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Protecting indigenous identities? An example of cultural expertise on sámi identity

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ABSTRACT

The national law of Finland identify criteria of belonging to the Indigenous Sámi in order to protect their cultural heritage and identity. In Finland, the electoral committee of the representative organ of Sámi Indigenous Peoples, the Sámi Parliament, decides who fulfills the criteria for being Sámi and thus is included in the electoral roll. Since its establishment, the Sámi Parliament has rejected hundreds of applications by persons not recognized as Sámi. Unsuccessful applicants can appeal to the Supreme Administrative Court of Finland (SAC). In 2015, the SAC overturned 93 rejections. This led to an internal crisis of the Sámi Parliament and to the question, who actually has the cultural expertise to decide who is indigenous in Finland. Sámi activists filed two complaints with the United Nations Human Rights Committee regarding the violation of Sámi rights to self-determination. In 2019, the Human Rights Committee concluded that Finland had violated the rights of the Sámi. This paper analyzes what is the cultural expertise for ascertaining Sámi identity and who exercises it. The focus is on the evidence required by the SAC and the question of whether identity can be decided by legal experts, independent judges of a Finnish judiciary without any involvement of cultural experts. It is argued that the legal instruments adopted to protect Indigenous Peoples lack cultural expertise on the diversity and heterogeneity of the real-life contexts where rights are negotiated, leading applicants to repeat essentialist arguments of how Indigenous Peoples stereotypically would be.

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1. Introduction: "To be a member of an indigenous group, you better wear a funny hat"[1]

"Indigeneity", or "indigenous identity", is in both the anthropological and legal sense based on people's self-identification, as well as on the recognition of their indigeneity by others in the same tribe or group (Cobo 1986). In Finland, Sweden and Norway, national laws on Sámi Parliament regulate this identification at the national levels

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whereas in Russia where Sámi peoples also live, does not have a representative organ of Sámi and thus no law on Sámi parliament.[2] The notion of "indigeneity" originally derives from international law and legal institutions, but today it has also become internalized as social identity and intertwined with local identity negotiations. Whereas international legal definitions must be abstract – as law always is in order to be applicable for individuals living in very different environments, settings and situations (Eide 2010; Medda-Windischer 2010) – self-identification and group-identification manifests in concrete political, social and historical contexts. They have outcomes that are far from abstract. These legal definitions of identity take actual form in a place – and as discussed in this article – also in time.

The international law that defines indigeneity and the rights connected to the concept stem from the ideal of emancipation (Saul 2016). At the same time, however, they still manage to draw boundaries based on certain stereotypes, which in many instances have become hegemonic by being internalized in the self-understanding of peoples (see Supiot 2003 on the construction of "victim"; Brubaker 2004 on "groupism"). The criteria upheld by international law are used as a demarking tool to keep out unwanted members of indigenous populations (Niezen 2003; Simpson 2007; Toivanen 2007).

This article's focus is how Indigenous identity is defined and negotiated before the courts, in a process that can be defined as "cultural expertise" (Holden 2011, 2019a). What are the elements that need to be stressed in order to become recognized as an Indigenous Sámi? Has this changed over the last decades when the legal concept of indigeneity has become a socio-politically relevant way of identifying oneself?

According to Holden, "[c]ultural expertise is the special knowledge that enables socio-legal scholars, anthropologists, or, more generally speaking, cultural mediators, the so-called "cultural brokers", to locate and describe relevant facts in light of the particular background of the claimants, litigants or the accused person(s), and in some cases of the victim(s)" (Holden 2011, 2; see also Brubaker 2004). Cultural expertise differs from cultural defense in that it, like any other kind of legal expertise, does not take sides and can thus be used by the court or the parties of the case (ibid., 3). Social scientists are increasingly contributing to dispute-resolution and protection of human rights in a range of cases varying from indigenous rights to migration issues (Holden 2019a). The use of social scientists in policymaking dates back to the 19th century, and especially anthropologists have been appointed as experts in First Nations' rights in Australia and America (Holden 2019b).

The article is based on a several yearlong legal-anthropological research projects carried out since year 2010.[3] I conducted interviews in Finland, Norway and Russia, either alone or with colleagues, with individuals and small groups including some families, and with different local stakeholders such as teachers, local politicians and municipal workers. The interviews (ca. 260) are transliterated, coded, and anonymized, and stored at the University of Helsinki archive. I analyzed the interviews and the extracts of field notes with the help of atlas.ti program in order to identify the common themes and topics of interest with a discourse analytical lens. I have in this article chosen to concentrate on the research made in Finland. In addition I have read and analysed the decisions concerning applications to the Electoral Roll

of the Finnish Sámi Parliament by the Finnish High Administrative Court in year 2015 to provide understanding to the research question at hand.

This contribution begins by discussing how indigeneity is performed and received in court in order to secure the respect of certain rights. It continues by contrasting these required performances against the developments in human rights law. It then examines the question of whether the basic problem is the translation of universal human rights to concrete instances and proceed to peruse real cases of Sámi identity decided by independent High Court Judges who do not have any cultural expertise about Sámi. Instead, they rely on the self-documented applications by persons who feel Sámi, all of them repeating stereotypes about indigeneity. The judges seem to decide on the basis of whose narrative seems most trustworthy vis-à-vis the stereotypes presented and further nourished in international human rights law. In a provocative manner, it concludes that "indigenism" has become one of the -isms that carry actual power, which can be used for projects of emancipation but also servitude.

