

Introduction

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THIS VOLUME OF essays is principally concerned with the recognition of the property interests (ownership interests and use rights) of indigenous peoples within the settler State, with some focus on the property interests of the Saami within the three Nordic countries of Norway, Sweden and Finland. The essays are the product of a multi-year collaboration between researchers from Nordic countries and elsewhere, generously supported by the Nordic Council of Ministers.¹ The particular impetus for the project came from the ongoing deliberations between the Nordic States and the Saami peoples of those three States on the possible adoption of a Nordic Saami Convention, an international treaty between the Nordic States to be agreed to by the Saami, to provide a framework for the recognition of the Saami as an indigenous people separated by international boundaries. A draft of a proposed Nordic Saami Convention was released in 2005² and negotiations to try to finalise a text resumed in 2011 with a view to concluding an agreement by 2015. This volume seeks to provide a broader context for examining the draft Convention. In addition, the authors of the various chapters identify issues that the negotiators might wish to consider (or re-consider) as they seek to finalise the text.

The Saami people are an indigenous people inhabiting northern Norway, Sweden, Finland and the Kola Peninsula in the Russian Federation. Some Saami communities are to be found along the coast (fishing, coastal or sea Saami), while others pursue reindeer herding in forest areas (forest Saami) or migrate with their herds between the mountains and coastal areas (mountain Saami).³

¹ For information on the Nordic Council see <<http://www.norden.org/en/nordic-council>>.

² *Nordisk samekonvensjon: Utkast fra finsk-norsk-svensk-samisk ekspertgruppe* (Oslo, Kopi og distribusjonsservice, 2005). Unofficial English translations of the draft Convention are available from the Saami Council website at <www.saamicouncil.net> and in (2007) 3 *Journal of Indigenous Peoples Rights* 98. The draft Convention was part of a larger report. That entire report has not been made available in translation but some parts have. Eg, Annex III to the report dealing with the Saami right of self-determination is available as J Henriksen, M Scheinin and M Åhrén, 'The Saami People's Right to Self-Determination' (2007) 3 *Journal of Indigenous Peoples Rights* 52.

³ M Åhrén, 'Indigenous Peoples' Culture, Customs, and Traditions and Customary Law—The Saami People's Perspective' (2004) 21 *Arizona Journal of International & Comparative*

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As James Anaya, the United Nations Special Rapporteur on the rights of indigenous peoples, recognises, the Saami are traditionally organised around the *siida*,⁴ that is

a local organization that plays an important role in the distribution of lands, water and natural resources. Within the *siida*, members had individual rights to resources but helped each other with the management of reindeer herds, hunting and fishing. On the basis of these structures, the Sami developed sophisticated systems for land distribution, inheritance and dispute resolution among *siida*. Although historical developments have weakened the Sami people's traditional patterns of association, the *siida* system continues to be an important part of Sami society.

Divided by international boundaries, and with the mountain Saami following the regular seasonal migration of their herds, the Saami of these four States have long been the subject of bilateral international treaties dealing with the terms on which they can move across the landscape with their herds. The most famous of these agreements is the so-called Lapp Codicil of 1751, annexed to the Strömstad Treaty between Denmark (Norway) and Sweden (Finland).⁵ Thus the Saami have long been objects of international law. Broderstad, in chapter six of this volume, provides an account of the evolving nature of treaty relations between Norway and Sweden dealing with Saami reindeer-herding rights.

But could the Saami also be subjects of international law in the sense of participating in generating the legal norms that apply to them, in the same way that States, as subjects of international law, generate both treaty norms and norms of customary international law? In the mid-1980s, the Saami Council, an umbrella organisation of the Saami organisations of Norway, Sweden, Finland and Russia, proposed that the four States along with the Saami should develop a Saami Convention to address the situation of the Saami as an indigenous people divided by international boundaries. The Nordic Council took up this idea in 1995 and appointed a committee to review the issue. The committee recommended that the governments proceed by establishing an Expert Group. They did so, establishing such a group in 2002 comprising one member appointed by each of the three States and one member appointed by each of the three Saami parliaments

Law 63, 65–66; Report of the Special Rapporteur, James Anaya, on the rights of indigenous peoples on the situation of the Sami in the Sápmi region of Norway, Sweden and Finland, A/HRC/18/35/Add.2, 6 June 2011, para 5.

⁴ Anaya, above n 3, para 6.

