



ARCTIC HUMAN DEVELOPMENT REPORT

Legal Systems

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Law provides a necessary framework for the social, economic, and ecological goals of sustainable development. We cannot manage natural systems, but we can try to manage the human element of interactions between social systems and natural systems. Law is a key tool in managing those interactions. Law helps us define such fundamental concepts as property and ownership. It serves to allocate rights and responsibilities and to define and protect the human rights of individuals and peoples.

Following some brief comments on global trends and basic characteristics of the legal systems of the Arctic states, this chapter pursues three basic themes. The first is an increased recognition of indigenous peoples' rights. The second discusses resource ownership. The third is the increased transfer of legal authority to regional governments. Each addresses how Arctic regions can reassert control over land and resources. A separate short article offers a critique of the submissions of two Arctic states, Canada and the United States, as part of efforts to elaborate the United Nations Draft Declaration on the Rights of Indigenous Peoples.

Legal trends and traditions

This chapter concentrates on the domestic laws of the Arctic states rather than international law. But the legal systems of the Arctic states and current development are part of a global context. This section therefore provides a brief overview of global trends and legal traditions as they relate to the Arctic.

Global trend of closer integration of legal systems

Scholars of comparative law have identified a number of global trends. One such trend is a

shift towards democracy and human rights, as well as an increased emphasis on the rule of law (1). Numerous authors from a range of disciplines also emphasize a trend towards globalization (2) and closer integration of legal systems.

The trend to globalization is reflected in the development of international trade rules through the World Trade Organization and regional trading and political initiatives (3). It is also reflected in the development of universal human rights norms (4) and in a growing number of multilateral environmental agreements. They include the Framework Convention on Climate Change and its Kyoto Protocol, the Stockholm Convention on Persistent Organic Pollutants, and the Vienna Convention and Montreal Protocol on Ozone Depleting Substances (5-6), all of which are relevant to the Arctic.

Along with these global developments, analysts are paying increasing attention to the relationship between international law and domestic law (7-8). As international law demands deeper commitments (9) from national governments, questions of the legitimacy of the international legal order and law-making processes become more pressing (10).

The trend to integration and convergence of legal systems is most apparent within the member states of the European Union. This can be seen as the voluntary reception of the laws of another system to distinguish it from the coercive imposition of new norms that characterized the period of European colonization (11). While there is increasing integration of legal systems across national borders, there is also increasing specialization within the legal system, in areas such as environmental law, trade law, indigenous peoples' law, and health law.

The implications of these trends for Arctic legal systems are three-fold. First, the development of international human rights law confirms a set of standards against which to measure the domestic laws of Arctic states. Second, the convergence of legal systems creates opportunities to transplant ideas from other jurisdictions to help solve common problems. Third, our growing appreciation of an interconnected world requires a legal response at national and international levels and across a range of subject areas from trade to the environment.

Diversity of legal systems

National legal systems reflect differences in history, tradition, and socio-cultural values. Within these traditions, the emergence of an Arctic consciousness is a very recent development. Therefore it is not surprising that the legal systems of Arctic states are heterogeneous.

The United States has a common law system characterized by a strong emphasis on judicial decisions as an independent source of law (12). Canada combines this common law system with civil law Quebec and considers itself bi-jural. Civil law systems trace their origins to Roman law and traditionally rely on comprehensive codes for ordering their legal materials. Nordic legal systems belong to the civil law tradition but with some qualifications since Roman law has played only a small part in their development. More important is the shared history of the Nordic states, which has ensured the close interrelationship of their legal systems (12). The distinctive Marxist theory of law required a separate category for the former Soviet Union, but commentators now group Russia within the civil law family. While the distinction between civil and common law systems remains fundamental, global integration has the potential to break it down. There is also evidence of a common approach in more recent areas of legislative activity such as environmental assessment, endangered species, and rules on resource disposition.

An equally fundamental distinction between legal systems is that between federal states and unitary states. In a federation, the national government has exclusive competence over international affairs (and alone has international personality), but the authority to make laws within the federation is distributed between the national government and the sub-units of the federation. In unitary states, all law-making

authority lies with the national government, while regions and municipalities have only delegated law-making powers. Denmark, Finland, Sweden, Norway, and Iceland are all unitary states. Canada, the Russian Federation, and the United States of America are federal states, but this broad category requires some qualification. For example, the three territories of the Canadian North lack the status of provinces as sub-units of the federation. The Russian federal system is distinctive because the federal government has broad concurrent powers to make laws, and because of the large number and diversity of sub-units of the federation. There are 89 "subjects" of the federation including republics, oblasts, okrugs, and autonomous regions.

Unitary states may permit some transfer of law-making authority to local or regional governments but generally this does not remove the power of the central government to legislate in these matters. Denmark in its relationships with Greenland and the Faroe Islands suggests an exception to this general rule. Under the respective Home Rule arrangements with the two jurisdictions (since 1948 for the Faroe Islands and 1979 for Greenland), the Danish Parliament has effectively waived its right to legislate in local matters. Matters of a more general nature, such as defense, citizenship, and banking, continue to be the responsibility of the central administration in Denmark (13). While foreign policy and treaty making are vested exclusively in the Danish Government, both the Faroese and Greenland Home Rule governments have assumed the right to conduct bilateral negotiations with the European Union and others, for example with respect to fishery matters.

Denmark, Sweden, and Finland are members of the European Union. The language of federalism remains controversial in Europe, but the European Union requires that members renounce some degree of sovereignty to its institutions. It is thus not unfair to characterize the European Union as a form of functional federalism or as a federation of member states in all but name. From its early days, it has expanded its membership and dramatically deepened the degree of integration between member states.

Denmark's accession to the forerunner of the European Union, the European Community, included Greenland, but Greenland negotiated its withdrawal from the European Community

in 1985. Greenland now has status as one of the overseas countries and territories attached to the European Union. A key element of their economic relationship is based upon the continuing fisheries agreements (14) under which Greenland allows EU fishers access to Greenlandic waters in return for significant fiscal transfers. The Faroe Islands has never been part of the European Union.

As a result of deepening integration within the European Union, many matters traditionally falling within the competence of nation states are now subject to directly binding EU regulations or to directives that are binding as to result but allow some national autonomy on how to achieve that result. Not only may the European Union engage in rule making on such “domestic” issues as agricultural and environmental policy, but it also has exclusive or shared competence in relation to many international matters. This includes global environmental issues that affect Arctic states, such as climate change, ozone depletion, and persistent organic pollutants. Member states are obliged to formulate and follow a common position on matters of security and foreign policy. Consequently, EU rules and policies will be important drivers for the Arctic EU members across a broad spectrum of areas.

