Legal Challenges in the Arctic

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Introduction

Over the course of the last decades, the challenges posed to the existence of human, economic, sustainable development and multi-level governance systems in the Arctic have prompted a renewed inquiry into the concrete forms of legal arrangements, new legislation and other legal measures that secure the basis for effective and resilient adaptation and evolution of the Northern lands. This development in the legal field takes place in international and trans-national areas, national and regional levels within the eight Arctic States and forms a constructive aspect of the general processes of globalization, institutionalization and cultural, social, economic political and other changes happening in the North. By drawing on some Canadian developments, this paper outlines general perspectives on understanding existing legal challenges and the role of law in dealing with Arctic matters.

Common legal challenges and the role of law

Recent initiatives involving various legal experts in addressing legal matters in the Arctic (e.g. Chapter on "Legal Systems" within the Arctic Human Development Report, 2004 (1), and ongoing cooperation among Nordic legal institutions via several networks, such as the Nordic Research Network for Saami and Environmental Law and the Nordic Human Rights Network), show an increasing importance of legal thinking in various areas of Arctic and global developments. These trends also point to the question of the existence or necessity of developments of an "Arctic law," a comprehensive legal regime which would embrace the legislative practices of the eight Arctic States and international law relevant to the Arctic region, or could lead to the development of some documents common to the Arctic States (e.g. an Arctic Constitution or Arctic Charter, or an Arctic Treaty system. Ideas of creating of some comprehensive regime in the Arctic (2) or as O. Young puts it: "[…] a constitutional contract, for the Arctic treated as a distinct region in international society" (3) are not new. The possibilities and limitations of the establishment of a binding legal regime in the Arctic has been one of the discussion topics of the 7th Conference of Parliamentarians of the Arctic region, 2006 (4) and several other workshops/seminars, e.g. seminar on Multilateral Environmental Agreements and their relevance to the Arctic, 2006(5). Thus, in its statement,(6) the 7th Conference suggested the legal regimes that impact the Arctic be audited and proposed that the UN conduct the Annual 2007 Treaty Event with the focus on UN treaties relevant to the Arctic (points 28, 29).

Despite many discussions, "Arctic law" terminology is confusing and requires further analysis. There are other relevant terms, such as, for example: Nordic law, which usually covers legislative practices of Nordic countries. Clearly, development of "Arctic law" is hampered by divergences in the domestic legal systems which are becoming more integrated and gradually nullify differences between a Common law, "Aboriginal law" and the Civil/Continental (Pandect) systems of law (e.g. Canada). There are obstacles in differing approaches within each Arctic state towards the place of the North in the national policies and consequent priorities in developing various legal regulations regarding Northern issues. Often there is no coherence between federal/central framework legislation and immediate needs that Northern legislators address locally. Local performers often mimic existing national rules, policies, and agenda due to the lack of financial and scientific/manpower capacity to introduce a unique northern vision at the level of regional legislation. There are some notable exceptions, for instance, the *Nunavut Wildlife Act,* which came into force in July 2005, includes about 13 *Inuit Qaujimajatuqangit* (IQ- traditional knowledge) principles and concepts. It can be argued, however, that the legislative process itself is

rooted in the mainstream legal system and enforcement without a real connection to the Inuit legal traditions (7).
Further challenge in defining “Arctic law” is connected with processes of legal globalization and developments in international law, which, on the one hand, is becoming more “universal” and points to the integration with domestic legal systems. On the other hand, there is an overlap within various areas of international law itself. The new notion of “transnational public law” has emerged. According to H. Koh, it “[…] is neither fully international, nor is it based only on one domestic law or another. It is both” (8). Growing inter-dependence between national and international legal practices is relevant to the Arctic. Thus, common legal challenges to the Arctic countries often point to the need for international legal guidance. In the meantime, developments in international law reveal that its jurisprudence relies on examples from domestic legal practices.

