

Contents

<i>Acknowledgements</i>	v
<i>Summary Contents</i>	vii
<i>List of Contributors</i>	xvii

Introduction	1
<i>Nigel Bankes and Timo Koivurova</i>	

PART ONE: DOCTRINAL AND THEORETICAL FRAMEWORKS

1. Recognising the Property Interests of Indigenous Peoples within Settler Societies: Some Different Conceptual Approaches	21
<i>Nigel Bankes</i>	
I. Introduction	21
II. Doctrinal Justifications for the Recognition of an Indigenous Property Interest.....	24
A. Common Law Aboriginal Title	24
B. Customary Law Indigenous Title	26
C. The Sui Generis Approach	28
III. Justifying the Recognition of Indigenous Property Interests Through International Human Rights Law.....	30
A. The Right to Self-determination.....	31
B. The Right to Equality (The Duty of Non-discrimination).....	32
C. The Right to Culture.....	33
IV. Justifying the Recognition of Indigenous Property Interests in Political Theory: Consent.....	34
A. John Locke's Arguments	35
B. Tully's Responses	35
V. Is There a Duty of Restoration or Restitution?	38
VI. Conclusions.....	42
2. Acknowledging and Accommodating Legal Pluralism: An Application to the Draft Nordic Saami Convention	45
<i>Jonnette Watson Hamilton</i>	
I. Introduction	45
II. Recognising Legal Pluralism.....	48

A. Recognition, Reconciliation and Transitional Justice	48
B. What is Law?	56
III. Legal Pluralism and Models of Interaction.....	61
A. Models of Interaction Between Legal Systems with Greater Autonomy	65
B. Models of Interaction Between Legal Orders with Limited Autonomy	68
C. Models of Interaction Between Legal Orders in a Hierarchical Relationship.....	71
IV. Conclusion	75
3. The Public-Law Dimension of Indigenous Property Rights	79
<i>Jeremy Webber</i>	
I. Introduction	79
II. The Public-Law Dimension of Indigenous Property Rights.....	82
III. Stepping Stones to Recognition: The Compounding of Property and Governance in Non-Indigenous Legal Orders	92
IV. Conclusion	98
PART TWO: THE PUBLIC INTERNATIONAL LAW DIMENSIONS OF THE DRAFT NORDIC SAAMI CONVENTION	
4. Can Saami Transnational Indigenous Peoples Exercise Their Self-determination in a World of Sovereign States?	105
<i>Timo Koivurova</i>	
I. Introduction	105
II. Does International Law of States Give a Place for Peoples and Their Claim for Self-determination?	107
III. Have (Transnational) Indigenous Peoples Been Able to Gain Self-Determination in International Law?	114
A. Introduction	114
B. The Process to Adopt the UN Declaration	115
IV. Self-determination of Saami Transnational People	120
V. Concluding Observations	123
5. The Nordic Saami Convention: The Right of a People to Control Issues of Importance to Them	125
<i>Leena Heinämäki</i>	
I. Introduction	125
II. The Right of the Saami People to Self-determination	128
III. Actualising Saami Self-determination: Consultation or Consent?.....	134