2. Performing indigeneity in front of the courts

When Tina entered the waiting area of the New York United Nations building before her case was brought before the Human Rights Committee,[4] she was challenged by a representative of the Finnish government: "How come you are pretending to be indigenous and asking for rights as an indigenous person? You are wearing jeans!" As a representative of the indigenous Sámi people, Tina was about to argue against Finland in a lawsuit on land rights. From the outset, she was accused of claiming "a fake identity" due to her untraditional clothing. A real Sámi would be wearing the traditional jacket called the *gákti*![5] Did Tina lose her identity when she chose to wear Western clothes for the committee session? Would it have made a difference for the other attendees if she had been immediately recognizable as different and indigenous?

In any international gathering of Indigenous Peoples, a wide range of special – often impractical – clothes are easily spotted. For example, when the United Nations Forum for Indigenous Issues gathers hundreds of representatives of Indigenous Peoples from all around the world, the clothing of the participants is what really catches the eye. In South Africa in September 2011, I met a human rights activist who belonged to the Indigenous San peoples of Southern Africa. In the interview, I was told: "We could not go there [the Permanent Forum for Indigenous Issues] without wearing our traditional dress, even though it is completely unpractical in the chilly weather of New York." These clothes, which symbolize indigeneity today, seldom have an ancient history. In most cases, they are reinventions based on imaginaries of the past.[6] Today such items of clothes are not merely clothes, however. Apart from being core symbols and demarcations of identity and belonging, for many Indigenous Peoples they are also "a second skin" (as Sámi activist Petra Laiti put it in a speech in 2017). They bear a sacral function, performing identity and being it at the same time (Magga 2014). Indigenous clothes have become a standard way of presenting indigenous belonging. For instance, Sámi can "read" family background, civil status and age from the specific details of each other's outfits. Ethnologist

Helena Ruotsala (2013, 363) has aptly compared them to a social security number. Thus, clothes are an object of vivid discussions in the politics of representation but also in the politics of reproduction (see Kaschuba 2001) of certain imaginaries. These imaginaries are intermingled with a debate on cultural appropriation, which concerns the question of who owns the "markers" of a culture (see Coombe 1993, 250), that is, who is allowed to make Sámi clothes and who is allowed to wear them.

Besten (2011) describes the opening event of the United Nations Permanent Forum for Indigenous Issues, where the representatives of the Southern African San chiefs were wearing leopard skins in order to mark their belonging but also to mark their ultimate difference and authenticity vis-à-vis those that they imagined as the dominant people and the colonizers. Why is it that nonindigenous people long to gaze upon the Indigenous, and why is it that showing indigeneity is so central to the Indigenous Peoples' movement today?

James Clifford (1988, chap. 12) famously describes a heterogeneous group of people who went to Federal Court in Massachusetts to claim a land title for the Mashpee tribe. In 1976, the Mashpee Wampanoag Tribal Council, Inc. had sued for possession of about 16,000 acres of land, which constituted three-quarters of Mashpee, known as "Cape Cod's Indian Town". One of the central issues was for the jury to decide whether people of different phenotypes, professions and lifestyles could be defined as the rightful descendants of a tribe which had lost its language already in the 19th century and since then had been seen in the area as simply "non-white" (ibid., 180ff). Clifford asked, "Could a group of four women and eight men (no minorities) be made to believe in the persistent 'Indian' existence of the Mashpee plaintiffs without costumes and props?" (ibid., 182). In the end, they could not, but they were recognized as a tribe in 2007 when they received a portion of the claimed land in exchange for waiving all the other claims on Mashpee town (Holden 2019a, 185).

What is the allure of ethnic clothing? Why wear uncomfortable clothes that are too warm and itchy, or hats which make moving around extremely difficult? Tina's answer was the following: when representing one's peoples in a forum where the objective is to claim their rights, such clothes are needed in order to conform to the stereotypes held by the majority populations, by those in power. If she looks indigenous, the expectations of a case on indigenous rights are fulfilled and the audience is satisfied. She may become easily categorized as the subject painted by law, a member of a minority. In the current apparatus for minority rights, these rights are only claimable through identity. In the opening ceremonies and conferences at the UN, the presence of the indigenous becomes obvious and tangible through the "funny clothes." To not accommodate this stereotype or refusing to play along with it endangers the identity claim and thus the right to invoke a certain type of discourse, the discourse of indigenous rights.

3. International human rights and the definition of indigeneity: from the abstract to practice

> The characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and universal validity. (Alston 1988, 3)

Human rights are inalienable, indivisible, interdependent and interrelated. All human persons are supposed to be able to enjoy the same rights, regardless of their background, origin, sex, gender, status, or any other difference (UN General Assembly 1948). Human rights are universal. The fundamental premise of international human rights law is that it is not up to a specific state or government to decide how it treats its citizens or people staying on its territory (Gibney 2015, 1). This premise is rarely completely fulfilled in practice. On a theoretical level, however, human rights form an understanding of the world where the individual, wherever she may reside, can always expect just treatment and trust that she is entitled to it just because she is a human (ibid.). The Universal Declaration of Human Rights and numerous documents adopted by the United Nations General Assembly after World War II are about hope – hope that there is a legal and universal bastion against exploitation and oppression (Ballard 2009, 299). Thus, human rights form a discourse of emancipation that has a universal outreach (Merry 2009, 131). This discourse is ever-expanding and inclusive; new issues and concerns can be addressed in the language of human rights (as Grigolo 2010 discusses in relation to the rights of migrants in Catalonia). Consequently, they can be framed in terms of concerns of international human rights law (Scheinin 2003).

One example of this is the expansion of the idea of Indigenous Peoples' rights. In his book entitled *The Origins of Indigenism*, Ronald Niezen (2003) discusses the emergence of Indigenous Peoples' rights in the United Nations. According to him,

> "the indigenous peoples' movement has arisen out of shared experiences of marginalized groups and economic modernization […]. Indigenous identity has also grown largely out of the institutions of successful nationalisms themselves; the international legislative bodies of states—the United Nations and its satellite agencies—have provided the conceptual origins and practical focus of indigenous identity. […A]n international movement has led to the creation of an important new 'ism.'" (Niezen 2003, 9).