⁵ JG Elbo, 'Lapp reindeer movements across the frontiers of northern Scandinavia' (1952) 6 *Polar Record* 348. There is an English translation of the Codicil available on the website of the Arctic Centre at <<http://www.arcticcentre.org/loader.aspx?id=50138dda-3009-4189-9b76-4b9df3f5dcde>>.

of the three States.⁶ The Expert Group presented its consensus report, comprising a draft text and a commentary, to the three governments and the Saami parliaments in November 2005. The proposed text has four official languages (Finnish, Norwegian, Swedish and Saami). An unofficial English translation has also been made available.⁷

In addition to a Preamble, the draft comprises seven chapters or groups of articles as follows:

- Chapter I, the general rights of the Saami people (including clauses addressing the right of self-determination and non-discrimination, as well as a clause dealing with the recognition of Saami legal customs)
- Chapter II, Saami governance
- Chapter III, Saami language and culture
- Chapter IV, Saami right to land and water
- Chapter V, Saami livelihoods (with specific clauses dealing with reindeer husbandry)
- Chapter VI, the implementation and development of the Convention (including clauses dealing with an implementation committee, as well as an article (Article 46) requiring the State Parties to make the provisions of the Convention directly applicable as national law)
- Chapter VII, final provisions (dealing with entry into force, etc, but with two unusual provisions stipulating that the Convention should be submitted to the three Saami parliaments for approval and that ratification may not occur unless and until the three Saami parliaments have approved the text).

Each of the three States subsequently appointed a committee or similar body to prepare an assessment of the draft Convention. Those assessments focused on the extent to which the provisions of the Convention codify or go beyond the obligations of States as a matter of customary international law, and the extent to which domestic legislation and practices might have to be changed to accommodate the provisions of the draft Convention were

⁶ The Saami parliaments are unique Saami representative bodies in the three States. Anaya (above n 3, para 37) refers to them as principal vehicles for Saami self-determination. It will be observed that the three Nordic States and the Saami elected to proceed without involving Russia. T Koivurova, 'The Draft for a Nordic Saami Convention'(2008) 6 *European Yearbook of Minority Issues* 103, 109, explains that the involvement of Russia was simply too difficult given Russia's general stance in relation to the recognition of indigenous people in UN fora and the reality that there are numerous indigenous peoples in Russia, making it difficult for the Russian Federation to become a party to an international convention focusing on the rights of the Saami. On the Nordic Saami parliaments, see K Myntti, 'The Nordic Saami Parliaments' in P Aikio and M Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Åbo Akademi University, 2000) 203–21.

⁷ Above n 2.

it to enter into force.⁸ The three States indicated in September 2007 that they were prepared to enter into negotiations based on the draft text, and held the first negotiating session in March 2011.

Of the three States only Norway is a party to Convention No 169 of the International Labour Organisation Concerning Indigenous and Tribal Peoples in Independent Countries ('ILO 169').⁹ Both Sweden and Finland have considered ratifying the Convention, but one of the key obstacles for both States has been a concern about the interpretation and implementation of the land and resource provisions of the Convention (Articles 13–19), and the changes that the Convention might require in domestic law and practice. Some of the implications of becoming a party are well developed by Hans Petter Graver and Geir Ulfstein in an opinion prepared for the Norwegian Parliament (the Storting), in which they assess whether the draft Finnmark legislation satisfied Norway's international obligations under both the International Covenant on Civil and Political Rights¹⁰ and ILO 169.¹¹ Given this background, it is hardly surprising that the members of the Expert Group found it particularly difficult to reach consensus on the land and resource provisions of the draft Convention.¹² However, the Group did reach agreement (although the Finnish Government appointees—each member had a substitute—to the Group indicated in a covering letter that it was only with difficulty that they had been able to accept some of the provisions of the draft, including the Land and Resource provisions of Chapter IV).

Chapter IV comprises seven articles (Articles 34–40). Article 34 deals with the recognition of Saami ownership and use rights, while Article 35 deals with the protection of those rights. Articles 36 and 37 may also be paired together: Article 36 deals with the utilisation of natural resources, and Article 37 with Saami rights to compensation and profit sharing as a result of resource exploitation. Article 38 extends the provisions on ownership, protection and resources to fjords and coastal areas, and has a

⁸ The committee reports were all prepared in the respective national languages of the three States. The authors of the different chapters in this volume benefited from being able to review unofficial translations prepared as follows: the Finnish report (translation prepared by Timo Koivurova, Leena Heinämäki and Tanja Joona); the Norwegian report (translation of Final Remarks prepared by Susann Skogvang); a summary of the Swedish report (translation provided by Christina Allard).

⁹ International Labour Organisation Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries, Geneva (adopted 25 June 1989 and entered into force 5 September 1991) (1989) 28 *International Legal Materials* 1382. Indeed, Norway was the first country to ratify.

¹⁰ 16 December 1966, 999 UNTS 171.

¹¹ HP Graver and G Ulfstein, 'The Sami People's Right to Land In Norway' (2004) 11 *International Journal on Minority and Group Rights* 337.

¹² M Åhrén, 'The Saami Convention' (2007) 3 *Gáldu Čála—Journal of Indigenous Peoples Rights* 8, 27. Åhrén was the nominee of the Swedish Saami parliament on the Expert Group.

special clause dealing with access to quota resources. The final two articles are also linked in so far as they recognise the right of the Saami parliaments to be engaged in the co-determination of the lands and resources of traditional use areas (Article 39) and environmental management of these areas (Article 40).¹³ Of course these are not the only provisions of the draft Convention that have a bearing on the land and resource interests of the Saami people. As subsequent essays in this volume will show, other related and crucially important provisions of the draft include certain provisions of the preamble that emphasise the foundational importance of land and waters for Saami culture. Thus Article 3 acknowledges the Saami right to self-determination (addressed in this volume by both Koivurova and Heinämäki); Article 4 identifies the rights-holders, ie those covered by the Convention (addressed in this volume by J Joona and T Joona); Article 9, deals with the recognition of Saami legal customs (addressed here in the chapters by Ravna and Helander-Renvall); Article 16 the involvement of Saami parliaments in matters of importance (also addressed by Heinämäki); and Part V of the Convention dealing with Saami livelihoods and especially reindeer husbandry (addressed by both Ravna and Allard).

