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WHO IS LISTENING?

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An examination of the Norwegian state's environmental injustice towards the South Saami: through the development of Storheia and Roan wind farms on Fosen, in Trøndelag.

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"Colonialism has dressed up in nice green finery and we are told that we have to give up our territories and our livelihoods to save the world because of climate change."

- Aili Keskitalo, former president of the Norwegian Saami Parliament.
(Schreiber, 2018)

ABSTRACT

This thesis examines the Norwegian state's environmental injustice towards the South Saami through the development of Roan and Storheia wind farms on Fosen, in Trøndelag. By analysing all of the development stages, starting with the assessments in 2008 and ending with the Supreme Court judgement in 2021, the dialogue between the South Saami and the Norwegian state is scrutinised.

By building on the theoretical framework of environmental justice, with the theory of non-listening, the purpose of this thesis is to answer the research question: How does the development of Storheia and Roan wind farms illustrate the Norwegian state's environmental injustice towards the South Saami?

This thesis aspires to open up the possibilities for the politics of non-listening to assist environmental justice in future research. Additionally, this research aims to facilitate a further discussion on the urgent need to rethink renewable energy in Saepmie, and beyond, by including Indigenous knowledge. This is needed to protect the Saami culture, achieve a more equal society, and avoid a future of polarisation between the Saami and the majority society. However, this cannot be achieved as long as the State listens without the intent to understand.

KEYWORDS: Wind development, green colonialism, indigenous rights, South Saami, environmental justice, listening, decolonisation.

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Last and most importantly, this is for the South Saami community - may the Fosen case not only stand as a victory but also a pivotal moment in time on the road towards environmental justice.

ACRONYMS

ICERD - International Convention on the Elimination of All Forms of Racial Discrimination

NVE - Norwegian Water Resources and Energy Directorate

MPE - The Ministry of Petroleum and Energy

ECHR - European Convention on Human Rights

EXPLANATION OF SAAMI TERMINOLOGIES

Saepmie[1] - The Saami's traditional territory

Sïjte / Siida[2] - A reindeer herding district

Gaeptie[3] - Traditional Sami clothing

Saemiedigkie = Southern Saami for The Saami Parliament

Laedtieh = The Saami word for persons of non-Saami origin

'SAAMI' AS OPPOSED TO 'NORWEGIAN'

I acknowledge the complexity, and the ethical difficulties, of using the identity labels *Indigenous/Saami* as opposed to *Norwegian*. The terms are not meant to produce exclusive categories, it is rather a conceptual tool to understand the complex colonial relationship between the Norwegian majority and the South Saami minority. The South Saami people can be both Indigenous and Norwegian. Throughout this thesis, the Southern Saami word *Laedtieh* will be used exclusively when referring to non-Saami Norwegians.

[1] The English spellings *Saami* and *Saepmie* will be used, as it is the closest to the letters and pronunciation in the Southern Saami language. Only exception to this consistency is when there is a direct quote involved, that uses the English spellings closer to the letters and pronunciation of the Northern Saami; i.e. Sámi/Sami and Sápmi.

[2] Sïjte is *Southern Saami* and siida is *Northern Saami.* Although an exception is Nord-Fosen siida, one of the two sïjtes in this case, that goes by *siida*.

[3] In Southern Saami it goes by the names *gaeptie*, *gapta* or *gåptoe* (different regional dialects).

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1. INTRODUCTION

On the 11th of October, 2021, a unanimous Supreme Court ruled that the Norwegian state had violated the country's obligations to safeguard its Indigenous population's rights, under international law. The construction of the two wind farms on the Fosen peninsula, *Storheia* and *Roan* wind farms, conflict with the rights of the reindeer herders of Nord-Fosen siida and Sør-Fosen sïjte under the UN Convention on Civil and Political Rights (SP) Article. 27. Thus, the licence to develop, given in 2010 by the Norwegian Water Resources and Energy Directorate (NVE[4]), were deemed invalid (Supreme Court, 2021:151). The more than a decade long battle, which has been through two District Courts, one Court of Appeal and finally the Supreme Court, has been intense for both sides claiming legitimacy over the area, on different grounds. Furthermore, despite the Supreme Court ruling, the Fosen case is far from over, as there is no further agreed-upon plan for what is next. The reindeers have lost their winter pastures, the herders are terrified that this might be the beginning of the end for reindeer husbandry in Trøndelag, and the Saami argues that Storheia and Roan must be taken down immediately (Stranden, 2022c). But who is listening?

1.1. PURPOSE AND RESEARCH QUESTION

The purpose of this thesis is to shed light on the environmental injustice, as well as the act of non-listening by the Norwegian state towards the South Saami, in light of the development of the wind farms on Fosen. Additionally, this thesis aspires to open up the possibilities for the politics of non-listening, through the three pillars of ignoring, ignorance and denial, to assist environmental justice in critical decolonising research. Departing from the purpose, I ask the following research question:

> How does the development of Storheia and Roan wind farms illustrate the Norwegian state's environmental injustice towards the South Saami?

[4] One of The Royal Norwegian Ministry of Petroleum and Energy (MPE) subsidiaries.

In order to answer the main research question in a lucid way, the following two sub-questions will guide this thesis:

I. How has environmental injustice been expressed through distributional injustice, procedural injustice and non-recognition?
II. How did the Norwegian state listen when the South Saami spoke?

1.3. DISPOSITION

Firstly, previous research will be accounted for, before discussing the research contributions of this thesis. In the third chapter, there is a rather extensive contextual background, before theoretical frameworks will be introduced in chapter four. Following that is chapter five, which starts by discussing the many ethical concerns in this thesis, before continuing onto the other methodological decisions taken. Analysis can be found in chapter six before chapter seven discusses the major findings and answers the research question(s).

2. LITERATURE REVIEW AND RESEARCH CONTRIBUTION

This section will discuss previous literature on the approaches to environmental justice, green colonialism and the politics of listening. This will not only create an outline of the research field, but also shed light on the gaps in existing literature, which forms the basis of the research contribution of this thesis.

2.1. REVIEW OF EXISTING LITERATURE

Environmental justice (EJ) is a concept and theory that focuses on the interconnectedness between contemporary environmental injustice and the legacy of social, political and economic injustice. Thus, the framework is suitable when studying environmental injustice situated in a society with colonial roots. Edwards (2021) argues that the ‘climate justice’ approach can explain why climate change ultimately is a justice issue. The ‘energy justice’ approach connects in many ways to climate justice but focuses on the justice problems linked to production and consumption of energy, including clean energy, as discussed by Day

(2021). In Latin America, the 'decolonial environmental justice' framework has gained traction (Rodriguez, 2021:78). Rodriguez (2021) presents and scrutinises how decolonial EJ has been applied to shed light on Latin American Indigenous people's fight against the continuing colonial impact on contemporary society. The nature of the Latin American decolonial EJ framework builds on what Rodriguez (2021:85) argues is "Indigenous peoples' own anti-modernity agenda". What this refers to is how Indigenous people resist development as we know it, as the nature of development is based on exploiting and expanding production in natural areas, often inhabited by Indigenous people. Moreover, it is a call for an alternative development, which focuses more on living in harmony and peace with Mother Earth and all natural beings[5].

Furthermore, Oskal (2001), Jeffes (2019), and Rice (2017) have examined the political representation of Indigenous people, in light of what can be described as well-intended policies and initiatives by the State but which end up being everything but. Jeffes (2019) discusses paternalism and continuing colonialism in Australia towards the Aboriginal and Torres Strait Islander communities. Oskal (2001) also researched the paternalistic trait of the Norwegian government in the early 2000s. Moreover, Oskal (2001) researched the political exclusion of the Saami people through the State not allowing them legitimate representation and participation in political decision-making processes over land- and water-right disputes. Rice (2017) argues that Indigenous people in Latin America have two unfavourable options. To either submit themselves to the rules of a political system that serves as an instrument of suppression and colonialism, or they must seek representation through other means, e.g. social movements (ibid).

In tact with the increasing encroachment on Saami land in the name of climate change mitigation, the term green colonialism has increasingly gained traction in Saepmie. Normann (2020) explored how wind power development represents the awakening of the historical dispossession and colonialism, and how the industry thrives on knowledge gaps in the Norwegian society and State. In the decision-making process over wind development projects, the Saami are often overruled and excluded, which has made wind power become synonymous with green colonialism (Normann, 2020:5). Nilssen (2019) also argues that wind farms threaten the South Saami cultural landscape.

[5] Often linked to the Latin American concept of *Buen Vivir*.

As outlined in section 1.1., this thesis aspires to discuss how the politics of non-listening can assist EJ in critical decolonising research. Bassel (2017) is one of the scholars in the growing field of *listening*. By studying' selective audibility' through the politics of non-listening, Bassel sheds light on how minority women, especially Muslim women, in France, Canada and England, only are audible for the state and other citizens when they take certain 'acceptable' roles that are easily digestiable for others, preferably a role that reinforces the 'us versus them' sentiment (Bassel, 2017:17).

2.2. RESEARCH CONTRIBUTION

The research contribution to this thesis is two-folded; firstly, it studies environmental injustice by concentrating on those enforcing the injustice rather than experiencing it, and secondly, it contributes to the field of environmental injustice by introducing the concept of non-listening, both as a theory and method.

2.2.1. FLIPPING THE OUTLOOK ON JUSTICE UPSIDE DOWN

There is a general lack of research utilising the EJ framework to study those enforcing environmental injustice. Moreover, there is a need to actively engage the EJ framework into critical decolonising research, and effectively flip the outlook on justice upside down. Thus, this study focuses on the former colonisers lack of accountability and continuing ignorance. Imperative to EJ is to face the challenges of privilege and history, by letting the communities experiencing environmental injustice be the leaders of healing their own communities (Murdock, 2021:9). Similarly, I argue that the majority, who are not experiencing environmental injustice, need to acknowledge their part in the privilege of justice. Furthermore, EJ has received some criticism, including the tendency to victimise marginalised individuals and communities carrying environmental burdens (Ishiyama, 2003:120). As this thesis sheds light on those who create the burdens but who are not experiencing it, this research manages to steer away from the pitfall of victimising. Moreover, it contributes to a field of growing importance; the need to decolonise the climate debate.

2.2.2 NON-LISTENING ASSISTING ENVIRONMENTAL INJUSTICE

"Scholars across disciplines have repeatedly noted that listening has been relatively understudied in social and political life, in contrast to the focus on voice and speaking" (Bassel, 2017:4). When it comes to international development, it becomes imperative to study not only listening but the act of non-listening. *Whose voices are not heard and why?* This study aims to contribute to the growing literature on listening, by introducing *ignorance, ignoring* and *denial* as conceptual tools to understand the lack of listening to the South Saami. Moreover, non-listening will assist the EJ framework, as there arguably cannot be procedural justice, distributional justice or recognition[6] if there is a state of non-listening. This theory-building will ultimately fill the gaps of EJ in the South Saami case study, and hopefully be able to shed light on how further EJ research can be conducted using the theory extension of non-listening. Lastly, the concept of listening also goes beyond the theoretical framework, and into the methodological section of this thesis. The method chosen is active listening, through analysing what has been already said in the last decade.

3. CONTEXTUAL BACKGROUND

To be able to fully understand the Fosen case, it is necessary to have a deeper understanding about the South Saami, colonialism, reindeer herding and wind development. As Bassel (2017:90) argues, we need to include historical injustice in the present dialogue, if we want to understand contemporary struggles for justice and political equality. Thus, this thesis will scrutinise the extensive historical injustice, in Trøndelag, and ultimately shed light on the attempted erasure of the Saami culture.

3.1. THE SOUTH SAAMI

The Saami are the Indigenous people whose traditional territory, Saepmie, stretches across central and northern parts of Norway, Finland, Sweden and the Kola Peninsula in Russia. The total Saami population is estimated to be between 50,000 and 100,000, whereas around 50-65,000 live in Norway, translating into 1.06% - 1.38% of the total Norwegian population

[6] The three pillars, which constitutes the trivalent theory of environmental injustice

(IWGIA, 2021:507). However, the South Saami people are a small community within the larger Saami society, living in both Norway and Sweden. With a population of roughly 2,000 people in both countries, the South Saami are frequently referred to as a minority within a minority (Hermanstrand, et.al. 2019:3). Furthermore, estimates point to only 5-700 speakers of the South Saami language today, and UNESCO therefore classifies the language as severely endangered (Moseley, 2010). Although, as Hermanstrand, et.al. (2019:3) argue, it is a miracle that the Southern Saami language even exists after the assimilation policies in Norway from the mid-1800s to the 1980s.

3.2. COLONIAL HISTORY IN TRØNDELAG, NORWAY

The internal colonisation, which ended not more than a few decades ago, has shaped modern South Saami identity and culture (Hermanstrand, et.al., 2019:3), meaning that the past is still present in today's South Saami society. Not only does the South Saami experience being ignored in detrimental land-right disputes, but there are also still ignorant attitudes about the Saami and their indigeneity, supported by discredited racist ideologies from the colonisation period (Fjellheim, 2020:213). The colonisation of the Saami, often referred to as the Norwegianization era, refers to the historical and systematic deprivations of cultural, intellectual and territorial rights that lasted roughly from the 1700s until at least 1980 (ibid; Mæhlum, 2019:22).

Nationalism played a significant role in the development of the Norwegian state during the 1800s and 1900s, after the dissolution of Denmark-Norway (Knudsen, 2021). It was during this period of nation-building, as the country was grappling with an identity-crisis, that the Saami was under the toughest assimilation policies. One thing was for certain, Norway was meant for Norwegians, and Norwegian culture was to be cultivated at all costs (Rørosmuseet, 2022a). However, after the Second World War, as the Norwegian welfare state grew, the assimilation policies were framed as a way to help the social development and welfare of the Saami people (ibid). When describing the Saami people and the reason behind the Norwegianization, in 1889, the Norwegian provost, Andreas Gjølme expressed: "The Saami people are children. They stand as people on the child's naive, undeveloped

standpoint. The purpose of the Norwegianization is to bring them to the maturity of man - if this is even possible[7]" (Stortingets Presidentskap, 2018).

As part of assimilation policies, the Saami were forced to give up their language in official settings, which included forbidding the Saami language in schools (Breidlid, 2020:20). Saami children were forced to speak the foreign Norwegian language from one day to another, which led to Saami children being viewed as less intelligent than the Laedtiehs (Minde, 2005:14). The Norwegianization-politics made schools into a battlefield and the teachers were the frontline soldiers (ibid:5). Furthermore, as a smaller community, geographically and linguistically distant from the majority Saami in the north, the South Saami community was affected particularly hard by the assimilation policies (Fjellheim, 2020:209).

Mæhlum (2019:22) explains the intense assimilation measures as a "subtle form of ethnic cleansing". The Saami were taught to hate their culture and identity, and being Saami was turned into a burden too great to bear, and rejecting their ethnic origin and culture was in essence a *survival* technique (Mæhlum, 2019:22). In addition to banning the Saami language- and culture, the intense expansion of agriculture and infrastructure developments continued to encroach on Saami land, pushing them out of their traditional territories, one acre at a time (Fjellheim, 2020:209). This translated into even more difficulties to cultivate their traditional livelihood, reindeer herding, which was already being threatened by administrative restrictions and legal measures favouring the agriculture sector (ibid). As farming settlements started to increase, frictions started to build up between farmers and the reindeer herders, ultimately leading to forced displacement of Saami people from traditional Saami areas (Gaavnoes, n.d).

The assimilation policies were upheld and reinforced by a dangerous emerging racial hierarchy in the country. As pointed out by Mæhlum (2019:21), there was a general acceptance in the Western world of Social Darwinism ideals, which created a conventional outlook that "gradually evolved to regard the Saami as representing a lower development stage than the majority Norwegian population". During the 1920s and 30s, many scholars belonging to the Social Darwinist ideology and influenced by the idea of eugenics, racially examined Saami human skeletons and living human beings (Fjellheim, 2020:212). One of the most extreme physical anthropologists was the prominent racial scientist, Jon Alfred Mjøen,

[7] My own translation from Norwegian to English.

who conducted racial examinations on the South Saami population (ibid). Believing it was necessary to conduct genetic control to avoid deterioration of the superior Nordic race, Mjøen photographed and measured the South Saami and argued that they were "primitive, less intelligent and with generally bad genes" (ibid). Mjøen's work continued to inform and influence the field of study up until 1939, but the dehumanisation and objectification of the Saami people continued beyond (ibid).

Even though the Norwegian society has come a long way from letting racist ideologies and attitudes shape the political and economic agenda, discrimination and harassment does not only belong to the past. Saami people are still experiencing harassment and ignorant attitudes. Reports show that one out of three Saami persons have experienced discrimination (Nystad & Ballovara, 2020), which the government has expressed deep concerns about (Regjeringen, 2019). There are often reports resurfacing about Saami signs being destroyed (Paulsen, 2018; Karlsen & Andersen, 2011; Schanche, 2012; Manndal, 2011), Saami people getting harassed and yelled at in public, sometimes for speaking Saami (Ballovara & Gaup, 2020) and other times because of their appearance (Ballovara & Gaup, 2020; Brekke & Utsi, 2020). There are also reports of Saami persons experiencing judgement by other Saami people, if they are not Saami *enough* (Pedersen, 2022). After the assimilation policies, it is not a given that all Saami individuals speak a Saami language or own a gaeptie, which cannot be seen as anything but the assimilation policies continuing its work. Nonetheless, these examples point to a society that has not fully understood the scope of its colonial ancestry, and consequently have yet to confront it. In other words, the past is very much present.

3.3. REINDEER HUSBANDRY

Reindeer herding is when semi-domesticated reindeers are herded within a limited area (AWRH, 2022a). Reindeer herding is characterised by the cyclical use of seasonal pastures, and the herders follow the reindeers' migration throughout the year. While reindeer herding refers to the practical work a herder does with the reindeer, reindeer husbandry refers to the whole financial and social industry (ibid). Reindeer husbandry is practised in remarkably similar ways, across the world, speaking to a bond between people and reindeers that holds much traditional wisdom about survival and sustainability (AWRH, 2022b). The strong link

the Saami has to traditional forms of nature utilization reinforced colonial arguments about the Saami culture being “old-fashioned” and “uncivilised” (Mæhlum, 2019:23). In other words, reindeer husbandry played a significant role in the marginalisation and stigmatisation of the Saami people.

Scandinavian research indicates that Saami reindeer husbandry has existed since the 9th century, and possibly even earlier (Meløy, 2019). However, since the 1880s, reindeer herding has been an exclusive Saami right in Norway, meaning that only the Saami population within regulated reindeer herding areas are allowed to practise it (Hermanstrand, et.al. 2019:22). Ethnicity and indigeneity therefore becomes a central component in land-use conflicts over reindeer herding areas (Fjellheim, 2020:210).

Reindeers carry immense cultural and financial significance to the Saami people and society (UN, 2021). Moreover, reindeer husbandry is a vital identity factor for the South Saami community, as about half of the population are reindeer owners or close descendants of reindeer owners, resulting in a proportion larger than in any other Saami community (Fjellheim, 2020:209). Moreover, the South Saami themselves often argue that reindeer husbandry is a prerequisite for the preservation of South Saami knowledge, language and traditions, thus, a threat towards reindeer husbandry is a threat to the South Saami (Nilssen, 2019:171). This is why reindeer herding is called the Saami *cultural shield* (Mæhlum, 2019:23).

Reindeer herders face many challenges. In addition to the threats of predators, mostly wolves, bears and golden eagles, they are increasingly facing climate change threats (AWRH, 2022a). Unpredictable weather conditions result in variations in grazing conditions, where shorter and warmer winters create difficulties finding food, and summer heatwaves affect mountain flora and insects, which frustrates the reindeers (Risvoll & Kaarhus, 2020:195). However, according to both research, the primary challenge that reindeers face is the increased intrusion and encroachment on pastures in the form of military activities, mining activities, national parks, pipelines and, last but not least, wind power expansion (AWRH, 2022a).

3.4. WIND DEVELOPMENT IN SAEPMIE

The increasing demand for raw materials, and the conversion over to green energy has increased the encroachment on pristine natural areas, in Saepmie and beyond (IWGIA,2021:512, NIM, 2021:7). These areas have been exploited for ages by those aiming to profit from nature, however, as exploitation has turned green, it has become increasingly difficult for the Saami to resist, as the world is calling on greener solutions. The extensive and rapidly growing wind power industry is causing conflicts between the Saami and the government, often because it happens without the *free, prior and informed consent* of the sïjtes (IWGIA, 2021:512). Moreover, wind farms come as a package deal, with increased human activity, the construction of new road networks and larger industrial sites (Normann, 2020:5). That means that wind development threatens reindeer herding from the moment the assessment and planning starts.