Today this -ism, indigenism, as part of minority rights, is at the core of the international human rights theorization. The aim of human rights is to ensure that people who are in a weaker position in society or less able (due to their small number or non-dominant position) enjoy the same rights and parity with the standards of the majority or dominant people in the state (de Varennes 1996; Scheinin 2003). Indigenous peoples' rights concern First People, Native Peoples, Aboriginal Peoples, Indigenous Peoples, as well as people who were conquered through colonization or suffered assimilation practices by the dominant populace in their own territories (Saul 2016, 23–24).

Human rights that include the rights of minorities and the rights of indigenous people are often referred as tools of emancipation and empowerment, set in place in order to guarantee that people, even those who are different from the majority population (having different identity markers that they wish to preserve), enjoy substantial equality which is not only on paper (Gibney, Tomasevski, and Vedsted-Hansen 1999). The special measures provided by minority rights can be either temporary by nature or designed as a permanent structure (Orlin 2005), and they can include the following: protection of smaller, non-state minority languages by providing education; support of smaller, non-dominant religions; and territorial

or non-territorial solutions that support the way of life of minorities and their cultural activities.

However, in order to realize the protection of those in a structurally weaker position, the idea of international human rights law has been that the subject of these measures needs to be defined. Human rights apply to each and every person, but minority rights are for minorities only; they are measures that need to be targeted in order to lift the subject to the standards of those belonging to the majority. It is noteworthy that not every kind of diversity is defined in terms of "minority-ness". There are certain qualifications that need to be met before a minority rights claim can be made (Jackson-Preece 2014). The same goes for Indigenous Peoples' rights. Ideas that are sometimes promoted in highly diverse places– such as in South Africa stating, "we are all indigenous here" (see Saul 2016, 22) – do not fit into the frame of indigenous rights as understood by international law. There are standards that must be met and often fought for (see the Mashpee case as above) in order to get national and international recognition as Indigenous Peoples. For example, Martinez Cobo (1986) and Erika Daes (1996) have produced reports for the UN[7] to provide a basis for a legal understanding of who Indigenous Peoples are. Both reports are similar in that they put special weight on the self-identification of a person as indigenous at the individual level and the need for the community to accept the person as their member. According to these reports, in order to be considered as indigenous the applicants have to show historical continuity with pre-colonial or pre-settlers' societies. They also need to show strong links to territories and surrounding natural resources and be able to demonstrate distinct social, economic, or political systems. Furthermore, they should have a specific own language, culture, and beliefs, form non-dominant social groups, and resolve to maintain and reproduce their ancestral environments and systems as distinct peoples and communities (ibid.).

As mentioned, the definition of indigeneity is kept fairly abstract in order to be applicable to a variety of contexts. Simultaneously, however, the definition needs to be concrete and narrow enough to prevent governments from dismissing the factual existence of Indigenous Peoples on their territory (see Medda-Windischer 2010 on the definition of a minority in the EU). I have elsewhere discussed the paradox with the human rights discourse and the indigenous peoples' rights discourse, namely, the homogenizing force of the rights discourse overall (Toivanen 2001, 2003). In order to have the entitlement to claim rights, peoples have to adapt to normative presentations of identity, which are often constructed on primordial grounds (Toivanen 2003). Thus, to be indigenous, one has to act according to the dominant ideals of how indigenous people are supposed to be. This, again, is defined by those in power. Therefore, one can have doubts about the truly emancipatory force of human rights.

In his book *The Endtimes of Human Rights*, Stephen Hopgood (2013) argues that the idea of universal human rights has not only become ill-adapted to current realities but the project itself is also overambitious and unresponsive to the actual present-day situation. From the perspective of those endorsing human rights and using human rights vocabulary, the situation is not so much about the objective of human rights but perhaps more about compliance with these rights. As Rudnyckyj

and Schwittay (2014, 4) write, it is not the end of development that characterizes the current state of affairs but a new understanding of the projects, actors, practices and knowledges. In this situation, concerns arise around two issues: on one side, it is clear that human rights comprise a success story that has changed the lives of millions of people for the better, and it would be unreasonable to give up the ideals of universal humanity and the universal right to equality. On the other side, human rights are not only about innocent emancipation from suppression; they have a coercive force which makes people change their identity representation in accordance with the dominant discourse (Toivanen 2019a).

So, could the problem then be that something goes wrong when we translate the idea of human rights at the general level to concrete cases and purposes? How can we develop a cultural expertise that is able to catch, as Brubaker (2004) proposes, the changing realities and fluidity of belonging and Indigeneity?

Thus, it has become clear that although the aim of universal human rights, which includes minority and Indigenous Peoples' rights, are being written and codified as abstract ideals, this does not mean that they exist only in the abstract. Court cases fought and decided based on international law have given concrete manifestations to abstract texts explaining how their contents should be interpreted in different contexts (see Saul 2016 on international and national jurisprudence). These create case law, the flesh on the bones of international law, which helps legal practitioners apply the spirit of abstract standards to specific situations and contexts to promote the protection and promotion of human rights of people belonging to minorities (Orlin 2005). Through jurisprudence provided by legal experts the abstract is turned to concrete, also when the notion of indigeneity is concerned.