The discussion of the draft Convention serves as the backdrop to the current volume. It confirms the importance of land and resource rights for indigenous people, and it also confirms that the recognition of these rights by the settler State may prove to be very contentious. But, difficult as these issues are, it is apparent that they must be resolved to the satisfaction of all concerned—the three States and the Saami—if the Convention is to be concluded and ratified.

This volume is divided into four parts. Part One serves to place discussion of the recognition of indigenous property rights by settler States within a broader international and theoretical context. Part Two of the volume locates the draft Convention in the context of international law, while Part Three examines aspects of the status of Saami land rights within each of the Nordic States. Part Four concludes the volume with a series of comparative essays examining the treatment of indigenous property rights within different settler States, as well as an essay dealing with gender equality issues in the context of the recognition of indigenous rights.

Part One comprises essays by Nigel Bankes and Jonnette Watson Hamilton (both from Calgary, Canada) and Jeremy Webber (Victoria, Canada). Bankes' essay leads off the volume by examining the different justifications that have been offered for recognising the property interests of indigenous peoples within settler societies. Bankes identifies three lines

¹³ For a more detailed analysis of these provisions, see Åhrén, *ibid*, 26–30; and N Bankes, 'Indigenous Land and Resource Rights in the Jurisprudence of the Inter-American Court of Human Rights: Comparisons with the Draft Nordic Saami Convention' (2011) 54 *German Yearbook of International Law* 231.

of argument. One, drawing on the doctrinal content of domestic laws of the settler State, offers three distinct reasons why the settler State should recognise the property rights of indigenous peoples. One reason begins with the observation that indigenous communities governed themselves in accordance with their own laws before the acquisition of sovereignty by the settler State. Those laws survived the acquisition of sovereignty unless expressly erased by the new sovereign, and thus indigenous property interests established in accordance with those laws continue and should be recognised by the settler State. Another justification starts with the proposition that all legal systems recognise that actual occupation of lands provides a basis for the acquisition of rights by virtue of legally-recognised possession leading to title. All that is necessary in order to recognise an indigenous property interest in the settler State is to apply the norms of the settler State in a non-discriminatory way to the occupation of territory by indigenous people. A third justification has emerged more recently, suggesting that neither of the previous justifications is entirely convincing, and proposing instead a *sui generis* approach, drawing on the relationship between the settler State and indigenous societies, and thus the idea of inter-societal law.

A second line of argument in the literature seeks to justify the recognition of aboriginal property interests by drawing upon the doctrinal categories of international human rights law. The arguments here are wide-ranging and draw upon a number of different human rights norms, including the right to self-determination and the right of a people not to be deprived of their means of subsistence, the right to equality and the correlative duty of non-discrimination, and the right to culture and, through that, the right to be connected to traditional territory.

A third line of argument emerges from the writings of political theorists such as James Tully. The argument here is that settler societies should recognise indigenous property interests principally on the ground that indigenous communities never consented to the alienation of their traditional territories. Bankes concludes his chapter by addressing the right to restitution for past dispossessions. It is one thing to argue that a settler State has a continuing duty to recognise the property interests of indigenous communities if they have never been dispossessed of their lands, or if title to the lands is vested in the State or an entity of the State, but it is not so obvious that the duty to recognise indigenous property interests carries over to the situation where the lands and territories in question are held by settlers, and perhaps have been for generations, as a result of historic acts of dispossession.

Watson Hamilton's contribution 'Acknowledging and Accommodating Legal Pluralism: An Application to the Draft Nordic Saami Convention', endeavours to set the draft Convention within the broader context of legal pluralism (multiple legal orders within a given social space), and in doing so situates legal pluralism within the normative theories of recognition, reconciliation and transitional justice. Watson Hamilton describes three waves

of legal pluralism and engages with the question of how multiple legal orders, including those of the indigenous community, the settler State and international law, 'fit together'. Recognition and reconciliation are both terms that are widely used to describe the emerging relationships between settler societies and indigenous peoples, but, as Watson Hamilton notes, both terms are freighted with different meanings. Thus, for some, recognition by the State of indigenous status is a hegemonic act by the settler State, more concerned with self-legitimation than the legitimation of the other. Reconciliation may be process-orientated or outcome-orientated, with outcome-orientated versions of reconciliation ranging from peaceful coexistence to a shared comprehensive vision. The latter, however, suggests a 'prior social unity' which may be fictional. Western liberal democracies are less comfortable using the language of 'transitional justice' in describing emerging relationships with indigenous peoples because of the term's associations with regime changes and gross human rights violations, but it may provide a useful vocabulary both to acknowledge the past and to construct a shared future.