Renewable energy is sought-after commodities globally, which provides Norway with opportunities for a solid income in the future, which will come in handy for the welfare state in the absence of today's main export income of gas and oil. The wind power industry does not only generate greener energy alternatives nationally and internationally. Wind power projects are often supported by local municipalities, as it comes with land rental payments, sponsorship funds, it increases income and property taxes and opens up employment opportunities for local people (IWGIA, 2021:512). Thus, a clear conflict of interest arises between the Saami and the *Laedtiehs*, similar to that between the Saami and the agriculture sector, during the Norwegianzation era. In 2015-16, the Norwegian State published a report on the energy policies and goals towards 2030, arguing that they will facilitate and ease the way for long-term development of wind power in Norway (Det Kongelige Olje- og Energidepartementet, 2016). After several disputes over land-based wind development, such as the case study at hand, the State paused all granting of licences from 2019. However, in April 2022, the government announced that the development would start up again (Nyhus & Hatlestad, 2022).

4. THEORETICAL AND CONCEPTUAL FRAMEWORK

This chapter will discuss the theoretical frameworks of EJ and non-listening, before section 4.3. will introduce how they connect.

4.1. ENVIRONMENTAL (IN)JUSTICE

'Environmental justice' developed in the 1980s, as a response to the demonstrations in North Carolina against the decision to place a toxic waste landfill in a primarily African American community (Murdock, 2021:6). EJ scholars argue that environmental degradation affects people unequally, where the poor and marginalised communities end up carrying the largest burden of environmental risks. The decision to place a toxic waste landfill in a more marginalised community is no coincidence, and it's not an exceptional story. Because the matter of fact is that the effect of environmental degradation is systematically unfair. The overall aim of EJ is to create just and meaningful involvement of all people and communities with respect to environmental issues, including protection from environmental degradation and unfair regulations and policies.

The focus EJ has on comparing levels of justice between marginalised communities and the privileged reflects more than *just* the aim of equality (Kaswan, 2021:33). As Kaswan (2021:24) sheds light on, it is more "an underlying concern about the legacy of social injustice". Thus, more often than not, an extensive background research of the legacy of injustice is necessary in order to understand the current scene of environmental injustice. Equally as structural injustices in a society have a tendency to further environmental injustice, environmental injustice have a tendency to solidify structural injustices (Murdock, 2021:12). The EJ framework will prove useful in this case study as it emphasises the interconnectedness of the unfair distribution of burdens, including but also going beyond environmental issues.

4.1.1. ENVIRONMENTAL JUSTICE'S TRIVALENT THEORY

There are countless definitions of *justice*. Without entering into a greater philosophical discussion about the terminology, definitions of justice primarily touch upon the aspect of

impartial fairness (Merriam-Webster, 2022; Cambridge Dictionary, 2022; Collins Dictionary, 2022). However, theories of EJ vary to a large extent depending on the geographical location and the form of injustice, as already discussed in previous literature. Several approaches could be valuable when analysing the Fosen case, especially the decolonial EJ approach, as the Saami face similar challenges to the Indigenous people in Latin America. However, the historical discrimination towards the Saami has partly been due to the Laedtieh and State's view of them as "old-fashioned" and "uncivilised", who need to develop (Mæhlum, 2019:23). As the nature of the decolonial EJ approach builds on the "Indigenous peoples' own anti-modernity agenda"(Rodriguez, 2021:85) there is an ethical conflict behind the presumption that the South Saami have an anti-modernity agenda. Thus, this research is grounded in the much-debated trivalent theory of environmental justice, which understands justice through three pillars; *distributive justice, procedural justice* and *recognition* (Murdock, 2021:12). To help capture the essence of the three pillars, the subsequent paragraphs will refer to the research of Kaswan (2021), Suiseeya (2021), Coolsaet and Néron (2021).

4.1.1.1. DISTRIBUTIVE JUSTICE

Kaswan (2021:22) describes distributive justice as concentrating "on how harms and benefits are distributed and experienced". In other words, *who* gets *what* in the environment. Moreover, Kaswan (2021:24) argues that distributional disparities are rooted in colonialism, and by studying unequal distributions, one is led to a deeper discussion about historical socio-political injustice. The more dominant theories within distributive justice focus on *equality*, *capabilities* and *utilitarianism* (Kaswan, 2021:22). Generally, utilitarianism aims to maximise overall social welfare by achieving "the greatest good for the greatest number" of people, while capabilities focus on how all people should be allowed minimum physical and mental well-being, to be able to lead a meaningful life (ibid:24). Equality wants distributive justice to be of equal distribution (ibid). However, there are acceptable reasons for diverging from strict equality, e.g. if it benefits the marginalised people (ibid:23). I will refer to this diverging branch of equality as equity, throughout the thesis.

4.1.1.2. PROCEDURAL JUSTICE

Minority and poor communities, including Indigenous communities are often frontline communities, i.e. those that experience the first and worst consequences of climate change (Suiseeya, 2021:37). Even though it seems apparent that frontline communities must be included in decision-making processes regarding climate change, they are disproportionately experiencing exclusion, and as such, a lack of procedural justice (ibid:39). Central to the commitment of procedural justice is to include the communities whose welfare will be affected by the industrial or development initiatives, however, these communities are most often the ones with the least "access, representation, and power in decision-making processes" (ibid:42). Procedural justice connects to distributional justice as unjust decision-making leads to unfair distribution. As the saying goes, *if you don't have a seat at the table then you are probably on the menu.*

According to Suiseeya (2021:39), the opportunities and restraints to procedural justice are shaped by *power*, *representation* and *participation*. Power is a nuanced and relational expression, referring to social and political ties (ibid). Moreover, the relation between individuals, communities and institutions, including norms and regulations shapes how power emerges and changes over time (ibid). Furthermore, representation refers to making something visible (Suiseeya, 2021:38). Representation in itself is a form of power, however, it doesn't equal power. Moreover, equally important to observe who is visible or represented is to observe who is not. Representation is an important principle to look into when studying EJ, as it forwards the imperative of *we speak for ourselves,* which privileges the experiences and knowledge of those confronted with environmental injustice (Murdock, 2021:9).

While participation at an international level often is seen through individuals and communities attending World events, where they share, present and network, local participation is often more nuanced (Suiseeya, 2021:42). Participation at local levels can e.g. be active inclusion in the development of projects and initiatives, public outreach, activities and capacity-building (ibid). Although participation should reinforce procedural justice, it is often a disconnect between participation and procedural justice, as participation does not guarantee that one is heard or has the power to influence the decision-making.

4.1.1.3. RECOGNITION

The recognition approach under the EJ framework aims to uncover environmental injustice by examining whose voices and knowledge is heard, listened to and deemed relevant (Coolsaet and Néron, 2021:61). Furthermore, recognition "deals with the way in which we accommodate and respect different people, their cultural practices, their identities and their knowledge system" (ibid:52). The concept also cares about communities' right to self-recognition, by cultivating collective identities and needs (ibid). Environmental conservation and policies are always influenced by the majority's culturally specific ideas about what is worth protecting, as the meanings of nature are culturally defined (ibid:52). This means that a conflict over nature conservation is never just a conflict of interest, it points to a conflict over which culture and community is being heard and recognised. Due to the attention recognition gives to communities' voices, sovereignty and knowledge, recognition is particularly central when it comes to the achievement of EJ for Indigenous peoples.

The three pillars of justice are highly interconnected. However, considering that distributional justice is more about who gets what in the environment, it is more the end result of procedural justice and recognition. Thus, distributional justice will be further analysed in section 7., while recognition and procedural justice will be under further scrutiny through the theoretical framework of non-listening.

4.2. THE POLITICS OF (NON) LISTENING

The theoretical perspective of "non-listening" is inspired by an email exchange I had with a representative at the Saami Council. Without going into further details about this written dialogue, which will be elaborated on in the methodological section, the term non-listening comes from the prolonged historical experience the Saami community has of not being listened to in environmental conservation cases. The sheer nature of non-listening also points back to the previously mentioned lack of recognition under the EJ framework, as the EJ framework aims to uncover environmental injustice by examining whose voices and knowledge is heard, listened to and deemed relevant (Coolsaet & Néron, 2021:61).

Listening is not only an act of attention to other people's narratives, it is also a political form of recognising someone (Bassel, 2017:72). Bassel (2017:89) sheds light on how it is too often "little space or political will to hear a different and often more complicated

version of events" especially "when what *they* say may demand change from *Us* and challenges existing distributions of voice and power". Furthermore, Bassel (2017:4) reflects over how we live in a society that rather wants to speak than listen, and our yearning of being heard and getting attention has ultimately damaged our capacity to truly hear others. However, it seems that our capacity to listen has never been truly damaged, as we do manage to listen to some, while ignoring others. As Bassel (2017:17) argues, selective listening refers to when someone only listens when it suits them. Moreover, being selectively audible is particularly challenging when the norms of audibility are enforced by the State and its institutions (ibid:34).

Based on the current academia on the politics of non-listening, three concepts continuously surfaced; *ignoring, ignorance* and *denial.* Consequently, these highly interconnected but divergent concepts will be further researched. Some scholars argue that ignorance and denial are two sides of the same coin (Kuokkanen, 2008), however, due to some differences between the two, they will be discussed separately.

4.2.1 NON-LISTENING AS IGNORING

The multidimensional concept of *ignoring* encompasses situations where someone appears dismissive, either through official statements or by not responding at all (Bishara,2015:958). Examples of ignoring include condescending communication, or no communication at all, acting with contempt towards the particular group of persons, or even physically avoiding them, or the absence of wanting to resolve the conflict (ibid:958;962). Thus, ignoring refers to both action and inactions, but both always encompass a degree of disengagement on the one side (ibid:961). Authoritarian regimes often favour repression, when someone challenges "their monopoly of power" (ibid:959). Ignoring, on the other hand, is more compelling for non-authoritarian regimes, who don't want to concess nor repress. However, ignoring has a tendency to trigger emotional responses, such as anger, outrage and indignation (ibid:958). Moreover, studies show that when individuals and communities are included in decision-making processes, but at the same time ignored, it creates far more frustration than not being included at all (ibid:970). Havemann (2009:8) argues that when Indigenous people speak from their framework of knowledge, they are often not understood or heard by others. While the lack of *understanding* would point to ignorance, *not being heard* rather points to *others* not being willing to listen, i.e. ignoring.

Two important aspects that influence how the act of ignoring is perceived by someone is *time* and *severity.* "The dimension of severity could be seen along a spectrum", with "passive behavior including the absence of a response" on one side, and the more "active types of dismissal or indications of disregard" on the other side (Bishara, 2015:962). *Time,* on the other hand, refers to how ignoring someone for a longer period of time will have more severe consequences, as repeated actions get a stronger reaction (ibid). Depending on the severity of the conflict, and the collected experiences over time, individuals and communities may perceive ignoring as either being dismissed, at best, or not recognised and respected at worst (ibid:964).

4.2.2. NON-LISTENING AS IGNORANCE

Definitions of *ignorance* often refers to a lack of knowledge, which entails a sense of *passiveness*. However, Kuokkanen (2008:60) argues that ignorance is also seen through the active decision of avoiding or not recognising other knowledges. No matter if ignorance comes from a passive lack of knowledge or an active decision to not understand, ignorance leads to a state of non-listening. Recently the theoretical field of *epistemology of ignorance* has gained traction amongst philosophers and scholars. Building onto the field of epistemology, which is the study of the nature and limits of human knowledge, epistemology of ignorance seeks to examine how ignorance produce and sustain the exclusion of all other knowledge than the dominant Western knowledge (Martínez, 2020:508; Kuokkanen, 2008:60).

The epistemology of ignorance can be seen through the active engagement of "misunderstanding, misinterpretation and misrepresentation" (Martínez, 2020:512). This also translates beyond the academic world, where the South Saami experience ignorance through continuing colonial narratives of non-recognition. In the infamous book "The Norwegian Geographical Society", from 1891, the influential historian and geographer Yngvar Nielsen created the immigration narrative where he argued that the South Saami first migrated to the Røros area during the 1700s (Rørosmuseet, 2022b). His theory, called the Advancement Theory, wrongly concluded that the South Saami settled after the Laedtiehs, and it was highly endorsed by Norwegian historians (Rørosmuseet, 2022b). Even though the Advancement Theory is no longer defended by mainstream Norwegian academia, the narrative of South

Saami's historical presence is disputed, which is still used against the South Saami over land right conflicts, consequently reinforcing procedural injustice (ibid).

4.2.3. NON-LISTENING AS DENIAL

To deny something refers to "declaring something to be untrue" or "to refuse to admit or acknowledge something" (Merriam-Webster, 2022). Following Kuokkanen (2008:60) definition of ignorance and how it often moves beyond the passiveness of lacking knowledge, and over to resisting other knowledge, it is challenging to differentiate between *ignorance* and *denial*, without getting into a deeper discussion about human social behaviour. However, ignorance is more often unconscious or unintended, while denial is more conscious and intended. Moreover, denial is more closely linked to suppression, while ignorance is more like repression.

The Marley hypothesis[8] finds that race plays a factor in one's ability to acknowledge and understand contemporary racism (Bonam, et.al.2019:1). Persons who have not experienced racism themselves "... tend to define it as isolated incidents, rather than long-standing, systemic problems with policies, laws, and institutions" (ibid). This form of ignorance often leads to a state of denial. However, it is not only one's race that determines the level of ignorance and denial, as research shows that those with a strong sense of nationalism tend to deny systemic racism to a larger degree than others (ibid; The Orwell Foundation, n.d). Moreover, Cohen (2001:x) argues that people seldom attempt to deny facts and specific incidents, but rather deny the implications an incident or history have had.

4.3. OPERATIONALISATION

Both ignorance and a decision to ignore leads to a state of denying someone the right to be heard. Denial can be individual and private or it can be collective and organised (Cohen, 2001:9). Individual denial might be experienced as ignorance or disregard, while collective and organised denial is systemic and far more dangerous. See Appendix I. for an

[8] The Marley hypothesis was first used as a social experiment by scholars Jessica C. Nelson, Glenn Adams, and Phia S. Salter, in 2012, to explain how European Americans' and African Americans' different knowledge and understanding of historical injustice and racism mirrors their perception of current racism in society (Nelson, Adams & Salter, 2012).

operationalisation table, and examples of how EJ and non-listening can interact with one another.

5. RESEARCH DESIGN AND METHODOLOGY

This following chapter provides a discussion regarding the methodological choices of this thesis. The research design, which is a qualitative case-study, as well as the research method; thematic analysis (TA), will be discussed, along with limitations and reflexivity. But firstly, there is a rather extensive section on ethical consideration, as ethics guided this research from start to finish.

5.1. ETHICAL CONSIDERATIONS

According to Saami scholar Porsanger (2004:107), research has historically been yet another tool, used to reinforce colonialism and disempower Indigenous people. By presenting Indigenous people through the eyes and voice of the colonisers, Indigenous knowledge, culture and rights has been obscured (Fjellheim, 2020:207). This has ultimately reinforced the power imbalances in the society (Stordahl, et.al. 2015:6) and a view of Indigenous people as passive objects (Porsanger, 2004:108). Stories about wide-spread abusive and racist researchers, during the 20th century, are still fresh in the memories of Saami communities (Boekraad, 2016). Moreover, colonial theories and research about the South Saami, such as those previously mentioned, i.e. Mjøen's extreme social Darwinist theories and Yngvar Nielsen's "advancement theory" prevailed for so many decades that after they left, trauma and exhaustion still exist. Furthermore, as research has a long history of extracting extensive Indigenous knowledge and giving nothing in return, research is often understood, from an Indigenous perspective, as stolen knowledge that benefits only the person stealing it (Porsanger, 2004:108). To avoid the colonial trap of research, there have been increasing requests from Saami academics and politicians, in the last decades, for a concrete Saami ethical framework (Boekraad, 2016). However, this still does not exist.

There are some opinions about how non-indigenous scholars should not "...conduct research on, with and about Indigenous people" (Porsanger, 2004:108). As tacit knowledge, it is difficult for non-Saami people to access the knowledge needed to fully understand the

Saami culture and history, which means that even with good intentions, they might end up doing more harm than good (Boekraad, 2016). In the 1970s, the Saami philosopher Alf Isak Keskitalo proposed an Indigenous epistemology of *ethnic monopoly*, where Laedtiehs should not research Saami issues (Boekraad, 2016). However, Indigenous research does not generally reject non-indigenous researchers, as it can create productive and beneficial research, if done right (ibid). To be able to do this, non-indigenous researchers need to show cultural sensitivity and ultimately only carry out research that is accepted by the researched community (ibid). Just like all aspects of society that relate to power and control, research needs to be decolonised. This includes Indigenous people's right to autonomy, making them the decision-makers when it comes to the research agenda and methodologies (Porsanger, 2004:108).

After extensively researching the Fosen case, I was left with a strong feeling that the problem is not that the South Saami have problems voicing their concerns in Norway. In fact, they do it quite often. Neither is there a shortage of platforms and channels to get the Saami voice out. The problem lies with the ones who are supposed to listen. Because one does not have to look close to find Saami arguments against the wind development on Fosen splattered across the internet, and they have been demonstrating since before going to court against Fosen Vind DA. The message from the Saami community has been well documented, inside and outside of the rulings, and they therefore hardly need another burdensome interview round, from a master student. As a researcher, interested in uncovering injustice, I couldn't take up even more of the Saami's time and energy, and then ultimately give them nothing in return. I would just academically capitalise on their pain. Perplexed by the feeling that it would be ethically wrong to research the case without the voice of the South Saami guiding me through interviews, but also ethically wrong to do the interviews, I decided to contact the Saami Council for some guidance.

The Saami Council is a Saami NGO, with Saami member organisations in Finland, Russia, Norway and Sweden. "Since it was founded in 1956 the Saami Council has actively dealt with Saami policy tasks" (The Saami Council, 2022). They have by no means a responsibility to guide and help students, which is why the response I got was beyond all expectations. Firstly, the respondent shed light on the tiredness of academia amongst the Saami communities, after much experience with academia acquiring knowledge and contributing little or nothing to what the interviewees think is relevant. Not only does this challenge the ethics of interviewing, in this particular case, but my contact argues that the

research fatigue will make it very difficult to get informants to show up. Furthermore, they agree that there is no shortage of platforms and channels to get the Saami voice out and continuously argue:

> " … but what does it take for it to go in? This is something we from the Saami side often think about and which should be the subject of research. It sets up a research mirror that addresses the majority society's ability to understand. With that angle, the ethical challenges linked to researching the Saami are less, as the Saami per se is not at the centre" (Saami Council representative, personal communication, 2022-02-07, my translation).

Boekraad (2016) supports this methodological approach, when arguing that the main goal of a non-indigenous researcher "could be to gain more insight in their own society and ways in which it is entangled with colonisation". As Laedtiehs, Lien and Nielssen (2021) argued, by confronting their own colonial past, they were met with a sense of relief and clarity over what their role and responsibility as members of the majority society was.

By consulting with a Saami representative, this research has a small element of participatory action research. Participatory action research is an approach where the members of communities affected by the research actively participate through formalised procedures (Boekraad, 2016). However, this is mostly used in larger projects as the method requires extensive time for lengthy consultative structures and funding for meetings (ibid). Due to the time and scope of this research this would have been too ambitious and not feasible. Moreover, as the short consultative dialogue I had with my respondent was more about assisting and providing ethical guidance, and not so much a collaborative relationship, this study is not a participatory action research, it only has elements of it. Nonetheless, the methodological decisions of this study is inspired by my respondent, and in accordance with the influential Maori scholar Graham Smith's four-folded approach[9]. Out of the four approaches, this study adheres to *the empowering model* approach; "…in which the local community decides the research questions…" with the hope that the research then will empower the local community (Boekraad, 2016).

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[9] I. *"The tiaki or mentoring model in which authoritative Indigenous people sponsor and guide the research".*
II. *"The whangaimodel in which research is negotiated and the non-indigenous researcher is a part of the daily life of Indigenous people and sustains a life-long relationship with them".*
III. *"The power sharing model in which the community assists and support the research enterprise".*
IV. *"The empowering model in which the local community decides the research questions and the research empowers local society".*

5.2. RESEARCH DESIGN

The chosen research design for this thesis is a qualitative, instrumental single-case study. Qualitative research is an umbrella term for research methods that provide information-rich and in-depth data that aims to better understand human beings' experiences and interpretations of the social world (Patton, 2014:105; Hammersley, 2013:1). While comparing it to riddle-solving, Pertti Alasuutari (1995) sheds light on the qualitative research method by arguing that:

> "Any single hint or clue could apply to several things, but the more hints there are to the riddle, the smaller the number of possible solutions. Yet each hint or piece of information is of its own kind and equally important; in unriddling - or qualitative analysis [...]" (Hammersley, 2013:1).