Common legal challenges to the Arctic states include, for example:

- illegal immigration, fishing and hunting activities
- drugs, possible human trafficking
- cross-border crime and security against potential terrorist threats
- efficiency of judicial systems
- environmental, health, educational, trade, economic, human resources regulations
- affirmative action/positive discrimination rules, employment equity rules
- traveling and visa policies/regulations
- The need for more comprehensive international regulations due to technological developments and increasing capability of commercial and other shipping activities
- High energy prices, improving economic feasibility of mineral exploration and exploitation in the Arctic, increase in tourism activities require coherent mining, tourism, economic, etc. policies and call for corresponding legislative measures e.g. pollution, undersea mining regulations etc.
- The impact of colonialism on indigenous peoples, the place of indigenous knowledge, cultures and concepts in decision-making/legislative policies and the administration of justice.

Further, debates over the benefits of soft-law instruments in the Arctic, as opposed to the necessity of legally binding agreements, also question the need for the development of “Arctic law.” Despite the fact that soft-law often provides a basis for hard law developments, these debates raise the question of the importance of hard–law commitments in the Arctic. Already existing web of soft-law declarations, informal arrangements, and growing institutional cooperation in the Arctic, show that these measures often prove to be quite efficient in addressing existing challenges. Activities of various Arctic forums, e.g. the Arctic Council, the Nordic Council, the Nordic Council of Ministers, many bodies of environmental co-operation, University of the Arctic etc. also point to the benefits of employing informal practices. Increased intergovernmental cooperation among various levels of governance in the North also results in a growing amount of inter-governmental arrangements which are often efficient. For instance, concluded in 2003 by 3 Canadian Northern territories the Northern Co-operation Accord (NCA)(9) which had the aim of collaborative work to achieve goals common to Yukon, the N.W.T. and Nunavut agenda has paid off. Although it is questionable whether the NCA has any real impact on the northern legal landscape, the territories received substantial additional funding from the Federal government. This success of the territorial leadership was also conditioned by the ability and willingness of Northern premiers to work together.
Further, activities of indigenous NGO, like the Inuit Circumpolar Council, which represents more than 155,000 Inuit of Alaska, four regions in Canada, Greenland and Chukotka, show that this non-governmental organization despite, limitations of its mandate, is often ahead of national governments of the USA, Canada, Denmark and the Russian Federation in tackling the most urgent issues for Northern communities, e.g. POPs or climate change. For instance, the ICC’s petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, submitted December 7, 2005 (10), despite its outcome, is already breaking new ground in international environmental law and environmental rights of indigenous peoples.

Should international law, domestic law of Arctic states, trans-national law or developing practice of soft-law measures determine the direction of dealing with legal challenges in the North? Or in the future shall we work with the concept of "Arctic law" which may embrace elements and practices of several legal regimes and branches of law?
Currently, we witness some success and gaps in international law and national legal systems in dealing with Northern matters. For instance, the UN Convention Concerning the Protection of the World Cultural and Natural Heritage (November 16, 1972) helps to protect several thousand rock cravings created by the ancestors of Saami in Alta, Norway. These carvings have been on the World Heritage List since 1985. Canada ratified this Convention in 1976. However, the fossil forest on Axel Heiberg Island (Nunavut) and the ancient rock carvings near Kangiqsujuaq (Nunavik) are still top candidates for World heritage sites status (11). Sadly in August 2006 Canada's only major 1,500 year old Arctic petroglyph site at Qajartalik Island near Kangiqsujuaq was vandalized (12).
Existing international and domestic legal regimes which somehow deal with Arctic matters show that there is no unanimous solution to the question of which legal measures are most efficient in dealing with current and future legal challenges in the North, as it will depend on the circumstances of each case. Even though today, the efficiency of hard law in solving Arctic matters is debatable, and "Arctic law" as a distinct area of law has a long way to be defined or developed, there is no disagreement that law, in fact, does matter in addressing Northern challenges in the Arctic as a whole, and in the legislative practices of Arctic and other states with interests in the Circumpolar region. However, it is still a challenge for many Arctic states how to enforce existing legislation. Further, I'll look at some Canadian examples to show the role of law in addressing challenges in the Arctic.