Whatever conceptual framework is adopted, legal pluralism is a crucial component of recognising the existence of partially autonomous societies; and pluralism requires that we consider the relationship (interlegality) between these different orders. Is the relationship hierarchical, or is it respectful of autonomy? In considering this question Watson Hamilton draws important insights from the literature and applies them to the draft Convention. She suggests that the draft Convention does not offer a consistent view of interlegality. Some of the provisions privilege Saami norms (especially Article 43 acknowledging an important role for agreements between reindeer-grazing communities) and create space for autonomy (Article 3 on self-determination), while other provisions seem less deferential to those norms (eg the due regard and due respect language found in a number of provisions, including Articles 9, 34 and 38).

Jeremy Webber continues the discussion of legal pluralism in his contribution on the 'Public-Law Dimension of Indigenous Property Rights'. Webber emphasises that indigenous property rights can never be severed from the legal and political orders that created them. 'Legal pluralism,' he suggests, 'is intrinsically bound up with institutional pluralism'. Thus the recognition of indigenous property interests is inevitably also a recognition of an indigenous normative order.¹⁴ Webber demonstrates this by referring to a number of examples, including decisions as to who has the right to use certain lands and resource sites and how we determine who might

¹⁴ And see K McNeil, 'Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence' in H Foster, H Raven and J Webber (eds), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver, UBC Press, 2007) 128, 130–31; and John Borrows, 'Let Obligations be done', *ibid*, 201, 209.

be the current ‘owners’ of traditional lands. Inevitably, in answering these questions, we must turn to the normative order of the indigenous society. Those norms may be allusive and flexible but they are still norms, and they provide important mechanisms of change for indigenous societies.

For Webber, then, the division between public law and private law is a false dichotomy, nothing more than an artefact of our construction of legal categories.¹⁵ And this is true not only of property as a legal institution, but also of other well-known institutions which we often label ‘private’. These institutions include the corporation, forms of co-ownership, the trust and the condominium. One of the implications of all of this in the present context is the suggestion that we should be careful, when recognising indigenous title, not to erase these underlying normative orders by using institutions such as land corporations and land trusts transplanted from the legal system of the settler State. There is a risk if we do so that such institutions will focus on accountability to others (eg governments), and on discharging private and proprietary roles rather than broader governmental roles. This theme re-emerges later in the volume in the essays by Mascher and Bankes.

Part Two of the volume sets the draft Nordic Saami Convention in the broader context of international human rights law and the transnational characteristics of the Saami people, with essays by Timo Koivurova and Leena Heinämäki (both from Rovaniemi, Finland) and Else Grete Broderstad from Tromsø, Norway. In his essay, entitled ‘Can Saami Transnational Indigenous Peoples Exercise Their Self-Determination in a World of Sovereign States?’, Koivurova traces the development of the right of self-determination in international law from the classical period of decolonisation following World War II and the adoption of common Article 1 of the two international human rights Covenants in 1966, through to the adoption of the UN Declaration on the Rights of Indigenous Peoples by the General Assembly of the United Nations in 2007.¹⁶ He suggests that the compromises adopted in moving the Declaration through its final stages (from approval by the Human Rights Council to adoption by the General Assembly) mean that self-determination for indigenous peoples must be achieved internally rather than externally. That said, this conclusion still needs to be read in the context of common Article 1 of the Covenants.¹⁷

It is widely recognised that the realisation of the right of self-determination is particularly challenging for transnational peoples. This was understood

¹⁵ See also in this context the distinction between dominium (ownership) and imperium (sovereignty), a distinction which McHugh suggests is simply a fusty distinction of western lawyers which makes little sense to others, including not only indigenous people but also political theorists: PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Rights* (Oxford, Oxford University Press, 2009) 334–35.

¹⁶ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295.

¹⁷ And see to the same effect, Anaya, above n 3, paras 32–33.

during the classical period of decolonisation; the doctrine of *uti possidetis* was developed, as Koivurova emphasises, to ensure that self-determination was realised *within* the boundaries of the colonial State and was not used to *dismantle* those boundaries. The UN Declaration largely confirms this approach in the context of indigenous peoples with its concluding provision on territorial integrity. Furthermore, the only provision of the Draft (Article 36) which addresses the situation of transnational peoples is limited to facilitating contacts between a people separated by an international boundary rather than, as Koivurova puts it, encouraging them to unite.¹⁸ Seen in this context, the draft Nordic Saami Convention is a considerable achievement since it celebrates the Saami as a transnational people and develops a vision in which it is possible to conceive of four nations co-existing within the physical space and territories of three States. There is a caution, however, in Koivurova's remarks; the draft is still a draft, and Finland in particular seems to regard the current articulation of the right to self-determination in Article 3 of the draft as too ambitious and going beyond what is required by international law.

