# Human security as philosophy of law and legal pluralism in Arctic indigenous areas

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## Abstract

*The aim of this legal-philosophical paper is to shed light on the idea of legal pluralism and two jurisdictions in indigenous areas in the Arctic. The argument is that legal pluralism and Canada's state-indigenous experiences may help to recognise indigenous rights that are part of human security in the Arctic, also in Finnish Lapland. This seems a good tool to make natural resources management in Finnish Lapland just in the eyes of the Sami. Sami rights, including lands rights and indigenous natural resources management, should be better recognised in Finland. The Sami people are the aboriginal nation beyond borders. This research presents narratives of both Finland's government and the Sami Parliament. Also, the theory of legal pluralism and the idea of two jurisdictions in indigenous areas are analysed to support the*

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*argument. Finally, chosen Canadian experiences (the Nisga'a; the Crees and the Inuit) are shown in order to explain how legal pluralism or two jurisdictions (state v. indigenous) may work in practice in Lapland. Last but not least, the paper pays attention to relevant philosophical, cultural and moral issues as well.*

## 1. Introduction

### 1.1. Aim

The aim of this legal-philosophical paper is to shed light on the idea of legal pluralism in indigenous areas as a problem of human security in the Arctic with particular reference to Finnish Lapland. This is not an international environmental law analysis or legal analysis *sensu stricto* but it seeks a new philosophy of law in Lapland. In the past few decades a number of researchers have sought to determine environmental law and rights in the context of indigenous rights and human security in the Arctic (see e.g. some recent works, such as Koivurova 2006/7; Hossain 2012; Heinämäki 2015; Zojer and Hossain 2017). However, few writers have been able to draw on any systematic research into legal philosophy in the Arctic (e.g. Kuppe 2016; Husa 2016), and much of the research up to now has been descriptive in nature. The approach presented in this paper is based on legal philosophy. The difference it makes is that this research focuses on inspiring legal-philosophical and political theories, values, and ideas, and not on written state or international laws only. In the pages that follow, it will be argued that legal pluralism is a good tool and could be fast becoming a key instrument to make natural resources management (sometimes, the abbreviation "NRM" is used)

in Finnish Lapland better in terms of justice. This is the central thesis of the paper. These issues are chosen because legal pluralism matters for human security in the Arctic and plays an important role in the maintenance of human security as it covers indigenous traditions and customs (compare on human security and its interplay with societal security: Zojer and Hossain 2017: 62). The question arises as to whether nations states, central government, the application of public law failed to the Sami, as appears to be the case, and, if so, whether autonomous regulation and recourse to local, indigenous government and jurisdiction are a better option? The argument is a normative-descriptive judgement: legal pluralism and Canada's state-indigenous experiences might be helpful in recognising indigenous rights in the Arctic with particular reference to Finnish Lapland, and it is about practical connotations or implications for indigenous rights that are part of human security.

All the Nordic states are human rights-oriented but have problems with recognition of indigenous rights. The theory of legal pluralism and experiences of other countries like Canada may help them work in this field. Practically speaking, Sami rights, including Sami rights to land and political self-government as well as to natural resources management, should be better recognised in Finland. This claim is supported by the theory of legal pluralism (see: Bunikowski and Dillon 2017: 37-38, 42-45, 55-59). Also, *historical Justice* meets Equality in the Arctic: it means that egalitarian values of the Nordic countries face a demand for exclusive rights for the Sami (see more about this clash of values: Bunikowski 2014: 76, 82-84). This is one of the most important but sensitive topics of human security in the North. Resolving many plights in the field is akin to a multitude of misunderstandings, also the

cultural or linguistic ones. Thus, to put it briefly, in this paper, the history and situation of the Sami people is dealt with (part 1) and, afterwards, there are shown chosen but representative official statements of both sides (Finland's Government v. the Sami Parliament) which might be perceived as, often, too bleak or stringent (part 2). Nevertheless, the theory of legal pluralism is presented with the idea of two jurisdictions in indigenous areas to support the argument (part 3). Finally, Canada's experiences (the Nisga'a; the Crees and the Inuit) on recognition of indigenous jurisdiction are analysed in comparison with the Finnish Sami's situation (part 4). Other important legal, philosophical and cultural considerations are drawn upon in the end of the paper (part 5). A qualitative approach was used in the data analysis.

Significantly, an explanation of the concepts, such as "justice" and "nature" or others related to the paper topic, must come in this section. Since terms like those might obviously carry different meanings to different people, it seems necessary to frame their meaning within the context of the paper. First of all, a more general concept should be clarified. The word "nature" might differently be understood and is one of the most complex meanings in the language, reminds Kate Soper (Soper 1995: 1). According to Aquinas in "On Being and Essence", "nature" was a thing that was perceived by the intellect: "whatever can in any way be grasped by the intellect is called a nature" (Bobik 1965: 45). In other opinions, nature is just the environment (Soper 1995: 2). This is very close to another term, the term "biodiversity". *In biodiversity* indigenous people and local people are a seminal part of nature. Since all international policies on biodiversity, as alleges Elli Louka, are "state notions of what biodiversity is" and there appear "nationalistic tendencies of control over biodiversity resources", then all the notions of biodiversity (like in

Biodiversity Convention) are based on "conservation of biodiversity resources": "conservation and national measures" rather than "local management, restoration or gene bank development" (Louka 2002: 1-2). By "natural resources management", it is meant administration of lands, forests, fishing waters, hunting grounds, reindeer husbandry pastures, mining areas etc. It is an open texture term. The essence of the concept is deeply rooted in the concepts of land, landscape, and land use. Land rights are connected to this concept. The term "jurisdiction" means the power of law enforcement or, as enjoin dictionaries, "the official power to make legal decisions and judgements". "Indigenous areas" are those of the lands which were originally inhabited by people who had arrived in these places before Western colonisers came. In the context of this paper, the concept of justice is taken from Justinian's Code: "Justice is the constant and perpetual wish to render to every one his due" (*Iustitia est constans et perpetua voluntas jus suum cuique tribuens*) (see also: 5.2.). The idea of two jurisdictions is referred, in this case, to a situation in which in one social or geographical place there are two jurisdictions: the indigenous one, the state one. It is very close to the theory of legal pluralism.

Many general questions are also put on the table to be discussed and maybe some of them are left without clear or black-white answers: Who is or should be the owner of the land in terms of constitutional and public law? The Sami or the state? Who should manage natural resources? It really seems to portray the situation as a dichotomy (either-or case), and this is the point. The question is not about individuals or corporations. The latter concerns private law. The most important question remains as to whether it is genuinely

possible to talk about two jurisdictions in one state[1], following legal pluralism and the right to self-determination (i.e. a people have the right to choose their sovereignty[2]) of indigenous people there? The answer of this paper is positive.

## 1.2. The Sami people

There is a large volume of published studies describing the history and status of the Sami people. However, few words about the Sami people are necessary here. The Sami people are commonly recognised as the only one indigenous nation in the European Union. They live beyond borders in northern Scandinavia (Sweden, Norway), Finnish Lapland, and northern Russia (the Kola Peninsula). They call this region "Sápmi". This is both a material (geographical, physical) and spiritual homeland (Porsanger 2003: 151). There are different estimates how many people belong to this nation[3]. There are also different criteria of belonging to this group. Probably, there live over 60 000 Sami people in their traditionally occupied territories (mostly, in Norway) (Bunikowski 2014: 81; Bunikowski 2016b: 43; but see also: Aikio 2003: 35, where it is mentioned that there are 70 000-100 000 Sami people). Maybe only one third of the population speak one of the ten Sami languages, of which North Sami is the most rudimentary (90% of the native speakers use it) (see more: Aikio 2003: 35). This is necessary to remember that phenomena and

[1] There are claims that it is impossible to apply different laws to different people within the same state because this could lead to a dangerous slippery slope. I claim that this would be possible as an exception and shall relate to exclusive rights of the Sami (e.g. in reindeer husbandry).

[2] It is seems a kind of misunderstanding to support a critical voice that the concept of self-determination applies to oppressed peoples, not to those living in open democracies. The Catalonians or Scots live also in a democratic state but want to be independent.

[3] I use the term "nation" here, even if from a political/state viewpoint or to some scholars, it might be not correct in this context. It is correct to me because the Sami are the one nation in terms of ethnicity, language and history.

processes, such as the closing of borders from the 19th century, the modern education system, language policies, revived Lutheran ethics, and property law regimes from the 19th and the 20th centuries, destroyed a large part of traditional Sami ways of life, knowledge, property rules, reindeer husbandry[4], and indigenous languages (Bunikowski 2016b: 43).

In the beginning of the 21st century, the feeling of injustice is strong among Sami. "I felt that I was being treated as dirt", asserts Ole Henrik Magga (see: Laskow, in "Others"), a Sami leader from Norway. This is true that the slogans such as ″The Lapp people are childlike people in more than one respect (…) it is the goal of Norwegianization that they are brought to the maturity of man…" (Rector Andreas Gjølme in Sør-Varange, 1886) were applied to the whole Sami society. Eventually, missions, religious, educational programme etc. to these ends, were deemed "ethical" or moral from this point of view. These looked just morally justified from this perspective. Sami people as indigenous people have been depreciated by Scandinavian states in many ways and by different institutional actions. These missions brought with it Enlightenment ideas to do with the nation state, progress, and Protestantism[5]. These destroyed the traditional way of life of

[4] Of course, one has to remember about the other historical Sámi groups which were fishers, landowners themselves and sedentary coastal dwellers.