Furthermore, this case-study is instrumental, as findings in this case might facilitate understanding in other similar cases. The increasing encroachment on land and cultural rights is not distinct for Saepmie, as environmental injustice happens to Indigenous people all over the world. Even though Indigenous communities struggle for recognition and justice differently, this study might provide some assistance in understanding conflicts taking place around the world.

The Fosen case is an interesting and unique case study, as it clarified whether and how Article 27 can be used to protect Indigenous rights in legal settings. It was the first time the Saami won in an intervention case by referring to Indigenous human rights, through Article 27 (NIM, 2021). Thus, Fosen is likely to stand as an example in coming conflicts, both in Saepmie and beyond, which means that we ought to research what went wrong up until the Supreme Court decision, to understand how to best avoid it next time.

5.3. RESEARCH METHOD

This study is supported by a document analysis, as the aim is to shed light on what has been said, what has been ignored and denied, and how this has reinforced the environmental injustice against the South Saami.

5.3.1. DATA SAMPLING AND MATERIAL

Documents can be divided into two types of data, i.e. primary and secondary. Primary data "provide a first-hand account of an event or occurrence, without interpretation or analysis", while secondary data refers to documents that analyse and interpret primary data (Frey, 2018). This thesis relies on both primary and secondary data, but only three primary documents will be analysed in the analysis. The documents subjected to analysis are the Supreme Court of Norway Judgement and two reindeer husbandry assessments (See appendix II). The Supreme Court document includes extensive information from before the licence was given in 2010, from the District Court, from the Frostating Court of Appeal, and the Supreme Court Judgement itself. Moreover, the document is one of the few official documents about the Fosen case that is translated to English. The District Court(s) and Frostating Court of Appeal is only retrievable in Norwegian, thus when discussing the two it will be done in the light of the findings pointed out by the Supreme Court. Despite only being retrievable in Norwegian, the two reindeer husbandry assessments have been chosen as they contain vital information. The sampling of primary data was rather straightforward, as it is official records, easily retrievable for everyone using a computer.

5.3.2. THEMATIC ANALYSIS

To be able to identify and organise patterns on non-listening and environmental injustice, the documents were analysed using a thematic analysis. TA "is a method for systematically identifying, organizing, and offering insight into patterns of meanings (themes) across a data set" (Braun & Clarke, 2012:57). By identifying unique meanings and then compartmentalising them into themes, TA offered a way to interpret and make sense of recurring patterns of non-listening and environmental injustice in the primary data. The collection of codes was done deductively, as all codes derived from the theoretical framework (ibid:58). The codes were namely, *distributional injustice, procedural injustice, non-recognition, ignoring, ignorance and denial.* By reviewing the primary data over and over again, it was predicted that the codes would alter, however, they stayed the same.

5.4. LIMITATIONS AND DELIMITATION

This section aims to present and discuss some of the identified limitations and delimitations within this study. Firstly, a delimitation; the three forms of non-listening all have clear subjective dimensions, where the perception a person or a group has about the action plays a significant role (Bishara, 2015:962). This poses the question whether or not it is possible to objectively grasp a situation of non-listening. In future research, interviews might be able to address the gaps this research has by focusing on the subjective dimension of non-listening.

Furthermore, I speak Norwegian, which has helped in this case study, as a lot of the information and documents are not available in English. However, a limitation is that I don't speak Southern Saami. The limitation of not speaking Southern Saami is not seen as a great hindrance in this case study, as it attempts to research the dialogues and relations between the South Saami and the State, dialogues that are conducted in Norwegian. However, knowing the Southern language would undoubtedly have integrated another level of legitimacy. Despite not speaking the language, I have chosen to use some Southern Saami terminologies, based on the reasoning Boekraad (2016) made arguing that "the use of local languages is generally considered an important factor in decolonising research". Moreover, some Southern Saami terminologies describe certain concepts more effectively than the English translation would.

Another important delimitation is the absence of a codebook in the analysis. A codebook usually illustrates the content found in the data files, which would have made the analysis more transparent. However, by trial and error, I found that a codebook misrepresented the situation of non-listening and EJ in each of the development stages. The reason for this is due to the information possible to gather from the three judicial systems. Information from the Court of Appeal is far more extensive than from the District Court, which made the references to ignoring, denial and ignorance far greater. However, this created a distorted view of the case, as the Court of Appeal recognised the South Saami's claims to a much greater extent than what the District of Court did (Supreme Court, 2021:7).

5.5. POSITIONALITY AND REFLEXIVITY

Research is never a completely objective activity and as researchers we are heavily influenced by the established traditions that prevail in academic institutions, as well as our

own beliefs and experiences (Stordahl, et.al. 2015). This section aims to discuss my positionality and reflexivity, as well as possible bias, as a researcher. Firstly, as a qualitative researcher, I am part of the research process, meaning that my personal perspectives and experience influence the research process. As TA intends to identify and organise patterns of meaning across a dataset, my subjective opinions will, unintentionally, play a role in eliciting meaning from the dataset.

According to Holmes (2020:2), positionality is explained as an individual's worldview, which is shaped by the individual's values and beliefs and can refer to both fixed and non-fixed attributes. As a Norwegian researcher, with no affiliation to the Saami communities, I stand as not only an outsider but also as a part of the majority society of former colonisers. My ethnicity and cultural affiliation to the Norwegian majority has not only shaped the methodology and ethical considerations throughout this study, it has also allowed me to confront my own relationship with colonialism and contemporary injustice, as my own knowledge of the history of Norwegian colonialism, and the Saami people, was arguably rather poor when starting this research.

Some scholars argue that non-Saami researchers are in danger of letting their *bad conscience* affect their methodologies to the degree where research becomes biassed (Boekraad, 2016). Even though this thesis is not a conscious attempt to assuage a bad conscience, it might play a certain role, that I feel sick to my stomach reading about the Norwegian colonial history. However, I believe that a bad colonial conscience can be an opportunity for the majority society to uncover and research its past and current role as former colonisers. In agreement with the Marley Hypothesis, by actively searching for ways to understand historical injustice, we might all get better at recognizing it in our contemporary society. Lastly, it's important to mention that it's not only difficult, but also arguably wrong to be objective in the light of injustice.

6. ANALYSIS

The analysis is divided chronologically, starting with the assessments and consultations before and after NVE' s issued the licence to develop, then the District Court, then the Frostating Court of Appeal and the final Supreme Court Judgement. Lastly, a section will

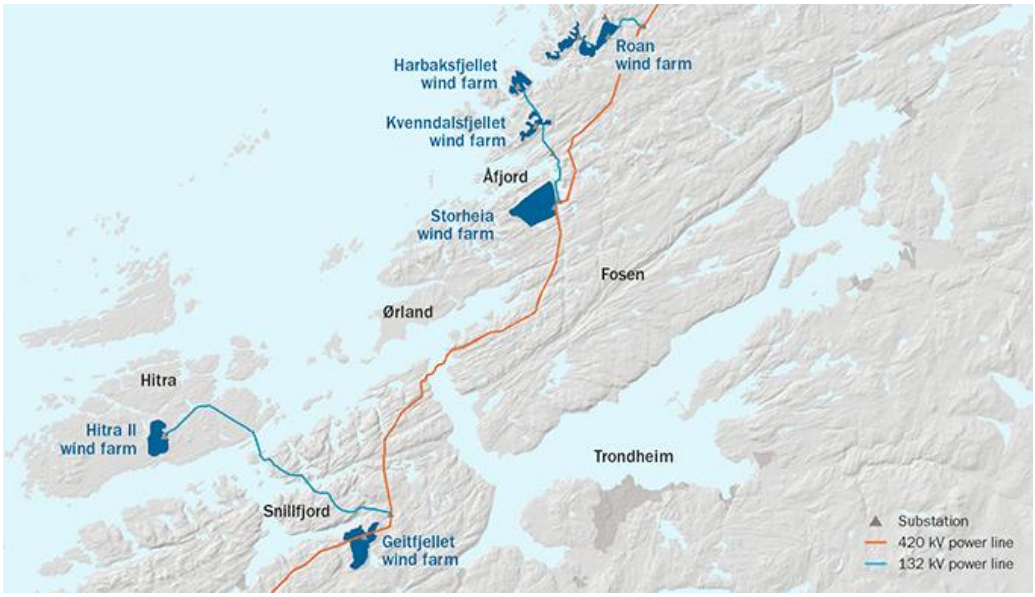
discuss the present state of affairs. All sections will discuss general findings from each stage but more importantly analyse how Fosen Vind DA and the State listened to and considered the South Saami voices. More closely, are the South Saami and their knowledge *ignored* or *denied*, or do the others show signs of *ignorance*? Some media sources will complement the court rulings, to create a greater understanding about the situation outside official settings.

6.1. FOSEN WIND FARMS - THE SCENE OF ENVIRONMENTAL INJUSTICE

6.1.1. STORHEIA AND ROAN WIND FARMS

Fosen wind farms (see illustration I.) comprising six wind farms[10], with 277 wind turbines, are currently Europe's biggest land based wind turbine facility (Statkraft, 2022a). It has a yearly production capacity of 3,4 TWh, translating into the consumption of approximately 170,000 Norwegian households (Rosvold, 2022). The work on the wind turbines started in April 2016 and finished in August 2020 (ibid). Around 11 billion NOK has been invested in the six wind farms (FosenVind, 2022). The case at hand, referred to as the Fosen case in popular media and in this thesis, concerns *Storheia wind farm* and *Roan wind farm*.

Illustration I: Map over Fosen Vind farms

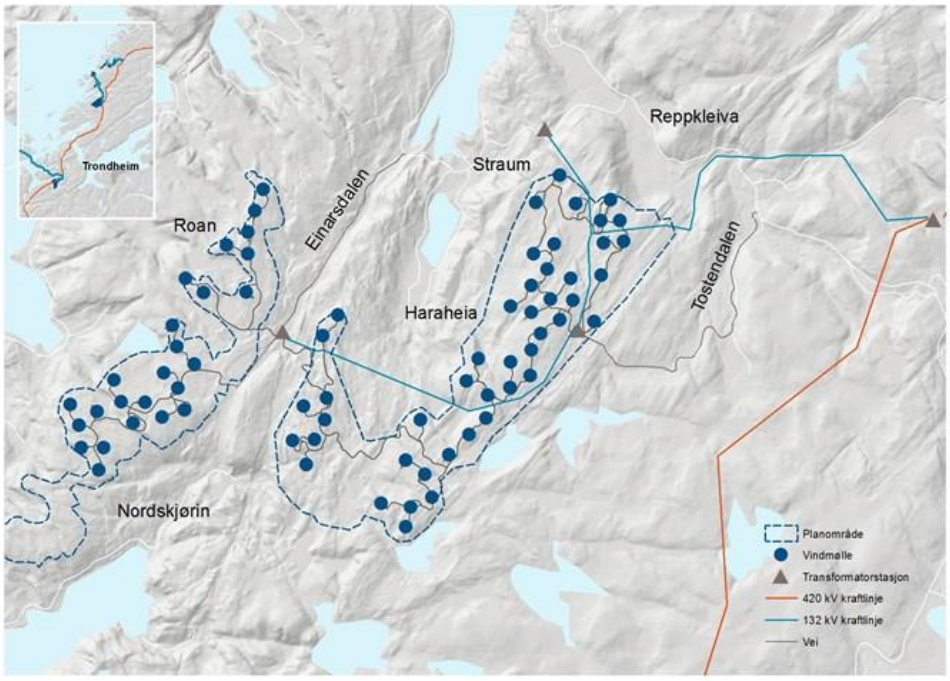


(Statkraft (n.d.) Fosen vind. Retrieved from: https://www.statkraft.com/about-statkraft/where-we-operate/norway/fosen-vind/)

[10] *The six wind farms at Fosen is; Roan wind farm, Storheia wind farm, Kvenndalsfjellet wind farm, Harbaksfjellet wind farm, Geitfjellet wind farm and Hitra 2 wind farm.*

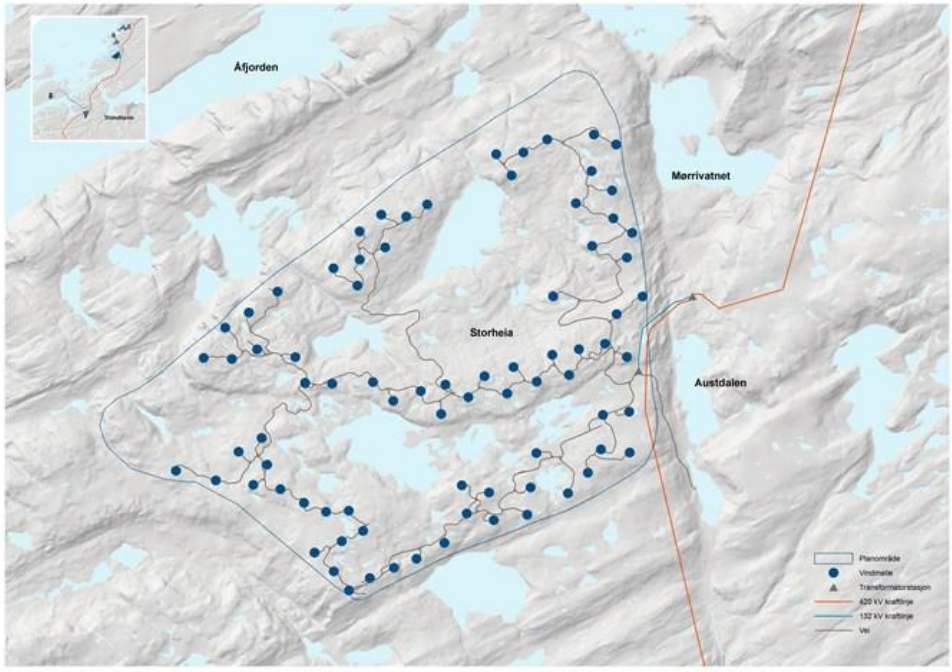
Roan wind farm (see illustration II.) has 71 wind turbines, and stretches over 70 kilometres, while Storheia (see illustration III.), Norway's largest wind farm, has 80 wind turbines, and stretches over 62 kilometres (Supreme Court, 2021:3). Both wind farms are located in the Fovsen Njaarke Sïjte, where two sïjtes practice reindeer herding, Sør-Fosen sïjte and Nord-Fosen siida (see illustration VI). The two sïjtes consists of three sïjte units each, i.e. a family or individual practising reindeer husbandry, amounting to a total of 32 reindeer herders (Sør-Trøndelag fylkesbibliotek, 2017).

Illustration II: Roan wind farm



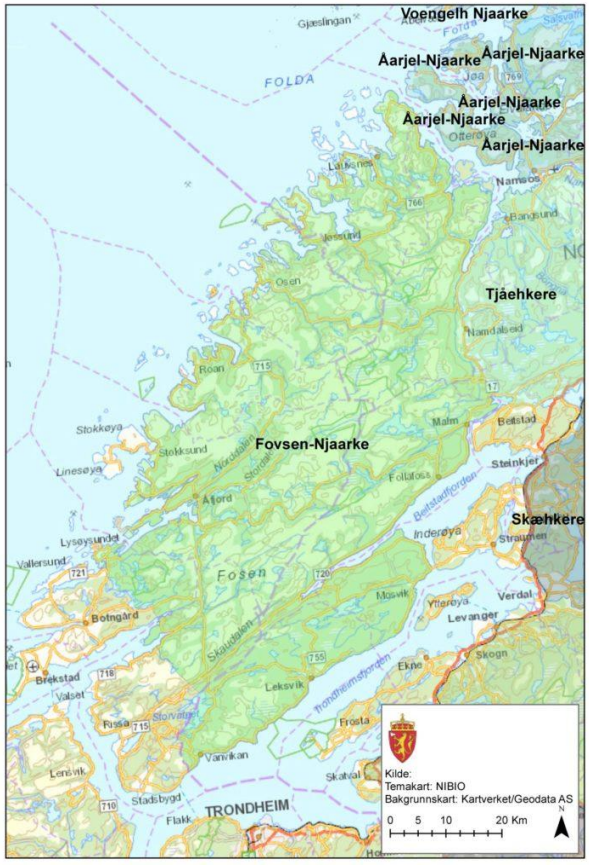
(Fosen Vind (n.d.) Roan. Retrieved from: https://www.fosenvind.no/vindparkene/, Accessed: 2022-01-12.

Illustration III: Storheia wind farm



(Fosen Vind (n.d.) Storheia. Retrieved from: https://www.fosenvind.no/globalassets/fosen-vind/bilder/storheia_ny_1000x714.jpg, Accessed: 2022-01-12.

Illustration VI: Fovsen-Njaarke Sïjte



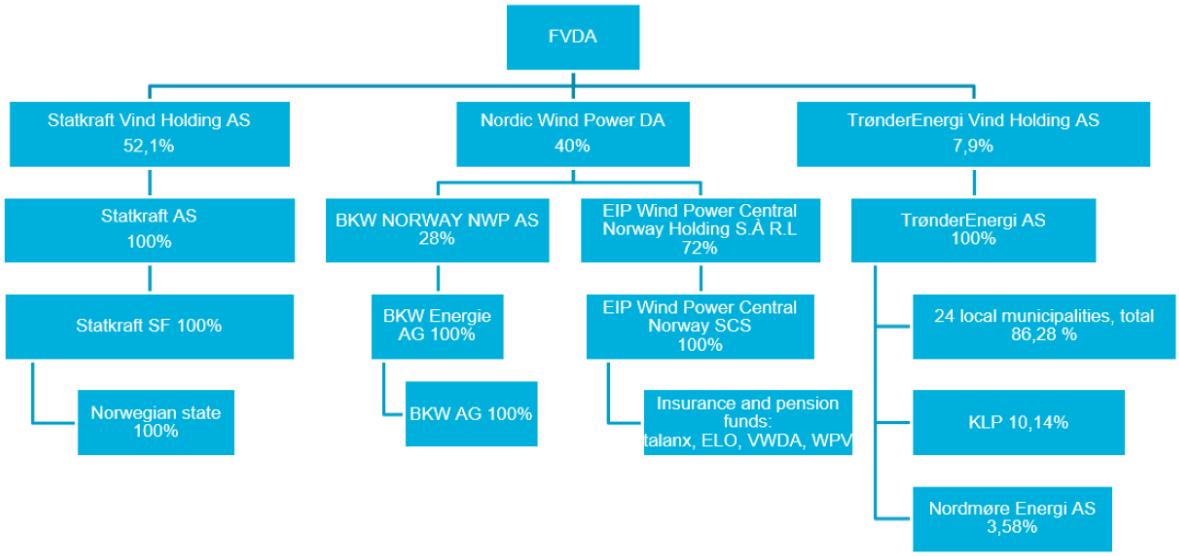
(Gaavnoes (n.d.) Fovsen-Njaarke reinbeitedistrikt. Retrieved from: https://gaavnoes.no/2017/09/fovsen-njaarke-reinbeitedistrikt/, Accessed: 2022-01-13.)

According to the co-owner of Fosen Vind, Statkraft (2022a), the Fosen peninsula has some of the best conditions for wind power production in Europe. The turbines are strategically placed on the high wind-blown mountain ridges, where the reindeer have been winter grazing for hundreds of years (Supreme Court, 2021:13). A prerequisite for the reindeers winter grazing area is the access to lichens, which are mostly accessible in these bare rock areas with high wind-blown ridges (ibid). Furthermore, the maximum number of reindeers allowed for the Fovsen Njaarke Sïjte is 2100,-, divided equally between the two sïjtes (ibid). The development of Fosen wind farms challenges the already scarce number of reindeers allowed in the district, which the sïjtes argue threatens their livelihood and culture (ibid:137).

6.1.3. THE OWNERS OF FOSEN VIND FARMS

Fosen wind farms have changed owners multiple times, but Statkraft has been a majority owner from day one. Statkraft is Europe's largest renewable energy producer, fully owned by the Ministry of Trade, Industry and Fisheries, i.e. the Norwegian state (Statkraft, 2022b). Due to reorganisation, the ownership was transferred over to Fosen Vind DA, which is organised as a responsible company with shared ownership between Statkraft (52.1%), TrønderEnergi (7.9%) and the European investor consortium Nordic wind power DA (40%), in 2016 (see illustration V.) (FosenVind:2022; Statkraft,2022a).

Illustration V: Fosen Vind DA



Fosen Vind (n.d.) Fosen Vind Eiere. Retrieved from: https://www.fosenvind.no/om-fosen-vind/eiere/, Accessed: 2022-01-12.

In early 2021, the ownership and daily operation of Roan wind farm was transferred to a new company called Roan Vind DA, owned by TrønderEnergi and Stadtwerke München (TrønderEnergi, n.d.). TrønderEnergi is owned by 19 municipalities in Trøndelag, as well as KLP, which is Norway's largest pension company (ibid). This recent transaction will be discussed further in section 6.5. of this thesis, as a reasonable prediction is that it will have a significant implication on the decision whether to take the wind turbines down or not.