The difference between national, cultural, and ethnic minorities vis-à-vis Indigenous Peoples becomes especially apparent in terms of livelihoods, lifestyle and religion or worldview (Toivanen 2019a). Minorities do not lose their minority claims if they show a progressive change of lifestyle, economic structure, or social strata. It is enough for a national minority to remember their roots and maintain the wish to continue their cultural and linguistic difference (Jackson-Preece 2005). For ethnic minorities, the law expects them to wish to carry on their religion and language and cultural habits in the new, changing environment. Thus, one could say that national minorities *are allowed* to enter modernity, whatever is meant by it. Indigenous Peoples, however, need to establish or maintain a different social structure, economy, and special connection to the land they inhabit, in addition to the requirements put on the shoulders of other minorities, in order to be recognized by experts as Indigenous (Cobo 1986; UN General Assembly 2007). The jurisprudence on Indigenous Peoples' matters is vague and can thus be defined as "constructivist" meaning. This according to Benedict Kingsbury (1998) means that the term is not clearly defined in law but embodies a continuous process of different situations that can be dealt under the umbrella of "indigeneity". The problem of abstract law but very concrete application – without clear cultural expertise that would allow for nuanced and multifaceted ways of being indigenous –on of it is discussed in the next sub-chapter.

4. Sámi in Finland: who are they and who is not part of them?

In Finland, belonging to the Sámi indigenous community, at least in a political and legal sense, is currently defined by the Law on Sámi Parliament (1995/974). The fundamental criterion is the person's self-identification as Sámi. This is the basic requirement that means that no person can be added to the electoral roll against their will. In addition, at least one of the following three must apply to the person: (one) he/she or at least one of his/her parents or grandparents must have learned Sámi as their first language; (two) he/she is a descendent of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp; or (three) at least one of his/her parents has or could have been registered as an elector for an election to the Sámi Delegation or the Sámi Parliament (ibid., § 2).

The definition, one would think, is clear and neutral. However, because these criteria guide possibilities of membership in the electoral roll of the Finnish Sámi Parliament, and thus bear on the right to vote in its elections, they have political significance already at the outset. Furthermore, membership in the electoral roll of the Sámi Parliament has come to be understood by many as proof of one's authentic ethnic identity. Section 23a of the aforementioned Law on Sámi Parliament states that a Sámi who has not been included in the electoral roll shall be entered into it on her or his own request. The Sámi Parliament's Election Committee, comprised by 5 persons already in the register but without any further requirements for qualifications, decides whether the person requesting to be included in the electoral roll is qualified, based on the legal definition above. Anyone dissatisfied with the decision of the Election Committee may file a demand for rectification with the Board of the Sámi Parliament within fourteen days of having received notice of the decision (ibid., § 26).

The above process of self-identification and group recognition has been interpreted as being in conformity with international law (see Daes 1996). In Norway, for example, being included in the electoral roll of the Sámi Parliament is not generally considered the only proof of authentic ethnic identity (Allard 2017). It is widely recognized that many Sámi have for political or other reasons chosen not to enroll themselves. In Finland, however, being a member of the electoral roll has in practice gained considerable strength as the ultimate proof of being a *real* Sámi. Conversely, having been refused the right to vote makes one a non-Sámi or, as Erika Sarivaara (2012) calls it, a non-status Sámi.

The Sámi Home Area is also defined by law.[8] The idea behind the establishment of this area was that it would draw a line on the Finnish map, north of which people still use Sámi languages at home, where support should be directed in terms of language and culture.[9] The geographical location of the line is based on a survey made in the 1960s by university students, most of them Sámi from the same region, who went from house to house to map where Sámi languages were still spoken. According to the supervisor of the project, Erkki Nickul, the project had many flaws and the collected register was incomplete. It only covered a small part of the area where Sámi was potentially still spoken (Nickul 1968; see also Asp 1965). Nevertheless, the homeland area of the Sámi came to be defined on the basis of that study. At

the outset, the researchers were not suggesting that there were no Sámi families south of the border (Nickul 1968). Yet, the border changed in meaning gradually, suggesting that people who lived south of the border were not Indigenous Sámi in the same way as those on the northern side (or those who had roots in the homeland but, for instance, had moved to the cities). The Sámi Parliament, as the body which governs cultural autonomy (in matters of language and culture) in the homeland area it is not in the position, nor has it shown any interest, to advocate for rights with regard to lands outside of the home territory.

A debate on the ratification of the International Labour Organization's Convention on the Rights of Indigenous Peoples (later ILO Convention No. 169) is presently at the core of the Sámi political sphere in Finland. In particular, Article 14 on land rights would, according to the current interpretation by the Sámi Parliament of Finland, have a protecting effect only for those people who are registered members of the Sámi Parliament and live in the designated home territory. The Sámi Parliament would then have more powers than now when deciding on land resources. There is fear that the ratification would possibly leave those people who get their living from natural economies, such as reindeer herding, gathering, hunting and fishing, but are not registered as Sámi, in a weaker position than before. The neighboring country Norway ratified the ILO 169 convention already in 1990,[10] putting pressure on Finland to do the same. This unsettled issue of the legal definition of Sámi is part of the reason why the convention has to this day still not been ratified in Finland.

The need to clearly define who is indigenous does not, however, come from the ILO Convention No. 169. As a human rights convention, it would offer a support network in the form of an expert committee, which in turn would help to guide Finland in realizing the human rights of its Indigenous Peoples. In most of the countries that have ratified the ILO No. 169 convention, self-identification has been defined as the most important criterion (Belmonte Sanchez n.d.).