Koivurova's concluding statement provides a natural segue to Leena Heinämäki's contribution, which deals with questions both of international law and of Finnish domestic law. Heinämäki examines the claim that the terms of the draft Convention go beyond Finland's current international commitments and as such require changes to domestic law. In this context Heinämäki discusses two central questions. The first relates to the expression of the right of self-determination in the draft Convention, and the second relates to the treatment of indigenous consent. In both cases she concludes that the draft Convention does not go beyond current requirements of international law, or at least not beyond the requirements of the UN Declaration. As to the right to self-determination, Heinämäki concludes that the way in which the right is expressed in the draft Convention is *sui generis* (in much the same way as some—eg Koivurova—argue that the reference to self-determination in the UN Declaration is *sui generis*, since, as Koivurova points out, it is qualified by the context in which it is expressed, ie the compromise provisions that Koivurova discusses in his chapter), especially in so far as it fails to mention the right of the Saami freely to determine their political status, a key element of common Article 1 of the Covenants.

As to the issue of consent, and, in particular the idea of prior informed consent, Heinämäki suggests that international law already requires not just consultation but also consent, at least in those circumstances in which government action may cause significant harm to Saami interests. Heinämäki finds support for this conclusion not only in the jurisprudence of the Inter-

¹⁸ The Declaration, Art 36. Anaya highlighted Art 36 in the introduction to his report on the situation of Saami people, *ibid*.

American Court of Human Rights, but also in the decisions of the Human Rights Committee under Article 27 of the International Covenant on Civil and Political Rights (ICCPR), and especially its *Poma Poma* decision.¹⁹

Else Grete Broderstad's essay on cross-border reindeer husbandry, subtitled 'Between Ancient Usage Rights and State Sovereignty', explores the negotiations between Norway and Sweden concerning cross-border reindeer husbandry. While focusing on the current round of negotiations, Broderstad also sketches the history of these negotiations from the Lapp Codicil of 1751 forward. The current round concluded in 2009 with a signed treaty, but the treaty has still to be ratified, giving rise to a set of questions as to why these negotiations have proven to be so difficult. In responding, Broderstad offers two alternative framings to explain the difficulties. One framing is a norm-based model in which cross-border reindeer herding is seen to be based on a set of rights going back to the Lapp Codicil. This is complicated by competing norms based on national citizenship, which leads to a collision of norms. A second framing is an interest-based model which recognises that cross-border reindeer herding has elements of a zero-sum game in which Swedish and Norwegian Saami are competing for a limited grazing area and national governments respond to their domestic constituents in the resulting distributive bargaining.

Seen within this context, the Lapp Codicil, celebrated as an international instrument that recognises Saami rights (the Saami Magna Carta), is also an important source of tension between Norway and Sweden in so far as, from Norway's perspective, it represents a relic of a colonial past which created an on-going Swedish servitude over Norwegian territory. This leads Norway to seek to move beyond the rights-based claims of the Codicil and to favour more politically appropriate solutions that respond to the interests of the main domestic reindeer-herding association. Sweden remains reluctant to abandon the rights-based position grounded in the Codicil, while recognising that the procedures that it embodies are perhaps not workable. There are at least two important elements of the current unratified agreement, which are also reflected in the draft Nordic Saami Convention. First, the agreement contemplates the creation of two committees, both of which will be comprised of herders. Second, both instruments emphasise the importance of agreements between herders on both sides of the boundary, and indeed the draft Convention privileges these agreements in the event of any conflict. Broderstad emphasises the importance of appropriate procedures and institutions in situations where norms conflict.

Part Three of the volume examines issues of Saami land and reindeer-grazing rights in each of the three Nordic States: Øyvind Ravna (from

¹⁹ *Poma Poma v Peru* (27 March 2009), UN Human Rights Committee, Communication No 1457/2006, Doc CCPR/C/95/D/1457/2006.

Tromsø, Norway) looks at the position in Norway, Christina Allard (from Tromsø, Norway and Luleå, Sweden) examines the situation in Sweden and Juha Joonas (Rovaniemi, Finland) looks at the complex historical position in Finland. Two other essays complement the national coverage provided by Ravna, Allard and Joonas. Thus, Tanja Joonas (Rovaniemi, Finland) examines the definitional issues associated with Saami status and the related right to be included within the ambit of the Convention, while Elina Helander-Renvall (also Rovaniemi, Finland) emphasises the need for pluralistic approaches that recognise the importance of Saami customary norms as well as State norms.

Although focusing on Norway, Ravna's contribution deals at both the theoretical and practical levels with the important question of how indigenous people go about establishing title and use rights to their lands. This is often challenging, since indigenous peoples use land in ways different from the people of settler societies, and may not leave many visible traces on the landscape. If the indigenous culture is an oral culture, such records as exist will be the written records of the settler society, and ownership and land rights cases will be litigated in the courts of the settler society using the rules of evidence of that society. These rules have developed in light of the land use patterns and needs of the settlers, rather than the land use patterns and needs (economic and cultural) of the indigenous community. Ravna shows how Norwegian law has evolved in response to these challenges in the last couple of decades, both through important decisions (notably the *Selbu* and *Svartskog* cases)²⁰ and through an important amendment to the Reindeer Husbandry Act in 1996. This amendment reversed the onus of proof, making it necessary for landowners to prove that there is no right to herd in outlying fields included in a designated reindeer-husbandry area. These important developments in Norwegian law were influenced by Norway's ratification of ILO 169, but they have in turn influenced the development of the draft Nordic Saami Convention. Thus, as Ravna points out, Article 34 of the draft, drawing directly on the Norwegian jurisprudence, requires that the national legal system must be sensitive to the reality 'that Saami land and water usage often does not leave permanent traces in the environment'. There are also signs, as both Ravna and Allard recognise, that the Norwegian case law is having some influence on the Swedish courts, most notably in the recent *Nordmaling* case.