[5] Further explanations are needed here to avoid misconceptions or confusion: the Enlightenment (18th century) has much to do with the concepts of the Nation-state (fully developed in the 19th century) or Protestantism (that was an inspiration for missions among the Sami in the 19th century). For example, Jukka Pennanen (2003. claims that in the 19th century "The Laestadian revivalist movement emphasised not only deep religious beliefs but also healthy, sober and pious habits" (Pennanen 2003: 150), so there were also positive aspects of the process. However, it has to be added as a general statement that the Western countries' interferences in the Sami culture had created many problems with which results they were later or still are enforced to fight (in education, health, employment etc.). *Per analogy*, it is a commonly known problem that some young people of the Canadian Inuit group commit suicide because they have lost the sense of life in terms of their traditional way of life in a process that was a result of many new Canadian regulations and policies like bans on hunting.

so-called “dark”, “dirty” people. Sami customary laws[6] have not been recognised by the Nordic states since the end of the 18th century as, that mentioned, Sami culture was depreciated in Scandinavia in the 19th and 20th centuries. Nowadays in Finland, the land rights of Sami people are unresolved human rights problem, an issue that was highlighted by the UN Human Rights Committee in "Concluding observations on the sixth periodic report of Finland, of 22 August 2013. Some Sami asserted that the right of the state to the Sami people’s land (Lapland) is controversial. However, the recognition of the Sami people to administer hunting grounds and fishing waters remains a sensitive political question. The Sami are not "lords"/"rulers" in their own country/traditionally occupied territories. It is also known that about half of the Sami population in Finland[7] have been forced to move outside Lapland due to unemployment, economic stagnation and the lack of opportunities (Bunikowski 2016b: 43).

Ideas of Sami self-determination and own natural resources management, not only claims of real cultural autonomy, are very powerful and well visible in public discourses in Sweden, Norway, and Finland. In addition, Sami identity is strong (e.g. among the youth). Many Sami people get active in politics (see more: Bunikowski 2016b; Pennanen and Näkkäläjärvi 2003; see also the film Sámi People (OV)). However, constitutionally speaking, the Sami people are

[6] The idea is that one can refer to "customary law" only with explaining those customs (and hence, the necessary references). These customs and customary laws are explained in 3.4. This is true that it could also open up an interesting debate between traditional customary, oral law vs. written codes (of Western or indigenous origin), but there is no room for such subtle discussions in this paper as it is out of range of the paper.

[7] This is true that this number shall be put in context, for example by comparing it with the non-Sami population from Lapland also forced to move outside Lapland, or with population from other peripheral regions of Finland. However, this is beyond the scope of the paper. This note is only to signalise this issue.

not treated as "a people" but "ethnic minority" in Finland. This matters because only "a people" (not only those living in non-open democracies) may enjoy the right to self-determination in modern international law.

However, it might be claimed that the Sami people have enjoyed the allodial title to their lands and their lands have never been ceded. In contrast to the feudal systems, the allodial title constitutes ownership of real property like land that is independent of any superior landlord like the Crown/State and is only kept under God (compare: Hill 2014: 36-37, 48). Such land is not granted as a tenure by the Crown/State, but it comes from owning land "outright" (e.g. like in the udal law in Shetland). It means that the current state of things based on the Nordic states' ownership of the Sami traditional lands seems illegitimate and can be easily questioned by the Sami. There are only three forms of "the starting point" of the sovereign power on a given territory: conquest (that is not recognised in modern international law[8]), *terra nullius*, and cession, No one of these situations took place in Finnish Lapland. And, resolving this problem is related to justice.

[8] However, someone could claim that the non-recognition of conquest as a legitimate way to acquire land/territory is indeed not recognised in modern international law; but as a norm it is not retroactive. Thus, someone could continue, it cannot be applied for conquests that had taken place before the norm itself came into modern acceptance. I claim that such statements support the position of the Nordic countries that the Sami people have not enjoyed the allodial title to their lands. In terms of universal morality (e.g. Kant), this formalistic attitude is not acceptable and seems at least partially wrong. See more: Bunikowski 2017: 48-51.

## 2. Natural resources management in Finnish Lapland: two narratives

Natural resources management concerns the most important elements of the Sami culture in Finland, such as lands, hunting forests, fishing waters. That said, their lands are sacred and have both a material and spiritual entity, playing an important role from the point of view of the survival of the Sami culture and nation. First of all, in this part, there should be presented two narratives (the state one, the indigenous one) about the current state of things in the field of natural resources management in Finnish Lapland.

### 2.1. Constitutional background

Unfortunately, before one starts with the two narratives, one has to take into account that the constitutional framework is pertinent to this problem. These are the most significant provisions concerning the principles of equality and cultural autonomy of the Sami in Finland. First of all, according to Finland's Constitution of 1999's Chapter 2 - Basic rights and liberties, Section 6 - Equality, "Everyone is equal before the law. No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person". In Chapter 2, Section 17 - Right to one's language and culture, it reads that "The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act". Also, it

is stated in Chapter 11, Section 121 - Municipal and other regional self-government, that "Finland is divided into municipalities, whose administration shall be based on the self-government of their residents. (...) In their native region, the Sami have linguistic and cultural self-government, as provided by an Act". Among many legal acts regarding the Sami in Finland (like on the Sami language, reindeer husbandry but also the water and mining acts), one is the most crucial. According to the Act on the Sámi Parliament (974/1995), Chapter 1 — General provisions, Section 9 — Obligation to negotiate, the government is obliged to negotiate with the Sami, also in the fields of, among many, management of lands and community planning[9]. All these provisions must be understood in the context of decentralisation. Moreover, international law constitutes a supportive part of the constitutional standards. The content of ILO 169 convention, which has not been ratified in Finland yet, is mentioned in the end of the paper. Also, it is necessary to add that Finland signed the United Nations Declaration on the Rights of Indigenous Peoples of 2007 and has intensively worked on the Nordic Sami Convention, which aims "to build a better future for the life and culture of the Sami people" (that is to be ratified soon).

[9] The whole provision sounds: "The authorities shall negotiate with the Sámi Parliament in all far reaching and important measures which may directly and in a specific way affect the status of the Sámi as an indigenous people and which concern the following matters in the Sámi homeland: (1) community planning; (2) the management, use, leasing and assignment of state lands, conservation areas and wilderness areas; (3) applications for licences to stake mineral mine claims or file mining patents; (4) legislative or administrative changes to the occupations belonging to the Sámi form of culture; (5) the development of the teaching of and in the Sámi language in schools, as well as the social and health services; or (6) any other matters affecting the Sámi language and culture or the status of the Sámi as an indigenous people".

## 2.2. Two narratives

In this section, chosen but representative official and international statements of both sides, i.e. the Finnish government and the Sami parliament[10], are analysed. What the observer can perceive is the two quite different narratives on cultural autonomy (say, CA) and natural resources management (say again, NRM). (CA and NRM are interrelated.[11]) Caught between two stools, these are as follows: the Finnish government's "optimistic" narrative and the Sami parliament's "pessimistic" narrative. Shortly, some features of this meeting of the narratives could be described in this way: first, there are completely different arguments and claims on both sides; secondly, there is no understanding each other because there are different voices and contradictory meanings and contexts. The following two documents (that said, which are select and representative for both policies and sides) are compared: "Concluding observations on the 20th to 22nd periodic reports of Finland adopted by the Committee on the Elimination of Racial Discrimination at its 81st session in 2012. Information provided by the Government of Finland on its follow-up to the recommendations contained in paragraphs 12, 13 and 16, 30 August 2013"; "Statement by Finnish Saami Parliament on the Realization of Saami People's Right to Self-determination in Finland Presented by the President of the Saami Parliament of Finland J. Lemet, April 2010".

[10] In fact, the Sami parliament in Finland is an institution of the Finnish state. It shall represent the Sami people but institutionally is a part of the Finnish state (working under the "supervision" of the Ministry of Justice). This is rather a weak institutional position in the constitutional system.

[11] To many Sami, NRM is a part of CA. Lands belong to culture. Reindeer husbandry and grazing, pasture lands, fishing waters, hunting grounds etc. are part of the Sami culture. But to the Finnish side, CA is only about language and culture like air craft. The Finns follow the constitution very strictly here: lands are not related to the concept of culture. NRM is not in CA, so e.g. no Finnish forest company needs to ask the Sami for a permit for logging in Lapland.