Ownership claims: Hans Island

An ongoing dispute between Canada and Denmark over Hans Island exemplifies the challenge of application of national legislation and other local practices to support claims for ownership over the island by each side, because of the partial insufficiency of existing international arrangements.
Due to the sovereignty dispute over Hans Island, the Island which is located between Ellesmere Island (Nunavut) and Greenland was excluded from a 1973 agreement between Canada and Denmark on the delimitation of the continental shelf between Greenland and Canada. The continental shelf line was drawn up with exclusion of the Island which consequently does not have an exclusive economic zone or a territorial sea. The current dispute includes the Island only. The Danes strengthened their claim over the Island by means of "effective occupation"- raising the Danish flag over the Island for several years and repeated visits to the Island. Canada contests this claim and has shown similar activities on the Island. There is speculation that the Island is of interest to both sides because of probable natural resources, e.g. oil which may be located on or near the Island. The argument on both sides is that the Inuit of Canada and Greenland have been using this Island for centuries as an area for polar bear hunt. Some Inuit in Nunavut state that Canada can claim the Island on the basis of historic use by Canadian Inuit of lands on the Queen Elizabeth Islands which include Hans Island. In September 2005, Denmark and Canada agreed to develop a protocol for managing Hans Island, revealing that both countries continue to pursue their claim and have agreed to disagree about the Island's ownership (13). The dispute may be settled through the UN. Interestingly, despite this dispute, in February 2006 Canada issued to geologist Mr. J. Robins a five year prospector's permit with exclusive right to explore the entire Island (14).

Sovereignty claims over the Northwest Passage

An ongoing disagreement mostly among the EU, the USA and Canada over the Northwest Passage (claims to the waters of the Arctic Archipelago) is another example of a legal challenge. The melting of the Northwest Passage and increasing transportation in the Arctic Ocean reveal the need for Canada and the USA to resolve the unresolved matter: who controls the Passage? This dispute is also bolstered by an expected future boom in resource exploration including offshore and the question of environmental control in the area.
The U.S. does not recognize Canada's sovereignty over the Passage and considers it as "international waters." There have been incidents of foreign ships and submarines sailing through Canada's Arctic waters without the consent or even the knowledge of the Canadian Government (e.g. U.S. super tanker

the SS Manhattan sailed the passage escorted by a Canadian icebreaker in 1969, and in 1970; the U.S. icebreaker Polar Sea crossed the passage in 1986; in 2005 a U.S. nuclear submarine traveled to the North Pole, possibly via the Northwest Passage).

Canada refers to the Passage as "internal waters." To assert its sovereignty Canada needs to provide all year-round military presence in the air, sea and on the ground. Commitments made by the current Conservative government to build a deep water sea port in Nunavut, to create a new military training centre, to improve undersea and aerial surveillance, to increase the number of Canadian rangers and to purchase three naval ice breakers should help to achieving this goal. Further, to support its claim, within the last few years, Canada started extensive military exercises in the North. For instance, in August 2006 Operation Lancaster which included navy, army and air force exercises in the Passage was one such undertaking in an attempt to show the international community Canadian capability to defend its North. Furthermore, the Inuit who live in this area also support Canada's efforts to establish control in the Passage. According to Malachi Arreak of Pond Inlet, which is the nearest community to the Passage, "Lancaster Sound is our grocery store, so stop saying it's an international waterway…This is our home and native land" (15). This is also supported by the Nunavut Land Claims Agreement (NLCA) 1993 which affirms Canada's sovereignty over the waters of the Arctic Archipelago on the basis of Inuit use and occupancy (Art. 15.1.1). Prime Minister Harper emphasized during his August 2006 trip to the North, that "Canada intends to enforce its rights under the law of the sea" convention (Art.234 of the UN Convention on the Law of the Sea (UNCLOS) allows Canada as a costal state to exercise environmental protection of the Passage by means of adoption and enforcement of environmental laws and regulations within 200 nautical mile limit exclusive economic zone). Mr. Harper said: "We must be certain that everyone who enters our waters respects our laws and regulations, particularly those that protect the fragile Arctic environment"(16).