In addition to the formal differences between different legal systems, there is another distinction that is perhaps of greater practical importance: the fault-line between those Arctic states with a long commitment to participatory democracy, mixed economies, and the rule of law and the one Arctic state, Russia, with a long tradition of totalitarian government and a centrally directed economy only recently interrupted by the collapse of the Soviet Union. These dramatically different traditions permeate the ways in which citizens conceive of rights in relation to the state. They

also affect the way in which citizens use courts and demand justice. They influence ideas of property and the way in which we think about the very idea of the rule of law and legal argumentation. While the collapse of the Soviet Union has brought about massive institutional and legal changes at the formal level, traditions do not change overnight. The rule of law is a work in progress rather than a completed project (2, 15-17).

In sum, and notwithstanding global trends towards convergence, Arctic legal systems continue to exhibit considerable diversity.

Rights of indigenous peoples

A main trend in both international and domestic law is the enhanced recognition and protection of the rights of indigenous peoples. This section examines the degree of legal recognition and protection afforded to the indigenous peoples of the Arctic. It begins by looking at the protections under international law and then examines the position of indigenous peoples under the domestic laws of the Arctic states. The focus is on the legal process of decolonization through the vehicle of human rights law.

International law accords increased recognition to peoples’ rights

Since World War II, there has been a tremendous expansion in the reach of international law. Historically, international law had little to say about the manner in which a state treated its own citizens, but the growing field of international human rights law now sets minimum standards. Much of this body of law is concerned with the human rights of individuals (e.g. basic civil and political rights) but the main instruments also recognize a collective right: the right of self-determination of peoples. This is a

Ratification of universal and regional international human rights instruments

	Canada	Denmark	Finland	Iceland	Norway	Russia	Sweden	US
European Convention on Human Rights	X	✓ (1953)	✓ (1990)	✓ (1953)	✓ (1952)	✓ (1998)	✓ (1952)	X
European Charter for Regional or Minority Languages	X	✓	✓	signed	✓	signed	✓	X
International Covenant on Civil and Political Rights (ICCPR)	✓	✓	✓	✓	✓	✓	✓	✓
Optional Protocol to the ICCPR	✓	✓	✓	✓	✓	✓	✓	X
Convention on Elimination of all forms of Racial Discrimination (CERD)	✓	✓	✓	✓	✓	✓	✓	✓
ILO Convention 107	X	X	X	X	X	X	X	X
ILO Convention 169	X	✓ (1996)	X	X	✓ (1990)	X	X	X
Int'l Covenant on Economic and Social Rights	✓	✓	✓	✓	✓	✓	✓	X
Inter-American Convention on Human Rights	X	X	X	X	X	X	X	X
American Declaration of the Rights & Duties of Man	✓	X	X	X	X	X	X	✓

X = not a party

✓ = a party to the treaty by accession or ratification

signed = the state has signed the treaty thereby indicating support for the object and purpose of the treaty but has yet to become bound by the instrument by ratification or accession.

human right that is interdependent and interrelated with and indivisible from all other human rights. This right of peoples is also a prerequisite to the enjoyment and exercise of all other human rights.

International human rights law has also shown an increasing concern for other collective rights, including the language and cultural rights of minorities, and for the distinctive rights of indigenous peoples. The standards established by international human rights instruments are of universal significance, but the relevant international treaties include not only global instruments sponsored by the United Nations but also regional instruments that apply within Europe or to the Americas.

There are two basic approaches to ensuring the rights of indigenous peoples within international human rights law. One approach locates indigenous peoples' rights in general principles of equality and non-discrimination (18). It emphasizes that special measures may be required to rectify historical discrimination. It also emphasizes that indigenous peoples are "peoples" for the purposes of the right of self-determination. This includes the right not to be

deprived of their natural resources and their own means of subsistence, as articulated in the opening article of the Covenant on Civil and Political Rights and the Covenant on Economic and Social Rights. See box below for examples.

A failure of mainstream international human rights instruments to deal adequately with the situation of indigenous peoples has led to a second approach: to create international instruments that specifically protect indigenous peoples. This approach has led to Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries of the International Labour Organization (ILO). There are also continuing efforts to adopt a Declaration on the Rights of Indigenous Peoples under the auspices of the United Nations Commission on Human Rights. Of the eight Arctic states, only Denmark and Norway have ratified ILO 169. Sweden has signed the instrument and both Sweden and Finland continue to study ratification. Russia has indicated that it has commenced preparatory work related to ratification. Article 14 of Convention 169 deals with land rights and is particularly important in the context of this chapter.

Can general international law on human rights be used to protect indigenous peoples' rights?

Arctic indigenous peoples have tried to use the right of individual petition to the Human Rights Committee for alleged violations of the provisions of the International Covenant on Civil and Political Rights (especially its Article 27 protection of the rights of minorities) pursuant to the terms of the Optional Protocol to that Covenant. One such case is *Länsman et al. v. Finland* in 1992 (19). The petitioners, Saami reindeer herders, contended that the state, by authorizing a quarrying operation within a traditional and sacred territory, was breaching their Article 27 rights:

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

The Human Rights Committee held that reindeer husbandry, whether pursued using traditional or modern means, was an essential element of Saami culture falling within the protection of Article 27, but that not all state-sanctioned activities will amount to a denial of Article 27 rights. "The question ... is whether the impact is so substantial that it does effectively deny the [petitioners] the right to enjoy their cultural rights in that

region." The Human Rights Committee noted that in making its assessment it would consider the effective participation of minorities in decisions that affect them. In the end, the Human Rights Committee concluded that the small-scale nature of the operation did not constitute a denial of Article 27 rights but warned that large scale and expanded operations might.

The Human Rights Committee has emphasized that a state may need to take positive measures for the benefit of minorities (20). While a petitioner may use the Human Rights Committee to vindicate individual rights under the Covenant, the Optional Protocol procedure cannot be used to vindicate the rights of peoples, including the right of self-determination under Article 1 (20). However, the Human Rights Committee does take the view that the country reports of state parties to the International Covenant on Civil and Political Rights should cover Article 1 rights.

Similarly, the Committee on the Elimination of Racial Discrimination (21) requires state party reports to address the position of indigenous peoples and further "calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources ..." (22).

The approach that specifically highlights indigenous peoples' rights is also evident in multilateral environmental agreements. A case in point is the ongoing efforts to elaborate Article 8(j) of the Convention on Biological Diversity dealing with the ecological knowledge

of indigenous and local communities. Institutionally, the approach has led to the creation of a United Nations Permanent Forum on Indigenous Issues (22). Arctic indigenous peoples play a key role in that forum. The chair is a prominent Saami: Ole Henrik Magga. The two approaches are not incompatible. For example, one of the objectives of the Draft Declaration on the Rights of Indigenous Peoples is to make it clear that fundamental norms of international human rights law are equally applicable to indigenous peoples.

ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries: Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

In summary, the widespread adoption of international human rights instruments in the decades following World War II has transformed the nature and scope of international law and established standards against which to measure domestic laws and practice that affect indigenous peoples. This work is part of the larger process of decolonization and has yet to be concluded. Many fundamental aspects remain contentious. Some Arctic states appear reluctant to accept the non-discriminatory application of fundamental human rights to indigenous peoples.

This chapter does not assess the extent to which the Arctic states conform to international standards for the protection of the rights of indigenous peoples. The remainder of this section will instead look at the domestic laws of the Arctic states in light of four questions:

Draft United Nations Declaration on the Rights of Indigenous Peoples

The Draft Declaration on the Rights of Indigenous Peoples comprises 45 articles. Some deal with fundamental human rights, including the right of self-determination of indigenous peoples and the right of indigenous peoples not to be subject to ethnocide and cultural genocide. Other articles deal with the ownership and control of lands and resources and the right to withhold consent to proposed developments within traditional territories. There are also articles that deal with language rights and other social and cultural rights.

The Draft Declaration was originally adopted in 1993 by the Working Group on Indigenous Populations. This working group was established in 1982 by a sub-commission of the Commission on Human Rights. It consists of independent experts and members of the sub-commission but is open to all representatives of indigenous peoples and their communities and organizations. Once the Working Group on Indigenous Populations had adopted the Draft Declaration, the Commission on Human Rights established a working group to elaborate the declaration

intending to have it adopted by the United Nations General Assembly within the International Decade of the World's Indigenous Peoples (1993-2004). Since then, this working group has met annually. The representatives of indigenous peoples are actively involved in its work but only member governments of the Commission on Human Rights are entitled to vote. The current process is thus more state-centered than the early work.

Progress is painfully slow and there remain disagreements on foundational articles. For example, some governments remain opposed to the use of the word "peoples" in the Draft Declaration, precisely because it is "peoples" to whom the right of self-determination applies. Others emphasise the principle of territorial integrity and argue that while indigenous peoples may have a right of self-determination, such a right should be limited to internal self-determination (23). Similarly, there is no consensus on the articles dealing with land and resource ownership by indigenous peoples.

Constitutional provisions protecting indigenous peoples

Canada: section 35. "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Finland: section 17. "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."

section 121. "In their native region, the Sami have linguistic and cultural self-government, as provided by an Act."

Norway: Article 110a. "It is the responsibility of the authorities of the State to create conditions

enabling the Saami people to preserve and develop its language, culture and way of life."

Russia: Article 68(3). "The Russian Federation shall guarantee all its peoples the right to preserve their native language and to create the conditions for its study and development."

Article 69. "The Russian Federation guarantees the rights of small indigenous peoples in accordance with the generally accepted principles and standards of international law and international treaties of the Russian Federation."

Sweden: chapter 2, article 20. "The right of the Saami population to practise reindeer husbandry is regulated in law."

1. To what extent does each state provide explicit constitutional protection to the rights of indigenous peoples?
2. How does each state protect the language rights of indigenous peoples?
3. How does each state protect the land rights of indigenous peoples?
4. How does each state protect the governance rights of indigenous peoples?

Four Arctic states accord explicit constitutional protection to the rights of indigenous peoples

Four of the eight Arctic states – Canada, Finland, Norway, and Russia – provide explicit constitutional protection for the rights of indigenous peoples. Specific protection is not an issue in Iceland. The Swedish constitution refers to the Saami interest in reindeer herding but does not provide formal constitutional protection to Saami rights and interests. Federal states (e.g. the United States) may indirectly protect indigenous rights, for example by insulating indigenous peoples from the application of the state laws of sub-units of the federation.

Language rights

Indigenous languages are an important aspect of practicing, maintaining and revitalizing indigenous culture. One measure of the recognition of language rights is the extent to which indigenous languages are accorded "official" status. A language has "official" status if the government has a duty to communicate in that language and if it is a permissible language in at least some official fora such as the legislature or the courts. The general trend is an increased

recognition and protection of indigenous languages in most parts of the Arctic.

In Greenland, Greenlandic and Danish are official languages and the Home Rule Act provides that "Greenlandic shall be the principal language" (24). The Faroese Home Rule Act has similar language (25).

For the Saami, both the Finnish and Norwegian constitutions affirm some aspects of indigenous language rights. In Finland, the Saami language may be used in the courts and with a variety of state offices and agencies within the Saami areas. This is confirmed by the terms of a new Saami Language Act that came into force January 1, 2004 (26). Chapter 3 of the Norwegian Saami Act is devoted to Saami language rights and recognizes a right to use Saami in communications with government bodies and local governments and within the court system within the Saami language administrative region. This includes the municipalities of Karasjok, Kautokaino, Nesseby, Porsanger, Kåfjord, and Tana. The Swedish Saami language legislation is similar to the Finnish and Norwegian models. Under the 1999 Saami Language Act, Saami in the municipalities of Kiruna, Jokkmokk, Gällivare, and Arjeplog have the right to communicate in Saami orally and in writing with local and regional governments and the courts.

In Russia, article 68 of the constitution establishes Russian as the official language. It does not provide official status to indigenous languages although the same article does guarantee all peoples (i.e. indigenous and non-indigenous) the right to preserve their native language. Republics of the federation may accord official status to other languages but in practice

this authority has not been used to privilege the languages of indigenous peoples.

In Canada, there is no constitutional protection of indigenous language rights but in the past 10-15 years all three Arctic territories have taken statutory measures to give some official recognition of indigenous languages. For example, the Northwest Territories Official Languages Act provides that "Chipewyan, Cree, Dogrib, English, French, Gwich'in, Inuktitut and Slavey are the Official Languages of the Territories." This allows any person to use any of these languages in the debates and other proceedings of the legislative assembly. However, many other rights typically associated with official status (e.g. the language of statutes and the right to use the language in a court) are confined to French and English. The government of the new territory of Nunavut is attempting to go beyond language rights to incorporate Inuit knowledge and values into the very process of government (27).

"Official" status is merely part of the picture of language rights. A more complete assessment would also look at the support offered to indigenous languages in popular media and to the language of education in schools. For example, while indigenous languages have no official status in Alaska, in 2000 the state legislature did enact the Native Language Education Act, which both documents the impending loss of Alaskan Native languages and allows for, and in some cases requires, the creation of language curriculum advisory boards for school boards. (See *Chapter 10. Education*).

