure the basis of Sami culture[115].

All of my informants fall into the category of the conditional supporters. They are knowledgeable about the Act and the Estate, and have all been in contact with, or are "users" of the FeFo-system. All informants were positive to the Act, and even if they are of different opinions of how Sami and local land rights should be realised, they are all supporters of codification of Sami rights and self-determination through law, for instance through the Sami representation in the FeFo-board.

All of my respondents are concerned with the how the Finnmark Act changes the power dynamic between the centre and the periphery, the local inhabitants versus the "centralised" Norwegian state at large. They all support the idea that the Finnmark Act should make the people of Finnmark *lords of their own house*. However, they differ in their views on whether or not the Estate as a manager is sufficiently empower the local population, or if FeFo in practice is just continuing the centralised management of Statsskog under a new name and a new centre of operations. In 5.3.2, I divide my respondents into two groups with opposing ideologies[116], the *compromise-oriented* and the *rights-oriented*.

5.3.1 The Compromise-oriented and the Rights-oriented

The *compromise-oriented* group sees unitary and "ethnically indifferent" land management as the best for Finnmark at large. The even representation of the Sami Parliament and the County Council on the board makes a fair compromise between Sami concerns and the majority population[117]. The Estate represent a revolution from the Statskog regime, as democratically elected members of the Sami Parliament and the County Council, and not appointed by the government, govern the Estate. Therefore, the Estate represents the Sami and the people of Finnmark self-determination of their un-cultivated areas. Informant 3 for example represents this group in my survey, interested and sympathetic to Sami rights, but supportive of unitary management. I also argue that the Estate through their management strategy represent the compromise oriented ideology.

[115] Broderstad, Josefsen, and Søreng, "Finnmarkslandskap I Endring- Omgivelsenes Tillit Til Fefo Som Forvalter, Eier Og Næringsaktør," 120.

[116] I use the word ideology as referring to a set of values and believes.

[117] You could also say that the Sami population gets "two votes" in the election of board members, as they can vote for both County Council and the Sami Parliament.

The *rights-oriented* group on the other hand, are urging local management of the un-cultivated areas, rather than a unitary countywide management by the Estate. Where group one emphasise political virtues as compromise and calm, group two tend to emphasise *rights*, the land rights of the Sami and others through immemorial use and the right of the local population to manage their areas. They support the Act, but their amount of trust in the Estates' operationalisation of the Act, is lower than in the first group. They are disappointed in the lack of local influence, and do not necessary see FeFo management as representative of the local population, but rather as an external authority. Local self-determination over the un-cultivated areas should be realised by letting the locals manage the areas themselves. They are in favour of local management practically because the local population would manage the areas better than the Estate, but also legally and politically, as they see local management as "settling the score" after Norwegian Colonisation. The informants from the TA, Silje Muotka from the NSR and the legal scholars Kirsti Strøm Bull and Øyvind Ravna represents this group in my survey. Many in this group might initially been the firmest supporters of the Finnmark Act in the Sami Rights debate in the 2000s, but might have become more alienated by the Estates operationalisation of the act in the years of the mapping process.

Broderstad et al writes that the condition for whether or not the conditional supporters will support the FeFo-regime, is how the object and purpose, §1 of the Finnmark Act, is operationalised. *The compromise-oriented* would support the interpretation of §1 and the operationalisation of the clause done by the current FeFo-board: focusing on the *regionalist* dimension of the act[118]. On the other hand, the rights-oriented group claims that such and operationalisation of the act is not in accordance with the object and purpose of the Finnmark Act, and urge the Estate to make operational-strategies to operationalise the *Sami dimension* as well.

(table 2)

Group 1: the Compromise-oriented	Group 2: the Rights-oriented

[118] See section 4.2.3

1. In favour of unitary management 2. Values: Ethnical indifference, compromise 3. Sami self-determination is realised through consultation and compromise 4. Sees FeFo as a representation of the people of Finnmark	1. In favour of local management 2. Values: rights oriented, customary law, indigenous rights 3. Local management realises Sami self-determination 4. Sees FeFo as an extension of the central power, in the way of local management
Proponents in this study • FeFo organization, Jan Olli • Informant 3 Suggested proponents in the broader society: [119] • Hunter- and fishing organisation, organised outdoor activity interests • Norwegian bureaucracy? • The majority population?	**Proponents in this study** • Informant 1 and 2 • Silje Karina Moutka and the NSR • Øyvind Ravna • Kirsti Strøm Bull Suggested proponents in the broader society: • Sami political parties: NSR, Arja, parts of the Sami branch of the Labour Party • Sami academia • Sami Rights Community, The Sami Council

[119] The suggested proponents are based on the responses to the consultations of the Act in 2003-5 Referred to in section 2. And *Innst.O.Nr. 80 (2004-2005).*

6 Conclusions

In this thesis I wanted to examine whether the FeFo system provides an appropriate and effective land rights mechanism for indigenous people, fulfilling the (1) object and purposes of the Finnmark Act and the preliminary work leading to the act; and (2) the indigenous rights instruments provisions Norway have ratified, like the ILO 169, and (3) if the FeFo regime is suitable for fulfilling land rights in the eyes of the stakeholders and users of the law.