### 2.2.1. The UN's critics and the narrative of the Finnish state

The "debate" on CA and NRM should be also interpreted in the context of the international pressure put on Finland. This also includes the Human Rights Committee's "Concluding observations on the sixth periodic report of Finland, of 22 August 2013", where it is stated in par. 16: "While noting that the State party has committed to ratifying the International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, and established a working group in August 2012 to strengthen the rights of the Sami to participate in decisions on the use of land and waters, the Committee remains concerned that *the Sami people lack participation and decision-making powers* over matters of fundamental importance to their culture and way of life, *including rights to land and resources*. The Committee also notes that there may be insufficient understanding or accommodation of the Sami lifestyle by public authorities and that there is a lack of legal clarity on the use of land in areas traditionally inhabited by the Sami people (arts. 1, 26 and 27). The State party should advance the implementation of the rights of the Sami by strengthening the decision-making powers of Sami representative institutions, such as the Sami parliament. The State party should increase its efforts to revise its legislation to *fully guarantee the rights of the Sami people in their traditional land,* ensuring respect for the right of Sami communities to engage in free, prior and informed participation in policy and development processes that affect them. The State party should also take appropriate measures to facilitate, to the extent possible, education in their own language for all Sami children in the territory of the State party". [italics-DB]

### 2.2.2. The Finnish narrative

Going back to the documents of the two sides of the conflict ("debate"), here comes Finland's narrative. On the one hand, Finland (here: the Government) claims in its statement that: "A Working Group, appointed by the Ministry of Justice in June 2012, is preparing a proposal for the revision of the Act on the Sámi Parliament. The Act on the Sámi Parliament (974/1995**)**, which is *important for the regulation of the self-determination of the Sámi*, was enacted in 1995". Later, it is added that: "Legislative project is under way at the Ministry of Justice, which aims at developing the rights of the Sámi people as an indigenous people especially by clarifying the legislation on the rights of the Sámi people *to participate in the decision-making regarding the use of land and water areas in the Sámi Homeland.* The objective is to create conditions for the ratification of ILO Convention No. 169 on Indigenous Peoples". It reads also: "The Government stresses that the legislation contains specific requirements for the mentioned areas, *inter alia*, in Section 2 (2) of the Reindeer Husbandry Act that are specifically intended for reindeer herding. The land in these areas may not be used in manner that may significantly hinder reindeer herding. On the other hand, the Finnish *legislation does not require a permission or prior consent from the Sámi for logging*". Finally, the document hits the nail on the head: “In its recommendation No. 11, the Committee has stated that the State party, when revising the Act on the Sámi Parliament, "should enhance the decision-making powers of the Sámi Parliament with regard to the cultural autonomy of Sámi, including rights relating to the use of land and resources in areas traditionally inhabited by them"**.** In this regard the Ministry of Agriculture and Forestry notes that *the cultural autonomy* that the Constitution of Finland

guarantees the Sámi people in itself *does not constitute a competence for the Sámi Parliament to utilise natural resources*, whether in state or private ownership, within the Sámi Homeland". [italics-DB]

So the Finnish official attitude to the Sami claims can be summarised in simple statements: the government has some projects of the law reforms as well as working groups to improve the Sami self-determination; the aim is to ratify the 169 ILO Convention, and the government is working hard in this field; Finnish law is to protect reindeer herding and the environment (but one must remember about equality in accession to the reindeer herders' association); either the Sami consent or caveat is not necessary in natural resources management like logging nowadays; the government cooperates with the Sami parliament; and the Sami have cultural autonomy (but only this one, since sec. 17 and 121 of the Constitution speaks of "indigenous people", "the right to maintain and develop their own language and culture", then about "their native region", "linguistic and cultural self-government", but not about political autonomy). This might be seen as a positive narrative. The image of what has been done and what is being done is rather good and positive. The argument is state-oriented as well (i.e. against some special, far-going, exclusive rights or privileges like land rights for the Sami). The mentioned statement in one place is even quite harsh and unambiguous as the constitution interpretation is very strict: "In this regard the Ministry of Agriculture and Forestry notes that the cultural autonomy that the Constitution of Finland guarantees the Sámi people in itself does not constitute a competence for the Sámi Parliament to utilise natural resources, whether in state or private ownership, within the Sámi Homeland".

As a comment, this must be asseverated that it seems possible to interpret the term "culture" also in a wider sense, and then "linguistic and cultural self-government", cultural autonomy, may also include e.g. a competence to "utilise natural resources". That is not the problem of any language but of good will. A language is open: culture, literally as dictionaries tell, means "the arts and other manifestations of human intellectual achievement regarded collectively". Intercepting the strict interpretation of sec. 121 of the constitution and interpreting sec. 121 functionally, it is possible to claim that Sami livelihoods and Sami ways on how land is used or, in particular, how utilise natural resources are part of the Sami culture. There is no reason to affirm that it is impossible. So by changing the interpretation of the constitution without having any right to walk out in high dudgeon, it is easy to change lower legal acts and so far governmental policies in order to grant the Sami strong competences in natural resources management. The constitution is not a point. The point is its interpretation and the real political will of this change.

### 2.2.3. The Sami narrative

From another standpoint, the Sami (here: by the words of the then President of the Sami Parliament of Finland[12], *Sámediggi*) admit in their statement that: "While the statutory status of the Saami is satisfactory in Finland, *the law is not adequately enforced.* The Constitution of Finland guarantees the Saami the status of an indigenous people, right to their own language and culture and cultural autonomy in their homeland, which covers the municipalities of

[12] The then President's Finnish name is Klemetti Näkkäläjärvi. He uses his Sami name also: Juvvá Lemet. Lemet served as a President in 2008-2015.

Enontekiö, Inari and Utsjoki and the northern part of Sodankylä. *The right to own culture includes traditional means of livelihood*". [italics-DB] In contrast, in the governmental document, it is stated that the cultural autonomy "does not constitute a competence for the Sámi Parliament to utilise natural resources" (see also 5.3).

The Sami side notices: "Finland *has failed to ratify* and enforce international conventions that would help improve Saami self-determination, such as the ILO Convention 1692, the U.N. Declaration of the Rights of Indigenous Peoples, and UNESCO's Convention for the Safeguarding of Intangible Cultural Heritage. Nor has Finland succeeded in implementing fully the obligations of conventions already ratified when it comes to the rights of the Saami. Finland has ratified the International Covenant on Civil and Political Rights (ICCPR)". One can also read that cultural autonomy does not include natural resources management but is understood very strictly literally in Finland: "Cultural autonomy secured by the Constitution of Finland applies to the Saami language and culture in the Saami homeland. *The Saami Parliament has a very limited genuine decision making power*; it is restricted solely to the distribution of certain granted appropriations. The main means of the Saami Parliament's pursuit of policies are negotiations, pronouncements and initiatives. The present right of self-determination is limited to the presentation of shared opinions and common representation through the Saami Parliament". Finally, the neutral observer listens to a strong voice of accusation: "*The Saami cultural self-government is usually ignored in favor of the needs of municipal self-government,* other means of livelihood and other forms of economy. Most of the Saami Parliament's propositions and statements remain unanswered, and the Government makes no genuine

attempts to consider the needs of the Saami culture from the Saami point of view". [italics-DB]

There is a lot of other resentment about "structural discrimination" on the Sami side. This might be found out in these excerpts: "*The needs of the Saami are not prioritized*; they are repeatedly overlooked in favour of other needs. The improvement of the legal status of the Saami should be one of the cornerstones of Finnish policies, considering that the future of the only indigenous people within the E.U. is at stake. Unfortunately the attitude of the national government is quite the opposite. While *Saami Culture is willingly exploited* for the benefit of tourism and in international contexts *to create a positive image of Finland*, reality is something else. There is *no willingness promote granting a genuine right of self-determination to the Saami Parliament*" [original spelling-DB]; "The lack of resources pre-empts *the implementation of cultural autonomy* and should be regarded as *structural discrimination*. The low level of resources of the Saami Parliament effectively pre-empts active promotion of the status of the Saami and the improvement of their self-determination rights. With the present resources, the Saami Parliament cannot support Saami livelihoods. Funding to the Finnish Saami Parliament is the lowest of the three Nordic countries and hinders cooperation in the Saami Parliamentary Council". [italics-DB]

To be honest, the Sami dissatisfaction (complaining) is even more visible in these passages where the President of the Sami Parliament in Finland claims that the Sami autonomy does not include natural resources management at all while the Sami culture consists of Sami livelihoods, lands, and natural resources management: "Respected Special Rapporteur, *the Saami right to*

*self-determination or autonomy in Finland does not include Saami livelihoods, land use management and planning or the management of natural resources*. The Saami Parliament's possibilities to promote Saami livelihoods are restricted to pronouncements, negotiations and small-scale projects. The Finnish legislative and administrative systems fail to recognise Saami livelihoods; these are treated in the same way as other economic activities. The Saami means of livelihood are protected by the Constitution, but not by special enactments"; "The Saami must endure many types of pressure from surrounding society. Although their rights are collective rights, individuals must specifically demand them. *Finnish society does not make it easy to be a Saami.* In many legislative proposals involving Saami rights, similar rights are granted to the other residents of the municipality as well"; "Respected Special Rapporteur thank you for this opportunity to give you a review of the implementation of Saami self-determination in Finland. I regret that I don't have *anything more* positive to tell you". [italics-DB]

So the Sami narrative might be characterised in these short statements: the Sami have no self-determination; the Sami even have no cultural autonomy (in a very basic constitutional understanding as to maintain the Sami "culture and language"); the Sami have no political power,; the Sami have no their own natural resources management; the Sami have no financial resources to implement their cultural autonomy; the Finnish government does not listen to the Sami proposals; the Sami have no exclusive rights (in reindeer husbandry etc.); the Sami are discriminated and ignored, and Finland takes care of its own image abroad only (by tourism etc.). In this non-barking-upon-the-wrong-tree-narrative, there is a very negative language and pejorative image of both Finland and the Sami status. The narrative is self-determination-

oriented also. What is, then, perceived in Lapland seems just a conflict: a clash of narratives and values. The clash shows the idea of this growing conflict between different interests of both sides.