Land and resource rights

Indigenous ownership rights merit distinctive treatment because of the cultural importance of connection to land and because of the potential economic benefits associated with land and resource ownership. Two general trends emerge. The first is a more vocal critique of the assumption that states gained title to lands occupied by indigenous peoples upon settlement or the acquisition of sovereignty (28). A second less developed trend suggests that Arctic states may be progressing from the minimalist position of recognizing indigenous rights to use land and resources towards a recognition of exclusive ownership rights or land title (29-30). In fact, the United States and Canada have taken steps to recognize exclusive indigenous title for selected and agreed tracts of land. In other Arctic states, including Norway, Sweden,

Finland, and Russia, indigenous ownership rights continue to be the subject of debate. In at least Norway, Sweden and Finland, this debate is very much framed in terms of compliance with international instruments and especially International Labour Organization Convention 169, which is not the case in Canada and the United States.

In the Nordic countries, the courts have played an important role in raising issues around ownership and resource rights. For example, the Swedish Supreme Court decision in *Skattefjällsmålet* (the Tax Mountain case) in 1981 rejected Saami claims of ownership in the County of Jämtland near the Norwegian border. But that court also suggested that Saami might have a stronger claim in areas further north where Saami use of land and resources was more intensive (29). In Norway, the controversy surrounding the development of a dam on the Alta River in the Saami area led to the creation of the Saami Rights Commission, which presented reports in 1984 and 1997 dealing with the rights of Saami under both Norwegian and international law (28). The Norwegian Supreme Court has recognized Saami ownership rights in its *Selbu* and *Svartskogen* decisions (31). Moreover, the Norwegian Parliament, *Stortinget*, is currently (2003) considering a new law, the *Finnmark Land Act*. This Act recognizes the distinct entitlements of both Saami and non-Saami Norwegians (32) within the *Finnmark* area, see box on page 108. The Norwegian Government also appointed a Saami Rights Commission in 2001 to look at the Saami land rights question in the area south of *Finnmark*.

As part of its decision-making on whether or not to ratify International Labour Organization Convention 169, Finland has been actively studying the question of Saami land rights since 1999. To that end, the government commissioned a series of expert reports studying questions of land ownership within the Saami homeland (34).

At present the Finnish Ministry of Justice has nominated a four-person research group to examine the situation. This project should be finished by the end of 2004. The situation is similar in Sweden where the implications of International Labour Organization Convention 169 are also under study (35). Sweden takes the view that it cannot ratify until it can define the outer boundaries of the reindeer husbandry area and has thus appointed (36) a boundary com-

The proposed Finnmark Land Act

In April 2003 the Norwegian Government presented a new law, the Finnmarksloven or Finnmark Land Act to the Storting for its approval. Its objective is the management of the land and resources of Finnmark "in a balanced and ecologically sustainable manner in the best interests of Saami culture, reindeer husbandry, economic activity and social life, the inhabitants of the county and the public in general."

The main vehicle to reach this objective is the proposed Finnmark Management Commission, which will have equal numbers of members elected by the Finnmark County Council and the Sámediggi (the Saami Parliament), and a seventh member appointed by the King in Council. The commission's responsibilities include the right to withhold approval for proposed changes in the use of uncultivated lands, and proposals to sell or lease such lands. Some matters can be referred to the Sámediggi. The commission is also supposed to take account of guidelines developed by the Sámediggi in making its decisions. These guidelines may deal with the evaluation of how changes in the use of uncultivated land will impact Saami

culture, reindeer husbandry, economic activity, and social life. In some cases the final decision will rest with the King in Council. Other provisions of the Finnmark Act protect the harvesting rights of other residents of the Finnmark County and in some cases the rights of other Norwegians.

The Sámediggi has voiced serious criticism of the proposed act on the grounds that it disregards the work of the Saami Rights Committee established after the Alta River dam controversy (1980). In particular, the Sámediggi argues that the act does not comply with Norway's obligations under International Labour Organization Convention 169 and under the International Covenant on Civil and Political Rights. Two law professors commissioned by the Judiciary Committee of the Storting have expressed similar doubts and the Committee on the Elimination of Racial Discrimination has signaled its concerns that the act "will significantly limit the control and decision-making powers of the Saami population over the right to own and use land and natural resources in Finnmark County" (33). Accordingly, the fate of this legislative initiative is not clear.

mission to formulate proposals for the definition of the boundaries for Saami reindeer breeding areas.

In Canada, the Delgamuukw decision (37) of the Supreme Court of Canada represents a clear basis for recognizing the concept of indigenous title in Canadian law. While the full implications of that decision are still being worked through in lower courts (38-39), Delgamuukw suggests that an indigenous title may include significant resource rights, including oil and gas rights. In the Arctic area of Canada, most title claims have been settled through negotiated land claim agreements. The US Government took a similar approach with the passage of the Alaska Native Claims Settlement Act (ANCSA) in 1971. In addition to conferring ownership rights to land and resources on Native regional and village corporations, ANSCA contained a clause purporting to extinguish any remaining indigenous rights and title within Alaska. Clauses with similar effects are included in most modern Canadian land claim agreements. The existence of indigenous offshore rights and title remains contentious.

Within the Russian North there are more than 30 numerically small peoples and a complex interaction of federal laws relating to indigenous peoples and the laws of the subunits, or subjects, of the Russian Federation

(40). Since 1990, there have been various efforts to recognize the land and resource use rights of indigenous peoples.

An early federal step, the Presidential Ukase No. 397 of 1992, urged the subjects of the federation to establish "territories of traditional use," which would not be available for industrial activities without the consent of the indigenous people (16, 41). Implementation of this and other related initiatives has been "spatially irregular" and many governments did nothing (41-42). More recently, the federal government has passed a number of special laws to supplement the ukase. These laws include the laws "On guarantees of Indigenous Minority Peoples of the Russian Federation Rights" (1999), "On General Principles of Organizing Communities of Indigenous Minority Peoples [obshchinas] of the North, Siberia and the Far East of the Russian Federation" (2000), and "On Territories of Traditional Use of Natural Resources by Indigenous Minority Peoples of the North, Siberia and the Far East of the Russian Federation" (2001).