²⁰ McHugh, above n15, writing principally about Anglo settler colonies, has emphasised the important role that judicial decisions (he terms them 'breakthrough cases') can play in the national recognition of indigenous title. McHugh discusses the significance of the Norwegian cases briefly, *ibid*, 213–17. But while emphasising the importance of case law in making the 'breakthrough', McHugh also acknowledges that any follow-up may require further legislative or constitutional enactments (eg *ibid*, 310). In this respect Ravna and McHugh share common ground.

In examining Swedish law dealing with issues of Saami title and use rights, Allard focuses on the question: 'Who holds the reindeer herding right in Sweden?' Allard suggests that the treatment of this topic in Swedish law is conceptually complicated but also confused and highly problematic. The issue is complicated because the positive law, the Reindeer Herding Act, vests the reindeer-herding right in the Saami people collectively but then goes on to say that the right to herd reindeer may be exercised only by a member of a Saami village. The treatment of the topic is conceptually confused since the current legislation provides that the right which is vested in the Saami collectively is founded on immemorial prescription. This hardly seems realistic. It is one thing to say that a particular Saami village may establish a right by immemorial prescription, but quite another to say that such right vests in all Saami. According to Allard, some of the reasons for the conceptual confusion may be traced back to a view of Saami as a primitive people roaming generally about the landscape with little organisation and no internal divisions of lands. The practical difficulties with these arrangements arise when we start to pose questions such as who has standing to complain about an infringement of the right, and who has the duty to compensate in the event that herding activities cause damage to landowners.

The doctrine of immemorial prescription is still important, however, since it underlines the point that the reindeer-herding right has an independent legal basis and does not depend on statute. This is crucial in terms of the legal status of the right, since a right based on immemorial prescription is a civil law right much like any other property right, whereas an entitlement based simply on the statute is more vulnerable and affords the State (including the Saami parliament) a larger degree of discretion in dealing with such an interest.

In sum, Allard offers a number of reasons for suggesting why it might be important to re-think the subject of the reindeer-herding right. In doing so, she suggests that it would be more logical to attribute the right to the Saami village or a smaller group within the village (a *siida*). This would also bring Swedish law and practice closer to that of Norway, which interprets similar provisions vesting the reindeer-herding right in the Saami far less literally. Some convergence in Nordic law on these issues would be consistent with the sentiment expressed in the draft Nordic Saami Convention for harmonisation of rights regardless of the international boundaries.

In considering the position of Saami land rights in Finland, Juha Joonas takes an historical approach to the pattern of settlement in northern Finland, largely in order to assess whether the national definition of Saami (in Finland), combined with the definition of the rights-bearer in the Convention (which has a significant twist in relation to Finland), is sensitive to the historical record. In doing so Joonas identifies a significant problem associated with Article 4 of the draft Convention which deals with the question of

to whom the Convention applies. As drafted, the Article creates a number of alternative possibilities by which a person may become a subject of the Convention, including a language qualification and a voting qualification. However, one of the possible qualifying criteria, the criterion relating to the pursuit of Saami reindeer husbandry, applies only to those pursuing reindeer husbandry in Norway or Sweden—not Finland. Joonas suggests that the resulting definition, in conjunction with the way in which the Finnish statutory definition of Saami has evolved over the last 40 years, creates the potential for serious injustice to the original Saami inhabitants of northern Finland, the Forest Lapps.

In order to demonstrate the problem, Joonas traces the pattern of settlement in central and northern Finland, drawing attention to three developments. The first development is the incursion of settlers into Saami areas at the end of the seventeenth century. This wave of settlement served to dispossess the Forest Lapps of much of their lands and resources. At the same time, the settlers sought to stamp out the use of the Saami language. A second development was the migration of Mountain Lapps from Norway into the area, along with their large reindeer herds, during the first part of the nineteenth century. This development created additional competition for land and resources for the original Forest Lapps. The third and more contemporary development refers to the measures taken to develop a definition of Saami in Finland beginning in the 1970s. These efforts focused on language rather than livelihood. Joonas contends that this approach tended to favour Mountain Lapps (who were more likely to have retained language) and to exclude Forest Lapps. As the original inhabitants, the Forest Lapps not only suffered more at the hands of original settlers, but they were also more likely to have lost their language, both because of the longer passage of time and because they were victimised for speaking the language. As a result, Joonas suggests that Article 4 of the draft Convention, as well as Finnish domestic laws and policies, need to be revised to ensure that the draft Convention does not further perpetuate and validate a past injustice.