## 2.3. Two ways of life

The difference between the two narratives might be explained by such a presupposition that the Sami admire their own way of life according to nature, which can be shown in such a scheme:

| 1) Sami: |
| --- |
| North: Nature --- Human --- Way of Life.<br>(Here one may consider reindeer husbandry understood as a way of life (see: Bunikowski 2015 and Bunikowski 2016b).<br>In this clash, Finland represents official governance, the law[13], economy, business, tourism. |
| 2) Finland: |
| economy, economic activity, resources use, tourism, Santa Claus.<br>(Here one can consider regulation of reindeer husbandry as a business occupation by the state law.) |

This is an obviously idealistic approach as not everybody on both sides understands the way of life thereby. However, it is apparent from this table that there are the two traditionally different ways of life. Thus, such questions, of course, arise to avoid idealistic, naive or postcolonial studies-approaches: What is e.g. Sami "sustainability" (understood as a respect for nature), practically speaking then? Is it sustainability without mining companies, tourism and hydroelectric power plants? Or without state laws? So, for sure, there is a clash of values and attitudes here, and axiologically, this is the clash

[13] See: Legal acts in the List of references.

of the two values: Equality and Justice – historical Justice. How to resolve the problem of justice of natural resources management then? There are Sami old customary laws concerning natural resources management as well as relatively new, relevant state rules. They exist in a certain conflict about ownership, natural resources management, and jurisdiction. Such conflicts might be resolved. Not dwelling on things, some theory gets needed indeed. This is the reason why the theory of legal pluralism is described in the next section. (It has to be clarified here that referring to the Sami culture, the paper focuses mostly on reindeer-herding nomads, not the other historical Sámi groups which, as one can certainly know, were fishers, landowners themselves and sedentary coastal dwellers. Due to practical constraints, this paper cannot provide a comprehensive review of the literature on the whole spectrum of the Sami culture and groups.)

## 3. The theory of legal pluralism

Customary laws and legal pluralism might be good "inspirations for seeking new forms of political organisation of the Sami people" in Scandinavia and Finland (Bunikowski 2014: 84). "All law begins with custom. Anthropologists know this…", rightly claims David J. Bederman (2010:3). Of course, realisation of the idea of legal pluralism, i.e. two *personal* and *substantial* jurisdictions in one geographical or special sphere: the state system and the indigenous system, means almost "full" self-determination with the sovereign power and jurisdiction that comes from the sovereign power. Legal pluralism may make indigenous jurisdiction justified and possible. This is how it can be made: indigenous jurisdiction means that the practical authority is granted to an indigenous legal body to administer justice

in a given field of responsibility. Colloquially, the term might be referred to the geographical area like Lapland or its part, but the legal term concerns the granted practical authority in a given field like natural resources management.

## 3.1. Introduction

The theory of legal pluralism is well described and developed [see: Galanter (1981), Griffiths (1986), de Sousa Santos (1987), Vanderlinden (1989), Teubner (1991-1992), Tamanaha (1993; 2008), Macdonald (1998), F. von Benda-Beckmann (2002), K. von Benda-Beckmann (2002), Bunikowski & Dobrzeniecki (2009)]. Legal pluralism is a situation in which there are at least two normative systems in the same social sphere, and there is no rule of recognition (in Hart's sense; see: Hart 1961: 92-96) on which rule is more important and which rule one has to choose and apply (Bunikowski 2014: 77). It seems that the theory may help Finnish decision-makers and scholars understand that indigenous jurisdiction is possible in Lapland.

## 3.2. Viola's narrative

According the Italian philosopher of law Francesco Viola, in the case of legal pluralism all rules or norms (that can be taken into consideration in a given case) are *legitimate* and they are "equally" important (Viola 2007: 109). Legitimacy may come from a legal system, but it is also vested and deeply rooted in traditions, long-standing customs, beliefs, or religion (Bunikowski and Dillon 2017: 41). Legal pluralism is not "plurality *in the* order" but "*of the* orders". Legal orders "compete and concur" in "the regulation of a course of action or actions concerning social relations of the same kind". Legal

pluralism is not about different normative mechanisms, which are applicable to the situation within the same legal system. In *one* order, all problems can be resolved following some hierarchy of sources of law, rules of precedence and rules of interpretation. In a *plurality* of orders, such a solution does not exist because it *must not* exist[14] (Viola 2007: 109). This plurality of legal orders throws up conflicts and tensions not only between state-indigenous but also "between state-international, local-state, customary-state, religious-state, moral-state, professional-state laws" etc. In a concrete case, how should the rules concerning it be understood and interpreted? Whose interests should take precedence and prevail? What rule should one follow in such conflicts? (Bunikowski and Dillon 2017: 41). "Social or political pressures often determine what rule takes precedence, not the state laws", and the rules of indigenous customary laws may prevail in such conflicts between indigenous and state rules then (Bunikowski and Dillon 2017: 42).

### 3.3. Twining's narrative

I agree to William Twining that the theory of legal pluralism (by e.g. Santos) explains the phenomenon of law better than the so called systems theories (Twining 2000: 230). For example, Teubner or Luhmann's considerations on "autopoietic systems" might be interesting but look a bit too abstract: for example, this does not matter too much in practice if one claims that "all

[14] This statement by Viola looks like an easy way out of a big problem (and honestly, maybe for some scholars being critical to legal pluralism, it is a very unsatisfying one), but to me, it is logical from Viola's point of view: in the order there are some hierarchies of legal sources and rules of interpretation, but in a plurality of orders such hierarchies and rules are equally legitimate and solutions "do not exist" *per se* - these have to be achieved in other ways than legal interpretation of texts. For example, this might be made in other forms of social communication (e.g. social pressure by protests).

systems are operationally closed, but cognitively open" (like claims Luhamann 2004: 8).

According to Twining, legal pluralism was originally relevant to the study of sociology of law (like unofficial law, "non-state law") and anthropology of law (like customary law, "traditional norms") (Twining 2000: 224-228). However, following Santos's theory, it turned to be also a part of primary considerations in the context of globalisation; it focuses on "the co-existence and interaction of legal orders at different levels" from "a global perspective". This is one of the reasons "why the phenomenon of legal pluralism must become central to general jurisprudence" (Twining 2000: 228). In Twining's book entitled "Globalisation and legal theory", he points out that legal pluralism is a "central phenomenon of law", especially from a "global perspective" (Twining 2000: 233). Furthermore, the marginalisation of legal pluralism is a result of two facts. One is that Western legal tradition is monist (legal system is internally coherent), statist (law has to come from the state that "has a monopoly of law") and positivist (rules must be created and recognised as law by the state). The second reason is that while talking about law the focus is on "lawyers' conceptions of law". Lawyers are influenced by their education and legal language ("training and socialisation", "their claims to having a monopoly of certain kinds of knowledge and expertise"). They are also impressed by legal positivism (that is a statist conception of law), not by such concepts as "folk law", "customary law", "non-state law", which are associated with anthropology and sociology (Twining 2000: 232-233). However, the fact is that parliaments and officials focus little on the legal conceptions and feelings of ordinary people: what they think of law and of

what law is. Law-makers do not ask e.g. indigenous people about their conceptions of law.

Twining, critically analysing Santos' theory, suggests one should study legal pluralism in relation to normative pluralism ("in the broader context" of it). Everybody knows that in everyone's everyday life one might meet different rules in different places every day. Only some of them are of a legal nature (Twining 2000: 231). Twining uses a very interesting example of asking his students the question about rules which governed their day (they must write down "what bodies of norms they have been subject to or have invoked during the previous 48 hours"). Some of these rules are legal, but many of them are not legal. People live in normative pluralism, Twining says the least (Twining 2000: 232). He also reaffirms, like Griffiths or Llewellyn, that the definition of law is not necessary and sounds misleading. Such a definition might be necessary only "for pragmatic reasons in quite specific contexts" (Twining 2000: 231).

Twining reminds the reader of the Santos concept of interlegality and "mapping". In fact, it is necessary to explain in this place that interlegality is a mix of different laws, like customary law, Western state law, indigenous beliefs, religious rules, locals customs etc. Twining also repeats Santos' words about law as mapping that is a better understanding of legal pluralism, because it concerns "(...) not the legal pluralism of traditional legal anthropology, in which the different legal orders are conceived as separate entities co-existing in the political space, but rather, the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds, as much as in our actions (...)" (Twining 2000: 229). This might be remarked

that such a conception of the different legal orders in human mind is similar to Leon Petrazhitsky's psychological theory of law that was invented more than 100 years ago (in Russia and Poland).