Efforts to territorialize indigenous rights have been based on the (re)construction of obshchinas (family clans or communes) (16, 43). An obshchina may petition the okrug or oblast for the allocation of land in order to

continue such traditional activities as hunting and reindeer herding. Title remains with the state. The actual practice has varied. While both the original ukase and the federal law of 2000 are explicitly directed at indigenous peoples, the territorial laws (e.g. Sakha Republic) in some cases refer more generally to those engaged in traditional activities (43). There is also considerable diversity in the form of tenure. The ukase contemplated lands being granted in perpetuity, but in many cases the tenure has been much more limited (44). Title to these lands has not been transferred and there remains considerable opposition in Russia to the privatization of land and resources (16). While the recognition of territories of traditional use and the allocation of land to obshchinas offer protection to numerically small peoples, there are also cases in which indigenous peoples have lost land and resource rights. This includes the decision of the Murmansk administration to lease parts of the Ponoï River to private fishing interests without regard to the interests of the Saami and Nenets peoples of the Kola Peninsula. In other cases (e.g. in the Khanti-Mansiisk region of Siberia), family and clan lands have been acquired by oil and gas interests either with no regard for the traditional owners or for purely nominal consideration (16).

Governance rights

The authority to govern oneself as a people is an important aspect of self-determination. To what extent and how do the legal systems of the Arctic states recognize the self-governing capacity of indigenous peoples? As described in *Chapter 5. Political Systems*, there are two models for self-governance in the Arctic: territorial or regional public governments that may afford a significant degree of self-government to all residents of a region, and self-government based on indigenous membership. It is difficult to identify a trend towards one approach or the other.

The Greenland Home Rule Government and Nunavut provide two well-known examples of public governments. The position is more complex in Alaska. In the United States, the “most basic principle” of federal Indian law is the recognition of an inherent right of tribal self-government (45) but it has proven difficult to work through the implications of this in light of the Alaska Native Claims Settlement Act (ANCSA). The position seems to be that Native villages continue as self-governing entities but that they lack a territorial basis (46). According to the US Supreme Court, the decision to transfer lands to Native-owned corporations rather than to tribal governments was inconsistent

Home Rule in Greenland and the Faroe Islands

In 1999/2000, the Greenland Home Rule Government established the Commission on Self-Governance with the mandate to explore Greenland’s status and place in the Danish realm in light of the evolution of international law.

The Commission was comprised of nine members appointed by the Landsstyre and undertook to gain the perspectives of other indigenous peoples as well as academics and scholars with a background in the area of international law and self-determination. The Commission’s Executive Summary identified and addressed the areas of self-governance and resources; economic strategy and industrial development; public administration and human resources; self-sufficiency; language; increasing capacity and political development; the possible formation of a Joint Commission with Denmark through a Partnership Treaty on foreign and security policy; and a plebiscite in 2006. Under the coalition government between the Inuit Ataqatigiit and Siumut parties (1999), the Ministry of Self-Governance, Mineral Resources and Justice

will further the process for the exercise of indigenous self-determination.

Home Rule in the Faroe Islands has developed in a different direction, and may come to follow the precedent of Iceland. The Icelandic Althing was dissolved in 1800 and Iceland came under direct Danish control. Following a struggle for independence that began in 1830, Iceland had a home rule government with legislative and executive powers by 1904. By 1918 a treaty between Iceland and Denmark stipulated that Iceland was a sovereign country that continued to recognize the Danish king. In 1944 Iceland annulled the treaty in accordance with its terms and declared itself a republic. In the general election to the Faroese Lagting in April 1998, the parties favoring autonomy or severance from Denmark gained the majority, and in September 1999 the Faroese Government published a white paper about Faroese sovereignty. From amongst several other options, the white paper proposed a model of free association between the Faroes and Denmark based upon the Denmark-Iceland treaty of 1918 (47).

Equality and Self-Determination in the Arctic

An Advocate Speaks

Dalee Sambo Dorough,
Inuit Circumpolar
Conference*

Historical and contemporary social, political, and economic forces have resulted in far-reaching adverse consequences on virtually every aspect of the lives and traditional territories of the Inuit, Saami and other Arctic indigenous peoples. To redress these impacts, new levels of international cooperation, along with commitments to human rights are essential. This is consistent with a new phase of democracy that we are currently witnessing, which fosters the “international hearing” of indigenous voices, languages, and worldviews.

Peoples’ right to self determination

Since 1982, the United Nations has been engaged in human rights standard setting to address the rights of indigenous peoples (1). Specifically, according to the UN Charter, the United Nations and its member states have a solemn responsibility to promote universal respect for, and observance of human rights for all. Indigenous peoples in the Arctic must be assured the full enjoyment and exercise of their human rights without discrimination. A human rights approach is the optimal way to effectively address the debilitating and ongoing legacy of colonialism and dispossession.

A key aspect of human rights is the principle of equality. For indigenous peoples in the Arctic and other regions of the globe, this has yet to be realized. The failure of many states to fully respect this principle is especially evident in the ongoing dialogue between indigenous peoples and nation states concerning land and resource rights and self-determination.

Article 1(1) of the International Covenant on Civil and Political Rights and the Covenant of Economic, Social and Cultural Rights provides that “[a]ll peoples have the right of self-determination.” States have an affirmative obligation to fully apply this article equally to indigenous and non-indigenous peoples. In relation to indigenous peoples, States have no authority to impose new qualifications, limitations, or any other discriminatory double standards. Though the eight States in the Arctic Council have been directly involved at the United Nations and relatively engaged with indigenous peoples throughout the standard-setting process, indigenous land and resource rights and the right to self-determination are still being treated as extremely contentious matters.

The right to self-determination is inherent or pre-existing. It is not subject to the whims or discretion of any government. Consistent with principles of equality and justice, it is expressed, exercised, and manifested in different ways by different peoples.

At the 1997 session of the UN Commission on Human Rights Intersessional Working Group,

which addresses norms for indigenous peoples’ human rights, a troubling discussion was prompted by nation States introducing a notion of “internal” and “external” self-determination. This false dichotomy is used to confine indigenous peoples’ right to self-determination, making it dependent on domestic policies on internal autonomy or self-government. Such positions are incompatible with international law. It is also not in line with the role that indigenous peoples already play as international actors by participating at the United Nations, the Arctic Council, and other international fora, and thereby exercising their right to self-determination external to the nation states.

Ongoing discrimination

Some of the most troubling positions have been expressed by the United States. In regard to self-determination and territorial integrity, the recent statements made by the United States rely on the false dichotomy of “internal” and “external” dimensions of self-determination and the idea that we must “create” a new right or a different right of self-determination for indigenous peoples than what currently exists for “all peoples” under international law. These positions have been met with strong opposition by the Inuit, Crees, and numerous other indigenous peoples and organizations.

In regard to land and resource rights, both the government of Canada and the United States have taken positions that are inconsistent with their commitments under the international human rights covenants relating to self-determination and in the context of the Arctic Council. Here Canada claims to be committed to sustainable development, improved health conditions and cultural well-being, and the protection of the Arctic environment *in partnership with* indigenous peoples. If the U.S. and Canada continue to undermine our exercise of self-determination, and especially our rights to lands, territories and resources, then their idea of “partnership” appears to be one of continuing paternalistic control and diminution of our most fundamental rights.