The so-called "Sámi conflict" extends beyond the question of land rights, however. Membership in the electoral roll today has become intermingled with questions of authenticity of Sámi identity and belonging. The debate in Finland has reached the point that some are advocating for a revocation of the rights of those people who are not granted permission in the Sámi Parliament's electorate roll to knit or make Sámi clothes, and some are even arguing to refuse these people the right to wear traditional Sámi clothes. It has occurred several times that with this argument a non-registered Sámi has been asked in public to take off his or her Sámi clothes. When a member of the Finnish Parliament, Eeva-Maria Maijala, who considers herself Sámi but has not been granted the right to vote in the Sámi Parliament (the electoral committee did not recognize her as a Sámi), wore a Sámi dress for the Independence Day ceremony at the palace of the President of Finland in 2016, she was heavily criticized for "polluting the Sámi culture" and was called "a leasing Sámi."[11] The pejorative term "leasing" indicates that some non-Sámi person is using Sámi cultural heritage, such as clothing, in order to pretend to be Sámi. When another MP took a picture of herself in the Sámi clothes of her mother and posted it on social media many outspoken Sámi activists were outraged and condemned the clothes as not being authentic.[12] Twitter and Facebook posts indicated that many

Sámi were offended because the dress was not made in "one of the five recognized" styles,[13] and thus, it was fake. As Turunen writes, the MP defended herself by stating that her mother had given her permission to wear the clothes and that her family was indeed a very old Sámi one, just without official status.[14]

Thus, cultural expertise over who is allowed to vote in the Sámi Parliament's elections deals also with the question of who is allowed to wear traditional Sámi clothes and, ultimately, who is allowed to feel and claim Sámi identity.

5. Sàmi identity in the hands of the supreme administrative court

The following will review the 2015 decisions of Finland's Supreme Administrative Court (SAC). The judges of the court are independent experts in law, not in culture, and while the court does not use any external experts to help out in cases such as the Sámi case, they are forced to relay in the testimonies in the appeal applications. The SAC functions as a court of appeal for persons who were rejected by the Sámi Parliament's electoral body and its government in their application to be granted the right to vote in the Sámi Parliament and therefore were denied membership to the Sámi community.

The relationship of the Finnish state (via the SAC) with the Sámi Parliament's electoral committee has become more and more tense since the first elections in 1999. Before the elections of 1999, the electoral roll included 4,672 persons. When 436 of their children reached adulthood, they were automatically added to the roll. In addition, 1128 other people applied.

The Sámi Parliament's electoral committee accepted 100 applications; among the refusals 765 applied for a review and twenty-five applicants were eventually granted enrolment. Then, 726 people appealed to the government of the Sámi Parliament, which granted one application only. 712 people then appealed to the Sámi Parliament's general meeting. Out of these, twenty-six applicants were granted enrolment. Finally, 656 complained to the SAC. The SAC granted seven applications because of evidence that one of their grandparents had spoken Sámi as their first language.

Eventually, 969 persons who put great efforts into entering the electoral roll as Sámi were rejected in 1999, both by the Sámi Parliament and by the SAC. In 2011, the SAC requested the Sámi Parliament to add four applicants that had been previously refused. In 2015 (during the last elections), 800 persons applied for membership to the Sámi Parliament. Out of these, 483 were accepted, mostly on the basis of being children of persons who were already members. When 201 applied for review to the Sámi Parliament, they were rejected, mostly with the argument that the Sámi community did not recognize the applicant as a Sámi. Finally, 182 persons made an appeal to the SAC, and it accepted the applications of ninety-three persons who were then included in the electoral roll.

The approach taken by the SAC has changed during the course of twenty years of functioning as the Court of Appeal for the Sámi Parliament's electoral roll applicants. The applicants' aim is to convince the judges of the SAC that they have an identity and personal life that reflects the direct continuation of traditional Sámi life. However, Tanja Joona (2017) points out one case in 1999 where both the Sámi parliament and later the SAC had denied an applicant's membership[15] but then, ten

years later, the SAC, using similar reasoning, confirmed the person's membership and right to vote in the Sámi Parliament, albeit the Sámi Parliament still does not accept the person. Joona asks, how did this person become Sámi in the course of ten years? Looking deeper into the two cases, which deal with the same person, reveals one apparent difference: the SAC itself has developed a new approach of cultural expertise by adopting a more human rights-oriented approach and has put more emphasis on self-identification. This change had been induced by the international human rights monitoring bodies as explained below.

The role of the self-identification of minorities has clearly received more attention by international human rights bodies since the 1990s. In 2003, and again in 2009, the Committee of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) criticized the election of members to the Sámi Parliament as not taking self-identification into consideration seriously enough.[16] In 2012, however, in the concluding observations of the CERD on Finland, it recommended that, in defining who can vote for the Sámi Parliament, the Sámi people should be given the right to determine their own status and membership of the Sámi community:

> The Committee recommends that, in defining who is eligible to vote for Members of the Sámi Parliament, the State party accord due weight to the rights of the Sámi people to self-determination concerning their status within Finland, to determine their own membership, and not to be subjected to forced assimilation.[17]

The above-mentioned conclusion opposes the committee's earlier position. The same is also reiterated in the concluding observations by ICERD in 2017.[18]

In Norway and Sweden, the criteria for applying to the electoral register of the Sámi Parliament includes a subjective criterion, the self-identification as Sámi plays a crucial role (see Allard 2017 on Norway and Gerdner 2021 on Sweden) . In addition to the criterion of having at least one great-grandparent with Sámi as their primary domestic language. In praxis, however, the Sámi Parliament trusts the applicants to give a correct statement regarding their Sámi identity, and it does not require proof of Sáminess. Other members could file complaints about accepted members, but this is rarely done (see Allard 2017).

The Finnish Supreme Administrative Court calls the new approach "holistic interpretation" (*kokonaisarvio*). The SAC used this holistic interpretation as its reasoning for the acceptance of 97 cases to the electoral roll of the Sámi Parliament in 2011 and 2015.[19] These are the "cases" that the president of the Sámi Parliament Tiina Sanila-Aikio disputed as representing the Sámi Parliament and the Sámi people in general[20] and the former president Klemetti Näkkäläjärvi – together with seventeen Sámi, two of them also members of the Sámi Parliament[21] – brought against the state of Finland to the Human Rights Committee. Both demanded in the name of Sámi self-determination that these ninety-seven persons be excluded from the electoral roll.