6.1 Is FeFo fulfilling the object and purpose of the Finnmark Act?

Concerning the first question, we should start by referring to the object and purpose paragraph of the Finnmark Act. I stated in section 2.2.1 that § 1 of the act has three purposes (a) to make a balanced and ecologically sustainable management of Finnmark, (b); that this management of resources should benefit the residents of the county, and (c) that this management should particularly protect Sami culture, as the resources are the material basis of the culture. I argued that purpose (b) and (c), the *regionalist* and the *Sami dimensions of the act* are the core purposes of the act. This due to notes from the Justice Committee in Parliament emphasising the regionalist aspirations of the act[120], and statements from both the SU and the Committee that the purpose of the law were to clarify the legal status of the Sami in Norway[121].

As discussed in 4.2 the Estate operationalises §1 with an opinion that Sami rights are best protected through a management for the best of all inhabitants of Finnmark, not specifying what kind of management would benefit Sami culture, reindeer husbandry, and traditional and commercial use of resources[122]. The Estate thus operationalises purpose (a) and (b) of the act, but not (c).

I am of the opinion that this is a faulty understanding of the purpose of the Finnmark Act. The wording and structure of the act compels us to see protection of the material basis for Sami culture through land rights as an important purpose. §5 of the act states that the *Sami have collectively and individually acquired* land rights in Finnmark due to immemorial use, and these rights of the Sami and others are to be mapped. This provision is especially important

[120] *Innst.O.Nr. 80 (2004-2005),* 32.

[121] *Innst.O.Nr. 80 (2004-2005),* 1.

[122] Broderstad, Josefsen, and Søreng, "Finnmarkslandskap I Endring- Omgivelsenes Tillit Til Fefo Som Forvalter, Eier Og Næringsaktør," 117.

for Sami land rights, as there from the 1850s to 1968 was an established opinion that Sami customary use could not give rise to land rights as use- and ownership rights[123]. We should also consider the fact that chapter five of the Act establishes both a commission and a court to map and assess claims of use- and ownership rights beyond the general rights of use found in chapter 3 of the act. Chapter 5 of the act was a result of the consultation process with the Sami Parliament, and strengthened the rights of the Sami and the inhabitants of Finnmark on expense of the position of the general Norwegian public and the Norwegian government. Chapter 5 is in the Act for a reason, and that reason is because Sami rights of use- and ownership of land is one of the acts main purposes.

I have further shown how statements by the justice committee in their proposition to the act of 2005[124] as well as the original proposition from the Government in 2003[125] cite extensive work done on Sami rights through the SU, and especially the NOU 1997, as the driving factors leading to the adoption of the Finnmark Act. So does statements given by Parliamentarians[126], Estate employees[127], and Sami politicians as Egil Olli and Silje Muotka. The text and structure of the act, as well as the preliminary work show us that Sami land rights, as a way of securing protection of the material basis for Sami culture, is the essential object and purpose of the act. The aim for political calm is not mentioned anywhere in the Act.

The Estate have embracement of the compromise-oriented ideology in their jurisprudence and legal understanding. On the other hand, the Tribunal have shown through their jurisprudence in the Nesseby case, and in the Stjernøya case[128], to give more weight to Sami legal custom, especially through adjusting the criteria of good faith. If this is a sign of an emerging dynamic between the Estate and the Tribunal, we should be concerned. A dynamic where cases are taken out of the Finnmark Act system and appealed to the Supreme Court, is undesirable. Practically, having to settle cases in the Supreme Court force both the Estate and rights-claimants to spend

[123] See section 3.1

[124] *Innst.O.Nr. 80 (2004-2005)*, 1.

[125] *Om Lov Om Rettsforhold Og Forvaltning Av Grunn Og Naturressurser I Finnmark Fylke (Finnmarksloven)*, nr. 53 (2002-2003), 120. The ministry states that the proposition is based on NOU 1997

[126] Like the quote of Trond Helleland in Section 2.1

[127] Olli, "Interview with Jan Olli, Head of the Finnmark Estate."

[128] Referred to in *Judgement of the Land Rights Tribunal 23.01.2017/the Nesseby Case*, 51.

huge amounts of time on the case[129] and money on legal fees. When settling cases in the Tribunal the parties can do actual observation trips to the area in contest, a tool not possible in the Supreme Court. Further, such a dynamic could reduce the Tribunal from a court of appeal and an instrument for conflict resolution, to a party in the land rights process, undermining the whole land-rights system. If decisions made in the Tribunal, a court which is supposed to have special competence in Sami legal traditions and where the members are to have knowledge about societal, natural and geographical conditions in Finnmark[130], are consequently moved to the regular Norwegian legal system, what need do we really have for the FeFo-land rights regime?