A number of other States have also claimed that the draft UN Declaration on the Rights of Indigenous Peoples must be altered in a way that entrenches the principle of territorial integrity of States. Most indigenous peoples vehemently oppose such proposals since they are unnecessary. In addition, some States are already invoking territorial integrity in abusive and illegitimate ways. This has the potential of stifling the natural evolution of the right to self-determination under international law.

The principle of territorial integrity is already incorporated in a balanced manner as an integral part of international law. States are well aware that not only this but also other existing principles and rules in international law will still be applied in any given situation, to the extent they may be applicable, in determining the meaning

and scope of the right of peoples to self-determination. Like self-determination, the principle of territorial integrity is evolving. The principle is no longer tied solely to nation States. Rather, the integrity of indigenous peoples' territories and other basic interests are also intimately linked to this principle (2).

Benefit rather than threat

The right of peoples to self-determination is not an absolute right without limitations (3). It is a relative right that does not confer on any one people the right to deny other peoples the same right on an equal footing. It does not include any right to oppress other peoples.

The international community is well aware that few, if any, indigenous peoples seek full independence as nation-states. Yet certain states, suggest or at least imply that the explicit recognition of indigenous peoples' right to self-determination is a threat to territorial integrity. Current developments in Canada, for example, where the self-determining actions of indigenous peoples have effectively contributed to safeguarding territorial integrity over the past two decades, demonstrate the reverse. Specifically, in the context of Québec secession, the democratic actions of James Bay Cree people have far exceeded what the Government of Canada itself had done to secure its borders as an existing State (4). Furthermore, the political, demographic, and economic realities do not point to indigenous peoples as a major threat in terms of State dismemberment, impairment or disruption.

Ironically, the most powerful and affluent nation in the world, the United States, also starts from the false premise that indigenous peoples globally are a genuine threat in a national security context and has attempted to build upon this unfounded fear (5). The United States is of the view that self-determination must be addressed within the context of "management and control over internal affairs", declaring that international law does not "accord indigenous groups everywhere the right to self-determination." In many instances, the United States has thus evaded affirming the collective or group rights of indigenous peoples, repeatedly calling for reference to "persons belonging to minorities" and the exercise of individual rights "in community with other members of their group."

In large part, the United States in effect controls whether the principle of territorial integrity applies or not in any given situation relating to the U.S. Under international law States are required to respect the principles of equal rights and self-determination of all peoples and to refrain from forcible actions that deprive peoples of the right to self-determination. States must also have a democratic government that is representative of the whole people belonging to a territory, without distinction as to race, creed, or color. Should these conditions be met, then such

States can invoke the principle of territorial integrity.

Rights are necessary for effective action

The essential message from Arctic indigenous peoples has been consistent and clear: there is a need to deal with the growing and urgent issues that pose a threat to our Arctic homelands. In this wide-ranging context, States must be prepared to abide by preemptory norms, such as the prohibition against racial discrimination. It is only through the full realization of our basic human rights that we can take effective action through the Arctic Council and other fora of the global community to respond to these objectives. If Arctic indigenous peoples are to ensure our collective security in cultural, social, economic, political, and environmental terms, States must thus affirm and respect our basic rights, values, customs, practices and perspectives. This is especially crucial, so that we may continue our stewardship of the environment and contribute to the security and integrity of our territories for the benefit of present and future generations.

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* Editors note: This article presents the personal views of the author.

with the application of tribal taxing laws to those lands. That said, tribal governments still have jurisdiction over their members and other internal affairs with respect to such matters as adoption, tribal courts and internal governance (45). In addition, indigenous peoples in Alaska have also been able to take advantage of their demographic dominance in some areas and have used public government models to exercise effective law-making powers, including property taxation and planning powers, over large territories.

The position in Canada is not uniform either. Nunavut represents a public government model, as does Nunavik in Northern Quebec. There are counter examples in Yukon and Northwest Territories, where land claim agreements recognize an ethnically based law-making capacity. This is the case, for example, with the self-government agreements in Yukon (48). There are on-going negotiations in the Northwest Territories to recognize a similar capacity for self-government.

In Russia, the settler population vastly outnumbers the indigenous population in all of the autonomous regions, and public government models are not able to provide for indigenous self-government (49). Instead, the *obshchina* has come to serve as a territorial base for self-government. Another possibility would involve using native counties (*rayony*) and native village administrative units (*administratsii* (first established during the Soviet era), but relatively few counties have a majority native population. In some cases, villages have combined the powers of an *obshchina* and a native village. Overall, the geography of self-government in Russia is best described as archipelagic (50).

Three Nordic states have established Saami parliaments: Finland in 1973, Norway in 1989, and Sweden in 1993. While these parliaments do not have law-making authority, they have important consultative and advisory roles. For example, in Finland, the state is obliged to negotiate with the Saami Parliament on all far-reaching and important measures that may affect the status of Saami as an indigenous people, including decisions with respect to the use of state lands and mineral interests. The Saami Parliament in Norway may, on its own initiative, raise any matters and issues of concern to the Saami people (51). There is no Saami parliament in Russia.

Theme summary

Developments in the international law of human rights since World War II offer significant protections for indigenous peoples. The domestic laws of Arctic states illustrate a range of responses. While there is an increased recognition of the language rights of indigenous peoples, there is greater reluctance to recognize land ownership rights. Where there is increased recognition of land rights, courts have often played the catalytic role. There is a debate about the role of public governments and indigenous governments in fulfilling the self-government aspirations of indigenous peoples. Where indigenous peoples are in a clear majority (e.g. Nunavut, Greenland), they embrace public government as a possible vehicle for self-government. Where indigenous peoples are in a minority, and the discussion centers on residency, subsistence, and traditional practices rather than on indigenous heritage and emphasizes the form rather than the substance of non-discrimination, public forms of government fail to protect indigenous interests from majoritarianism.

Property rights and rights to develop natural resources

The Arctic is rich in natural resources, but who owns these resources? This section covers the forms of ownership within the Arctic states, distribution of ownership and control within federal states, and the schemes for allowing private parties to acquire public resources. In addition to this overview, further detail is presented in *Chapter 7. Resource Governance*.