The SAC begins all decisions from the application round of 2015 with the statement that "the applicant identifies herself/himself as a Sámi." After this sentence, the decisions continue in the second and third paragraphs with an evaluation of objective criteria of the second and third paragraphs. The SAC has taken the

approach that the family connection cannot go further back in history than the linguistic criteria; thus, fulfilling the criteria (which all the applicants do, even though the Human Rights Committee in both cases was led to believe that this was not the case) does not suffice if the applicant cannot show that there is also proof that one of the grandparents spoke Sámi as their first language (Joona 2017, 96–7). However, proving that Sámi was the first language is a problem. How can one prove that a multilingual child spoke Sámi as first language? Thus, all those who appealed to the SAC and got their cases overturned in 2015 had fulfilled the legal criteria and could prove "without any doubt", as the court writes in its verdict, that they were descendants of people marked as Lapp in the church books or land registers. Thus, they all fulfilled the second criterion of the current law. In addition, however, they all had also needed to prove that they fulfilled the language criteria *or* could convince the judges that their life today is still a Sámi way of living.

The need for people to convince the judges of the SAC that their lifestyle is based on a continuation of Sámi culture is clear in the overturned cases of the 2015 appeals to the SAC. For example, in one appeal granted by the SAC, the appellant expressed a strong self-identification as Sámi and had proof of being a descendant of a person that was marked in the land registers of 1739 as a Lapp.[22] The appellant had been able to prove that his parents spoke Sámi but did not convincingly put forward the evidence that it was their first language. In the decision by the SAC, the following is stated:

> The appellant's father had learned the Sámi way of life at home. The appellant had learned to move in nature, to pick berries, to fish, to hunt and to make traditional food. Fishing for home needs continues in the family still. The appellant's parents have taught the appellant the "birge" skills of surviving in the forest. The summers are spent in cloudberry bogs [*hillajängillä*] and picking blueberries and lingonberries. The most important lesson has been the love and respect for nature and the lands of the forefathers. The appellant has had the Sámi traditional costume [*saamelaispuku*] and has also sewn such for his children.[23]

The SAC continues:

> The appellant has credibly shown that his family is Sámi on both parents' sides and that the Sámi lifestyle and Sámi culture have been followed in his living environment since his childhood.

The decision clearly shows that the court has emphasized continued contact with Sámi lifestyle and Sámi culture as proof of the appellant's Sámi identity and as a needed and sufficient argument to overturn the rejection of the application. The decision provides examples of what the SAC considers to be sufficient, concrete evidence of Sámi identity and lifestyle: being close to nature and adhering to natural livelihoods. Fishing, hunting, picking berries, reindeer herding, and even spending time in nature seem to be regarded as authentic ways of Sámi life. The SAC mentions the appellant's "love and respect for nature and the lands of the forefathers" and puts these forth as an additional argument of the authenticity of the appellant's "Sáminess".

To give a few more examples of how the SAC relies on arguments based on concrete examples of the appellant's culture and lifestyle, in another similar case

that was also accepted, the decision by the SAC states as follows: "Hunting, fishing and berry-picking, which were an important part of the livelihood already of his parents and grandparents, are part of the appellant's Sámi lifestyle".[24] Once again, natural livelihoods and generational continuation are stressed in the decision. In addition, the SAC stresses that the appellant has practiced reindeer herding and *joik* (traditional Sámi singing).

In the aforementioned case, as in many others that have emphasized cultural traits and continued Sámi lifestyle in the holistic evaluation, arguments about Sámi culture and lifestyle lead to acceptance in cases where the language criteria could not be proved. In this case, the Sámi Parliament had found that the applicant had failed to fulfill the language criteria to such a degree that it could have been sufficient on its own; they had not put forth official documents proving that the applicant had parents or grandparents that spoke Sámi as their first language. However, the SAC did not, "as opposed to the Sámi Parliament […], view that this indicates that the appellant's grandfather's first language could *not* have been Sámi" [my emphasis]. Contradicting the Sámi Parliament, the SAC has thus in some cases based on a so-called holistic evaluation, using its own cultural expertise, overturned the language criteria through negation. This means that in cases where no evidence has been put forth that proves that the applicant's parents' or grandparents' first language could not have been Sámi, the SAC has relied on a sum of other markers that it deems as proof of indigeneity and Sáminess. The appellant had submitted a signed testimony by a relative saying that his grandfather's first language was Sámi. The case concludes that the Sámi lifestyle and "strong identification with Sáminess" mean that he should be considered Sámi, as defined at paragraph 3 of the Law of Sámi Parliament. In yet another similar decision the SAC states, "[f]ishing has run through the appellant's family both on the father's and the mother's side until this day. Nature and especially the lake mean a lot to them."[25] This appeal was also accepted by the SAC, which decided, "taking into consideration the appellant's Sámi lifestyle and strong identification with Sáminess," that this appeal should be accepted because of holistic evaluation.

In a majority of the cases, the Sámi lifestyle is referred to in terms of a close relationship with nature, and generational continuation is stressed. A close relationship with nature has always been innate to Sámi ways of life and cosmology (Helander 2000) and, as we know, it is at the core of global and local narratives of indigeneity (Posey 1999; Toivanen 2019b). In addition, references to concrete, publicly recognized Sámi traditions (handicrafts, natural livelihoods, *joik* and nature survival skills) were many times referred to by the SAC as an explicit factor in cases where the language criterion was not fulfilled or convincingly proven. In most cases it was stressed that these were derived from ancestors and parents and represented a continued way of life. Clearly, then, a cultural expertise that relied on a certain essentialist representation of indigenous identity has played an important role in the court's decisions.