6.2 Is the FeFo regime suitable in the eyes of the users of the Act?

In 5.3 I argued that all of my informants fit into the group of *conditional supporters* of the Finnmark Estate, a term presented in Broderstad et. al *"Finnmarkslandskap i Endring"*. I further elaborated on the work of Broderstad by identifying two sets of ideas or ideologies in within the conditional supporters, *the compromise oriented* and the *rights oriented*, grouping my respondents in these groups[131]. The interests and political and legal orientation of these groups are in conflict. This sets the Estate in a kind of damn-if-you-do, damn-if-you-don't, position: operationalise the act in a way pleasing the compromise-oriented group would alienate the rights oriented group, and vice versa.

By embracing the compromise oriented ideology, as I argue FeFo has done, the Estate might alienate the rights oriented group, a group that in my survey consists of local rights-claimants in Sami towns, politicians of independent Sami political parties as NSR, and academics in the field of Sami legal custom. If further pursued I would think we might further add much of Sami academia, the Sami art and culture community and the inhabitants in towns where the Sami

[129] For a discussion on the time-frame of the land-rights cases constitute an violation of the plaintiffs right to swift clarification and remedy by article 8? Of the European Charter of Human Rights, see Ravna xx

[130] Reference to the Finnmark Act

[131] In have utilised these two groups in regards to the Finnmark Act and Land Rights in my survey. However, I also think that this dichotomy is helpful to understand the broader debate on Sami rights and Sami policy. I would argue that this dichotomy is at least as important as the traditional left/right dichotomy, and is the main line of conflict in Sami politics. This should be examined further in the future.

constitute the majority[132]. These are groups that might have been the most supportive of the Estate and the Finnmark Act in the years leading to the adoption. At the same time, further embracing the compromised oriented ideology could increase the Estates support in the majority population of Finnmark, sorely needed according to the numbers Broderstad et al present[133]. From the perspective of the Estate, this might be an acceptable payoff for alienating the rights oriented group.

6.3 Summing up

Research Question (1): Insofar the Estate do not operationalise the *Sami dimension* of §1 through active management strategies on how to secure Sami traditional livelihood and culture through their land management, I am of the opinion that the object and purpose of the act and the preliminary are not fulfilled.

RQ (2): In 4.5, I concluded that the land-rights regime complies with ILO convention 169, due to ILO jurisprudence. However, I argue that the Estates *compromise-oriented* ideology is in the way of effective and appropriate fulfilment of indigenous people's rights. By not operationalising the Sami dimension of §1, the Sami have no guarantee that their concerns will be protected by the Estate, as seen in the Nussir controversy. The tendency to focus on the States dispositions in Finnmark, and downplay the role of Sami legal custom set a high bar for Sami towns to get ownership rights, or rights of management corresponding to those of an owner, recognised.

RQ (3): I have grouped the users of the law and the stakeholders into two groups, the *compromise oriented*, and the *rights-oriented*. The first group is of the opinion that the Estate through their jurisprudence and management strategies, are fulfilling land rights in a good way, by acknowledging equal rights of use for all of the population in Finnmark. The other group is also supportive of the Finnmark Act and the concept of the Finnmark Estate, but seem to become alienated by the Estates jurisprudence and management, which they feel that don't live up to their expectations of the Finnmark Act. This group are the ones filing rights-claims, and is thus the group the mechanisms laid down in §5 and chapter 5 of the act were supposed to fulfil the rights of.

[132] In Karasjok the Commission has received a record amount of rights claims, and they suppose they will receive as many in Kautokeino. This tell us something about the general idea of Sami land rights in areas of Sami dominance.

[133] referanse

6.3.1 Reflections on the road ahead.

The Nesseby-case is to appear before the Supreme Court 16.01.2018, finally settling the case. If the Supreme Courts final decision is in line with the decision in the Svartskogen Case, siding with the TA, this should have consequences for future Estate jurisprudence. A decision in favour of the rights-claimants, should force FeFo jurisprudence towards the rights oriented ideology, and could in time lead to widespread local management of un-cultivated areas in Inner-Finnmark, where the Commission is now starting a mapping process.

If however the Supreme Court decides to side with the Estate, this would further cement the compromise-oriented ideology in the institution, further alienating the some of the conditional supporters of FeFo. I would also claim that it would be a setback for Sami land rights in Norway, setting aside the progress made with the Svartskogen case.

The Commission are currently working on their report on land-rights in Karasjok, and has received 73 claims, a record amount[134]. The Commission are now are moving into territories where the Sami are in majority, and we could expect that the amount of claims might be just as high in Kautokeino, where the Commission are starting the process in the fall of 2017. If the Estate uphold the compromise oriented jurisprudence, the un-willingness to accept claims of land ownership or management, in these areas, the sheer amount of filed claims gives us an indication that the popularity of the Estate would suffer in inner-Finnmark.

134 https://www.domstol.no/no/Enkelt-domstol/finnmarkskommisjonen/Felt-1---3/Felt-4-Karasjok/Innkomne-meldinger1/

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