Importantly, Twining analyses Santos' theory, especially his seven types of legal transnationalisation. In this context, it is considerable to mention two of these seven global tendencies described by Santos. One is related to "Ancient Grievances and New Solidarities". This is "the Law of Indigenous Peoples": indigenous collective rights, processes of indigenous self-determination as well as indigenous (human rights) movement and indigenous linkages and coalitions. The second is about "cosmopolitanism and human rights" where besides traditional issues about the protection of human rights there are also considerations on universalism, cultural relativism or self-determination etc. (Twining 2000: 240). Taking into consideration Santos' categorisation, it might be surmised that these particular processes look localised, autonomous, spontaneous, "anti-hegemonic", and "anti-statist". "Cosmopolitan, anti-hegemonic, utopian legalities", writes Twinning about Santos' understanding of these processes though (Twinning 2000: 240). They come into sight locally and are not steered by states (governments) or corporations (economic governors). They stand against hegemony of nation states and traditional paradigms of legal positivism and the doctrine of state. It might be added to Twinning's narrative that Sami movements and claims concerning their self-determination are also localised, autonomous, spontaneous, "anti-hegemonic", and "anti-statist".

In this context, it can be appended that recently also another term has appeared in the literature: it is "indigenous constitutionalism" by John Borrows (2016).

Shortly, the concept means the process of taking power *back* from states to indigenous people by new uplifting, positive and liberating forms of indigenous activism in true self-government: by living systems of thought and practice, applying originalism, civil disobedience, changes in education on women, not by interpretations of aboriginal treaties etc.

### 3.4. The old Sami customary law on natural resources management in the context of legal pluralism

It could be stated that according to the old Sami customary laws, the Sami are the rulers in Lapland and enjoy the collective "ownership" of the land, Lapp-land, S**á**pmi[15]. René Kuppe supplies that the Sami did not know our Western concepts of ownership, public land, contract, sovereignty or border, and their rights were abused by e.g. Sweden's legal order and the Swedish parliament (Kuppe 2016: 63-65, 68-69). According to Matthias Ahrén, the Sami old customary laws were linked with "land, waters, and natural resources management", with many variations, depending on the region (see more: Ahrén 2004: 68-73). One has to remember that customary law "varies between regions" of the Sami people (Ahrén 2004: 68).

Sami customary laws[16] have never been written[17] as law books or enacted by some state authorities. As Ahrén clearly points out, these laws "have

[15] Maybe also in our modern constitutional-political sense.
[16] For the sake of this paper, I use the terms "Sami customary law", "Sami customary laws", "customary law", "customs", "customary rules", "Sami customary legal rules" interchangeably.
[17] There are arguments criticising customary law precisely because it was never written, and thus could be interpreted, or remembered, in different ways by different people or in different times. This should be signalised here.

developed in response to the Saami people's surrounding environment, and to correspond to the fundamental requirements and conditions for the Saami traditional livelihoods" and reflect "a respect for nature and an aspiration to leave no traces upon it" (Ahrén 2004: 69). Of the most fundamental customary legal rules of the Sami people, it is necessary to mention the following anyway.

First of all, every reindeer herding *siida* (community/village) had pasture areas and migration paths between the pasture areas as well as places designated to rest. Customary rules regulated crossing another *siida*'s land and the ownership of the reindeer of the *siidas* that mixed (Ahrén 2004: 69).

Second, there were regulations how to inherit pasture areas, migration paths and resting places, and both men and women were equally able to inherit. Customary law regulated also how to transfer grazing areas between different *siidas* by marriage and how to resolve all disputes concerning such lands (Ahrén 2004: 69).

Third, the reindeer are "free, mobile and independent", and the reindeer herder has to "compromise with the animal" (Ahrén 2004: 69). The reindeer herder shall be careful about moving "the herd to areas outside the regular grazing areas and migration paths" if he or she does not want to lose control over the animals. Thus, "A *siida* could only with great difficulty change to a grazing area traditionally belonging to another *siida*" (Ahrén 2004: 70).

Fourthly, an individual member of a given *siida* made decisions about her or his reindeer. It was possible to take into consideration other members' advice as well (Ahrén 2004: 70).

Fifthly, the *siida* decided who belonged to the *siida* and how to resolve land issues (like disputed grazing areas) between members and neighbouring *siidas* (Ahrén 2004: 70).

Sixthly, in the Sami coastal areas, Mountain Sami were forbidden to fish in the sea without having the permission of the local Sea Sami. Customary laws regulated which *siida* was allowed to fish in the sea. Customary laws also regulated "which community had the right to whales stranded on the seashore" and how to divide the whales within the community (Ahrén 2004: 70).

Seventhly, the *siidas* located at the shores of the big rivers were exclusively allowed to fish those waters but they were allowed to make agreements with other Sami (the 16 and 17 the centuries) (Ahrén 2004: 70).

Eighthly, lake fishing was the right belonging to the local *siida* (similarly, like sea and river fishing) (Ahrén 2004: 70; compare Ravna 2009: 159, where it is said about the great river Tana in Norway and Finland and its Sami users that "Salmon fishing has been a right which has belonged exclusively to the Sámi people in Tana from time immemorial" and they demanded compensation for fishing).

Ninthly, there were also customary rules concerning hunting. For example, in Norway, in the 18th century, there existed even Sami rules regarding such issues as how to divide beaver between those participating in a given hunting, those who paid duty to the community and those who were older and disabled (Ahrén 2004: 70-71). It shows how egalitarian and loyal these Sami communities were.

Tenthly, in a given *siida* every family had its own "grazing, fishing, and hunting areas, which in turn could be divided among the family members" and, as it was explained by one Sami, "The emotions say that this is a familiar place. (...) You are bound to your own area, therefore, it is of great importance to you" (Ahrén 2004: 71). Individual usufructory rights are recognised but "land, waters, and natural resources are vested in the collective" and "the value of land" relies on the fact that a given individual or his and her families "could live off the land for generations" (Ahrén 2004: 71).

Eleventh, conflicts between the Sami people were resolved according to oral customary laws, not "law books". The Sami relied on "men with good memories". These wise men did "store" and "convey" customary law. Customary laws were always the basis of every solution, even if negotiations were made e.g. on land conflicts (Ahrén 2004: 72). If negotiations were not possible, disputes went to a collegial council (*norraz*) that was in every *siida*. The *norraz* was dominated by the *siida*'s "wise man". If a conflict was related to two neighbouring *siidas*, the two *siidas*' two wise men could meet and resolve the conflict "in line with, or, if necessary, through directly applying the customary law relevant to the area" (Ahrén 2004: 72). Like the Norwegian side of the Sami lands had its *norraz*, the Finnish side had *sobbar* (or *norrös*)

and *kärreg*, the family elders with a community elder. There was no possibility to appeal to their decisions. *Norraz*, *sobbar* (or *norrös*) and *kärreg* usually met once a year to resolve disputes on hunting, fishing and grazing areas (Ahrén 2004: 72-73).

Thus, there were Sami territories with Sami legal institutions. For now, Finnish public law treats these territories as a Finnish land. Here is the reason of a deep conflict. Consequently, in the light of the old Sami laws, the Sami are to decide about hunting grounds, fishing waters, logging, permits in mining areas, minerals, hydroelectric power plants, reindeer husbandry, pasture lands, *siida* (organisation of the village) etc. In this vision, the Sami are responsible for natural resources management and enjoy collective land rights (Bunikowski 2014: 77). These old laws "establish" that the Sami should manage forests, fishing waters, and hunting grounds as well as pasture areas by their own indigenous institutions, authorities and bodies. The problem is that these Sami laws are not binding for a nation state that Finland is supposed to really be. In every nation state there is one kind of law, i.e. state law, which should be equal for everybody. There is also one culture that dominates and is majoritarian.

## 4. The idea of two jurisdictions in indigenous areas

### 4.1. Model

Furthermore, it is worth noting that a legal-pluralistic model for the Nordic region has been proposed and would make living in Lapland possible for both sides of the conflict (Bunikowski and Dillon 2017: 42-45). The authors of

"Arguments from cultural ecology and legal pluralism for recognising indigenous customary law in the Arctic" put on the table "a general model for customary law", which might be presented in the following table:

| |
|---|
| For non-indigenous people - state law (and international law as a part of the domestic order) – state courts and jurisdiction. |
| For indigenous people – indigenous/customary laws – indigenous courts and jurisdiction[18]. |
| For conflicts between indigenous and non-indigenous – crown court(s). |
| The status of the indigenous would be double and *complementary*[19]: |
| State status – a formal citizenship, but with an opt-out if an individual does not wish *by a declaration* to have such rights and duties[20]. |
| Indigenous status – traditional and customary rights and duties following from membership or belonging to a given indigenous community/group. |

In addition to this, another table explains the authors' ideas about the division of competences of the state and indigenous domains:

[18] Offhandedly, see also critical texts like Harari 2014, especially on social norms and their origins as well as on legal orders on pp. 117-124. Yuval Noah Harari writes: "All these cooperation networks - from the cities of ancient Mesopotamia to the Qin and Roman empires - were 'imagined orders'. The social norms that sustained them based neither on ingrained instincts nor on personal acquaintances, but rather on belief in shared myths" (117). In the case of indigenous law, in my opinion, there are also shared beliefs, not necessarily myths, behind these laws.

[19] It can be also said by some lawyers that it rather seems that a group of citizens would be subject to a different (and arguably, more favourable) legal framework.