The existing array of legal arguments (17)(18) show that it is not clear which legislation is better to use, for example, in order to protect the Passage from consequences of global security threats. Some authorities argue that compared to international law Canadian legislation presents a stronger case in protecting defence interests within the disputed area (19). If the Northwest Passage is an international strait - "international waters," as the U.S. and some other countries claim then it is possible for various states to send their ships, submarines, including possible "terrorist" warships, or vessels carrying toxic cargo to sail through the Passage without notification. This may have serious implications for global security, Canadian claims of control over the area, environment and social disruptions.

Existing legal debate also reveal weaknesses in the legal position of Canada as a coastal state and potential user states, insufficiency of Canada's *Arctic Waters Pollution Prevention Act* (AWPPA) and Canada/USA 1988 agreement on "Arctic Cooperation" to resolve this matter. G. MacNeil suggests that rather than conforming to the arguments of the both sides, the development of an emerging unique Arctic regime may help to deal with this issue (20). Although legal arguments of Canada and the USA to support claims over the Passage has not changed, the global war on terror after the events of September 11, 2001 suggest that it is not helpful for purposes of global security to claim the Northwest Passage as "international waters." Further, as D. Pharand notes, "[…] because of the remoteness of the region and the difficulties of navigation, comparatively little use for international navigation might be sufficient to make the passage an international strait" (21). The legal challenge remains, but the tendency may be towards improved Canadian–U.S. cooperation in this area. For instance, in April 2006 the North American Aerospace Defense Command (NORAD) agreement was renewed and now it includes maritime surveillance (22).

These disputes are relevant to the matters of control over potential resource areas and exploration licenses in Canada-U.S. disagreements over maritime boundary in the Beaufort Sea (which has a potential of substantial oil and gas reserves), and the border at the bottom of the Alaska panhandle. Questions of border delineation across Arctic waters are becoming of utmost importance because of increasing accessibility to the last frontier. They also bring to the agenda political and legal issues of ownership rights and the supremacy of application of legislation of Arctic states in the disputed areas (e.g. who can fish, who can drill, what permits to ask for etc). Furthermore, legal claims in the Arctic may extend beyond the eight Arctic states and include other countries with interests in the region. There are, however, some developments which may bring a challenge to existing international and domestic legal regimes.

Icebergs
In 2004 two proposals by British entrepreneurs to steer icebergs from Canada's East Coast to Europe (e.g. Spain and Portugal) raised the question of ownership and pointed to a potential conflict between Canada and Greenland in that regard. According to some estimates, a 50-million-tonne iceberg can provide about $3 million worth of fresh water. Greenland produces the largest amount of icebergs in the world. Most icebergs originate in Greenland and drift along the coasts of the Canadian province of Newfoundland and Labrador. If in the future iceberg-trade becomes a reality than it will need further legal clarification as to who owns icebergs and should control this trade, including some regulations on resource sharing (for example, Canada sells to the EU icebergs that drifted from Greenland) (23).

Claims over the North Pole
Canada and Denmark disagree with the Russian Federation over the seabed jurisdictions on the underwater mountain Lomonosov Ridge. In accordance with the UNCLOS, which covers seabed claims, Canada has by December 7, 2013 to submit evidence which will help to determine the extent of its continental shelf over which it exercises exclusive sovereign rights, including potential underwater reserves of oil, gas and minerals. Canada now conducts surveys and mapping in the area to identify the limits and boundary of its undersea continental shelf that lie beyond the 200-nautical mile EEZ. Denmark ratified UNCLOS in 2004 and has to put forward its claims towards potential areas and provide data for a submission to the UN by November 16, 2014. The Russian Federation ratified UNCLOS in 1997 and has to prove by 2007 that the Lomonosov Ridge is a continuation of the Siberian continental shelf.
On June 27, 2005 Canada and Denmark signed a MOU (representatives from Natural resources Canada and the geological survey of Denmark and Greenland). They agreed to collaborate on an undersea data collection project and conduct surveys in areas north of Ellsemere Island and Greenland (24).The MOU helps both countries to improve their understanding of this area while reducing research costs. In 2006 a joint Canadian-Danish expedition started to conduct such geological surveys.