I have argued elsewhere that it was the policies of the Nordic countries toward Sámi populations, influenced by international standards of minority rights, that essentialized and homogenized the diverse Sámi cultures (Toivanen 2003). Creating an image of the homogeneous, group-centered, and changeless nature of premodern Sámi society made them eligible for the rights of Indigenous Peoples. However, there is also another historiography, which depicts the Sámi ancestors as rational

landowners with an individualistic way of life (Korpijaakko-Labba 1989). As such, they did not form a closed ethnic group but were always cultural hybrids in the modern sense, which does not fit into the picture of "global indigeneity" (Joona 2019). It is important to engage with these two opposing postulates of history to identify the influence of the dominant historicism that is fundamental to power. This structural power imbalance has helped Nordic states to keep the Sámi movement at the periphery of modern politics, while entrusting the Sámi parliaments with cultural autonomy but not economic or political autonomy. Thus, the role of the Nordic states in producing a canon of Sámi history has been double-edged. First, by stressing the harmony with which the Sámi encounter their environment and their disinterest in ownership battles while at the same time underlining the distinctiveness of the ethnic group called Sámi, it has been easy for the national governments to declare Lapland forest and fields as state property (Korpijaakko-Labba 1989). Second, the Nordic states have improved the socio-cultural situation of the Sámi people and have managed to create an international image as the benign caretakers of the Sámi. History is presented in a manner that the Sámi are "nature people" who have depended on the kindness of the Nordic states.

Being indigenous and claiming an indigenous identity in the modern world in which we live are – in most parts of the world, at least – is a complex task. Indigenous ways of life, defined as premodern, are expected to be free from modern technologies and equipment. This brings us back to the previously cited example, that even wearing non-traditional clothes at a UN meeting may be seen as a sign that one has given up one's claims for protection as an indigenous person. By contrasting the actual lifestyles of Indigenous Peoples and modernity, indigeneity is contested whenever possible by majority populations. Modern people use technologies that the Indigenous Peoples should not, because then they would not be indigenous but modern: Sámi reindeer herders who detect and herd their reindeer via mobile phones and satellites, and use motor sledges for hunting, are constantly accused by Finnish people of not being real Sámi.

6. Conclusions: indigenous claims among the indigenous

The global identity project called indigeneity has induced local tensions and conflicts around the question of who is allowed to embrace this label. Social psychologists speak about the trauma when you (and your identity) are not recognized by your own people. The fundamental question that people in this situation ask themselves is, who am I then when I am not the one I feel I am? As one of the interlocutors said in an interview about identifying as a Sámi or not: "If one identifies as a member of an Indigenous Peoples, as one is, and in Finland there is no other Indigenous Peoples than Sámi, then hell yes you are then Sámi"[26] International law constructs certain primordial assumptions as the true signs of indigeneity, pressuring Indigenous Peoples into models that are alien for most of the members of their community (Joona 2018; Johansen 2019). In the beginning of the Sámi indigenous rights movement, reindeer herding became a core symbol of Sámi identity and lifestyle – it became a symbol of the cultural distance to the dominant populations

of the states. Those Sámi whose livelihoods were based on fishing and agriculture, for example Inari Sámi in Finland, Sea Sámi in Norway (Pedersen and Viken 2009) or Forest Sámi in Sweden (Gerdner 2021), long had to deal with their lifestyle not being conform with the dominating narrative of Sáminess. This is something that Indigenous Peoples have to cope with and navigate with their political representatives, who calculate the pros and cons of admitting the actual diversity and heterogeneity of Indigenous people themselves. The leadership of Indigenous movements may also create requirements for their own people; the question can then be how much "authentic indigenous blood" one needs to have in one's veins, or whether one's family has obeyed the demands of the elite and accepted their leadership (Benhabib 2002). The legal ascertainment of belonging to Indigenous groups goes beyond the Finnish Sámi experience and has been discussed by the anthropology of human rights which highlighted the dynamicity and fluidity of "Indigeneity" (Brubaker 2004; Goodale 2006, 2016).

The cultural expertise that relies on an essentialist perspective to evaluate the requirements for belonging to an Indigenous Peoples – either pinpointed by international law or by those who claim indigenous authority – in different ways challenge the actual realization of the universal human rights of the individual human being. Both international law and several national case laws have been formulated in an attempt to assert that in order to guarantee international human rights for indigenous people, communities need to guarantee the human rights of all their members. This also includes those that some powerful Sámi families do not recognize as members. The right to challenge one's tribe's decisions and a judicial review of the decisions of the tribe are among the requirements included at the constitutional level.

However, these rights are often contested by indigenous leaders as vestiges of colonialism. From a human rights perspective, targeted minority rights and laws for the protection of Indigenous Peoples are an absolute necessity. It is also understandable that indigenous communities argue for increased self-determination in matters concerning their membership. But, international human rights law also has the duty to protect those people who are the victims of power unbalances within minority groups, who live according to a different ethos, who belong to sexual or gender minorities, who choose to change their religion, etc. In these issues, as shown in this article, a cultural expertise that relies on essentialized perceptions of indigeneity may succumb to powerful individuals who are promoting their own – and, therefore, particularistic – interests.

As Holden (2019a, 198–199) points out, cultural experts should acquire a better awareness of the power unbalances within minority groups. This is one specific danger in the fields of minority rights and the rights of Indigenous Peoples: those who have best served the agenda of the dominant power, adapted to the norms of self-representation, and gained a self-evident place for representing the minority may, innocently, be blind to or, purposefully, ignore internal minorities. I argue that the reason for this is that Indigenous Peoples are often in a situation where claiming rights in effect means having to please the expectations of those in state power. Governing diversity and accepting the unknown unknowns (Chandler 2014) become untenable; accepting a more heterogeneous form of group could, according to the dominant narrative (or fear) endanger all rights gained heretofore. I contend,

therefore, that the rights discourses used by Indigenous Peoples today have still not been able to inherently emancipate them, and it has not become a true part of the human rights discourse. These discourses still entail the idea that Indigenous peoples have been *given* rights by the state, not that they have *taken* them.