[20] The issue of stateless people, as well as the huge problems they face, is not addressed in view of this point.

| |
|---|
| The social spheres in which the indigenous and non-indigenous jurisdictions do not overlap are: |
| - Traditional way of life (e.g. nomadicism) |
| - ***Natural resources management (land rights, hunting grounds, fishing waters)*** |
| - Property rights (private and public rights) |
| - Status of indigenous peoples (rights and duties), |
| - Public infrastructure |
| - Education |
| - Internal security |
| - Indigenous welfare |
| - Courts |
| - *Provision of common goods like water, energy, electricity* |
| - *Fiscal policy* |
| - *External security* |
| - *Foreign affairs* |
| "Some spheres - especially the last four are *external* and should belong to the state; the rest should be in the hands of the indigenous community." (Bunikowski and Dillon 2017: 44) |

To give an illustration of what I mean, let the reader focus on these following ideas that are logically implied from the model. In this model, indigenous people have their own lands, governments, competencies, courts, citizenship. There are no institutional or systemic conflicts between the indigenous and the state domains. Disputes between the indigenous and the non-indigenous are resolved by special courts. NRM is in the hands of indigenous people and their jurisdiction. In this model, indigenous people have the allodial title to their lands. Generally speaking, the idea of two jurisdictions (state-indigenous) is candidly associated with the theory of legal pluralism. It has to be explained in the next part of the paper how this above-presented model, based on the theory of legal pluralism, may work in practice: maybe not in Scandinavia yet nowadays but rather or at least to some extent in Canada.

### 4.2. The idea of legal pluralism in Sami areas in the past and now

In the past, some kind of legal pluralism was recognised in the Sami case. This was made by the states in Scandinavia indeed. The Sami jurisdiction was allowed to some extent by the Nordic legal orders and international law. The historical international treaty in this field was the so called "First Codicil and Supplement to the Frontier Treaty between the Kingdoms of Norway and Sweden concerning the Lapps (done on 21st September/2nd October 1751)"[21]. Consequently, the Sami courts applied Sami law in relation to the Sami people and their disputes. The state courts were responsible for other matters. However, some influential contemporary legal scholars of Sami descent like Mattias Ahrén are against legal pluralism, claiming the Sami communities should be ruled according to the old Sami customary law concerning natural resources management and organisation of *siida* (village) (Ahrén 2004:107-112). This opinion is clearly against legal pluralism: "Regardless of all the obstacles raised by the non-Saami societies, the Saami people continue to aspire to live in accordance with their own customary laws, to the greatest extent possible. However, in addition to all the impediments outlined above, it is onerous for the Saami people to live in legal pluralism, torn between obeying non-Saami laws and their own perception of right and wrong. The present order puts the existence of the Saami people's culture – including their

[21] The treaty was to regulate "the customary transfrontier movements of the Lapps" and jurisdiction "over the foreign Lapps" during the movement period, and tax problems related to that (it reads in the preamble). Such areas are regulated in the treaty: state taxation (art.1-7), Sami mixed marriages (art. 8), free movement and crossing borders by the Lapps in Scandinavia (art. 9-21), limited indigenous jurisdiction (art. 22-30; art. 22: "disputes occurring between Lapps from the same side" in the transfrontier movement to be resolved the Lapp lensman). It is not incorrect to say that this treaty was also to recognise Sami customary laws and nomadic style. Very probably, this was not the primary aim of this act though as it starts with taxation issues.

customary law – in danger. There is an urgent need for remedies". More precisely speaking, Ahrén points out that the Sami should be not only recognised as a people (not only as an ethnic minority) but also have legal rights to their traditional land, waters, and natural resources, enjoying their own legal orders: "In order to adequately address the conflict between the Saami and non-Saami legal systems, the non-Saami societies must: (1) recognize the Saami people as a people, equal in dignity and rights to their neighbouring peoples, which in turn implies that the Saami legal system is equal in value to the non-Saami legal systems; (2) fully acknowledge that the Saami people's way of life might indeed give rise to legal rights to their traditional land, waters, and natural resources; (3) recognize the particularities of the Saami traditional livelihoods in conflicts between the Saami and non-Saami societies as to use of land; and (4) harmonize their legislation with the corresponding Saami customary laws in instances when there is no real need for conflict" (Ahrén 2004:10).

However, according to the Norwegian Sami legal scholar Øyvind Ravna, "By recognising Sámi legal customs and traditions, the Lapp Codicil attained a unique position both as law and international treaty all the way up to our time" (Ravna 2009: 154). This is the most persuasive argument. All things considered, it seems reasonable to assume that legal pluralism was not so dangerous for the Sami after all.

### 4.3. Jurisdiction in Indigenous Canada today: two cases

In fact, it seems that "Indigenous Canada" may help Finnish decision-makers and scholars understand that indigenous jurisdiction is possible. Of course,

Canada is the common law system country that as one of the CANZUS states "may be concerned to protect domestic bargains from competing international human rights norms" in the field of indigenous rights (Gover 2015: 373). Nevertheless, especially, the legal situation of the Nisga'a people relates to that one of the Sami people and may serve as a pattern of legal-political and legal-pluralistic framework. Thus, first, as a particular case and in order to show how indigenous jurisdiction may work in practice nowadays, this is to analyse the British Columbia's Nisga'a people jurisdiction. The Nisga'a are one of the 614 First Nations living in Canada. They have a kind of constitutional agreement with the federal government: The Nisga'a Final Agreement of 1999. The agreement concerns Nisga'a status, lands, and jurisdiction. This is a very precise document that creates indigenous self-determination, with the Nisga'a territories, government, citizenship, laws, courts, police etc. It is one of the latest and most developed such agreements in Canada (see also: Svensson 2002). This is also the reason why it is referred to it in this paper. Secondly, it should be also taken into consideration another agreement which is a bit older. However, it is good to present it in order to show some progress in the Canadian legislation: the second example is then drawn also from Canada, since it is the James Bay and Northern Quebec Agreement of 1975. One may say that this is apparent to explain the progress between the two cases/treaties. Also, it is necessary to note that making a long story short, the jurisprudence of the Canadian courts that was also meaningful in recognition of *particular* indigenous rights in different provinces and territories is skipped in this section.

What is the Nisga'a Final Treaty then? The Nisga'a Final Agreement is a treaty and a land claims agreement in terms of Canadian constitutional law

(paragraph 1, Chapter 2 "General provisions") and is binding in the light of the sources of law in Canada (paragraph 2, Chapter 2). Some chosen provisions show the significance of legal pluralism and indigenous jurisdiction: "“Nisga’a Nation” means the collectivity of those aboriginal people who share the language, culture, and laws of the Nisga’a Indians of the Nass Area, and their descendants" (Chapter 1 "Definitions"); "Nisga’a citizens have the right to practice the Nisga’a culture and to use the Nisga’a language, in a manner consistent with this Agreement" (paragraph 7 in Chapter 2); "the Nisga’a Nation owns Nisga’a Lands in fee simple, being the largest estate known in law. This estate is not subject to any condition, proviso, restriction, exception, or reservation set out in the Land Act or any comparable limitation under any federal or provincial law. No estate or interest in Nisga’a Lands can be expropriated except as permitted by, and in accordance with, this Agreement" (paragraph 3 in Chapter 3 "Lands"). *De facto*, it means the right to land and self-determination. "Fee simple" means absolute tenure in land with freedom to dispose of it. There are also some concrete provisions on e.g. mineral resources management and heritage sites, such as: "For greater certainty, in accordance with paragraph 3, on the effective date the Nisga’a Nation owns all mineral resources on or under Nisga’a Lands" (paragraph 19, Chapter 3); "Nisga’a Lisims Government has the exclusive authority to determine, collect, and administer any fees, rents, royalties, or other charges in respect of mineral resources on or under Nisga’a Lands" (paragraph 20, Chapter 3); Nisga'a Government "will develop processes to manage heritage sites on Nisga'a Lands in order to preserve the heritage values associated with those sites from proposed land and resource activities that may affect those sites" (paragraph 36, Chapter 17). On the other

hand, British Columbia owns the subterranean lands within Nisga'a Lands (paragraph 22, Chapter 3)[22].

In comparison with the Nisga'a people's situation, there are some First Nations in Canada whose land rights and self-government were regulated many years earlier. Ones of these nations are the Crees and the Inuit. This factor of time may mean that also a level of protection of their rights might have been lower. Here are analysed the most fundamental philosophical principles of the James Bay and Northern Quebec Agreement of 1975 (JBNQA), which requires citations to get the point of a new axiology of law. In the beginning of the document, in its law axiology, i.e. in a part entitled "Philosophy of the Agreement", it reads: "The needs and interests of the native peoples are *closely tied to their lands*; their lands are the very centre of their existence. That is why in this Agreement we have devoted ourselves especially to the *establishment of a land regime that will satisfy the needs both of the native peoples and of Quebec*" (JBNQA: 7). In another place, one may perceive a great understanding of indigenous belonging to (the) land: "*Land is the very basis* of the Cree and Inuit cultures. And it is not just a matter of sustaining themselves with the harvest of the land, which of course they do. They have *a mystique about the land*, and what it contains. They have a special relationship with the land that their ancestors inhabited, a link, something

[22] As Bunikowski and Dillon (2017: 54-55) claim, summing up the Nisga'a model of jurisdiction: "All these provisions must be understood in the context of delegation of power and decentralisation as well as cultural ecological processes of adaptation to the today's situation or legal-pluralistic processes of recognition of diversity and differences. To sum up, it is the Nisga'a who are responsible for the management of heritage sites, including sacred sites. The First Nation knows better how to protect their sacred sites from doubtful outcomes arising from the interests of tourism and natural resources companies. This process of giving the Canadian aboriginals their traditional and customary rights *back* might be seen as a reasonable policy carried out by the Canadian government. This has not always been the case; it took a long time to change the official policy".