Governance Arrangements in the Canadian North
Nunavut ("our land") was carved out of the N.W.T. in 1999. The system of public government (mirroring the mainstream system) with an indigenous majority (about 85% of the population are Inuit) was put in place. Increased jurisdictions over land management and resources, housing, economic development etc. show that the territory is often unable to assume liability and exercise existing jurisdiction without substantial funding from the Federal Government. This is a challenge in implementation of many land claim agreements in Canada's North, including challenges connected with the Federal Government's inability to meet its obligations under the Land Claims. Existing LCAs reflect inadequate mechanism for their implementation. They have been criticized for a weak protection of socio-economic rights, women rights etc. That is why it is not accidental that three Canadian Northern territories negotiated devolution agreements with the federal government (Yukon 2003, the N.W.T. 2006, and Nunavut is expected to do so by 2008). The goal of each territory is to achieve fiscal and economic sustainability. These pose challenges to local legislative practices and regulations. For instance, for Nunavut, this devolution agreement and transfer from Ottawa of responsibility for the management of oil, gas and mineral extraction on Crown lands and offshore, is of particular significance for the territory's economic independence and self-sustainable future (25).
Devolution processes can be observed in recent constitutional developments regarding Inuit within the province of Quebec and the province of Newfoundland and Labrador. For instance, the Nunavik ("place to live") project in Northern Quebec embraces about 10,000 Inuit living in 14 coastal communities. In June 2003 the Inuit birthright corporation (Makivik) signed a framework agreement with the Province of Quebec establishing a formal process for signing a final agreement dealing with the merging of the main institutions of Nunavik, created under the James Bay and Northern Quebec Agreement (JBNQA) of 1975, into a single entity. Thus, a unified public governmental structure will be composed of: the Nunavik government and a Nunavik Assembly. Negotiations of the Agreement in Principle have now been completed by the Makivik Corporation, Quebec and Federal governments. In addition to this development, since the Inuit claims to offshore areas were excluded from the negotiations of the

JBNQA, the Nunavik Inuit Land Claims Agreement will resolve the outstanding aboriginal claims of Inuit in the Nunavik Marine region - the area of offshore Quebec and an area offshore of Labrador (26).
In January 2005, the 5,300 member Labrador Inuit Association, the Federal Government and the Government of the province of Newfoundland and Labrador signed a comprehensive land claims agreement. On December 1, 2005 Nunatsiavut ("Our beautiful land") and the Nunatsiavut government, (which will consist of an Inuit self-governing regional authority and five Inuit community governments) became a legal and constitutional reality. Compared to Nunavut and Nunavik, the Nunatsiavut Land Claims agreement provides for a form of explicit Inuit self-government, rather than public government with "an indigenous face" (27).
These developments in the Canadian North show that existing Land Claims, so-called modern treaties with indigenous groups, are undergoing the process of re-evaluation and further constitutional and political evolution. These processes are partially driven by aspirations among indigenous groups to take more responsibility for their lands and regain control over their lives by realization of their right to self-determination. Another major factor is the focus on economic self-sustainability and need for less dependency on Federal funding, as well as the necessity to become more flexible in addressing local and global challenges. Within the existing constitutional framework, the challenge is how to make different developing governance arrangements more efficient and sustainable in practice while contributing to sustenance and protection of indigenous cultures. The scope and variety of land claims negotiations and existing agreements in the Canadian North do not solve the core issue of "legal sustainability."