I have in this article shown how the essentialist logic in law, in this case human rights law, becomes the correct mode by means of which people must claim their rights. In this case, cultural expertise means that depicting Sámi as peoples of nature and overemphasizing in an essentialist manner the stereotypical imagination of how Indigenous Peoples are and how they should behave lead to success and satisfaction. Thus, the legal experts in courts look for signs of "true" Indigeneity whilst cultural expertise should instead account for a more complex set of knowledge, which include change and structural inequalities (Holden 2020). Is there a way out of this paradoxical situation? Perhaps so, by increasing the education of both legal professionals and cultural experts concerning societal complexity.

Notes

1. Interview with a Sámi person, June 1996 in Finland.
2. Because of this difference in legal regulation of Indigenous Peoples in Russia, I have left Russia outside of this article. See more on Indigenous Sámi in Russia in Overland and Berg-Nordlie (2012).
3. Academy of Finland funded research projects On Glocal Governance (2010–2016) and MinorEuRus (2011–2013) and Centre of Excellence in Law, Identity and the European Narratives (2018-2025).
4. Pseudonyms are used throughout this article.
5. Based on the story told by "Tina," fieldnotes 21.6.1996.
6. For example, the traditional Sámi male "four winds" hat, easily recognizable today as *the* Sámi outfit, actually arrived in Northern Scandinavia with Central European entrepreneurs in the 18th century (Itkonen 1928, 11). This obviously *does not* make it less authentic as a part of the "national dress".
7. See also the factsheet of the United Nations (2015) titled "Who are Indigenous Peoples?".
8. Law on the Sámi Parliament (Laki saamelaiskäräjistä) 974/1995.
9. See *HE 248/1994 vp*: Hallituksen esitys eduskunnalle saamelaisten kulttuuri-itsehallintoa koskevien säännösten ottamisesta Suomen Hallitusmuotoon ja muuhun lainsäädäntöön (Government Bill to the Finnish Parliament on adopting the law on Sámi cultural self-governance).
10. International Labour Organization. 2019. Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169). Accessed February 25, 2019. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO
11. As Elli-Maaria Helander indicates in an interview by Vappu Kaarenoja titled "Me sortajat", published in *Suomen Kuvalehti*, February 24, 2017.
12. See Petri Turunen's article "Kansanedustajan asu aiheutti kitkerän kiistan – onko puku aito vai jäljitelmä? Kyseessä kulissi," (MP's dress caused a bitter dispute — s the dress authentic or fake) in *Ilta-Sanomat*, published on April 19, 2017. See also Outi Länsman and Pirita Näkkäläjärvi's response titled "Enontekiön mallin puku kuuluu vain Enontekiön saamelaisille," (The Sámi dress of Enontekiö belongs only to Sámi from Enontekiö) in *Ilta-Sanomat* the next day, April 20, 2017.
13. Piritta Näkkäläjärvi on Twitter, *@biret*, on April 20, 2017.
14. Satu Taavitsainen on Twitter, @SatuuTaavitsaine on April 20, 2017. See also fn. 12 Petri Turunen's article. "Kansanedustajan asu aiheutti kitkerän kiistan – onko puku aito vai jäljitelmä? Kyseessä kulissi."

15. Supreme Administrative Court of Finland decision KHO 9.9.1999 T 3834.
16. United Nations Committee on the Elimination of Racial Discrimination. 2003. *Consideration of reports submitted by states parties under article 9 of the convention*, (10 December 2003, CERD/C/63/CO/5). Accessed August 20, 2019. https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2F63%2FCO%2F5&Lang=en; United Nations Committee on the Elimination of Racial Discrimination. 2009. *Consideration of reports submitted by states parties under article 9 of the convention* (13 March 2009, CERD/C/FIN/CO/19). Accessed August 20, 2019. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FFIN%2FCO%2F19&Lang=en
17. United Nations Committee on the Elimination of Racial Discrimination. 2012. *Concluding observations on the twentieth to twenty-second periodic reports of Finland, adopted by the Committee at its eighty-first session* (6–31 August 2012, CERD/C/FIN/CO/20-22), para. 12. Accessed August 20, 2019. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD/C/FIN/CO/20-22&Lang=En
18. United Nations Committee on the Elimination of Racial Discrimination. 2017. *Concluding observations on the twenty-third periodic report of Finland* (8 June 2017, CERD/C/FIN/CO/23). Accessed August 20, 2019. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD/C/FIN/CO/23&Lang=En
19. It needs to be said that these are 97 human beings. The fact that nobody paid any attention to them in the hearings of the Human Rights Committee or in the decision underlines the problem of how might cultural expertise help to solve complicated societal problems.
20. Human Rights Committee. 2019a. Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2668/2015 (CCPR/C/124/D/2668/2015). Accessed August 20, 2019. https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/FIN/CCPR_C_124_D_2668_2015_28169_E.pdf
21. Human Rights Committee. 2019b. Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2950/2017 (CCPR/C/124/D/2950/2017). Accessed August 20, 2019. https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/FIN/CCPR_C_124_D_2950_2017_28170_E.pdf
22. Supreme Administrative Court of Finland decision KHO 2015 T 2601.
23. All citations from the decisions by the SAC are translated by the author from Finnish.
24. Supreme Administrative Court of Finland decision KHO 30.9.2015 T 2610.
25. Supreme Administrative Court of Finland decision KHO 30.9.2015 T 2624.
26. The interview was recorded in Inari in May 2014 (Interview code 097).

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