Public or private ownership

While subject to increasingly vocal claims of indigenous ownership, there is a remarkably consistent policy of public ownership of the surface estate of land throughout the Arctic. To take but one example, the state claims ownership of approximately 90% of the lands of the Saami homeland area of Finland. Similar figures apply in Sweden. Public ownership dominates even in those states in which private ownership tends to be more significant in the non-Arctic parts of the country, such as the United States. In some cases continued public ownership of resources is legally mandated. For example, the Alaska

Statehood Act requires the state to reserve mineral rights on any sale of the surface. In other cases, public ownership is simply a presumption, or is required by policy (e.g. Finland, Greenland, Canada, Russia, Sweden, and Norway). In Iceland and the other Nordic countries, lands may be owned publicly or privately, and public lands may be subject to limited private ownership rights especially for summer pasture for livestock. Where lands are privately owned in the Nordic countries, the title generally includes ownership of natural resources, although the right to develop those resources will be highly regulated. The offshore oil and gas and mineral resources of Arctic states are universally owned by the state, subject to the potential title claims of indigenous peoples.

Public ownership of resources within federal systems

Within the unitary states of the Arctic, title to the publicly owned non-renewable natural resources is vested in central governments rather than local or regional governments. In Canada all publicly owned resources were owned by the federal government until fairly recently. This is still the case in the Northwest Territories and Nunavut but not Yukon. Canada transferred administration and control of oil and gas rights to Yukon in 1998 and all other resources (with the exception of water) in 2003. Over time, the Northwest Territories and Nunavut are likely to follow this trend. The marine areas adjacent to these territories will be jointly managed by the territories and the federal governments.

In Alaska, the federal government owns significant blocks of lands including national forests, large national parks, and national wildlife refuges. It also owns strategic natural petroleum reserves. The rest largely belongs to the state or Native corporations. There is no immediate or long-term prospect of the further transfer of federal resources to the state.

Russia offers a very different federal model. The constitution provides that the federal government and the sub-units of the federation both have powers over mineral resources, creating the so-called “two-key principle.” The federal government has enacted a law according to which all subsoil resources are vested in the federal state. The joint jurisdiction has been implemented through agreements that transfer the authority to license subsoil use for all or a portion of the deposits to the regions (e.g. the Komi

Republic and the Sakhalin Oblast) (52). As a result, there is a considerable transfer of authority to the regions.

Greenland has another version of a two-key principle. According to the Home Rule Act, the residents of Greenland have fundamental rights to the natural resources. At the same time, the Mineral Resources Act provides that any permission to prospect or exploit natural resources requires the approval of both the Danish Government and the Home Rule Government. Joint management of the resources (minerals and oil and gas) is facilitated through a Joint Committee consisting of equal numbers of Home Rule and Danish representatives. Revenues from mineral activities are to be split 50:50 between the two governments with a further revenue sharing arrangement to be worked out in the event that revenues exceed DKK 500 million a year. At present there is only limited production.

In the Faroe Islands, Denmark has recognized since 1992 that the Faroese Government has executive and legislative responsibility for subsoil resources including resources in the territorial sea and continental shelf.

Disposition systems

The way in which a state transfers the right to develop natural resources to private interests is referred to as a disposition system. While there is some variation in resource disposition schemes for different non-renewable resources, it is possible to make one general observation. In all cases the interest owners, i.e. the mining and petroleum companies, must also comply with relevant land use planning, conservation and environmental rules.

Hard rock minerals are generally disposed of under one of three types of schemes: free-entry, some form of competitive leasing (as is typical for oil and gas resources where the rights are sold to the highest bidder), or negotiated concession. Under a free entry scheme, anyone may prospect for mineral resources on publicly owned lands and “stake” minerals that they discover (53-54). The three Canadian territories, Alaska, and Finland all use a free entry system or a free-entry-like scheme. The other Arctic states (e.g. Greenland, Sweden, Russia) use a negotiated concession or leasing scheme. If there is a trend, it is a movement from ground staking to map staking and then to leasing schemes. However, free-entry schemes have proven to be remarkably resilient notwith-

standing the power they accord to mining interests to determine the use to which public lands will be put.

Arctic oil and gas disposition regimes are predominantly work or bonus-bid leasing schemes. In a bonus bid scheme, the rights are awarded to the highest bidder and in a work bid scheme the rights go to the party committing to the most work (e.g. seismic and drilling activity). This is the case for Alaska, Greenland, and Canada (federal and Yukon). It is also the main scheme in Russia, which has also used production sharing agreements in a few cases. Leasing schemes have much in common, but there can still be great differences in how much governments must consult with indigenous peoples and others, including non-governmental organizations, about the planning and environmental effects before deciding to lease lands. Alaskan law imposes very strict and formal requirements, but the procedure is less demanding in other jurisdictions such as Canada.

Local ownership of resources may deliver significant benefits to local and sub-federal government. The benefits flowing from the Prudhoe Bay development to the state of Alaska and more indirectly to the North Slope Borough provide a dramatic illustration of this proposition. See *Chapter 7. Resource Governance* for further detail.

State participation in developing natural resources has, for the most part, declined in recent years. For example, state participation rights created in Canada in the early 1980s had disappeared by the early 1990s. Also, the Faroe

Islands concluded that international market conditions would not support a state carried interest (i.e. share) for its first petroleum leasing round in 2000. Continuing state participation seems most widespread in the hydro-electricity sector (e.g. northern Canada, the Kemijoki River development in Finland, and Greenland where the state-owned company has a monopoly). In some states (e.g. Denmark/Greenland, Norway, and Russia), state participation continues in the oil and gas sector.

Theme summary

Three points emerge from the discussion on property rights and rights to develop natural resources. First, public ownership of land and resources dominate in the Arctic regions of Arctic states. Second, within the federal states, there is an important continuing federal role in Arctic non-renewable resource ownership and management but also evidence of the transfer of control of resources to Arctic territories and some experimentation with joint management regimes. Third, the non-renewable resource regimes follow fairly standard models, especially in the oil and gas sector.

More legal authority to Arctic regions

Devolution is the transfer of law-making authority to local or regional governments. Over the past decades, there is strong evidence of the devolution of legislative power and control over resources from the metropolitan cen-

Significant devolution events in the Arctic

Alaska	1958	Alaska Statehood Act: Alaska ceased to be a federal territory and became a state
	1971	The Alaska Native Claims Settlement Act (ANSCA): settlement of indigenous title claims and federal/state ownership issues
	1980	The Alaska National Interest Lands Conservation Act (ANILCA): settlement of subsistence harvesting entitlements
Canada	1984	Settlement of the Inuvialuit claim
	1993	Umbrella Final Agreement with Yukon First Nations
	1993	Settlement of the Gwich'in, Sahtu and Nunavut Inuit claims
	1998	Transfer of ownership and legislative responsibility for oil and gas to Yukon
	1999	Creation of Nunavut
Nordic countries	2003	Transfer of mineral, forest and land ownership and legislative responsibility to Yukon
	1905	Norway's independence from successively Denmark and Sweden
	1917	Finland's independence from successively Sweden and Russia
Greenland	1944	Iceland's independence from Denmark
	1979	Home Rule Act
	1985	De-accession from the European Community
	1991	Joint authority provisions of the Mineral Resources Act
Faroe Islands	On-going	Partnership Treaty Discussions
	1948	Home Rule Act
	1992	Assumption of control over onshore and offshore natural resources
	On-going	Discussions over the future international status of the Islands

ters to Arctic regions and Arctic residents. Major devolution events are presented in the table on page 114.