IV. The Saami People’s Right to Participate in National and International Decision-making	141
V. Conclusions.....	145
6. Cross-border Reindeer Husbandry: Between Ancient Usage Rights and State Sovereignty.....	149
<i>Else Grete Broderstad</i>	
I. Introduction	149
II. Norm-driven Versus Interest Politics	152
A. Norm Collision and the Application Discourse.....	152
B. Questions of Sovereignty and Negotiations.....	154
III. Is the Historical Recognition of Rights Relevant Today?	156
A. Historical Recognition	156
B. The Current Relevance of the Principles of the Codicil.....	158
IV. Conflicting Interests in Grazing Areas.....	160
A. National Sovereignty and Trading Skills	160
B. State, Organisations and the Understanding of the Obligation to Consult	165
V. Why is the Negotiation Mechanism Insufficient?	169
VI. New Cooperative Approaches to Resolving Cross-border Grazing Issues	173
 PART THREE: SAAMI LAND AND REINDEER-GRAZING RIGHTS IN THE THREE NORDIC STATES 	
7. The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land.....	177
<i>Øyvind Ravna</i>	
I. Introduction	177
A. Some Characteristics of Indigenous Cultures Significant for this Analysis	177
B. The Problems to be Addressed	178
II. Historical Review of the Assessment of Saami Use of Land.....	180
A. Nomadic Communities Cannot Acquire Property Rights.....	180
B. Twentieth-century Case Law	183
III. Legislative Framework for Assessing Evidence Related to Traditional Saami Use of Land	186
A. The Draft Nordic Saami Convention and the Selbu Case.....	186
B. The Concept of Immemorial Usage in Norwegian Law	187
C. The Rule of Presumption in the Reindeer Husbandry Act.....	188

IV.	Assessing the Evidence of Saami Use of Land in Case Law	192
A.	Problems in Tracing the Use of Land	192
B.	The Use of Oral Sources as Evidence	193
C.	Requirements for the Intensity and Continuity of the Use	193
D.	Correction of Evidence from Older Sources	195
E.	The Assessment of a Good Faith Entitlement to Use the Land	195
V.	Assessing the Evidence of Saami Use of Land According to Customs and Traditions	197
A.	Traditional Use as Proof of Land Rights	197
B.	Evidence for <i>siida</i> Boundaries	199
C.	Traditional Rules Support Evidence of Use	200
D.	Opinions among Reindeer Herders on What Counts as Evidence	200
VI.	Some Conclusions	203
8.	Who Holds the Reindeer-herding Right in Sweden? A Key Issue in Legislation	207
	<i>Christina Allard</i>	
I.	Introduction	207
II.	Strengthening the Collectivist Feature of Saami Husbandry Rights	210
A.	Amendments with Respect to Who is Entitled to Carry Out Reindeer Husbandry	210
i.	Historical Ties to Reindeer-herding Families	210
ii.	The 1993 Amendment	213
B.	The Right-holder in Case Law	215
i.	Two Precedent Cases	215
ii.	An Upcoming Case	217
III.	Some Property Law Aspects	218
A.	Establishing Land Rights by Protracted Possession and Use	218
B.	Categories of Indigenous Peoples' Land Rights	220
IV.	Consequences of a Collectivist Approach	222
A.	An Absurd and Unjust Legal Application	222
B.	Traditional Reindeer Herding and the <i>Siida</i>	223
C.	Norwegian Legal Developments	224
V.	Conclusion	225
9.	The Draft Nordic Saami Convention and the Indigenous Population in Finland	229
	<i>Juha Joona</i>	
I.	Introduction	229
II.	The Settlement Areas of Finland's Indigenous People in the Seventeenth Century and Early Eighteenth Century	231

III. The 1673 Settlement Decree of Lapland	235
IV. The Arrival of Reindeer Herding Nomadism in the Current Finland Region	241
V. Finland's Definition of Saami	246
VI. Concluding Remarks	252
10. The Subjects of the Draft Nordic Saami Convention	255
<i>Tanja Joona</i>	
I. Introduction	255
II. Indigenous People in International Law	258
III. Article 4 of the Draft Nordic Saami Convention	264
A. Norway	266
B. Sweden	267
C. Finland	267
D. Conclusion	270
IV. The Division of Article 4	271
A. Applies to Persons Residing in Finland, Norway or Sweden that Identify Themselves as Saami	271
1. Use Saami as Their Domestic Language or Have at Least one Parent or Grandparent who has or has had Saami as his or her Domestic Language	271
2. Have a Right to Pursue Saami Reindeer Husbandry in Norway or Sweden	272
3. Fulfil the Requirements to be Eligible to Vote in Elections to the Saami Parliament in Finland, Norway or Sweden, or 4. are Children of a Person Referred to in 1, 2 or 3	272
V. Comparing Norway, Sweden and Finland	273
VI. Conclusion	278
11. On Customary Law Among the Saami People	281
<i>Elina Helander-Renvall</i>	
I. Introduction	281
II. Concepts and Definitions	282
III. Multiple Systems of Ordering	284
IV. Some Examples From the Field Study in the Municipality of Tana	286
V. Customary Law and National Law Systems	288
A. Case 1: Tana River Fishing in Finnmark County	288
B. Case 2: Black Forest (<i>Svartskog</i>) in Manndalen in Troms County	289
VI. Customary Law as Part of the Indigenous Right Towards Self-determination	290