The UN has emphasised the responsibility businesses have to respect indigenous people's rights, and the Norwegian state has in extension to this outlined a specific action plan, where it is explicit that the Saami people are to be consulted in matters that concerns them (NIM, 2021:85). Still, businesses do not have the same legal obligations to follow international laws, as the State does. However, as the State is the majority shareholder of Fosen Vind, the company cannot be exempt from Norwegian and international legal frameworks in this case (see appendix II).

6.2. CONSULTATIONS AND THE FINAL DECISION

The impact assessments, made before possible projects are approved, stand central in the governmental decision-making process whether to grant licences or not (NIM, 2021:12). Thus, this thesis will discuss two reports, grounded in two assessments; one in 2008 and one in 2011. The two assessments created by ASK Rådgivning and SWECO Norway (in 2008), and ASK Rådgivning alone (in 2011), were requested by Statkraft and several larger wind power players, with the aim to look into possible consequences on the reindeer husbandry (ASK & SWECO, 2008:8). Both assessments included local reindeer herder representatives, to assist with their knowledge and opinions. However, the South Saami has expressed their disagreements with the assessments made, arguing that they were inadequate (Nilssen, 2019:172).

6.2.1. THE 2008 REINDEER HUSBANDRY REPORT

The 2008 report recognizes that there is already a high number of interventions and disturbances on Fosen, which increases the pressure on reindeer husbandry and the South Saami community (ASK & SWECO, 2008:8). This is seen through increasing cabin constructions, hiking trails and general human traffic, as well as climate change (ibid:20). The report shed light on the mental strain these developments have on the sïjtes, and the necessity to consider these intervening elements when contemplating to build wind farms on Fosen, as consequences of disturbances accumulate over time and overall scope (ibid:8). The conclusion regarding the overall consequences for the Fosen wind farms were that it would affect the reindeer herders negatively (ASK & SWECO, 2008:103). Challenges that were mentioned were permanent loss of grazing resources, increased degree of interference from outsiders, increased workload and changing operating patterns and traditions, distressed reindeers, increased conflicts with nature, humans and other industries, such as agriculture and cottage development, frustration and lowered level of life joy for the herders, and detrimental economic consequences (ibid).

The report emphasises the necessary cooperation within and between the sïjtes (ASK & SWECO, 2008:103). The interdependence means that if the industry is no longer viable for some of the reindeer herders, forcing them out of business, it threatens the existence of reindeer husbandry on Fosen (ibid). Furthermore, the assessment illustrated a difference in the degree of conflict between the many different wind farms suggestions on Fosen, and argued for the importance to prioritise the projects predicted to have the least negative effects (ibid). Despite the fact that Storheia and Roan were assessed to be the ones with greater consequences, the conclusion was that development could soundly continue in these areas (ibid:110).

6.2.2. LICENCE DECISION IN 2010

In 2010, the NVE issued licences to build on Storheia and Roan, as well as several other places on Fosen, despite the serious findings in the assessments (Supreme Court, 2021:3). The State recognised the sïjtes' claim and need for the land, but ignored their plea, as it was a “conflict of interest” (ibid:24). The decision was appealed by a number of individuals and organisations, including Fovsen Njaarke Sïjte (ibid:3-4).

6.2.3. THE 2011 REINDEER HUSBANDRY REPORT

The 2011 report agrees with most of the statements made in 2008 and 2009, but they recommend no further granting of licences in the area (ASK, 2011:7). The report argues that NVE considered the consequences of the projects, when granting licences, but with two exceptions; Roan and Storheia, which were still deemed extremely conflict-ridden (ibid:14). Moreover, ASK (2011:7) classified Storheia as *largely/medium negative* and Roan as *largely negative.* In the report, the sïjtes argue that the development would destroy the winter pastures, which in return will threaten their existence (ibid).

The reports tell us that the sïjtes are being invaded by wind projects from all sides, as there are multiple projects going on (ASK, 2011). Moreover, the development on Fosen needs to be seen through the increasing wind development across all of Sapemie. As ASK and SWECO (2008:20) argue themselves, consequences of disturbances accumulate over time and overall scope. Additionally, the report emphasises that a possible wind farm development at Innvordfjellet and Breivikfjellet[11] would have **severe consequences**[12]. This would further the sïjtes' challenges of losing Roan and Storheia as pastures, as the reindeers would have nowhere to go (ASK, 2011:15). Furthermore, in the 2009 report, it was emphasised that a licence given to the wind farms at Roan would cross the line of what the reindeer herders could accept. The 2011 report built upon this, by arguing that if even more licences are handed out to other wind farm projects, it would be too great of a burden for the Fovsen-Njaarke Sïjte to accept. Moreover, ASK (ibid) acknowledges the South Saami disapproval of the projects, and emphasises that these interventions would increase the South Saami's feeling of being overrun and disrespected by the Norwegian society. Thus, an important part of the development story of Roan and Storheia is to mention the end-result of the plans on Breivikfjellet and Innvordfjellet. While the Breivikfjellet project was pulled by the project developer, Statkraft, in 2015 (NVE, 2015), NVE granted the wind farm project on Innvordfjellet a licence in 2018 (NVE, 2018). Ultimately, extending the threat to the very existence of reindeer husbandry on Fosen, and leading to what the 2009 and 2011 reports argue go far beyond what the sïjtes could possibly accept (ASK, 2011:15).

[11] Neighbouring to Roan and Storheia.
[12] The use of bold writing, emphasising severe consequences, was the authors in the reports own choice.

The reports from 2008 and 2011 concluded that it is within reasonable limits to continue the development at Storheia and Roan, despite the serious consequences. In each report, the sïjtes are recognised and included to the degree where their voice and knowledge are included in the assessment of the areas. However, there is a disconnect from listening to the information provided, and actually granting the South Saami knowledge enough weight to be included in the final decision. By analysing the reports and the State's decision to grant licences, in light of Bishara's (2015:962) dimension of severity, the actions of Fosen Vind and the NVE goes beyond the passiveness of ignorance and over to the active denial of the South Saami voice. The State's decision to ignore the Saami voice when granting the licences, shed light on a lack of recognition of Saami traditional knowledge. Additionally, it sheds light on a level of ignorance about the importance of reindeer herding in the South Saami community.

The Norwegian National Human Rights Institution (NIM, 2021:12) argues that assessment processes are often tedious, and the relationship between the parties included is often highly unequal. These tedious and unequal processes add a strain on the Saami community who continuously share their knowledge, time and energy to assessments that often end up ignoring their contribution in the final decision. As previously discussed, a system created to include individuals in decision-making processes, but at the same time ignore their voice to the degree where they are denied a legitimate form of influence, creates more frustration than not being included at all (Bishara, 2015:970). Moreover, having one's voice ignored is far more discouraging when the norms of audibility are systemically enforced by the State (ibid:34).

This section has emphasised the importance of having the non-listening framework assist the EJ framework, as the South Saami experienced procedural justice, by being invited to *represent* their community and *participate* in the assessments. However, their contribution is ultimately *ignored* and their claims are thus *denied*.

6.3. INNTRØNDELAG DISTRICT COURT

In 2014, Fosen Vind brought an appraisal action for measure of damages to the sïjtes (Supreme Court, 2021:4). Arguing that the development on Fosen violated their rights under Article 27 ICCPR, Sør-Fosen sïjte demanded the appraisal to be ruled inadmissible (ibid). In 2017, the District Court found that the development on Fosen did not violate the South

Saami's possibility to practise reindeer husbandry to the degree that it amounted to a violation of Article 27, and their plead was therefore denied (ibid). What the District Court failed to consider is how the survival of the South Saami culture is dependent on reindeer husbandry, and an offence to the traditional livelihood equals an offence to the already vulnerable community. Nonetheless, in 2018, Inntrøndelag District Court granted Sør-Fosen sïjte NOK 8.9 million and Nord-Fosen siida NOK 10.7 million, due to the damages to pastures, as well as financial support to alternative feed (ibid:5). Offering financial compensation to make up for the loss of pastures, indicates a level of ignorance about the importance the livelihood has to the South Saami. Nonetheless, both the sïjtes and Fosen Vind petition for a reappraisal, where Fosen Vind argued the damages were set too high, while the sïjtes opposed the results on the basis of the development being a breach of Article 27 ICCPR, Article 1 Protocol 1 of the ECHR, and Article 5 (d) (v) of the ICERD (ibid).

In the largest nature demonstration that year, hundreds of demonstrators met at Storheia in solidarity with the South Saami, a few days after the construction work started in 2016 (Kleven, 2016). They demanded a temporary stop in the construction until the District Court hearing was over (ibid). The demonstrators were reportedly not generally against wind development, but against how it is often at the expense of the South Saami community (ibid). The case also got international attention, when in 2018, the UN Committee on Racial Discrimination called for a temporary halt to construction work until the legality was clarified, something the The Ministry of Petroleum and Energy (MPE) rejected (Ravna, 2022). Starting the construction work when the case was still in the legal system was at best a bold move and at worst a tactic move, as it would be difficult to take down wind farms worth billions of NOK, paid largely by Norwegian tax money.

6.4. THE FROSTATING COURT OF APPEAL

The case was heard in the Court of Appeal by three legal judges in 2020. The court included four appraisal members, two of which had reindeer husbandry experience. Furthermore, two days were spent on extensive inspections and assessments of Roan and Storheia, including a helicopter inspection and GPS measurements of the reindeer movement in the area (Supreme Court, 2021:15). Moreover, the reindeer herder's knowledge was valued to a greater degree in these assessments than the ones made earlier.

The Court of Appeal found that the wind farms on Storheia and the eastern part of Roan wind farm already were lost as winter pastures, due to the heavy construction (Supreme Court, 2021:5). They also argued that giving the reindeers alternative pastures would not compensate for this loss (ibid:15). Moreover, the GPS measures of the reindeers' movement in the area before, during and after the construction on Roan showed that the reindeer avoided the area (ibid:16). The sïjtes argued, from the start, that this would happen, pointing to traditional knowledge and modern studies (IWGIA, 2021:512). Now as the reindeers avoid the area and the pasture is lost, it is per definition no longer a viable reindeer grazing area, thus a traditional South Saami land is consequently lost. At the point of the Court of Appeal, the case was no longer speculating about future distributive injustice, as it had already happened. It was the lack of listening and procedural justice, in the years before, that resulted in this loss of land. Moreover, the loss of land will challenge the already scarce number of reindeers allowed in the district, and if the reindeer numbers are reduced, so will the state subsidies be (Supreme Court, 2021:25). Thus, the possibilities of benefiting from the trade will significantly decrease, which will potentially force the reindeer herders out of Fosen.

Despite arguing that alternative pastures would not compensate for the loss in pastures, The Court of Appeal concluded that appropriate remedy measures should be introduced to avoid a significant reduction in the herds (Supreme Court, 2021:15). However, even with the introduction of alternative feeding, it is questionable if the livelihood will continue to be financially viable (ibid). As previously discussed, the interdependency between the sïjte units means that if one family quits, the whole reindeer husbandry on Fosen will suffer. Thus, the overall conclusion from the Court of Appeal assessments was that the very existence of reindeer husbandry was threatened at Fosen as a result of the wind farm development. The findings were almost identical to the knowledge and predictions the South Saami shared since before NVE gave out the licences. Thus, the Court of Appeal's findings created an understanding that the sïjtes were no longer ignored in the case, signalling that the environmental injustice happening could be turned around.

Still, the Court of Appeal concluded that despite the extensively negative effect the wind farms had on the South Saami's possibility to enjoy their own culture, it did not amount to a violation of Article 27[13], as winter feeding could be introduced, even if it is "not ideal in a Sami-cultural perspective" (Supreme Court, 2021:26). This conclusion is questionable in

[13] When discussing a possible violation of Article 27, the Court of Appeal demonstrated uncertainty.

light of the Court of Appeal's own assessment, arguing that alternative feeding would not compensate for the loss of pasture. However, stating that a winter feeding system, far from the reindeers' traditional nomadic lifestyle, is "not ideal" shows a lack of willingness to adjust to the traditional Saami lifestyle. Moreover, by arguing that winter feeding is a viable option, in the light of the dire expectations made, points to a level of ignorance.

When discussing the Court of Appeal's final decision, the Supreme Court argued that the Court of Appeal had not listened to the reindeer herders (Supreme Court, 2021:27). However, the Supreme Court also commended the thorough Court of Appeal inspections and used it as the basis for their judgement in 2021. Nevertheless, the link from findings to the Court of Appeal's conclusion was arguably faulty and continued on a path of non-listening and denial. The Court of Appeal granted the sïjtes a one-time compensation of 90 million NOK for the necessary reorganisation of operations, building fences and feeding in years of crisis, and extra work (Rosvold, 2022). The Judgement goes against traditional reindeer husbandry, which is to let the animals graze freely all year round (Eira & Danielsen, 2020). The reindeer herders on Fosen expressed that this would be an unnatural way to herd reindeers, to the degree where it would no longer constitute reindeer husbandry (ibid).

Both sides appealed against the judgement, Sør-Fosen sïjte on the same ground as before, while Fosen Vind on the ground that the Court of Appeal had allegedly exaggerated the measure of damages, and failed to consider the reindeer herders "duty to adapt" to climate change mitigation strategies (Supreme Court, 2021:6). The duty to adapt argument against the South Saami doesn't sit well after the long Norwegianization process, where the Saami had to adapt to the allegedly modern lifestyle of Ola and Kari Nordmann[14]. It is important to note that we all have some duty to adapt, but in regards to this case, it was ruled an invalid argument by the Supreme Court, and will thus not be further discussed.

6.5. SUPREME COURT OF NORWAY

Fosen Vind argued that the Court of Appeal was right in assessing the licence to be valid, but incorrect when measuring the damages done to the sïjtes (Supreme Court, 2021:9). Fosen Vind also argued that a violation of Article 27 is only done if the interference is "...so intrusive that it equals a total denial…", while according to the sïjtes, a violation of Article 27

[14] Ola and Kari Nordmann are commonly used as the national personification of Norwegians.

also includes when a violation has a substantial impact (ibid:7). The sïjtes also argued that as an already vulnerable industry, making them not financially viable, would mean to threaten the South Saami culture (ibid). Fosen Vind, on other hand, argued that a "threat against a minority's culture" is not a violation of Article 27 (ibid;10). The MPE supported Fosen Vind during the case, adding that "the public authorities have a positive right under the Convention to give special treatment to a group, but not a duty" (ibid).

In October 2021, the verdict was in and the Supreme Court had unanimously ruled that the reindeer herders rights had been violated under Article 27, and the licence and expropriation permit, given by the NVE in 2010 were therefore invalid. The Supreme Court argued that it was not possible to see how the Court of Appeal could rule the licence decision valid, on the basis of the assessments made (Supreme Court, 2021:27). In the discussion of Article 27, a unified Supreme Court sided with the sïjtes arguing that an intervention does not have to constitute a total denial of the right to practise culture; if it in fact leads to significant negative consequences (Ravna, 2022). The court also emphasised that the development on Storheia and Roan must be seen in connection with other interventions, both previous and planned, where the overall effect is decisive for whether there is a denial of the right to practise culture (ibid). The Supreme Court ruled that a substantial reduction in pastures deprives the herders to profit to the degree where the practice is no longer characterised as a trade (ibid). As a result, their livelihoods are threatened, and the South Saami culture could gradually be erased.

An argument from Fosen Vind was that the South Saami had been consulted prior to the development. However, the act of consultation does not guarantee legitimate inclusion and representation, when the information provided is not listened to. There was a disconnect from the assessments of Storheia and Roan in 2008 and the licence decision in 2010, similarly as there was a disconnect from the findings in the Court of Appeal assessments and their conclusion. As the Sør-Fosen sïjte argued, and the Supreme Court judges confirmed, even though consulting minorities is imperative, it does not in itself prevent a violation (Supreme Court, 2021:7).

Even though the Supreme Court agreed with Fosen Vind that there is a need for a green shift, Article 27 does not allow the State to strike a balance between the rights of the South Saami and other legitimate purposes (Supreme Court, 2021:25). Balancing of interests could be allowed if there was a conflict between different basic rights, however, the Supreme

Court did not see a basis for this (ibid). Further they point to the fact that MPE's considered many different wind power projects on Fosen and elsewhere in 2009, and could have chosen any of the less intrusive projects (ibid:26). Thus, "the green shift" argument was ruled is invalid. Moreover, the argument that a project more in line with a greener future somehow is exempt from considering Indigenous rights, is the reason why wind development is called green colonialism (Normann, 2020:5). The fact is that industrialised developments often have taken place on Saami land, which makes wind development part of an unflattering line of injustice. Moreover, by creating wind development on the basis of bettering the life of the majority, at the expense of the South Saami, brings forth memories of the State favouring the farmers over the reindeer herders, during the Norwegianization era. This circle of injustice is no coincidence, according to environmental justice theorist Murdock (2021:8), who argues that "the structural inequalities in distribution of environmental goods and environmental ills follow predictable patterns of domination and oppression".

"If the Sami reindeer herders' right to pastures are dealt with in same manner as other people's rights to property, we are in practice not dealing with equality, but discrimination" (Supreme Court, 2021:7). What the Sør-Fosen sïjtes means by this refers back to the theory of equity under distributive justice, i.e. equality is achieved by granting benefits to the marginalised people. On the other hand, Fosen Vind and the State, come from the point of view of *utilitarianism*; aiming for the greatest good for the greatest number of people (ibid:22). This means that unjust distribution can be excused if it is for the "greater good of society", such as a greener future. Even though the intention behind the green shift is distinct from the "modernisation process", during the Norwegianization era, the sentiment and results are the same; the South Saami's traditional lifestyle and culture does not fit in with contemporary, modern, and green Norway.

Even though it was not emphasised by the Supreme Court, the Fosen case also broke the Norwegian Constitution. Article 108 in the Constitution argues that "the authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life" (Lovdata, 1988). As the Saami language and culture is closely linked to reindeer husbandry, and reindeer husbandry works as a cultural shield for the South Saami, threatening their livelihood ultimately prevents the South Saami from preserving their "language, culture and way of life".

In conclusion, what the Supreme Court decision portrayed was that the state of non-listening had turned into a state of listening, and the South Saami was no longer ignored. However, the compensation was not part of the Judgement, which makes the future uncertain. This poses the question, now that the case has left the Supreme Court room and is back in the hands of the State, will the wind turbines be taken down or will the South Saami go back to being ignored again?

6.5. THE PRESENT STATE OF AFFAIRS

The South Saami argues that the only way to read the Supreme Court ruling, is that all of the 151 illegally built wind turbines, including power lines and other infrastructure, must be taken down. Additionally, the roads and the area needs to be restored to its previous state. Every minute that passes with Storheia and Roan standing, is yet another minute where the reindeer herders' rights are violated. Fosen Vind on the other hand, argues that they, in dialogue with MVE, are working on another impact assessment of how “Saami interests” can be safeguarded, at the same time as the wind farms remain standing (Stranden, 2021). Some politicians and wind project developers continue using the term “reindeer-interests”, when discussing how their current and future development clash with the Saami rights (Stranden, et.al., 2021; Wormdal, 2021). After the Supreme Court verdict it is clear that the sïjtes have more than just interests in the future of reindeer husbandry, and there is no conflict of interests, but a conflict of rights.

Nonetheless, as thoroughly discussed, the State has had an active part in the development, from giving out the licences in 2010 and being co-owner of the wind farms to supporting Fosen Vind, in and outside of court until 2021 (Supreme Court, 2021:10). With a clear bias and a history of unjust assessment skills, in this case, it seems questionable that those left to decide the future of Storheia and Roan, is no other than MVE themselves. Just like it's important to ask how the State continued to vouch for these projects, through more than a decade of assessments, national and international media scrutiny, demonstrations, and most importantly three levels of the judicial systems, we need to ask if MVE are the best equipped to decide the future of the wind farms. The UN Human Rights Committee argues that the state is obliged to ensure the complainant receives effective remedy and repair measures, which must be comparable to the damage suffered (OHCHR, 1966). Additionally it must be ensured that the right and competent authorities are the ones enforcing the

remedies (ibid). However, there is a large margin of state discretion here, i.e. the State has great room for manoeuvre, when deciding who the competent authorities are, and what the right measures ought to be (NIM, 2021). Furthermore, Prime Minister Jonas Gahr Støre has yet to comment on the case, and when asked he continuously refers all questions to MVE (Stranden, 2022a). Although, in February 2022, 4 months after the Judgement, he spoke enthusiastically about the increasing wind development in the North, arguing that it was part of the government's High North policy to utilise the local resources and making northern Norway the centre for green change (Thrane & Grønmo, 2022).