Tanja Joonas's contribution, entitled 'The Subjects of the Draft Nordic Saami Convention', is, in many respects, a companion piece to Juha Joonas's chapter. She too focuses on Article 4 of the draft Convention and Finnish practice in defining Saami, but her approach is less historical. Instead, Tanja Joonas works with what she identifies as a paradox or inconsistency within the draft Nordic Saami Convention. This inconsistency in her view arises from the tension between the emphasis in the draft on the unity of the Saami people, the importance of developing a unified legal approach to Saami in each of the three countries and the insistence that the border should not be seen as an obstacle, and yet, at the same time, deferring to the authority of each of the three States in critical ways to determine the scope of application of the Convention through the language of Article 4. As noted above, Article 4 prescribes four ways in which a person may

qualify as a rights-bearer under the Convention: the first criterion is language; the second criterion rests on having 'a right to pursue Saami reindeer husbandry', but only in Norway and Sweden (not Finland); the third criterion rests on eligibility to vote in elections to the Saami parliaments in each of the three States; while the fourth rests on descent from any of the above. The State plays a distinctive role in operationalising each of these criteria, even in the case of language, where, as both Tanja Joonas and Juha Joonas point out, the State (as is the case in relation to many indigenous peoples around the world) plays and has played a crucial role in validating (as in official language status) or denigrating (punishing those who speak the language) the indigenous language. Tanja Joonas concludes her chapter with a specific proposal for the amendment of Article 4.

Elina Helander-Renvall's is the last essay in this part of the volume. Helander-Renvall's essay examines Saami customary law, focusing on research carried out in Tana, in Eastern Finnmark in northern Norway. Her chapter examines customary norms in relation to reindeer herding, ptarmigan trapping, fishing and the gathering of cloudberries. Drawing on a number of different definitions of customary law generated by both anthropologists and lawyers, and working with ideas of pluralism and multiple systems of ordering, she is able to describe a number of customary rules regarding the use of lands and resources which were still prevailing at the time of her research. These rules included the idea that villages, and within the villages families and family groups, have their own specific areas of use. Such 'ownership' rights might be modified where one family ceases to use a particular area, but also by 'having friends' which might allow a person temporarily to use another's territory for hunting or fishing where necessary because of, for example, water conditions or ptarmigan movements. In this sense, the customary norms are dynamic, flexible and adaptable. In some cases this may cause a conflict between the positive law of the State which, for example, divides a river into fishing zones and assigns the right to fish in particular zones, and the customary norms which permit the visiting right described above. Helander-Renvall cautions that we need to be careful not to lose what is important about customary law through a process of State recognition, although she emphasises that an increased recognition of customary law is consistent with national and international policies favouring greater autonomy for indigenous societies.

If Part One of the volume provides one part of the context (the conceptual and theoretical) for thinking about the draft Nordic Saami Convention, Part Four provides another part of that context with a series of three chapters on developments in relation to indigenous land rights in three different parts of the world: Ecuador and Peru (Verónica Potes, Quito, Ecuador), Australia (Sharon Mascher, Perth, Australia and Kamloops, Canada) and Canada (Nigel Bankes), as well as a chapter that considers the manner in

which different instruments, including the draft Convention, deal with the equality rights of indigenous women (Jennifer Koshan, Calgary, Canada).

Potes' chapter broadens the context both geographically and conceptually. Geographically, Potes' contribution focuses on the situation of indigenous peoples in South America, a region with a strong level of participation in ILO 169, and more specifically on the situation of the Achuar people, divided, like the Saami, by an international boundary, in this case the boundary between Ecuador and Peru. Conceptually, however, what distinguishes this chapter is the introduction of the idea of the settler State as a 'plurinational State'. This term, first introduced into the Ecuadorian Constitution in 2008, reaches beyond the more conceptually limited terms 'pluricultural' and 'multiethnic' found in the earlier constitutional reforms of 1996. While the concept of the plurinational State seems to have considerable potential to decolonise power and inter-societal relations, and to replace a vertical order of domination by the settler society of the indigenous society with a more horizontal relationship, Potes, like Heinämäki in relation to the right of self-determination, is concerned to inquire into the practical effect of plurinationality, especially in relation to two dimensions: control over land and resources, and political autonomy. Her overall conclusion is that the promise of plurinationality has yet to be realised, especially within these two dimensions. This is because the State is reluctant to cede control over natural resources, especially non-renewable natural resources. Furthermore, it has proven difficult for the Achuar to take advantage of the various governmental models for achieving autonomy that are recognised in the constitution. This conclusion serves to emphasise that constitutional recognition of indigenous land and resource interests, or even more so perhaps, that recognition by an international instrument, is not itself enough; it is implementation that counts, and in the task of implementation the devil may well lie in the details.