indefinable but real and genuine nevertheless" (JBNQA: 11). To whom are these regulations dedicated? The answer is very interesting and wise: "The native peoples who will be parties to this Agreement are not the people you see in our cities selling artwork and handicrafts. They are not people who offer themselves as a tourist attraction. They are not people who do odd jobs and live on pizzas and other delicacies of our supposedly advanced southern civilization. They are flesh-and-blood people who *live and work in communion with the land they inhabit* and who express, in their everyday activities, *the continuity of a long, long tradition.* They are living, if I may say so, a *wholesome life in harmony with the land*. They are at *peace with nature*" (JBNQA: 11). [italics-DB]

There are three categories of land in the northern part of the province of Quebec ("a new land regime in the North"), according to the agreement[23]. This is the idea of legal pluralism. Category 1 appears crucial from the point of view of the native people. In this category, indigenous self-administration

[23] More about the three categories of land in the northern part of the province of Quebec can be read in this part of the agreement: "*It is the Category I and Category II lands, however, that are of particular importance in the context of the preservation of the culture and the economy of the Cree and Inuit peoples.* Now what do we mean exactly by Category I lands? These are the lands that will be allocated to the native peoples for their exclusive use. *They are the lands in and around the communities where the native peoples normally reside.* Certainly the native peoples will enjoy *a special position on these lands*. That is the point of having this land category. But there is more to be said. Quebec will retain the right to use Category 1 lands for *public purposes*. Acquired rights, private as well as public, are protected. If the public activities on these lands *interfere* with the native peoples use of them, then replacement land must be provided for them" (JBNQA: 8). This is also continued in this place as follows (about the very small relation of the Category 1 lands to the whole territory): "Now to see the Category 1 lands in their proper perspective, it must be realized that they represent a tiny proportion of the whole territory. Approximately 3,250 square miles are to be allocated to the use of the Inuit, and 2,158 square miles to the use of the Crees. Thus, *although these lands are vital to the native peoples* and they constitute an essential element of the Quebec Government's policy of protecting their traditional economy and culture, you will agree that they are of minimal importance in relation to the total economy of Quebec". [italics-DB]

is a strong value, which means "local matters" are regulated by "by the people who live there"[24]. However, there are some expectations about the use of this Category lands for some community services. On the other hand, bands have special rights in decision making processes on NRM (making the consent for mining activities). The mineral rights are not their ownership though. The so far mining owners and operators are still protected under a duty of paying compensation to the band[25]. Category II looks also important from the perspective of indigenous way of life (i.e. "exclusive hunting, fishing and trapping rights")[26]. Category III is a bit different from the other land categories and includes access of the entire population[27].

[24] More about indigenous self-determination in the Category 1 lands can be read in this fragment of the agreement: "One of the most important features of the Category 1 lands will be their self-administration. In other words, *local matters will be regulated by the people who live there,* as they are in any other municipality anywhere else in Quebec. There are to be Category 1 lands for the Cree communities south of the 55th parallel, in the James Bay region, but these will not be part of the Municipality of James Bay. These communities, or rather, the members of each of these communities will *constitute legal entities, and each entity will have its affairs administered by a council*" (JBNQA: 8). [italics-DB]

[25] More about the use of the Category 1 lands for their general community services can be read in this part of the agreement: "The native peoples will be required to allow the use of Category lands for their general community services, such as hospitals, police stations and schools. *The consent of the native peoples will be required for mining activities on Category I lands. However, the mineral and sub-surface rights will continue to belong to Quebec*, with the exception of rights already acquired by third parties. Owners of mining rights adjacent to Category I lands will be able to exercise them within the limits of the rights they retain, but they will be required to compensate the Band whose territory is affected by their operations" (JBNQA: 8). [italics-DB]

[26] More about the Category 2 lands can be read in this part of the agreement: "*Category II lands are those where the native peoples will have exclusive hunting, fishing and trapping rights, but no special right of occupancy*. The Government of Quebec may earmark Category II lands for development purposes at any time, as long as the land used for development is replaced. And servitudes for public purposes may be established on Category II lands without any requirement of compensation. *Mining exploration and technical surveys may be carried out freely on Category II lands.* The Government of Quebec may authorize scientific studies, administrative works and pre-development activities on Category II lands. These undertakings, it goes without saying, *must not interfere unreasonably with the hunting, fishing and trapping activities of the native people*" (JBNQA: 9). [italics-DB]

[27] More about the Category 3 lands can be read in the following part of the agreement. As it is stated, "*These are, generally speaking, lands where exclusive rights or privileges are not*

The "two guiding principles" behind the Agreement relates to, first, the use of natural resources by Quebec and, secondly, the needs of the native people[28]. This is averred that there are the two balancing principles: the (economic) interests of all the people of Quebec and the (cultural) needs of the Crees and the Inuit in Quebec. This attitude emanates as both a business and culture model. The philosophy of the Agreement and understanding of the problem of necessity of both protection and survival of indigenous way of life seem very impressive, taking into consideration the date of passing this law. Certainly, the problem is not how Western laws are written but how these work in practice. These may work well in practice. Anyway, some fundamental rights concerning the use of the land by the Crees and the Inuit seem protected. This is obvious that the land regime is, as it is stated in the Agreement, "an elaborate regime". There were different arguments and

*granted to the native peoples*. This does not mean they are shunted aside. On the contrary, they will be able to pursue their harvesting activities - hunting, fishing and trapping - the year round, as in the past. To this end, certain species will be reserved for their use. But, in general, *the entire population will have access to*, and the use of, Category III lands in accordance with the ordinary laws and regulations of Quebec concerning public lands" (JBNQA: 7). [italics-DB]

[28] These were explained as follows: "In undertaking the negotiations with the native peoples, we have followed two guiding principles, two principles of equal importance. The first is that *Quebec needs to use the resources of its territory, all its territory, for the benefit of all its people*. The use of these resources must be reasonably planned. The future needs of the people of Quebec must be anticipated. The Government clearly has the duty to take the measures necessary to ensure the orderly and rational development of the resources of our territory in the North. Those resources are a vital factor, they must be a vital factor, in the Government's over-all plans for the future of Quebec. The second principle is that *we must recognize the needs of the natives peoples, the Crees and the Inuit, who have a different culture and a different way of life from those of other peoples of Quebec.* We have negotiated with two minorities who felt themselves threatened with extinction. The *native peoples are battling for their survival.* If the State does not succeed in establishing principles aimed at *assuring the survival of these minorities*, it could well happen that we might not even be able to guarantee our own" (JBNQA: 10). [italics-DB]

interests taken into consideration in making the Agreement by Quebec, so it is caught in the middle between "affirming the integrity of its territory", ensuring to maintain the "traditional way of life" of the native people, and "the responsibility for the allocation of lands to the Cree and Inuit peoples -- some lands to the use of which they will have exclusive rights, other lands where they will have exclusive hunting, fishing and trapping rights". What is important the policy of paternalism was fully rejected: "The Government proposes to deal with the native peoples as full-fledged citizens" (JBNQA: 9).

By way of conclusion to these reflections, this section shows that it is possible to make a good level of indigenous self-determination (and self-government) and recognise land rights of indigenous people to a good and reasonable extent, balancing different interests and principles. Two legal orders, i.e. the state one and the indigenous one, overlap and complement in one geographical or social area. This is about a kind of legal pluralism. The legal orders had been competing for tens of years in Canada before the indigenous system was recognised by the state law as equally legitimate. Of course, not to mention that this is clear that written axiologies may still remain a dead letter. These have to work in practice of law. And, it is a job of the judges and courts to evaluate indigenous claims in the cases of disputes and conflicts with certain state interests. It is crucial to discern that the Nisga'a model is very similar to the theoretical model mentioned in 4.1. The Cree and Inuit model is not so well developed (because it had been made many years before the Nisga'a). A combination of the two models might also appear as an excellent solution for implementing indigenous jurisdiction of Finland's Sami people.

## 5. Other legal, political, and philosophical considerations

In this section, the narrative focuses on chosen international-legal, philosophical-moral and cultural-linguistic[29] challenges concerning natural resources management in Lapland. First, it concerns the Finnish dilemmas of ratification of the International Labour Organisation Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. Secondly, it shortly brings the most significant moral arguments (which are deeply rooted in European heritage) concerning the "change" in the field of legal pluralism and natural resources management in Lapland. Thirdly, it tends to raise questions regarding cultural differences and common misunderstanding of the official statements in Lapland.

### 5.1. ILO 169 and control over Lapland

One may admit that for Finland, the core of the "whole" problem is struck by possible losing control over Lapland (both economically and politically), as some Sami may take some ILO 169 provisions really seriously in the implementation process negotiations. Thus, Article 14 par. 1 sentence 1 states: "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised", and Article 15 par. 1 adds: "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and

[29] It is known that morality, philosophy, language and law are all different manifestations of what we call culture. Culture is a wider category then. However, there is also cultural linguistics. This is a field of linguistics which aims to study the relationship between language and culture. It analyses the way different ethnic groups perceive and understand the world.

conservation of these resources". Of course, these are open-texture terms. Anyway, these provisions might be differently understood, and here lies some danger of "fear" found on the side of the government in Finland. International law remains one problem, but moral claims are another. How to morally justify the rights of the peoples concerned to the natural resources pertaining to their lands?