As previously mentioned in section 6.1.3., the recent transaction of ownership of Roan wind farm will have an effect on the case at hand. Roan is now owned by TrønderEnergi and Stadtwerke München, and TrønderEnergi is responsible for the daily operation (TrønderEnergi, n.d.). Thus, Roan is now fully run by local workers, which has resulted in an extraordinary employment boom, and the municipalities on Fosen have seen an increase in revenues worth billions of NOK (Kleven, et.al., 2020). (ibid). The mayor of Åfjord municipality, Vibeke Stjern, argues that the local growth ows Fosen Vind the immense development they have experienced the last decade (ibid). If Roan would still be under the ownership of the State, the case would be grounded in a Saami vs. the State discourse. Now it has shifted over to a local indigenous vs. local Laedtiehs discourse. This will only reinforce an unfortunate situation where the reindeer herders are pitted against local people, similar to how it was during the agricultural expansion in Norway. Furthermore, this will reinforce the distorted belief that Saami are against the green transition (Thrane & Grønmo, 2022).

Additionally, as Saami legal cases against businesses and the Nordic states have become increasingly public with the years, Saami communities reports a surge of hate speech, death threats, violence and property damage (IWGIA, 2021:515). E.g. in Sweden, after the landmark decision by the Supreme Court in the renowned Girjas Case, the Swedish police detailed escalating and appalling situations of violence towards the Swedish Saami, including several incidents of reindeers being tormented and killed (ibid). These cases indicate an increasingly polarised Nordic society.

The future of Storheia and Roan will shed light on whether the South Saami's rights exist in practice, or only on paper. It will also shed light on the separation of power in Norway, between the executive and judiciary. In 2022, MPE asked Fosen Vind to come up with a proposal for a new investigation on Fosen (Stranden, 2022b). The Saemiedigkie argues that the Norwegian government's handling of the case is a threat to the rule of law (ibid). The President of the Saemiedigkie, Muotka contends that the case is about much more than the

wind farms at Fosen, it is about the State acknowledging the judiciary system and its verdict (ibid). Furthermore, the decision on what to do with Storheia and Roan will create an understanding of how Norway will approach future cases, when financial gain and green solutions aren't compatible with human rights and the Saami culture. Lastly, it will also stand as an important case across Saepmie, as all eyes, nationally and internationally are on this case.

7. DISCUSSION AND CONCLUDING REMARKS

This discussion will shed light on some of the major findings in the document analysis, by revisiting the two research sub-questions, before coming to a conclusion regarding the main research question. Firstly, how has environmental injustice been expressed through distributional injustice, procedural injustice and non-recognition? The South Saami are disproportionately experiencing distributional injustice, most often on the ground of *utilitarianism.* In addition to carrying burdens of environmental risks through the changing climate, and its effect on reindeer pastures, the South Saami community carry a larger burden of Norway's expansion of climate policies and initiatives (Schreiber, 2018). Moreover, the State seems to disregard the asymmetrical power the majority have, making them aim for *equality*, when what is needed is *equity*, if the South Saami community is to survive. On the surface, the Fosen case seems like a conflict over nature conservation, but at the heart it is a conflict about the preservation of the South Saami culture, and the need to be heard and recognised in order to survive (Nilssen, 2019).

Even though the South Saami has been able to participate and represent themselves in all stages of the Fosen case, that did not guarantee them the power to influence the decision-making. The power to influence the decision-making laid elsewhere, as the Fosen case was undoubtedly affected by strong political and social relations. Fosen Vind and the Norwegian government share the same mission, to increase wind development in Norway (Det Kongelige Olje- og Energidepartementet, 2016). However, their relationship does not stop there, as the majority owner of Fosen Vind is the State itself. Thus, since the start, the State has had a clear *conflict of interest*. Furthermore, there are no guidelines for how ministries should interpret international legal obligations, such as Article 27, which is why NVE were left to interpret the assessments of reindeer husbandry on Fosen as they pleased

(NIM, 2021:65). This lack of a blueprint must be addressed, sooner rather than later, so that NVE and other ministries do not have the power to assess legal obligations without formal guidelines. Especially when they are financially and politically invested.

A decision-making process is unlikely to produce a fair outcome if participants are not already committed to mutual recognition. The State showed a lack of willingness to recognise Saami knowledge and needs, during and after the development. Furthermore, the continuing attempt to have Fosen Vind pay themselves out of this predicament, sheds light on a lack of recognising the traditions of reindeer husbandry. Moreover, it suggests that business and the State can put a price on nature and cultural values, which conflicts with the view of Norway being a green and just society.

So, how did the Norwegian state listen when the South Saami spoke? There is a level of ignorance, when it comes to the State understanding the importance of reindeer herding traditions. However, as the South Saami explained the importance, on several occasions, it is difficult to brand the State's action as a passive lack of knowledge, as it seems more as an active decision to ignore or deny. Moreover, the South Saami voice was generally ignored throughout the decision-making processes, up until the Supreme Court. This case points to the South Saami being selectively audible to the State, as their voice and knowledge is clear up until a certain point; the point where they have conflicting interests.

At its core, non-listening is a form of not recognising a community as political beings who are capable of having a voice that should be heard (Bassel, 2017:6). Bassel argues (2017:90) that political equality is not achievable as long as the State does not actively listen. To reach political equality through listening we need to address the relations that condition the present conflict of inequality, including the colonial legacy (ibid). As the Marley hypothesis argues, we will first recognize current racism in society, when we reach a higher level of knowledge about past racism.

Finally, how does the development of Storheia and Roan wind farms illustrate the Norwegian state's environmental injustice towards the South Saami? This thesis has illustrated that the Fosen case was in essence a battlefield for achieving environmental justice, for the South Saami. Moreover, the development of Fosen wind farms portrays an exclusionary decision-making process, rooted in a lack of recognition of Saami knowledge. No matter if this lack of recognition comes from ignorance, ignoring or denial, it ultimately

leads to an unfair distribution of environmental ills, consequently reinforcing the injustice towards the Saami. Moreover, the State's lack of recognising the structural inequalities in distribution of environmental ills further a predictable pattern of domination and oppression. As long as the State and businesses do not confront the implications colonialism has on present-day land-rights disputes, there will be environmental injustice.

The future of green energy in Norway is reliant on research on how wind development and Saami rights could work side by side, without furthering distributional inequalities. However, that research must be created by, or in collaboration with, the Saami. Future research could also benefit from a closer examination of the way the South Saami can effectively participate in the Norwegian democracy, inspired by what Rice (2017) argued in previous literature. Lastly, future research could also benefit from building further on the aspect of non-listening in assisting the EJ framework. However, a suggestion would be to use it for interviews, rather than documents, to be able to analyse the subjectivity behind non-listening.

This thesis has shed light on the urgent need to rethink renewable energy in Norway, by listening and including Indigenous knowledge. This is needed to protect the Saami culture, to achieve a more equal society, and avoid a future of polarisation between the Saami and the Laediths. However, the most important conclusion to the Fosen case is that it is far from over. The South Saami voice is still ignored, as the State chooses wind over lichens. So, what does it take for them to listen?

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10. APPENDICES

APPENDIX I: OPERATIONALISATION

OPERATIONALISATION TABLE.

Non-listening	Simplified definitions	Non-recognition	Procedural injustice	Distributional injustice
Ignoring	Ignoring encompasses situations where someone appears dismissive, either through official statements or by not responding at all.	Ignoring and non-recognition: Laksefjordvidda, in Finnmark, is important to the North Saami, due to reindeer herding and because it is the location for Rásttigáisá, which is a sacred Saami mountain. Still, wind development is being established (IWGIA, 2021:513).	Ignoring and procedural injustice: The Saami being ignored in detrimental decision-making procedures concerning their land. E.g. the wind park in Laksefjordvidda, in Finnmark and on Stokkfjellet, in Trøndelag.	Ignoring and distributional injustice could e.g. be seen with the State and businesses absence of wanting to resolve a conflict in dialogue with the Saami (Bishara,2015:962)
Ignorance	Ignorance refers to the lack of knowledge. Either through the active decision of avoiding knowledge or by not recognising other knowledges.	Ignorance and non-recognition: Ignorant narratives, supported by colonial theories, such as “the advancement theory” (see 4.2.2). Also the case when “The History of Trøndelag " were to be published, and did not include South Saami competences, resulting in an exclusion of Saami knowledge about Saami’s presence in Trøndelag (Fjellheim, 2020:219).	Ignorance and procedural injustice: Ignorance shows up in cases, where the South Saami representation and participation are believed to be equal to that of the State and high-profiled businesses. Another e.g. is how Fosen Vind and the State (in this case) did not recognise that for it to be procedural justice in Norway, we need equity - not equality.	Denial or ignorance and distributional injustice: The State has yet to acknowledge that distributional injustices is highly unequal in Norway. Especially regarding wind development. This could be either ignorance or denial, depending on the ministry and/or individual.
Denial	To deny something refers to declaring something to be untrue or to	Denial and non-recognition: Denying the South Saami their indigeneity, arguing that they are “too modern to be indigenous”, and	Denial and procedural injustice: Turning a blind eye or actively denying that land-rights cases in Norway between the Saami and the State are	Denial or ignorance and distributional injustice: The State has yet to acknowledge that distributional injustices is highly unequal in

	refuse to admit or acknowledge something.	demanding DNA tests. See e.g. in Fjellheim, (2020:211), where Laedtieh forest owners argue that the South Saami are “too intelligent to be indigenous”.	impacted by unequal representation, participation, and power relations. Such as the case at hand.	Norway. Especially regarding wind development. This could be either ignorance or denial, depending on the ministry and/or individual.

APPENDIX II: LIST OF ANALYSED DOCUMENTS

Date	Name	Description	Author
11-10-2021	SUPREME COURT OF NORWAY - JUDGEMENT; **HR-2021-1975-S, (case no. 20-143891SIV-HRET), (case no. 20-143892SIV-HRET) and (case no. 20-143893SIV-HRET)**	*Appeal against Frostating Court of Appeal's reappraisal 8 June 2020.* *This document includes information from the District Court, the Court of Appeal and the Supreme Court.*	The Supreme Court
03-03-2008	Fagrapport reindrift. Konsekvenser av vindkraft- og kraftledningsprosjekter på Fosen. Translated: Technical report reindeer husbandry. Consequences of wind power and power line projects at Fosen.	Employer /Customer ordering the report: Statnett SF, Sarepta Energi AS, Statkraft Development, Agder Energi Produksjon AS, Statskog SF, og Zephyr AS	Publishers: ASK Rådgivning AS and SWECO Norge AS. Responsible for the report: Kai Nybakk (ASK) and Kjell Huseby (SWECO). Authors: Jonathan E. Colman, Sindre Eftestøl, Mats H. Finne, Kjell Huseby and Kai Nybakk
07-10-2011	Prosjektnavn: Samlede virkninger av konsesjonsgitte kraftlednings- og vindkraftprosjekter på Fosen. Translated: Project name: Total effects of licensed power line and wind power projects at Fosen	Employer /Customer ordering the report: Statenett	Publishers: Ask Rådgivning. Responsible for the report: Kai Nybakk (ASK) Authors: Sindre Eftestøl and Jonathan Colman

Article 27 in The International Covenant on Civil and Political Rights	*Article 27* *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.* *(United Nations, 1976)*
Article 5 (d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination	*Article 5* *In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the lav, notably in the enjoyment of the following rights:* *(d) Other civil rights, in particular;* *(V)The right to own property alone as well as in association with others.* *(United Nations, 1966)*
§ 108 in the Norwegian Constitution	*Article 108* *The authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life.* *(The Norwegian Constitution, 1988[15]))*

[15] Updated in 1988 to include this article. The Norwegian Constitution is from 1814.

SUPREME COURT OF NORWAY

JUDGMENT

given on 11 October 2021 by the Supreme Court composed of

Chief Justice Toril Marie Øie

Justice Jens Edvin A. Skoghøy

Justice Aage Thor Falkanger
Justice Ragnhild Noer
Justice Henrik Bull
Justice Knut H. Kallerud
Justice Per Erik Bergsjø
Justice Ingvald Falch
Justice Cecilie Østensen Berglund
Justice Erik Thyness
Justice Kine Steinsvik

HR-2021-1975-S, (case no. 20-143891SIV-HRET), (case no. 20-143892SIV-HRET) and (case no. 20-143893SIV-HRET)

Appeal against Frostating Court of Appeal's reappraisal 8 June 2020

Issues and background

(2) The case concerns the validity of decions on licensing and expropriation for wind power development on the Fosen peninsula. The key issue is whether the expropriation appraisal must be ruled invalid, as the development interferes with reindeer herders' rights under Article 27 of the International Covenant on Civil and Political Rights (ICCPR).

(3) On 7 June 2010, the Norwegian Water Resources and Energy Directorate issued licences to build four windfarms on the Fosen peninsula in Trøndelag County, including the two concerned in the case at hand: Roan and Storheia. The Directorate also issued a licence to build two power lines, including a 420 kV power line from Namsos, through Roan to Storheia. The latter licence was issued to Statnett SF (Statnett). Consent was also given to expropriation of land and rights.

(4) Licences for the building of Roan and Storheia windfarms were originally issued to Sarepta Energi AS and Statkraft Agder Energi Vind DA, respectively. The windfarm operation on Fosen was later reorganised, and in 2016, the licences were instead issued to Fosen Vind DA (Fosen Vind). Roan windfarm and related assets, rights and obligations have now been transferred to a new company, Roan Vind DA. However, it is agreed that Fosen Vind represents Roan Vind DA's interests during the trial. The ruling in the case will also be binding on Roan Vind DA under section 19-15 subsection 1 second sentence of the Dispute Act.

(5) Roan windfarm was put into operation in 2019 as Norway's largest with its 71 turbines. The planning area is 24.5 square kilometres, while access roads and internal roads constitute a distance of around 70 kilometres. The eastern part of the facility – Haraheia – is particularly harmful to reindeer husbandry in the area.

(6) Upon its completion in 2020, Storheia windfarm was the largest in Norway. The windfarm consists of 80 turbines and a planning area of nearly 38 square kilometres. Access roads and internal roads cover a distance of approximately 62 kilometres. The altogether six windfarms on Fosen are stated to be the largest onshore wind power project in Europe.

(7) Storheia and Roan windfarms are located within the area of Fosen grazing district. Two siidas practice reindeer husbandry in their respective parts of the district – Sør-Fosen sijte and NordFosen siida. The siidas are often referred to as the south group and the north group, including in the case at hand. I choose nonetheless to use the full siida names. A siida – or "sijte" in the South Sami language – is according to section 51 of the Reindeer Husbandry Act a group of reindeer owners practicing reindeer husbandry jointly in specific areas. Each of the two siidas on Fosen consists of three siida units. According to section 10 of the Reindeer Husbandry Act, a siida unit is a family or individual practicing

reindeer husbandry. The total number of reindeer for the district is stipulated in the rules of usage at a maximum of 2 100, equally divided between the two siidas.

(8) Fosen grazing district constitutes an area of around 4 200 square kilometres, divided on NordFosen siida with 2 200 square kilometres and Sør-Fosen sijte with 2 000 square kilometres. Roan windfarm is located within the pasture of Nord-Fosen siida, while Storheia windfarm is located within the pasture of Sør-Fosen sijte.

(9) The licence and expropriation decisions from 2010 were appealed by a number of organisations and private individuals. Nord-Fosen siida was one of the appellants against the Roan licence, while Sør-Fosen sijte appealed against the Storheia licence. On 26 August 2013, the Ministry of Petroleum and Energy decided to uphold the decisions, but with certain changes and on certain conditions. Among other things, parts of the Haraheia areas were removed from Roan windfarm's planning area. Sør-Fosen sijte also appealed against the licence decision for the Namsos−Roan−Storheia power line, without success.

(10) The Ministry of Petroleum and Energy assumed in its decision that the planning area of *Roan* windfarm was of "great value" to the reindeer herders. The consequences of a development were assessed to be "large negative" during both the construction and operation phase. It was also emphasised that the area could "be used for reindeer husbandry also after the development, even if it [would] demand more from the reindeer herders in the form of increased work". As concerned *Storheia* windfarm, the Ministry assumed that a development would "be negative" for reindeer husbandry, but that the area would not "be lost as winter pasture". The Ministry found that the wind power project would not "prevent continued operation for the south group".

(11) The windfarms were built and put into operation after a decision on advance possession. The Ministry of Petroleum and Energy's licence and expropriation decisions will hereafter mostly be referred to as the "licence decision".

The court proceedings

(12) On 25 August 2014, Fosen Vind brought an appraisal action for measure of damages to the siidas for the building and operation of, among others, Roan and Storheia windfarms. NordFosen siida and Sør-Fosen sijte were among the defendants. Statnett brought an appraisal action for the power line Namsos−Roan−Storheia.

(13) Sør-Fosen sijte demanded that the appraisal be ruled inadmissible on the part of Storheia windfarm, principally because the licence decision was a violation of minorities' rights under Article 27 ICCPR to enjoy their own culture. The consequences of the 420 kV power line were included here. This part of the case was heard separately by Inntrøndelag District Court together with the appraisal procedure towards one of the landowners harmed

by the power line. On 15 August 2017, the District Court found that that the building of Storheia windfarm with related infrastructure would not limit the Sami people's possibility to practice reindeer husbandry to such an extent that it amounted to a violation of Article 27 ICCPR. The appraisal was therefore allowed.

(14) The sijte requested a reappraisal to have the decision to allow the appraisal overturned. Frostating Court of Appeal turned down the request, and the second-tier appeal to the Supreme Court was dismissed. The reason was that a decision to allow an appraisal could not be challenged separately before an appraisal ruling is given.

(15) On 28 June 2018, Inntrøndelag District Court made a discretionary assessment of the measure of damages in connection with the expropriation of land and rights for the windfarms on Fosen and the power lines. Sør-Fosen sijte was awarded damages of nearly NOK 8.9 million for the loss of pastures, feeding in years of crisis, extra work and costs for materials. For Nord-Fosen siida, total damages were measured to approximately NOK 10.7 million. The amount includes compensation for the windfarms at Kvenndalsfjellet and Harbakksfjellet.

(16) Statnett and Fosen Vind petitioned for a reappraisal, arguing that the damages were too high. Sør-Fosen sijte also petitioned for a reappraisal, demanding that the appraisal be ruled inadmissible. The sijte claimed that the development of Storheia was incompatible with Article 27 ICCPR, Article 1 Protocol 1 of the European Convention on Human Rights (ECHR), and Article 5 (d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

(17) Sør-Fosen sijte argued in the alternative that the decision by the Ministry of Petroleum and Energy be ruled invalid for procedural errors, as it was based on false premises and poorly prepared. The sijte also made alternative submissions regarding the measure of damages. Nord-Fosen siida demanded that the reappraisal court examine the validity of the licence and expropriation decisions by its own measure and that the reappraisal be ruled inadmissible for Roan windfarm. Nord-Fosen siida, too, made submissions regarding the various compensation issues in the case.

(18) Frostating Court of Appeal issued a reappraisal on 8 June 2020, allowing the appraisals for both Storheia and Roan windfarms.

(19) The Court of Appeal concluded that Storheia and Haraheia – the eastern part of Roan windfarm – were in practice lost as late winter pastures. It found that the loss could never be fully compensated by the use of alternative pastures, that the number of reindeer would ultimately have to be dramatically reduced unless remedy measures were implemented, and that the windfarms thus threatened the very existence of reindeer husbandry on Fosen. This was still not considered a violation of Article 27 ICCPR, as the Court of Appeal found that it was possible to introduce winter feeding of the reindeer – based on the damages measured by the Court of Appeal. The Court of Appeal discussed whether

such an initiative was so remote from traditional reindeer husbandry that it, in itself, would violate the right to practice Sami culture, but concluded with “a certain doubt” that it would not.

(20) Furthermore, the Court of Appeal found that the decisions do not violate either Article 1 Protocol 1 of ECHR or Article 5 (d) (v) of ICERD. Due to the need of winter feeding, the damages for the loss caused by the windfarms exceeded by far those measured by the District Court – around NOK 44.6 million to each of the siidas. The three largest items are one-time investments in plant and equipment, annually capitalised feeding costs and annually capitalised costs for gathering and release. In the Court of Appeal's view, the one-time compensation for investments in facilities is justified by the necessity of more fenced-in areas demanding a total of 4 500 metres of fences. Fosen Vind and Statnett were held jointly and severally liable for the damages. The two siidas were awarded costs.

(21) Statnett has appealed the reappraisal to the Supreme Court (case 20-143891). The appeal challenges the application of the law and is limited to whether Statnett may be held jointly and severally liable for damages relating to the windfarms. During the preparatory phase in the Supreme Court, the parties have agreed that Statnett cannot be held liable together with Fosen Vind for damages for the windfarms, and prayers for relief on this point are concurrent.

(22) Fosen Vind has appealed against the Court of Appeal’s measure of damages (case 20-143892). The appeal challenges the application of the law and the procedure. Fosen Vind claims that the Court of Appeal has failed to link the damages to the siidas' financial loss and to consider the duty to adapt. The appeal against the procedure relates to the Court of Appeal’s reasoning.