Mascher's contribution examines 'The Australian Approach to Recognising the Land Rights of Indigenous Peoples'. Mascher's essay begins with the pivotal, paradigm-shifting, aboriginal land rights decision of the High Court of Australia known as *Mabo No 2*, before turning to the legislative response of the Australian Commonwealth Government through the enactment and subsequent amendment of the Native Title Act (NTA) 1993. Mascher points out that the legislation had multiple objectives, only one of which was to provide for the recognition and protection of native title following *Mabo*. Other objectives aimed at creating certainty of title for non-aboriginal interests and at providing a legal mechanism for determining which activities ('future acts') would still be allowed to occur on aboriginal lands. Thus, while the legislation has achieved some success and has resulted in the titling of significant areas of aboriginal lands, it has also been subject to significant criticism.

The principal responsibility for titling aboriginal lands in Australia rests with the National Native Title Tribunal, secondarily with the Federal Court. Thus, to the extent that the scheme emphasises tribunal determinations rather than negotiated agreements, it shares something in common with the procedure adopted in Norway's Finnmark Act for the recognition of the property interests of the Saami and others in Finnmark. Mascher's analysis of the implementation of the legislation and the literature on the NTA allows her to offer some useful comparative comments in relation to the draft Convention. The first relates to the right to negotiate/consent in relation to future resource activities on indigenous lands, a concept which is reflected in the NTA, the draft Convention (Articles 16 and 36) and in somewhat different terms in the United Nations Declaration (see Articles 19, 30 and 32, and also Heinämäki's essay in chapter five of this volume). Mascher's main point here is that the generalised injunction to negotiate in Australia has proven to be amorphous and difficult to enforce, thus leading her to suggest that it would be useful to particularise these requirements in the draft Convention. A second comment is that the NTA has proven to be as much concerned with property certainty for non-indigenous Australians as for (if not more than) indigenous Australians. Here Mascher comments that the same may not be true in the Nordic States, noting (and here following Ravna) that the Norwegian Government and courts in particular have been willing to accord the necessary certainty by shifting the onus of proof, at least in relation to reindeer husbandry rights. However, Mascher does offer the caution that the rather general 'due regard' language of Article 34 may not create the desired certainty for all interests. A third comment relates to the tendency of the Australian courts to fragment the conceptualisation of native title by focusing too rigidly on the language of the NTA, thereby losing in translation not only the full scope of a native title but also the broader connections between native title and the common law (as opposed to statutory) recognition of native title. But here again Mascher suggests that the language of the draft Convention and the leading role played by the Norwegian legislature and courts suggests that this may not prove to be a problem in the Nordic States.

Bankes' chapter also examines some of the implementation issues associated with State recognition of indigenous titles. Just as Mascher notes that State recognition might be quite limited and fragmented, and comes on terms and conditions in Australia, and just as Tanja Joona draws attention to the importance of defining the rights-bearer in the context of both national legislation and the draft Convention, Bankes examines similar issues in the context of modern land claim agreements in Canada. In doing so, Bankes also examines the debate that exists in the literature with respect to the titling of indigenous lands. Much of that debate has been triggered by the writings of de Soto, who, at least in the context of developing countries, has famously argued that informal, communal approaches to holding

land preclude access to capital and likely condemn the owners to poverty and under-development. On the other hand, others argue that the titling of land will lead to its commodification, potentially contrary to indigenous values, and may lead to the loss of an irreplaceable land base. Closely associated with this debate in the context of Anglo-imperial policies is the long-standing government policy of providing that indigenous lands are inalienable except to the government. Seen against this backdrop, Bankes examines how land ownership issues are dealt with in land claim agreements in Canada.

Unlike other related instruments, such as ILO 169 and the UN Declaration, as well as some national constitutions, the draft Nordic Saami Convention has little to say about the rights of indigenous women other than to recognise in the preamble that 'increased consideration shall be given to the role of women'. Koshan's contribution, 'The Nordic Saami Convention and the Rights of Saami Women: Lessons from Canada', uses this observation as a launching point for considering the merits and potential pitfalls of including express guarantees of equal rights for indigenous women in such instruments. Drawing on the work of Saami and non-Saami Nordic scholars, Koshan refers to some of the concerns of Saami women, including under-representation in Saami parliaments as well as concerns that relationships with land have been profoundly masculinised in the land rights discourse. While cautioning against essentialising indigenous women within a particular State or region, and while sensitive to concerns about the purported dichotomy between individual and collective rights, Koshan traces the decisions that led to the inclusion of a specific equality clause in the part of Canada's Constitution that recognises aboriginal rights as well as the subsequent jurisprudence on this clause. In the end, she concludes that the equality clause has had little impact in aboriginal rights litigation since it was included in 1983; however, the clause may be important in supporting legislation dealing with such matters as family violence and on-reserve property issues, both of which have been a major concern for aboriginal women in Canada. In the end, and emphasising rights as relational concepts, Koshan sides with those who take the view that individual and collective rights are congruous and not oppositional. This relational view of rights may be particularly important in recognising indigenous views of property and the role of women in transmitting and protecting rights in relation to land. Koshan's purpose in canvassing the arguments for and against the inclusion of a guarantee of equal rights for women in an indigenous rights instrument is not to urge the adoption of such a provision, but to provide 'food for thought' for those who may be in the position of considering such matters in the context of the draft Nordic Saami Convention.

The conclusion of the volume draws out some of the themes that emerge from this group of essays.

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