## 5.2. Philosophical justification of the change

The implementation of the presented model (see 4.1.) in Finnish Lapland would be "the change". Here is the more philosophical way then: what is the philosophical justification of the universal right of indigenous peoples to their own law at all? (see more: Bunikowski 2017) Are there any historical reasons to make more justice now? By these *historical reasons*, it is meant some obvious violation and eradication of many indigenous cultures. This is "obvious" that the Sami people enjoy a strong moral claim in relation to states (*historical Justice*), such as Finland, Norway, Sweden but also Russia. All the Sami cultures were really depreciated for tens of years. This is a matter of fact that these states do not appreciate narratives going back to their colonial history. In European traditions, both Roman law codified by Justinian and Kantian moral philosophy representing rationalism are ones of the most salient cultural artefacts. First, there is Justinian's legal heritage of justice. Justice means "to render everyone his due". This reveals through the common European legal culture - it is based on Justinian's Code (534) and ancient legal texts. Justinian in "The Institutes of Justinian" (Book I. Of Persons, I. Justice and Law) wrote: "Justice is the constant and perpetual wish to render every one his due". Offhandedly, the Justinian concept comes from Aristotle's

philosophy: "Justice is the virtue through which everybody enjoys his own possessions in accordance with the law; its opposite is injustice, through which men enjoy the possessions of others in defiance of the law" (Aristotle: Book I - Chapter 9). So the question is whether it is not the case of the Sami people. Have they not the right to their due, really? To land rights or lands? To compensation? To their own natural resources management? These are rhetorical questions from Justinian's ethical perspective. Secondly, one can base the approach on Kant's philosophy, which was so influential in Western philosophical traditions. In Kantian moral philosophy, the first formulation of the categorical imperative is as follows: "Act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction (Kant 1993: 30)". Immanuel Kant in "Grounding for the Metaphysics of Morals" seeks universal principles - these are absolute and unconditional, it seems to Kant. These principles concern also states. It is difficult to disagree with this opinion that also political decisions might be ethically judged: the individual's decisions are always morally evaluated (what is good and wrong). Thus, the practical, philosophical, political or moral question is whether politicians from Finland, Sweden or Norway, or Russia have not any pangs of conscience towards the Sami because of the violation of the categorical imperative by taking over the Sami territories without the Sami consent. This is a rhetorical question from Kantian moral perspective/theory (see: Bunikowski 2017: 50).

### 5.3. Cultural misunderstandings

To make it clear, also the language and aims of the official state and indigenous statements are conspicuous. This is an underestimated problem

in the academia. Sometimes, of course, a polite language means "nothing" and is a dead letter. To put it bluntly, the language of these documents which are analysed in 2.2.2. and 2.2.3. is really momentous in this sense that, as said rabbi Abraham Joshua Heschel, language matters, but "Language has been reduced to labels, talk has become double-talk. We are in the process of losing faith in the reality of words". According to Ludwig Wittgenstein, "the meaning of a word is its use in the language" (par. 43) (Wittgenstein 1951). So since the use is about state promises without the intention of keeping these promises, then the problem is caught in the middle between the real intentions of the parties of the debate/deal. How should one interpret these official statements of the Finnish government? The Sami expect actions based on keeping promises and keeping up with the literal meaning of the language used in the (international and domestic) legal acts and the official statements[30]. However, there are too many misunderstandings and plenty of misinformation between Western and indigenous worlds (see also: Bunikowski 2016a: 6-8). So is in Finland. The government seems to have been restrained with the ratification of the ILO Convention while Sami activists are getting more visible in the public and the academia, presenting stronger, not always united or pragmatic, voices about the process of losing their respect for the government because of both the ratification failure and the failure of implementation of other international norms (see: 2.2.2.). To many Sami people, their culture consists of livelihoods and lands which have both a material and an spiritual entity, and not only it consists of the Sami

[30] In 2014 the Prime Minister Jyrki Katainen promised to ratify the ILO 169 Convention, i.e. Convention concerning Indigenous and Tribal Peoples in Independent Countries (Entry into force: 05 Sep 1991). The promise remains the promise still. Relevant discussions in the Finnish Parliament have no an end. Some Sami say that they have just lost respect for the Finnish state because of this failure.

language, shamanism or art craft[31] (see: Statement by Finnish Saami Parliament on the Realization of Saami People's Right to Self-determination in Finland Presented by the President of the Saami Parliament of Finland J. Lemet). In my opinion, this is a different understanding of the concept[32] of culture than is known from Western traditions/conceptions and the Finnish legal interpretation in this field (see also: 2.2.3). To many Sami people, culture is also about land. Like it is known from the Philosophy of the Cree and Inuit Agreement, "*Land is the very basis* of the Cree and Inuit cultures. (...) They have *a mystique about the land*, and what it contains. They have a *special relationship with the land* that their ancestors inhabited (...)" (JBNQA: 11) [italics-DB]. And, to sum up, it is the same that might be perceived among the Sami in Finnish Lapland (see also: Heinämäki, S. Valkonen, J. Valkonen 2016: 77-80, who claim that "The connection to the land in Sámi culture is an ethnic underpinning of all Sámi groups and the foundation from which Sámi culture dwells" (77)[33]).

[31] For example, Sami handicraft is a manifestation of culture and identity but was first used as souvenirs, the products of the Finnish souvenir industry, for tourism in the 1960s. Originally, handicraft had concerned the symbols of the visual world and belonging to family and community (see more: Linkola and Pennanen 2003: 165-167). Maybe, due to both the pressure of the Finnish industry and tourism, it was also a kind of tool of economic survival for many workers, including the Sami people. However, there has been realised since the 1970s, first in Sweden, that handicraft is significant to Sami identity (Linkola and Pennanen 2003: 166).

[32] In indigenous understanding, tourism might be also interpreted as kind of blasphemy: one is economically enforced to sell out his or her own "culture", i.e. traditional cultural products, to survive, On the other hand, such economic activities might strengthen many young Sami people's interests in traditional art and craft that might be seen as both a job opportunity and appreciation of the Sami culture.

[33] The authors also claim (80): "General failure of the articulation in Finnish legal instruments is that it talks about livelihood, which emphasizes an economical aspect, thus failing to embrace the culture as a wholesome way of life that includes certain values and worldview."

## 6. Conclusions: more justice

In conceptual terms, the aim of this paper has been to explain what legal pluralism and Canada's indigenous experiences may "give" Finland in order to better recognise Sami rights to their lands. The aim has been realised by referring to chosen theories and case studies. The study suggests that resolving the dilemma of natural resource management in Lapland is difficult. The view is taken that legal pluralism and Canada's experience may help Finland work on the problem better. Practically speaking, everyone has to remember that in Lapland there are, for example, Finnish public and private forest companies, mining companies, and a lot of tourism businesses present on the spot. On the one hand, Finnish law passed in Helsinki is binding in Lapland. Finland as a nation state is to regulate such social areas as reindeer husbandry, fishing and hunting rights, land planning, mining issues, competencies of local communities, municipalities etc. On the other hand, a ground-breaking decision would be necessary to change this legal world. The ground-breaking decision could also throw the political paradigms of nation state and Hobbesian-Lockean ideal of sovereignty to the bucket, and this would be inconceivable for many people indeed (Bunikowski 2014: 84). Closing many lawyers' eyes around categories of nation states and legal positivism is a problem that one has to bear in mind, but "the action of a mature democracy to give indigenous people the means to rule and govern on their own", according to their own laws and on their own lands (Bunikowski and Dillon 2017: 55). Hobbes' commonwealth (1652 (1909): chapter 18) is a paradigm in nation states though. "Breaking the ice" of the old paradigms opens up the box of Pandora: what will come if the state loses natural resources management and control in Lapland? Finnish politicians and business people may certainly worry about these future potential economic

and political processes. This ground-breaking decision mentioned above costs an arm and a leg indeed. In fact, it is about simple things that one should deliberately repeat few times more than necessary: about *historical Justice* that meets Equality (and the principle of equality is the great idea of the Nordic countries). The most compelling argument is that this means the acceptance of legal pluralism and the two jurisdictions in indigenous areas. According to many Sami people, it concerns the proper rights in NRM and CA. However, Finland is a very egalitarian society by both the history and current organisation of social life. Undoubtedly and above all, it seems pertinent to remember that exclusive rights for the Sami as a group and individuals would be both a wiry and an awkward hole in this system - once in a blue moon. Nevertheless, historical Justice meets Equality, missing the boat, and there is no one right answer (see: the Canadian experience, in 4.3.). Anyway, and to recapitulate, the mentioned Canadian experiences seem a good pro-indigenous pattern to follow in order to reconsider the so far governmental way of doing things about natural resources management in Finnish Lapland. Normatively speaking, the political project would be to change the system for the more just one that is closer to the idea of legal pluralism in indigenous areas. Last but not least, the philosophy of law in Lapland shall be also based on new values and axiology that is closer to the Nisga'a Agreement or the Philosophy of the Cree and Inuit Agreement.

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