(23) Sør-Fosen sijte, too, has appealed against the reappraisal to the Supreme Court (case 20143893). The appeal challenges the application of the law, more specifically the interpretation and application of Article 27 ICCPR and Article 5 (d) (v) ICERD. Sør-Fosen sijte requests that the appraisal be ruled inadmissible.

(24) Nord-Fosen siida has not appealed against the reappraisal, but requested that the appraisal be ruled inadmissible.

(25) In the following, I will discuss the various issues thematically, without making a clear distinction between the three appeals.

(26) On 23 November 2020, the Supreme Court’s Appeals Selection Committee made this decision:

“Leave to appeal is granted to Fosen Reindeer Grazing District, the south group and Statnett SF.

Leave to appeal is granted to Fosen Vind DA as concerns the application of the law with regard to the financial loss and duty to adapt. Otherwise, leave to appeal is refused."

(27) Pursuant to section 15-7 subsection 1 (a) of the Dispute Act, the State represented by the Ministry of Petroleum and Energy acts as intervener for Fosen Vind in the Supreme Court in the issue concerning the admissibility of the appraisal. In the part of the case concerning the appeal from Fosen Vind, the State has acted in accordance with section 30-13 of the Dispute Act on the State's right to participate in cases involving the Constitution or international obligations. Apart from this and within the scope of the leave to appeal and the Supreme Court's jurisdiction, the case stands as it did in the previous instances.

(28) The Supreme Court has conducted a remote hearing in accordance with section 3 of temporary Act of 26 May 2020 no. 47 on adjustments in the procedural set of rules due to the Covid-19 outbreak etc.

The parties' contentions

(29) *Sør-Fosen sijte*:

(30) The development of Storheia violates the Sami reindeer herders' rights under Article 27 ICCPR and Article 5 (d) (v) of ICERD. The Ministry of Petroleum and Energy's licence decision is therefore invalid, and the appraisal must be ruled inadmissible.

(31) The determination of whether Convention rights have been violated requires an individual assessment based on the factual circumstances at the time of the judgment. One must establish whether the relevant decisions conflict with the substantive limits on administrative discretion, and the doctrine that the courts may only consider the adequacy of the public administration's forecasts is thus not applicable.

(32) The Court of Appeal's assessment of how the windfarms at Storheia affects reindeer husbandry in Sør-Fosen sijte is correct. The Supreme Court has a weaker basis for its assessments and should not diverge from the findings of fact in the reappraisal.

(33) Article 27 ICCPR confers rights on individuals to enjoy their own culture, and the question is thus, at the outset, whether the individual reindeer herder's rights have been violated. However, since reindeer husbandry is practiced collectively, a siida may also invoke rights under the Convention. In any case, the siida must be able to act as a party to the expropriation appraisal and assert a violation on behalf of its members.

(34) According to Article 27 ICCPR, a violation occurs not only when an interference entails a total denial of the right to cultural enjoyment, but also when it has a considerable

impact. When the cultural practice is vulnerable to begin with, a violation occurs already when the interference has a "certain limited impact". Article 27 is violated if the possibility of benefiting from the practice is lost. It is sufficient that the practice is threatened, and the provision does not allow for a margin of appreciation or a proportionality assessment. Consultation with the minority is an important factor, but cannot in itself prevent violation if the negative effects are substantive. Indigenous peoples' connection to the land must be included in the assessment.

(35) The development of Storheia windfarm amounts to a violation of Article 27 CCR. The interference has the effect that Sør-Fosen sijte loses a crucial late winter pasture. The loss of Storheia will over time give a dramatic reduction of the herd and make it impossible to operate with a viable profit. One must take into account the particularly vulnerable SouthSami culture. Damages for winter feeding costs do not prevent a violation. Article 108 of the Norwegian Constitution has the same content as Article 27 ICCPR, and applies independently if it is concluded that the siidas cannot assert a violation of the latter on behalf of the herders.

(36) The licence decision also violates the reindeer herders' rights under Article 5 (d) (v) ICERD. Loss of land threatens the preservation and existence of the Sami culture. Such a loss cannot be compensated financially, as is the case for interference with the rights of others. If the Sami reindeer herders' right to pastures are dealt with in same manner as other people's rights to property, we are in practice not dealing with equality, but discrimination.

(37) If damages are to be measured, Sør-Fosen sijte supports Nord-Fosen siida's contentions in this regard. Sør-Fosen sijte agrees with Statnett that the latter is not jointly and severally liable for possible damages for the consequences of the windfarms.

(38) Sør-Fosen sijte requests the Supreme Court to rule as follows:

"I. The appeal from Sør-Fosen sijte

Principally:
The appraisal is inadmissible.

Alternatively:
The reappraisal is set aside to the extent appealed.

In both cases:
Sør-Fosen sijte is awarded costs.

II. The appeal from Fosen Vind DA

1. The appeal is dismissed.

2. Sør-Fosen sijte is awarded costs.

III. The appeal from Statnett SF

1. The reappraisal is set aside as concerns Statnett's liability for the windfarms.

2. Sør-Fosen sijte is awarded costs."

(39) *Nord-Fosen siida*:

(40) The building of Roan windfarm violates the siida members' rights under Article 27 ICCPR and Article 5 (d) (v) ICERD. The Ministry of Petroleum and Energy's licence decision is therefore invalid, and the appraisal must be ruled inadmissible.

(41) The violation issue is substantive. The courts must assess all evidence available at the time of the judgement, and are not to assess the adequacy of the public administration's forecasts. Moreover, this case does not involve assessing new legal facts, but new evidence. Thus, the Supreme Court has full jurisdiction.

(42) The Supreme Court must build on the Court of Appeal's findings of fact, also when assessing the impact Roan windfarm has on reindeer husbandry. Nord-Fosen siida supports Sør-Fosen sijte's contention that the Supreme Court should not diverge from the findings of fact in the reappraisal.

(43) Nord-Fosen siida agrees with Sør-Fosen sijte's general interpretation of Article 27 ICCPR. In the individual assessment of whether Article 27 has been violated, it must be taken into account that Nord-Fosen siida is the group of reindeer herders in Norway most harmed by the windfarms and related infrastructure. The building of Haraheia will have particularly negative consequences for the herding, as crucial winter pastures are lost. Compensation for winter feeding costs does not prevent violation. There has also been a violation of the rights under Article 5 (d) (v) of ICERD. On this point, Nord-Fosen siida supports the contentions from Sør-Fosen sijte.

(44) Alternatively, the appeal from Fosen Vind against the Court of Appeal's measure of damages must be dismissed. The Court of Appeal has not made an error in law, and neither the findings of fact nor the appraisal procedure may be reviewed. In its measure, the Court of Appeal has correctly assumed that the Sami interests enjoy particular protection, established by case law. Article 27 ICCPR is not applied as basis for damages in the reappraisal. The Expropriation Compensation Act is not applicable, and the provisions therein do not in any

case preclude damages beyond the loss of proceeds. Under any circumstances, the Court of Appeal's measure of damages are in accordance with the principles of compensation for non-economic loss. The Constitution and the international law provisions on protection of Sami reindeer husbandry are relevant as interpretative factors and limitations, but may also form an independent basis for damages. The Court of Appeal has correctly considered the possibilities of reducing the loss.

(45) Statnett is right when stating that it is not jointly and severally liable for payment of possible compensation for the consequences of the windfarms.

(46) Nord-Fosen siida requests the Supreme Court to rule as follows:

"In case 20-143892SIV-HRET (the appeal from Sør-Fosen sijte)

1. Principally: The appraisal is inadmissible.

2. In the alternative: The reappraisal is set aside as concerns the application of the law in the question of the appraisal's admissibility.

3. Nord-Fosen siida is awarded costs.

In case 20-143893SIV-HRET (the appeal from Fosen Vind AS)

1. The appeal is dismissed.

2. Nord-Fosen siida is awarded costs.

In case 20-143891SIV-HRET (the appeal from Statnett SF):

1. The reappraisal is set aside as concerns Statnett's liability for the windfarms.

2. Nord-Fosen siida is awarded costs."

(47) *Fosen Vind DA*:

(48) The Court of Appeal has correctly trusted that the licence decision is valid, and the appraisal

is therefore admissible. This implies that the appeal from Sør-Fosen sijte must be dismissed. However, the reappraisal must be set aside because the damages are measured based on an error in law.

(49) The appraisal's admissibility is not to be examined for Nord-Fosen siida. The siida has not appealed against it, and for this group of reindeer herders, there is as a starting point no "dispute", see section 48 of the Appraisal Procedure Act. We are not dealing with a procedural condition automatically examined by the courts, but with a substantive issue that is only examined if disputed. The case is subject to unlimited rights of disposition. Admittedly, this issue may now change, with Nord-Fosen siida's request that the appraisal be ruled inadmissible.

(50) The assessment of the validity issue must be based on the facts at the time of the judgment. The question is whether the public administration's forecasts on how the development will affect reindeer husbandry on Fosen are adequate. New evidence may only be assessed to the extent it sheds light on the propriety of the licence decision at the time of the judgment.

(51) The Court of Appeal has made an error in fact. It is acknowledged that the herding in both siidas is disturbed by the windfarms, but the Court of Appeal has overestimated the negative consequences. Late winter pastures are not a so-called "minimum factor" for reindeer husbandry in the district – it is the availability of summer pastures that dictates how many animals the herders can have.

(52) The threshold for violation under Article 27 ICCPR is high, see the term "denied". The use of "threaten" in case law from the UN Human Rights Committee does not mean that merely a threat against a minority's culture is sufficient; the intereference must be so intrusive that it equals a total denial. Significant weight must be placed on consultations and involvement in the decision-making process. The States Parties may not exercise a margin of appreciation, but a balance should be struck against other interests of society.

(53) The wind power development does not violate the reindeer herders' rights under Article 27 ICCPR. The consequences are not so serious that they deprive the Sami of their right to enjoy their own culture on Fosen. The Ministry of Petroleum and Energy's assessments and forecasts are thorough and adequate in every way. The reindeer herders have been consulted in the process, while a balancing against other interests of society suggests that no violation has taken place. The significance of "the green shift" is massive. The development also does not violate Article 5 (d) (v) ICERD, see the State's contentions.

(54) The measure of damages in the reappraisal is based on an error in law. The Court of Appeal has failed to link the damages to the reindeer herders' financial loss. Article 27 ICCPR does not give a basis for derogating from general principles of measuring damages in expropriation law. Secondly, the duty to adapt has not been considered. Fosen Vind agrees that Statnett is not liable for the consequences of the windfarms.

(55) Fosen Vind DA requests the Supreme Court to rule as follows:

"In case 20-143893 (the validity case):

1. The appeal is dismissed.

2. Fosen Vind is awarded costs in the Supreme Court.

In case 20-143892 (the damages case):

1) The reappraisal is set aside."

(56) Fosen Vind's intervener − *the State represented by the Ministry of Petroleum and Energy* − supports the contentions from Fosen Vind and submits:

(57) Article 27 ICCPR protects physical persons only, not groups of individuals. Thus, no individual rights are conferred on Nord-Fosen siida and Sør-Fosen sijte. The siidas may also not appeal to the UN Human Rights Committee on behalf of its members. In a case like this, the siidas are not allowed under procedural law to represent their members in a lawsuit. Against this background, the request that the appraisal be ruled inadmissible cannot be considered.

(58) The siidas contention that their rights under Article 5 (d) (v) of ICERD have been violated cannot be heard. It is unclear whether the siidas' rights are protected under the Convention at all. In any case, the Convention does not contain other substantive requirements for the right to expropriation than equality. The public authorities have a positive right under the Convention to give special treatment to a group, but not a duty.

(59) The State represented by the Ministry of Petroleum and Energy has not requested a ruling.

(60) *Statnett SF*:

(61) The Court of Appeal's conclusion that Statnett is jointly and severally liable for the entire damages amount is an error in law. Statnett has only been awarded a licence and an expropriation permit for the establishment of a 420 kV power line and cannot be held accountable for the consequences of the windfarms.

(62) Statnett SF requests the Supreme Court to rule as follows:

"The reappraisal is set aside as concerns Statnett's liability for the windfarms."

My opinion

The key issue and further discussions

(63) The key issue is whether the appraisal is inadmissible on the part of Roan and Storheia windfarms because the licence decisions by the Ministry of Petroleum and Energy are invalid. The two siidas in Fosen grazing district have invoked two bases for invalidity – violation of
Article 27 ICCPR and violation of Article 5 (d) (v) ICERD. I will first present my view on the Supreme Court's jurisdiction in the validity issue. Then, I will discuss the findings of fact and the facts forming the basis for the discussion. Against this background, I will consider whether there has been a violation of the reindeer herders' rights under either ICCPR or ICERD.

The Supreme Court's jurisdiction in the validity issue

The scope of the examination under section 38 of the Appraisal Procedure Act.

(64) According to section 38 of the Appraisal Procedure Act, a reappraisal may only be appealed for "errors in law or procedure forming the basis for the ruling". It is established in case law that this limitation only applies to issues regarding the measure of damages. When it comes to whether the substantive criteria for bringing an appraisal action are met, the Supreme Court has full jurisdiction, see Rt-2006-1547 paragraph 46 with further references.

(65) The appeal from Sør-Fosen sijte in the validity case challenges the Court of Appeal's application of the law. However, the respondent Fosen Vind disputes the Court of Appeal's findings of fact. The respondent's contentions regarding the findings of fact cannot be precluded even if the appeal is limited to the application of the law, see HR-2017-2165-A paragraph 104 with further references. As emphasised in Rt-2014-1240, this is the consequence of the successful party in the lower instance lacking a legal interest in appealing, see section 29-8 subsection 1 first sentence. When the respondent exercises its right to challenge the findings of fact, the appellant may object by presenting its own view on the specific issue, see HR-2017-2165-A paragraph 104. These principles apply correspondingly in connection with an appraisal, see section 2 of the Appraisal Procedure Act. Consequently, the Supreme Court is to examine the findings of fact in the validity issue if warranted by Fosen Vind's contentions and the siidas' objections.

The Supreme Court's jurisdiction to review the facts

(66) Fosen Vind contends that the facts at the time of the judgment are decisive for the validity issue. The company also maintains that the Supreme Court may only consider the adequacy of the public administration's forecasts at the time of the licence decision.

(67) As set out in the plenary judgment Rt-2012-1985 *Long-residing children I* paragraph 81, the general starting point for the hearing of validity actions is that the review must be based on the facts at the time of the judgment. In my view, this limitation does not apply when the issue, like here, is the admissibility of an appraisal.

(68) First, I point out that if, during an appraisal procedure, a dispute arises on the rights or requirements related to expropriation, or on the expropriated property, the court is to resolve the dispute during the appraisal proceedings, see section 48 of the Appraisal Procedure Act. This includes disputes on the validity of the expropriation decision. If the court finds that the decision is invalid, the appraisal must be ruled inadmissible. On the other hand, if the court finds that the decision is valid, no separate ruling is required. The court is then to proceed with the case and measure the expropriation damages. However, the expropriation decision together with the appraisal criteria will form the factual basis for the court's measure of damages.

(69) Section 10 subsection 1 of the Expropriation Compensation Act establishes that "the time the appraisal was verified" forms the basis for the measure of damages. Section 10 second sentence makes exceptions for cases where the expropriation decision has already been effectuated. Then, the compensation must be measured based on the value at the time of the takeover. The case at hand illustrates the close proximity between the validity of the expropriation decision and the measure of compensation. It would be inexpedient if these issues were resolved based on facts at various points in time. If, after the time of the decision, new circumstances occur that may impact on the validity of the decision, the appraisal must be ruled inadmissible and the case sent back for new administrative processing.

(70) In this case, the time when the facts occurred is not a pronounced issue. It is nonetheless possible to present new evidence that may shed light on the situation at the time of the judgment, see paragraph 50 of *Long-residing children I*. Here, it has not been contended that new legal facts have occurred after the expropriation permit was granted, but new evidence has been presented through reports etc. Such new evidence may in any case be taken into account.

(71) As for the review of administrative discretion, case law establishes that to the extent the administrative decision is based on forecasts for future development, the court will only consider whether the forecasts were adequate at the time of the decision. Key in this regard is the Supreme Court judgment in Rt-1982-241 *Alta* page 266, also referenced in Rt-2012-1985 *Long-residing children I* paragraph 77. However, this cannot apply in our case, where the question is whether Article 27 ICCPR prevents the appraisal. The courts must then consider the effect of the interference based on independent findings of fact, and not limit

their review to the adequacy of administrative forecasts. I note that the Supreme Court's review in HR2017-2247-A *Reinøya* was not limited to this.

Is the Supreme Court to consider the admissibility of the appraisal also for Nord-Fosen siida?

(72) Nord-Fosen siida has not appealed against the reappraisal. This has raised the question whether the Supreme Court may consider the admissibility of the appraisal also for this siida.

(73) I start with section 48 of the Appraisal Procedure Act, which I have already mentioned. The provision reads:

"If during the appraisal procedure presided over by a judge, a dispute arises on rights or conditions related to expropriation, or on the expropriated property, the dispute shall be resolved during the appraisal procedure."

(74) In its final pleading to the Supreme Court, Nord-Fosen siida requested that the appraisal be ruled inadmissible, disputing the validity of the expropriation and licence decisions. This has been maintained during the appeal hearing. Hence, a "dispute" exists on the right to expropriation under section 48. The Supreme Court must therefore, as a starting point, consider the validity issue also for Nord-Fosen siida.

(75) Fosen Vind has mentioned that the request for an admissibility ruling was made after the time limit for appeal had expired, and after the Supreme Court's Appeals Selection Committee had decided to allow the appeal. However, these objections are not decisive. The admissibility of the appraisal is not a claim in a procedural sense, but a substantive premise for the measure of damages. Nord-Fosen siida may therefore request that the appraisal be ruled inadmissible, although the siida has not appealed against it. It is not possible under section 30-7 of the Dispute Act to broaden the prayer for relief or submit new facts or evidence after leave to appeal has been granted. However, this rule is not absolute, as such broadening is prohibited "unless special grounds suggest otherwise". As the case stands, it must be assumed that the Appeals Selection Committee has accepted the broadening of Nord-Fosen siida's prayer for relief. This means that the Supreme Court is obliged under section 48 of the Appraisal Procedure Act to consider the admissibility of the appraisal also with regard to Nord-Fosen siida.

The findings of fact in the validity issue

Some starting points

(76) When assessing the validity of the licence decision, the key evidentiary issue is which parts of the siidas' late winter pastures near Storheia and Roan windfarms are lost, and the significance thereof for reindeer husbandry.

(77) Late winter grazing takes place from January to around Easter, over a period of approximately 90 days. A condition for late winter grazing is that the reindeer have access to lichens. Lichens are particularly accessible in bare rock areas with high wind-blown ridges, but this depends on the snow conditions in the relevant year. Only a small part of the total area referred to as late winter pasture allows the reindeer to graze. The turbines in the two windfarms are placed alongside the mountain ridges and thus in areas well suited for late winter grazing.

(78) In the case at hand, the direct presentation of evidence is of great importance, to which I will also return. The Supreme Court has a poorer basis for assessing the consequences of the development than what the Court of Appeal had, and should as a starting point be reluctant to review the Court of Appeal's findings of fact. There are no limitations on Fosen Vind's possibility as a respondent to challenge the Court of Appeal's findings of fact. But, in my opinion, a respondent taking this opportunity has a particular responsibility to provide the Supreme Court with a solid basis for assessing the evidence. The Supreme Court must be allowed to concentrate on the objections made, and only examine the facts to the extent the objections give a reason for doing so.

The Court of Appeal's assessment of the development's impact on reindeer husbandry

(79) The Court of Appeal has concluded that the reindeer will avoid the windfarms in Storheia and Roan, and summarises this as follows in the reappraisal ruling:

"Against this background, the Court of Appeal takes it that the reindeer will avoid the windfarms developed on Fosen, where Storheia and Roan (Haraheia) are the most important by far. The avoidance will in the Court's view be so significant that the areas must be considered lost as pastures. The avoidance zone may be assumed to be at least three square kilometres, but this is not a pronounced issue in this case. For late winter grazing, the mountain ridges are particularly valuable, and these will in any case be lost."

(80) The Court of Appeal also considers it "speculative" to assume that the reindeer will become used to the windfarms and start grazing in the areas at a later point in time.

(81) Based on these conclusions, the Court of Appeal discusses which consequences the lost pastures will have for reindeer husbandry. The Court of Appeal takes as its starting point that this depends on whether late winter pastures are a restrictive factor for the number of reindeer – a so-called minimum factor – so a loss thereof will inevitably give a reduced number of reindeer and/or lower slaughter weights.

(82) After disussing the evidence, the Court of Appeal concludes that the building of *Roan* windfarm will give a "dramatic loss of pasture for the North Group, which in the long run will lead to a reduction of the number of reindeer unless measures in the form of winter feeding are implemented".