Devolution across the Arctic

Devolution is connected to internal decolonization, which is described in *Chapter 5. Political Systems*. Devolution has been most obvious for Greenland and the Faroe Islands in their relationships to Denmark, and in Canada. The (now) three Canadian territories, Nunavut, Northwest Territories, and Yukon, have yet to attain provincial status, however.

In the United States, there is little prospect of further devolution of authority. In fact, there has been some reversal as federal authorities have re-assumed authority for the allocation and regulation of wildlife harvesting on federal lands.

In the Nordic countries, there is some possibility of continuing devolution of authority but more at the level of local or regional governance. For example, in Norway, the proposed Finnmark Land Act would transfer some elements of ownership and control of resources to the Finnmark Estate (55). In Sweden, a government commission report in 2002 suggested conferring increased political power and some degree of self-determination on the Saami Assembly Parliament (36). In Finland, where the powers of the municipalities are protected to some degree by the constitution, there has been a trend to devolve greater autonomy to municipalities, including those within Lapland.

The picture in Russia is very different from the rest of the Arctic. The present tendency, which is not an Arctic-specific trend, is towards greater centralization within the federation.

Even where there are significant transfers of legislative responsibility, the metropolitan centers retain significant control of the Arctic areas of their territories. In Nunavut and Northwest Territories, the federal government of Canada retains ownership and legislative jurisdiction for essentially all public lands and resources. This is in marked contrast to non-Arctic areas of Canada where the basic rule is that publicly owned natural resources are vested in the province and not the federal government. Even in Yukon, which now has administration and control of its own resources, the federal government can disallow territorial laws, resume ownership of lands for certain purposes, and make laws that are inconsistent with Yukon laws. These federal laws would trump in the event of a

conflict. In Greenland, the Danish Government retains a joint interest in resource disposition and development decisions but has abandoned any such claim in relation to the Faroe Islands

To whom is authority devolved?

As discussed earlier in this chapter, law-making powers are most often transferred to public governments rather than to authorities based on ethnicity. This is the case in Greenland, the Nordic states, and is the principal model in the Canadian territories.

For devolution of resource ownership, the picture is more diverse. Two models dominate. The first, which we might call the North American Arctic model, has a significant transfer of public resource rights from the federal government to the state or territorial governments contemporaneously with the recognition of indigenous ownership rights through land claim agreements. The second model, which dominates in the Nordic countries, favors a more limited recognition of indigenous harvesting and related rights rather than full-blown ownership. While there is continued discussion of the further recognition of indigenous property rights in Finland, Sweden, and Norway, the proposed Norwegian Finnmark Land Act would see presumed state ownership rights transferred to the Finnmark Estate, which is intended to reflect the interests of all Finnmark residents, Saami and non-Saami. In Greenland, further devolution of authority appears to assume that ownership of resources would lie with the Greenland Home Rule Government rather than the indigenous people of Greenland. In Russia, transfer of ownership rights to mineral resources to indigenous peoples does not seem to be permissible, given that a federal law vests subsoil resources in the state. The Icelandic model upon independence from Denmark was simply for Icelanders to assume full responsibility for their own government and resources, and the same model would presumably obtain for the Faroe Islands were they to follow a similar route.

Trend summary

From a medium- to long-term perspective there has been a significant transfer of authority from the center to Arctic regions. It is particularly evident in the cases of Alaska, the Canadian Arctic, Greenland, and the Faroe Islands. In some cases (e.g. Alaska) there is little prospect of further devolution in the future. There seems to be a

preference for devolution to public governments rather than to indigenous governments. In areas where indigenous peoples are in the minority and where there is no specific protection for indigenous interests, this devolution to a public government seems consistent with international norms.

Key conclusions and gaps in knowledge

An underlying assumption in this chapter is that sustainable development in the Arctic is connected to how well people can assert or reassert local control of land and resources. Based on a review of how the international and national legal systems support such local control, four conclusions emerge.

Firstly, international human rights instruments provide an important standard against which to measure the behavior of different states. But they have yet to show their full potential. While some global instruments are broadly accepted (e.g. the Covenant on Civil and Political Rights), others are not accepted by the majority of Arctic states (e.g. International Labour Organization Convention 169). In other cases, the international standards remain works in progress (e.g. the Draft Declaration on the Rights of Indigenous Peoples). It would still be useful to conduct a rigorous assessment of the domestic laws and practices of each of the Arctic states in light of generally accepted international norms. A further strategy might be to develop a standard-setting instrument on the rights of indigenous peoples specific to the Arctic region. Arctic states and indigenous peoples might pursue this collectively or through processes that parallel existing multilateral undertakings like the Draft Declaration.

Secondly, there are two distinctive approaches to the transfer of legal authority to the Arctic regions of Arctic states. One approach has been to devolve authority to public governments, sometimes in conjunction with the settlement of the land claims of indigenous peoples. The other approach has been to recognize the inherent self-governing rights of Arctic indigenous peoples. Sometimes these two models are combined. It would be useful to have a clearer understanding of the respective merits of these two approaches and how they fit together, as well as their compatibility with international human rights instruments.

Thirdly, there is a broad range of responses to

how the property rights of indigenous peoples should be recognized. This range invites us to explore different possibilities rather than being trapped within the limits of a particular jurisdiction. At the same time, we need a deeper understanding of why certain techniques seem to work in some contexts and not in others, and the potential risks with legal transplants. This suggests the need for a more rigorous “comparative law of the Arctic,” engaging not only legal scholars but also people from other disciplines as well as local, regional and national governments.

The final conclusion draws attention to the difference between formal law and actual practice. As one moves from the apex of a legal system (the constitution) to the base (laws, regulations, orders, judicial decisions), norms are articulated with greater and greater precision. This chapter and much of the literature in the field operate close to the apex of this hierarchy. Therefore, many questions about actual practices remain to be addressed. They include: What do constitutional rights actually mean? How have they been interpreted and applied? How have they changed peoples’ lives? How do the norms of the state interact with folk norms and the norms of indigenous society? Such inquiries are complex and will require a multidisciplinary approach as well as a rich array of case studies.

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