Conclusion

This paper attempted to show that there is no simple solution on the issue of the definition what "Arctic law" is and whether we need a comprehensive legal regime for the Arctic as a distinct region. Further developments in the national legislation of the Arctic States and international law and the strengthening of jurisdiction of institutions of Arctic ordering may point to the necessity of negotiation of legal arrangements via an Arctic treaty system / Constitution etc. Considering current developments, there is a need to enhance cooperation and establish a better dialogue among legal scholars dealing with Arctic matters and with representatives of other social sciences and policy makers in addressing legal challenges in the North.

References

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1. "Legal Systems" Lead Author Nigel Bankes. Chapter 6. In AHDR Akureyri: Stefansson Arctic Institute, 2004.
2. Donald R. Rothwell. Chapter 6. In The Polar Regions and the Development of International Law. Cambridge: Cambridge University Press, 1996.
3. Oran R. Young. The Internationalization of the Circumpolar North: Creating a Course for the 21st Century, 2000:5.
4. 7th Conference of Parliamentarians of the Arctic Region. Kiruna, Sweden, 2-4 August 2006.
5. Seminar on Multilateral Environmental Agreements and their relevance to the Arctic. Arendal, Norway. 21-22 September 2006.
6. Statement of 7th Conference…2006.
7. Comment by Mr. Pierre Rousseau.
8. Harold H. Koh. Foreword. In M-C Cordonier Segger and C.C. Weeramantry eds. Sustainable Justice. Reconciling Economic, Social and Environmental Law. Leiden/Boston: Martinus Nijhoff Publishers 2005:V.
9. Northern Co-operation Accord. Cambridge Bay, Nunavut. September 3, 2003.
10. See: www.inuitcircumpolar.org
11. Jane George. World heritage designation brings money, protection. *Nunavut, Nunavik sites could use status to attract visitors, discourage vandals.* Nunatsiaq News. July 28, 2006.
12. Randy Boswell. Ancient Arctic rock carvings vandalized: Petroglyphs of faces: Archaeologist suspects religious motives. National Post. August 26, 2006.
13. Joint Statement. New York. September 19, 2005.

14. Prospector's permit gives man exclusive rights to Hans Island for five years. National Post. August 15, 2006.
15. Bob Weber. Northwest Passage 'grocery store,' not international waters, say Inuit. Canadian Press. August 20, 2006.
16. Graham Fraser. Arctic defence: Sure, he missed the AIDS conference, but Stephen Harper made waves in the Arctic this week: But were the PM's tough words on Arctic sovereignty anything more than just mere talk? Toronto Star. August 19, 2006.
17. Michael Byers and Suzanne Lalonde. Who controls the Northwest Passage? A discussion paper prepared in advance of a conference on "Canada's Arctic Waters in International Law and Diplomacy," Ottawa, June 14, 2006 at 7-26.
18. Donat Pharand. Our sovereignty is melting: Canada has a solid claim to its Arctic waters; but we must work hard to keep it from shipping away. Ottawa Citizen. August 23, 2006.
19. Jackie Wallace. Taking the Northwest Passage. *Experts stress the importance of answering Arctic sovereignty questions sooner rather than later.* Interviews with Michael Byers and Franklyn Griffiths. Canadian Geographic magazine May-June 2006 on-line.
20. Gillian MacNeil. The Northwest Passage: Sovereign Seaway or International Strait? A Reassessment of the legal status. Dalhousie J. Legal Studies 15(2006):204-240.
21. Pharand 2006. *Ibid.*
22. Sieff, Martin. "NORAD renewal good news for U.S." Intelligence and Terrorism Features. May 10, 2006. www.news.monstersandcritics.com/intelandterror/printer_1162933.php
23. Randy Boswell. Icebergs could add fuel to the fire. *Can Canada sell ice that originated in Greenland?* National Post. March 31, 2004 A6.
24. MOU. Ottawa, June 27, 2005. Canada and Denmark Agree in Joint Survey. News Release. July 14, 2004.
25. About developments in Nunavut see: Natalia Loukacheva. The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut. Toronto: University of Toronto Press, 2007.
26. In Nunavik see: www.makivik.org
27. In Nunatsiavut see: www.nunatsiat.com