(83) For *Storheia* and Sør-Fosen sijte, the Court of Appeal makes the following assessment of the development's consequences for reindeer husbandry:

"Despite these the objections, the Court of Appeal assumes that Storheia, considered in the long term, is a late winter pasture the herders use and depend on. In this assessment, emphasis is placed on the area's objective suitability; it concerns significant and naturally demarcated areas, which due to their location in the heights and close to the coast are well suited for late winter grazing. With a more unstable climate, there is reason to assume that the significance of such areas will increase in the future. Moreover, it is clear in a historical sense that the area has been used, if not recently.

Nonetheless, it is a separate question whether the South Group with its current number of reindeer can manage with Rissa and Leksvik late winter pastures, as it has indeed done since 2007. The Court of Appeal assumes that it eventually will be difficult to maintain the number of reindeer if Storheia is lost as late winter pasture. Partially because the other winter pastures, particularly Leksvik, at some point will need rest to avoid over-grazing.
The Court of Appeal does not have secure information on the current wear and tear in these areas, but reindeer owner Jåma has explained that the areas are now marked by long-term grazing. Partially also because Storheia, due to the climatic conditions, is the only secure winter pasture in so-called years of crisis. Both Leksvik and Rissa may be exposed to icing with winter temperatures around zero degrees centigrade. However, Storheia is snowless along the mountain ridges and therefore much less exposed."

(84) When discussing the validity issue, the Court of Appeal states:

"As mentioned, the Court of Appeal bases its assessment on the assumption that both Storheia and Haraheia in practice are lost as late winter pastures. Furthermore, the Court of Appeal has assessed the scope of the loss and the pastures in general, so that the loss cannot be fully compensated by use of alternative pastures. Without remedy measures, the development could have the effect that the reindeer herds must be dramatically reduced. Both sijtes have indicated up to a 50 percent reduction, but such an estimate is of course burdened with uncertainty and understandable pessimism.

As mentioned, the number of reindeer is 1050 for each individual sijte, divided on 350 for each of the three sijte units (the families). Leif Arne Jåma from the South Group has stated that the annual profit from his herding practice in 2018 was just below NOK 300,000. With such rather marginal results, there is reason to believe that a dramatic reduction of the number of reindeer implies that the practice can no longer be operated with a profit, or at least so that the profit is no longer reasonably proportionate to the efforts. The costs will be more or less the same with a reduced number of reindeer. If the reduction has the result that one of the families quits, this will create operational problems for the two others; during slaughter and other gathering of the reindeer, it is

necessary according to the herders to have at least three operational units. The Court of Appeal has no basis for doubting this.

An isolated assessment implies, in the Court of Appeal's view, that the building of windfarms at Storheia and Haraheia will threaten the existence of reindeer husbandry on Fosen."

(85) In other words, the Court of Appeal accepts that the building of the windfarms in Storheia and Roan will threaten the existence of reindeer husbandry on Fosen, unless remedy measures are implemented. The question is whether the Supreme Court has reason to derogate from these assessments. I will first look at the basis for the Court of Appeal's findings of fact before I consider the objections from Fosen Vind.

Basis for the Court of Appeal's findings of fact

(86) The Court of Appeal heard the case with three legal judges as decided by the senior presiding judge, see section 34 of the Appraisal Procedure Act. The court was composed of four appraisal members, two of whom had reindeer husbandry expertise. The appraisal proceedings were held over 13 court days. Two days were spent on inspections, and according to the court records, both Roan and Storheia were inspected in detail. The Court of Appeal was also on a helicopter inspection above parts of the area. Ten expert witnesses were interviewed, while a significant number of research reports have been assessed. As I see it, the case has been thoroughly dealt with, and that the Court of Appeal has had a solid basis for its findings.

(87) In its assessment of the consequences of the windfarms, the Court of Appeal takes as its starting point Report 1305 from the Norwegian Institute for Nature Research "Wind power and reindeer – a knowledge synthesis" (2017). The report is a compilation of various investigations on how the reindeer are affected by the windfarms and power lines. The Court of Appeal reproduces the report's summary on wind turbines and rotors, which sets out that variations in the findings are due to "topography, grazing conditions, closeness to other infrastructure as well as the design/completion of the various investigations". Against this background, the Court of Appeal takes the following starting point for its further discussion:

"Although the conclusion is relatively open considering the effect of wind power plants, it is so that the transfer value from the various investigations on which the conclusion in the report is based to the situation on Fosen, varies. It is therefore necessary to assess more closely geographical and other premises for the various investigations."

(88) This is a sound approach, which is also not disputed. The Court of Appeal continues by assessing and commenting on six different reports. I will return to Fosen Vind's objections to the Court of Appeal's conclusions. The point here is that the Court of Appeal

has been conscious of the somewhat divergent conclusions in the various research reports, discussed them and applied them to the conditions at Storheia and Roan.

(89) The Court of Appeal has placed significant weight on a presentation held by senior lecturer Anna Skarin from the Swedish University of Agricultural Sciences in Uppsala. Her conclusions have neither been commented on nor disputed by Fosen Vind in the Supreme Court. The Court of Appeal has also relied on several other expert witnesses and reindeer herders with experience from windfarm areas. No recorded evidence or written submissions have been presented from any of these.

(90) In the reappraisal ruling, the Court of Appeal also refers to GPS measurements of the reindeer's use of the Haraheia area before, during and after the building of Roan windfarm. In the Court of Appeal's view, the measurements support the conclusion that the reindeer will avoid the area. I cannot see that Fosen Vind has objected very strongly to these measurements.

(91) Also, the Court of Appeal makes several comments on the area's nature, including its suitability as late winter pasture and the significance of the visibility of the turbines for the reindeer. The assessment of what is lost for the reindeer herders is thorough and concrete. As I understand the reappraisal ruling, the Court of Appeal largely bases itself on its own observations during the inspection, which are in turned balanced against information from the expert witnesses among others.

(92) My overall impression is that the Court of Appeal has had a solid basis for its findings, and that they are adequate in every way. The Court's own observations and the direct statements from witnesses have been of great help to the understanding. As mentioned, the Supreme Court has a poorer basis for its assessment of the windfarms' impact on reindeer husbandry, and I refer to my previous comment that this suggests that the Supreme Court should be reluctant to review the findings of fact.

Fosen Vind's objections to the Court of Appeal's findings of fact

(93) A main objection from Fosen Vind is that the Court of Appeal has not considered alternative grazing resources. I do not agree. I have already mentioned that the Court of Appeal has considered whether pastures at Storheia and Roan are minimum factors for the two siidas, and found that a loss thereof will lead to a reduction in the reindeer numbers and/or reduced slaughter weight. The possibility to use alternative pastures is necessarily included in this assessment. And for Sør-Fosen sijte's part, the alternative late winter pastures in Leksvik and Rissa are assessed more explicitly.

(94) In its discussion of whether the late winter pastures dictate the reindeer numbers, the Court of Appeal has relied on an impact assessment from 2008 and the rules of usage for

the two siidas. Both suggest that winter pastures are not crucial for the operation. However, based on other evidence presented, the Court of Appeal has not considered this decisive in its assessment of the long-term effects of the measure. I have no basis for derogating from the Court of Appeal's findings here.

(95) Fosen Vind has also been critical to the Court of Appeal's interpretation and application of some of the research articles. The objections relate to the studies of Fakken, Gabrielsberget and Raggovidda windfarms. It may well be that not all the references to these investigations in the reappraisal are equally precise. However, on this point, also, the attack on the Court of Appeal's findings is not presented in such a way that I have a basis for saying that they are incorrect.

(96) In Fosen Vind's view, the Court of Appeal has no basis for stating that 44 percent of the reindeer need winter feeding. Nonetheless, the Court of Appeal has measured the damages based on this premise. As for the validity issue, the Court of Appeal has stated that the reindeer numbers must be "dramatically reduced due to the loss of pastures". The knowledge base currently available does not provide me with sufficient basis for derogating from this assessment.

(97) Overall, the objections from Fosen Vind are not sufficient for setting aside the Court of Appeal's findings of fact. I therefore rely on these findings when I turn to discuss the validity issue.

The question of violation of Article 27 ICCPR

Legal starting points

(98) Article 27 of the UN Convention on Civil and Political Rights (ICCPR) reads:

"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."

(99) Article 27 ICCPR must be viewed in context with Article 108 of the Constitution, which imposes a duty on the state authorities "to create conditions enabling the Sami people to preserve and develop its language, culture and way of life". The provision is based on Article 27 ICCPR and may constitute an independent legal basis where other sources of law give no answer, see HR-2018-872-A paragraph 39.

(100) Pursuant to section 2 (3) of the Human Rights Act, ICCPR applies as Norwegian law and thus sets limits on administrative discretion. In the event of a conflict, provisions in

the Convention take precedence over any other legislative provisions, see section 3. This implies that the licence is void if Article 27 ICCPR is violated.

(101) It is clear that the Sami people is a minority within the meaning of Article 27, and that reindeer husbandry is a form of protected cultural practice. I refer to HR-2017-2247-A *Reinøya* paragraph 120 and HR-2017-2428-A *Reindeer cull I* paragraph 55.

(102) When interpreting Article 27, statements from the UN Human Rights Committee will carry significant weight, see the Supreme Court's grand chamber judgment in Rt-2008-1764 paragraph 81.

Individual or collective protection – who may assert a violation?

(103) The State has principally contended that Article 27 ICCPR only protects individuals, not legal entities or groups of individuals. On this basis, the State has advocated that the protection cannot be invoked by the siidas. Two issues rise in this regard, and I will first take a closer look at who is protected under the provision.

(104) According to Article 27, the protection applies to "persons belonging to such minorities". This wording in the first part of the provision indicates that the protection is enjoyed by the individuals in a minority group. However, the provision further states that the individuals have the right to enjoy their own culture, etc. "in community with the other members of their group". This element was added to clarify the collective nature of the provision, see Nowak's ICCPR Commentary, 3rd edition, 2019 page 799–800.

(105) In line with this, the Supreme Court assumes in HR-2017-2428-A *Reindeer cull I* paragraph 55 that Article 27 protects the individual, but adds that the protection has "certain collective features". Furthermore, the UN Human Rights Committee does not always distinguish clearly between the protection of individuals in a minority and the group as such. Relevant here is *Lubicon Lake Band vs. Canada* (March 26, 1990, ICCPR-1984-167). The author is initially partially presented as "Chief Bernard Ominayak *and* the Lubicon Lake Band" and partially as "Chief Bernard Ominayak *of* the Lubicon Lake Band" (italics added). In paragraph 33, the Committee found that the interference threatened "the way of life and culture of the Lubicon Lake Band".

(106) Against this background, I find that Article 27 at the outset protects individuals in a minority. However, the minorities' culture is practiced in community, which gives the protection a collective nature. When it comes to reindeer husbandry, this is expressed by the fact that the Sami pasture rights are collective and conferred on each individual siida, see HR-2019-2395A *Reindeer cull II* paragraph 51 with further reference to Rt-2000-1578 *Seiland*. A siida is a group of people practicing reindeer husbandry jointly in specific districts, see section 51 of the Reindeer Husbandry Act. Against this background, it is difficult to draw a sharp distinction between the individuals and the group.

(107) The issue is then whether the two siidas in the case at hand may invoke the minority protection in Article 27 in Norwegian courts. I take as my starting point section 2-2 of the Dispute Act, which regulates who has the capacity to sue and be sued. According to subsection 2, organisations other than those mentioned in subsection 1 have the capacity to sue and be sued to the extent justified by an overall assessment. Emphasis should be placed on the factors listed in the subsection. The provision was intended to continue the previous rules on so-called limited capacity to sue or be sued, see Skoghøy, Dispute Resolution, 3rd edition, 2017 page 284 with further references to preparatory works and case law.

(108) In my view, it is clear that a siida may have a limited capacity to sue and be sued, which is also the conclusion in the Supreme Court judgment Rt-2000-1578 *Seiland*. Here, Justice Tjomsland states:

"In this case, the interference affects only a group of the reindeer herders in the district, which means that this group must have access to make compensation claims, see NOU 1997: 4 Natural basis for Sami culture, page 337."

(109) Also, chapter 6 part II of the Reindeer Husbandry Act regulates in detail the siida's authority and organisation. Section 44 subsection 2 of the Act further states that the siidas may safeguard "their own special interests", also in lawsuits.

(110) The question of limited capacity to sue and be sued depends on an individual assessment. I find it clear that the siidas in Fosen grazing district have a limited capacity to sue and be sued in the issues to be considered by the Supreme Court, and that they must be able to invoke the individual rights of their members. As already pointed out, obligations under international law have great significance in this regard. I have also emphasised the collective nature of the cultural practice, and that a siida is in fact characterised by a group of persons herding reindeer jointly in specific areas. The siida is also, as mentioned, bearer of collective land rights to which reindeer husbandry is related, see HR-2019-2395-A *Reindeer cull II* paragraph 51. In a case dealing with such rights, a siida must then have the capacity to act as a party and invoke individual reindeer herders' rights under Article 27 on their behalf. Article 108 of the Constitution, which requires the public authorities to create conditions enabling the Sami people to preserve and develop its culture, supports this interpretation.

The term "denied" – what is the threshold for violation?

(111) Although Article 27 ICCPR contains the term "denied", it is clear that also interference that does not constitute a total denial may violate the right to cultural enjoyment. Already in the Human Rights Committee's general comment No. 23 (1994) paragraph 6.1, it was specified that a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. The same interpretation is applied in HR2017-2428-A *Reindeer cull I* paragraph 55 with further references to Norwegian Official Report 2007: 13 A *The new Sami law*. On page 203, the Sami Law

Committee establishes that a denial within the meaning of Article 27 will not only include "total denials" of the right to cultural enjoyment, but also "violations".

(112) As the Sami Law Committee states on page 202 in its Report, the wording in Article 27 implies nonetheless that the provision's scope is "relatively narrow". The question is where the threshold for violation lies.

(113) There are four rulings from the Human Rights Committee that clarify in particular what it takes before the right to cultural enjoyment under Article 27 is violated − *Ilmari Länsman and Others v. Finland* (26 October 1994, ICCPR-1992-511), *Jouni Länsman and Others v.*

Finland I (30 October1996, ICCPR-1995-671), Jouni Länsman and Others v. Finland II (17 March 2005, ICCPR-2001-1023) and *Ángela Poma Poma v. Peru* (27 March 2009, ICCPR2006-1457). In HR-2017-2247-A *Reinøya*, these rulings are accounted for in more detail. This judgment concerned, among other things, the question whether a road construction on Reinøya north of Tromsø was a violation of Article 27 ICCPR because of the consequences for Sami reindeer husbandry. Justice Kallerud states the following regarding the four rulings in paragraph 124 of the judgment:

"(124) In the case *Ilmari Länsman and others v. Finland* from [26 October] 1994, the Committee established that "… measures whose impact amount to a denial of the right" would not be compatible with the Covenant. However, measures that had "… a certain limited impact on the way of life of persons belonging to a minority … [would not] necessarily amount to a denial of the right under article 27", see paragraph 9.4. Then, in paragraph 9.5, the Committee expressed that the question was whether the relevant quarry had such an impact in the area "… that it [did] effectively deny to the authors the right to enjoy their cultural rights in that region". It is then established that no measures, either implemented or planned, were of such a character that Article 27 had been violated.

(125) The case *Jouni E. Länsman and others v. Finland* from [30 October] 1996 confirms the line that was drawn in paragraph 9.4 in the case from 1994, see paragraph 10.3. The question there was whether the logging of trees that had already taken place, together with the logging that was planned was, "… of such proportions as to deny the authors the right to enjoy their culture in that area", see paragraph 10.4. In the individual assessment in paragraph 10.6, the Committee established that the logging in the area resulted in "… additional work and extra expenses …." for the Sami, but that it "… does not appear to threaten the survival of reindeer husbandry".

(126) In *Jouni Länsman and others v. Finland* from [17 March] 2005, the subject was once again the consequences of logging of trees in Sami areas. The Committee stressed in paragraph 10.2 that one had to consider "… the effects of past, present and planned future logging…". As in the earlier rulings, the Committee pointed at the fact that the low profitability of reindeer husbandry was due to other circumstances than the

measure, see paragraph 10.3. Finally, the Committee concluded in this paragraph that the consequences of the logging "… have not been shown to be serious enough as to amount to a denial of the authors' right to enjoy their own culture in community with other members of their group under article 27 of the Covenant".

(127) In a ruling from [27 March] 2009 – *Ángela Poma Poma v. Peru* – the Committee formulated the core issue as follows in paragraph 7.5: "… the question is whether the consequences … are such as to have a substantive negative impact on the author's enjoyment of her right to enjoy the cultural life of the community to which she belongs". The Committee concluded that Article 27 had been violated. It was held among other things that because of the measure, thousands of head of livestock were dead and that the complainant had been forced to abandon her land."

(114) Against this background, Justice Kallerud concludes as follows in paragraph 128 in the Reinøya judgment:

"Overall, the case law of the Human Rights Committee shows that it takes a lot for a measure to become so serious that it constitutes a violation of Article 27."

(115) In the case at hand, there are particularly three factors in these rulings from the Human Rights Committee that have been discussed. The siidas have, in connection with the threshold issue, emphasised the statement in *Ilmari Länsman and Others v. Finland* (ICCPR-1992-511) paragraph 9.4 that "measures that have a certain limited impact on the way of life of the persons belonging to a minority will not necessarily amount to a denial of the right under article 27". As they present it, there will be a violation when a measure with limited effect work together with previous and planned measures, and thus create significant consequences for the cultural practice.

(116) I agree with the siidas that the measure must be considered in context with other measures affecting the cultural practice, to which I will return. However, in my view, this gives no indication as to where the threshold should be placed. I note that the Committee in paragraph 9.5 starts its individual assessment by asking whether the impact of the measure was so substantial that it effectively denied the authors their rights under Article 27.

(117) Secondly, the question is what lies in the term "threaten" in some of the decisions. In *Jouni Länsman and Others v. Finland I* (ICCPR-1995-671) paragraph 10.6, the Committee justifies its conclusion by stating that the measure "[did] not appear to threaten the survival of reindeer husbandry", see also *Lubicon Lake Band v. Canada* (ICCPR-1984-167) paragraph 33. In my view, these statements do not address the threshold for violation. In *Jouni Länsman and Others v. Finland I* paragraph 10.6, the term is used in the individual discussion, while the Committee uses "deny" and "denial" when referencing the threshold in paragraph 10.4 and 10.5. *Lubicon Lake Band v. Canada* does not discuss the threshold at all, and the issue of violation of Article 27 seems to have been secondary.

(118) The statement in *Ángela Poma Poma v. Peru* (ICCPR-2006-1457) paragraph 7.5, that the question is whether the measure has "a substantive negative impact" on the author's enjoyment of her culture, has been particularly important in the case at hand. This is the most recent statement regarding the threshold and therefore, in my view, essential to the interpretation. The term "substantive" in this context means "considerable" or "significant", which suggests that the threshold is high.

(119) Against this background, my *conclusion* is that there will be a violation of the rights in Article 27 ICCPR if the interference has a substantive, negative impact on the possibility of cultural enjoyment. The measure in itself may be so intrusive that it amounts to a violation. However, the effect does not need to be as serious as in *Ángela Poma Poma v. Peru*, where thousands of livestock animals were dead as a result of the measure, and the author had been forced to leave her area. The measure must also be seen in context with other measures, both previous and planned. It is the different activities taken together that may constitute a violation, see *Jouni Länsman and Others v. Finland I* (ICCPR-1995-671) paragraph 10.7.

The significance of consultation

(120) Although the consequences of the measure largely dictate whether the rights in Article 27 have been violated, it is also essential whether the minority has been consulted in the process. This is set out in several decisions from the UN Human Rights Committee. Both in *Ilmari Länsman and Others v. Finland* (ICCPR-1992-511) paragraph 9.6 and *Jouni Länsman and Others v. Finland I* (ICCPR-1995-671) paragraph 10.5, this aspect is considered in the individual assessment. The Committee has a more general approach in *Ángela Poma Poma v. Peru* (ICCPR-2006-1457) paragraph 7.6. Here, it is set out that the question of violation "depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures …". The Supreme Court has stressed the importance of consultation in HR-2017-2247-A *Reinøya* paragraph 121 and in HR-2017-2428-A *Reindeer cull I* paragraph 72.

(121) It appears from the Human Rights Committee's decisions and the mentioned Supreme Court judgments that whether and to which extent the minority has been consulted cannot be decisive. This is rather an aspect to be included in the assessment of whether the right to cultural enjoyment has been violated, see NOU 2008: 5 *The right to fishing in the sea off Finnmark* page 272. If the consequences of the interference are sufficiently serious, consultation does not prevent violation. On the other hand, it is not an absolute requirement under the Convention that the minority's participation has contributed to the decision, although that, too, may be essential in the overall assessment.

(122) I also mention that, with effect from 1 July 2021, provisions on consultation have been included in chapter 4 of the Sami Act. In Proposition to the Storting 86 L (2020–2021) paragraph 4.2, the Ministry accounts for the Sami right to self-determination and the significance of consultations. As the case stands, I see no reason for going into more detail on this topic.

Margin of appreciation and proportionality assessment

(123) In its reappraisal, the Court of Appeal has assumed that Article 27 does not prescribe "a balancing of interests in the form of a proportionality assessment or the like", but keeps the possibility of using discretion and balancing various interests open. In this respect, the Court of Appeal highlights the considerations of climate change and emission-free energy. Fosen Vind recognises that the State Parties do not have a margin of discretion – they are not given the freedom to interpret the Convention according to their own conditions. However, Fosen Vind contends that the purpose behind the measure should be included in the overall balancing of interests – a proportionality assessment. The siidas have rejected such an interpretation of Article 27. The legal sources concerning margin of appreciation and proportionality assessment are partly the same. I will therefore discuss the issues jointly, although we are dealing with two different matters.

(124) At the outset, the wording of Article 27 does not allow the States to strike a balance between the rights of indigenous peoples and other legitimate purposes. The rights appear to be absolute, however so that they can be derogated from in time of public emergency, see Article 4. On this point, Article 27 differs from a number of other rights provisions in ICCPR, including Article 12 on the right to freedom of movement, Article 18 on freedom of thought and religion, Article 19 on freedom of expression and Article 22 on the freedom of association. These provisions expressly allow the States to limit the application on certain conditions, and a proportionality assessment is recommended. Nor is there anything in the wording of Article 27 that suggests that the States have a margin of appreciation.

(125) The Human Rights Committee established in *Ilmari Länsman and Others v. Finland* (ICCPR1992-511) that the States do not have a margin of appreciation in their application of Article 27. The Committee states the following in paragraph 9.4:

"A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27."

(126) Furthermore, in *Ángela Poma Poma v. Peru* (ICCPR-2006-1457) paragraph 7.4, the Committee specifies that economic development may not undermine the rights protected by Article 27.

(127) I line with this, it is stated in Norwegian Official Report 2008: 5 *The right to fishing in the sea off Finnmark* page 252 that a majority of the population should not have the possibility to limit the protection under Article 27, and that the States do not have a margin of appreciation. Correspondingly, the Sami Law Committee states in Norwegian Official Report 2007: 13 A *The new Sami law* page 195−196 that the States do not have an interpretation margin. The Committee continues on page 196:

"Hence, this case concerns an absolute right, which protects minorities from the majority restricting their rights. This is a natural consequence of the reason for the provision. Its minority protection would soon become ineffective if the majority population were to be able to limit it based on an assessment of its legitimate needs."

(128) The Committee follows this up in the summary of the state of the law on page 210, emphasising that the rights conferred by Article 27 appear "absolute". Also in legal literature, it is assumed that these rights are absolute, and that no margin of appreciation or proportionality assessment is allowed for. I refer to Skogvang, *Sami Law*, 3rd edition, 2017 page 174, Nowak's *ICCPR Commentary*, 3rd edition, 2019 page 833–834 and Åhrén, *Indigenous Peoples' Status in the International Legal System*, 2016 page 94.

(129) Against this background, the clear starting point must be that no margin of appreciation is granted under Article 27, and that it does not allow for a proportionality assessment balancing other interests of society against the minority interests. This is a natural consequence of the reason for the provision, as the protection of the minority population would be ineffective, if the majority population were to be able to limit it based on its legitimate needs.

(130) However, in situations where the rights in Article 27 conflict with other rights in the Convention, the at the outset conflicting rights must be balanced against each other and harmonised. A possible outcome of this is that Article 27 must be interpreted strictly, see also Norwegian Official Report 2007: 13 A *The new Sami law* page 195. The Human Rights Committee further allows for a balancing in cases where the interests of an individual in a minority group stand against the interests of the group of as a whole, see *Ivan Kitok v. Sweden* (27 July 1988, ICCPR-1985-197) paragraph 9.8. In HR-2017-2428-A *Reindeer cull I* paragraph 76, the Supreme Court also prescribes a balancing of interests in such situations.

(131) As I see it, the same balancing of interests may be necessary if the rights in Article 27 conflict with other basic rights. In a given case, the right to a good and healthy environment may, in my view, be such a conflicting basic right. In other words, the consideration for "the green shift" may be relevant. However, as I will return to, the status of this case suggests that further elaboration on this is not needed.

The significance of continued profitability

(132) In some decisions, the Human Rights Committee has emphasised that the members of the minority must still be able to operate with a profit. In *Ilmari Länsman and Others v. Finland* (ICCPR-1992-511) paragraph 9.8, the Committee states that other economic activities in the area must be exercised so that the appellants "continue to benefit from reindeer husbandry". Correspondingly, the Committee stresses in *Ángela Poma Poma v. Peru* (ICCPR-2006-1457) paragraph 7.6 that the admissibility of measures depends on whether the members of the community in question "will continue to benefit from their traditional economy". Against this background, the siidas contend that it amounts to a violation if the interference prevents the minority from benefiting from its traditional trade.

(133) The sources do not give much guidance on how to interpret these statements from the Committee. The quote from *Ilmari Länsman and Others v. Finland* is commented in Norwegian Official Report 2007: 13 A *The new Sami law* page 198, but without contributing much to the interpretation. The issue is also addressed in HR-2017-2428-A *Reindeer cull I* paragraphs 69−71. In that case, however, the interests of a single reindeer herder were balanced against the interests of the herders as a group, and the judgment is therefore of less interest in the case at hand.

(134) In my view, the starting point must be that Article 27 aims at protecting the right to cultural enjoyment. As mentioned, reindeer husbandry is a form of protected cultural practice while at the same time a way of making a living. The economy of the trade is therefore relevant in a discussion of a possible violation. The relevance must be assessed specifically in each individual case and must depend, among other things, on how the economy affects the cultural practice. In my view, the rights in Article 27 are in any case violated if a reduction of the pasture deprives the herders of the possibility to carry on a practice that may naturally be characterised as a trade.

The individual assessment of whether the rights in Article 27 ICCPR have been violated

(135) The question whether the reindeer herders' rights under Article 27 have been violated, depends on the Court of Appeal's findings of fact and the interpretation of the provision I have now presented. I will first consider whether Storheia and Roan windfarms have a substantive negative impact on the Sami people's possibility to enjoy their own culture.

(136) As mentioned, the two windfarms are part of the largest onshore wind power project in Europe. Both were Norway's largest upon completion, and the planning areas cover a total of well above 60 square kilometres. The development has changed the character of the area completely. I line with the Court of Appeal's findings of fact, I take it that the effect of the measures is that the siidas' winter pastures are lost in important areas connected to reindeer husbandry − and thus to the reindeer herders' culture – in late winter. The

development will ultimately eradicate the grazing resources to such an extent that it cannot be fully compensated by the use of alternative pastures. As a result, the reindeer numbers will most likely have to be dramatically reduced.

(137) The reindeer herders on Fosen are already operating with small margins. I have previously quoted from the Court of Appeal's assessment of the development's consequences for the trade's economy. The Court of Appeal assumes that a dramatic reduction of the reindeer numbers will entail that the herders may no longer benefit from the trade, or at least that the profit will no longer be proportionate to the efforts. The Supreme Court has been presented with comparative figures in the reindeer herders' trading statements supporting the Court of Appeal's assessments on this point. Against this background, the interference will ultimately constitute a serious threat against the trade and thus against the cultural enjoyment.

(138) Fosen Vind has emphasised that the production income from reindeer husbandry has never been enough to make a living, and that it never would, regardless of the interference. The trade is dependent on government subsidies, and Fosen Vind therefore contends that the weakened economy threatening the practice may have other causes. I do not concur with such an approach. For a long time, the basis for reindeer husbandry in Norway has partially been operating income and partially various subsidies with the purpose of maintaining the practice. The reindeer herders in our case have managed with this; it is the interference that causes the negative effect on the economy.

(139) Fosen Vind also contends that meaningful reindeer husbandry may be practiced with a much lower number of reindeer. To this, I note that no documentation is presented supporting this contention. This is a question of evidence, and I rely on the Court of Appeal's conclusion that the development threatens the existence of reindeer husbandry on Fosen.

(140) I add that, according to information provided, the subsidies for both production and calving will be reduced if the reindeer numbers are reduced. This is a consequence of the calving subsidies depending on the number of slaughtered animals, while the production subsidies are based on turnover. The information is not disputed. This, too, shows that a reduction in the number of reindeer will considerably reduce the possibilities of benefiting from the trade.

(141) It is also a factor in the assessment that the South-Sami culture is particularly vulnerable. Traditional reindeer husbandry is what carries this culture and the South-Sami language. The interference does not imply a total denial of the reindeer herders' right to enjoy their own culture on Fosen. My view is nonetheless after an overall assessment that the wind power development will have a substantive negative effect on their possibility to enjoy this culture.

(142) The wind power development is a result of thorough investigations and assessments. Along the process, there has been a close dialogue with the herders, and certain adaptations and remedy measures have been implemented in accordance with their input.

These factors have been important in the overall assessment, but they cannot in themselves be decisive.

(143) I do agree with Fosen Vind that "the green shift" and increased production of renewable energy are crucial considerations. But as mentioned, Article 27 ICCPR does not allow for a balancing of interests. As also mentioned, this may be different in the event of conflict between different basic rights. The right to a good and healthy environment may be relevant in such a context. However, no collision between basic rights has been demonstrated in the case at hand. I point in particular to the fact that the Norwegian Water Resources and Energy Directorate considered a number of wind power projects on Fosen and in Namdal in 2009. Despite the constant highlighting of the negative consequences for reindeer husbandry, the choice fell on Roan and Storheia, among others. Fosen Vind has not disputed that the progress of the planning of each windfarm was a key factor in the selection. As the case has been presented to the Supreme Court, I must assume that "the green shift" could also have been taken into account by choosing other – and for the reindeer herders less intrusive – development alternatives. Then, the consideration of the environment cannot be significant when assessing whether Article 27 has been violated in this case.

(144) Against this background, I find that the wind power development will have a substantive negative effect on the reindeer herders' possibility to enjoy their own culture on Fosen. Without satisfactory remedy measures, the interference will amount to a violation of Article 27 ICCPR, which will render the licence decision invalid. I will now turn to assessing whether the decision nonetheless may be upheld if compensation is awarded for the winter feeding of the reindeer, as the Court of Appeal has done.

Compensation for winter feeding – remedy measures and duty to adapt

(145) In the reappraisal ruling, the Court of Appeal summarises its view on whether Article 27 ICCPR has been violated:

"An isolated assessment suggests in the Court of Appeal's view that the building of windfarms at Storheia and Haraheia will threaten the existence of reindeer husbandry on Fosen. To which extent climate and pure energy considerations may be included in an overall assessment with the result that Article 27 has not been violated at any rate, is not at issue in the Court of Appeal. As it will appear below under the measure of compensation, the Court of Appeal finds that there is a basis for awarding compensation with a starting point in winter feeding of the reindeer. Such a measure, which surely is not ideal in a Sami-cultural perspective, will give the herders a guarantee for their herds' survival in late winter also in so-called years of crisis and during the periods where the available late winter pastures need rest. With some doubt, the Court of Appeal finds that wind power development in this perspective does not constitute a threat to reindeer husbandry against which it is protected under Article 27."

(146) Here, the Court of Appeal goes far as to say that the interference has so serious consequences that it violates the reindeer herders' rights under Article 27 ICCPR. Then, with some doubt, the Court of Appeal finds that a violation may be avoided by the award of compensation for winter feeding. As I understand the Court of Appeal, it relies on the siidas' duty – in return for compensation – to adapt, and that this duty is relevant in the assessment of whether Article 27 has been violated. The Court of Appeal carries on by establishing that such a remedy measure in itself does not constitute an interference with the Sami culture, but expresses doubt also here. When reading the Court of Appeal's ruling in context, it must also be interpreted to imply that other measures will not offer sufficient compensation.

(147) To this, I note that remedy measures by the authorities or the expropriator to minimise the disadvantages of an interference, must as a starting point be taken into account when assessing whether Article 27 has been violated. Depending on the circumstances, such measures may keep the interference below the threshold for violation. In the case at hand, the subsidies to Nord-Fosen siida's slaughter facility at Meungan, and subsidies for electronic reindeer marking and fences to Sør-Fosen sijte, are examples of relevant measures that may determine whether a violation has taken place. I have considered these subsidies in my individual assessment.

(148) Furthermore, the reindeer herders have a duty under general expropriation-law principles to adjust their operation, provided that the very trade base remains intact, see the Supreme Court ruling in Rt-2000-1578 *Seiland* page 1585. To which extent the possibility of adaptation is also relevant in the assessment of whether Article 27 has been violated, has not been addressed. However, I will leave that question here, as I cannot at any rate see how the licence decision may be upheld with the reasoning provided by the Court of Appeal.

(149) Here, I point out first that winter feeding according to the Court of Appeal's model deviates considerably from traditional, nomadic reindeer husbandry. According to information provided, such feeding, where half the herd for around 90 days each winter must stay within a relatively small fenced-in area, has never been tried out in Norway. Nor has information been provided on the effect of such a model, or on animal welfare, based on experience from other countries. Also, the information provided to the Supreme Court demonstrates uncertainty as to whether such a system is compatible with reindeer herders' right to enjoy their own culture under Article 27 ICCPR. This issue has not been given a broad and thorough assessment, and general reindeer husbandry interests have not been heard.

(150) There are also regulatory issues related to the solution chosen by the Court of Appeal. According to section 24 subsection 2 of the Reindeer Husbandry Act, fences and facilities that are to remain longer than one season may not be built without the Ministry's approval. And the starting point in section 60 of the Act is that the number of reindeer is stipulated based on the pastures of which the siida disposes. The significance of a system with winter feeding in an fenced-in area to the applicability of this provision, has not been addressed.

(151) Against this background, the Court of Appeal's solution with compensation for winter feeding is burdened with so much uncertainty that it cannot determine whether or not Article 27 ICCPR has been violated, even if a duty to adapt should be relevant also under Article 27 ICCPR. My conclusion is therefore that the licence decision violates the reindeer herders' rights under the provision.

(152) I add that the courts, in my view, in any case may build on such a measure as part of the expropriated party's duty to adapt. Measures of this nature must alternatively be presented by the public administration as a condition for expropriation, or provisions on this may be included in the conditions for appraisal proceedings.

(153) Against this background, the licence decision is invalid. In my perception, the contention that the appraisal is inadmissible only concerns Storheia and Roan windfarms, not the damages for the consequences of Statnett's 420 kV power line. I will formulate my conclusion in line with this.

(154) The siidas' contention that Article 5 (d) (v) of ICERD has also been violated, relates to the fact that the Court of Appeal has emphasised the compensation for winter feeding in its validity discussion. With my conclusion regarding the validity of the licence decision, this issue is not relevant.

The appeal from Statnett

(155) The appeal from Statnett challenges the Court of Appeal ruling that the company is jointly and severally liable for *the entire* compensation amount. It has been claimed that Statnett is only liable for the part of the compensation amount relating to the 420 kV the power line, more specifically NOK 288 000 for the moving of calving land. The siidas and Fosen Vind agree with Statnett, and the siidas and Statnett have both requested that the reappraisal ruling be set aside as concerns Statnett's liability for the windfarms.

(156) I have concluded that the appraisal is inadmissible as concerns Storheia and Roan windfarms. Thus, Fosen Vind is not liable for the damages related to the windfarms. However, Statnett is not a party to the cases regarding the admissibility of the appraisal, and I therefore find in favour of the request that the Statnett case be set aside. The compensation of NOK 288 000 for the moving of calving land due to the power line has not been appealed and is not affected by the inadmissibility of the appraisal for Roan and Storheia.

Conclusion and costs

(157) Against this background, my conclusion is that the appraisal is inadmissible as concerns Storheia and Roan windfarms. The reappraisal is set aside to the extent it concerns Statnett's liability for the windfarms.

(158) Sør-Fosen sijte and Nord-Fosen siida have won the case. They are thus entitled to compensation for their costs in the validity case, see section 54 b second sentence, cf. section 54, of the Appraisal Procedure Act. According to section 54 b first sentence, cf. section 54, Fosen Vind is also liable for costs in the compensation case. Statnett is liable for the siidas' costs in the case regarding joint and several liability for the compensation amount, see section 54 b first sentence of the Appraisal Procedure Act, cf. section 54.

(159) Nord-Fosen siida has claimed costs of NOK 31 125 in the Statnett case, NOK 2 701 961 in the damages case and NOK 449 375 in the validity case. For Sør-Fosen sijte, the corresponding amounts are NOK 34 438, NOK 1 105 625 and NOK 2 626 875. Sør-Fosen sijte has stated that NOK 750 000 has been paid in advance in the damages case, and this amount must be deducted. The remaining amount in the damages case is thus NOK 355 625. The claims include VAT.

(160) Fosen Vind has submitted that the costs claimed in the damages case are too high. As I see it, the case has raised extensive and complex issues, and the claims do not exceed the necessary costs, see section 54 of the Appraisal Procedure Act. The claims are accepted.

(161) I vote for this

J U D G M E N T :

In case no. 20-143891SIV-HRET:

1. The reappraisal is set aside as concerns Statnett SF's liability for the windfarms.

2. In costs in the Supreme Court, Statnett SF will pay to Sør-Fosen sijte NOK 34 438 within two weeks of service of this judgment.

3. In costs in the Supreme Court, Statnett SF will pay to Nord-Fosen siida NOK 31 125 within two weeks of service of this judgment.

In case no. 20-143892SIV-HRET:

1. The appraisal is inadmissible as concerns Roan windfarm.

2. In costs in the Supreme Court, Fosen Vind DA will pay to Sør-Fosen sijte NOK 355 625 within two weeks of service of this judgment.

3. In costs in the Supreme Court, Fosen Vind DA will pay to Nord-Fosen siida NOK 2 701 961 within two weeks of service of this judgment.

In case no. 20-143893SIV-HRET:

1. The appraisal is inadmissible as concerns Storheia windfarm.

2. In costs in the Supreme Court, Fosen Vind DA will pay to Sør-Fosen sijte NOK 2 626 875 within two weeks of service of this judgment.

3. In costs in the Supreme Court, Fosen Vind DA will pay to Nord-Fosen siida NOK 449 375 within two weeks of service of this judgment.

(162) Justice **Skoghøy:** I agree with Justice Bergsjø in all material respects and with his conclusion.

(163) Justice **Falkanger:** Likewise.

(164) Justice **Noer:** Likewise.

(165) Justice **Bull:** Likewise.

(166) Justice **Kallerud:** Likewise.

(167) Justice **Falch:** Likewise.

(168) Justice **Østensen Berglund:** Likewise.

(169) Justice **Thyness:** Likewise.

(170) Justice **Steinsvik:** Likewise.

(171) Chief Justice **Øie:** Likewise.

(172) Following the voting, the Supreme Court gave this

J U D G M E N T :

In case no. 20-143891SIV-HRET:

1. The reappraisal is set aside as concerns Statnett SF's liability for the windfarms.

2. In costs in the Supreme Court, Statnett SF will pay to Sør-Fosen sijte NOK 34 438 within two weeks of service of this judgment.

3. In costs in the Supreme Court, Statnett SF will pay to Nord-Fosen siida NOK 31 125 within two weeks of service of this judgment.

In case no. 20-143892SIV-HRET:

1. The appraisal is inadmissible as concerns Roan windfarm.

2. In costs in the Supreme Court, Fosen Vind DA will pay to Sør-Fosen sijte NOK 355 625 within two weeks of service of this judgment.

3. In costs in the Supreme Court, Fosen Vind DA will pay to Nord-Fosen siida NOK 2 701 961 within two weeks of service of this judgment.

In case no. 20-143893SIV-HRET:

1. The appraisal is inadmissible as concerns Storheia windfarm.

2. In costs in the Supreme Court, Fosen Vind DA will pay to Sør-Fosen sijte NOK 2 626 875 within two weeks of service of this judgment.

3. In costs in the Supreme Court, Fosen Vind DA will pay to Nord-Fosen siida NOK 449 375 within two weeks of service of this judgment.

In case no. 20-143893SIV-HRET:

1. The appraisal is inadmissible as concerned Storheia windfarm.

2. In costs for the Supreme Court, Fosen Vind DA will pay to Sør-Fosen sijte NOK 2 626 875 within two weeks of service of this judgment.

3. In costs for the Supreme Court, Fosen Vind DA will pay to Nord-Fosen siida NOK 449 375 within two weeks of service of this judgment.