PART FOUR: THE RECOGNITION OF INDIGENOUS
LAND RIGHTS IN OTHER JURISDICTIONS

12. The Achuar People in Ecuador: Towards Territorial and Political Autonomy	295
<i>Verónica Potes</i>	
I. Introduction.....	295
II. The Achuar People in Ecuador.....	296
III. The Official Land-tenure Policy on the Ecuadorian Amazonia and the Struggle of Indigenous Peoples for Recognition of their Territories	297
IV. The 2008 Constitution and the Political and Legal Scenario for Realising Indigenous Territorial and Political Autonomy.....	301
A. The 2008 Constitution: Indigenous Land and Natural Resources.....	308
B. The 2008 Constitution: Indigenous Political Autonomy.....	313
V. Conclusion.....	319
13. The Australian Approach to Recognising the Land Rights of Indigenous Peoples: The Native Title Act 1993 (Cth)	323
<i>Sharon Mascher</i>	
I. Introduction.....	323
II. Indigenous Land Rights in Australia Pre- <i>Mabo (No 2)</i>	324
III. The <i>Mabo (No 2)</i> Decision	327
IV. The Australian Response to <i>Mabo (No 2)</i> – The NTA.....	331
A. The NTA – A Broad Overview	332
i. Registration and Determination of Native Title Claims	332
ii. Validation of ‘Past Acts’ and ‘Intermediate Period Acts’	333
iii. ‘Future Acts’ Affecting Native Title Under the NTA	333
B. Outcomes of the NTA.....	339
V. Structural Criticisms of the Australian NTA	340
A. The Allocation of Certainty and Security of Title	340
B. Strict Interpretation of Legislation and a Move Away from the Common Law	343
VI. Conclusion.....	349
14. The Forms of Recognition of Indigenous Property Rights in Settler States: Modern Land Claim Agreements in Canada	351
<i>Nigel Bankes</i>	
I. Introduction.....	351

II. Reservations, Reserves and Aboriginal Trust Lands.....	352
III. Indigenous Land Holdings and <i>The Mystery of Capital</i>	355
IV. Modern Arrangements for Titling Indigenous Lands, Canada.....	359
A. Indigenous Title Lands.....	360
i. Conveyance or Recognition?.....	361
ii. The Legal Quality of the Title.....	361
iii. Constitutional Status of Indigenous Lands Under the Terms of Land Claims Agreements.....	363
iv. The Content of the Indigenous Title Under the Agreements.....	363
v. In Whom is Title Vested at the Outset?.....	364
vi. Restrictions on Alienation.....	365
vii. Conclusions.....	366
B. The Certainty Provisions of the Agreements.....	366
C. The Internal Aspect of Indigenous Lands.....	368
i. The Self-government Approach.....	369
ii. The Administrative Rules Approach.....	371
iii. Conclusions.....	374
V. Observations with Respect to the Draft Nordic Saami Convention.....	374
VI. Conclusions.....	377
15. The Nordic Saami Convention and the Rights of Saami Women: Lessons from Canada.....	379
<i>Jennifer Koshan</i>	
I. Introduction.....	379
II. The Need to Guarantee Equal Indigenous Rights for Saami Women.....	382
III. Protection of Indigenous Women's Rights in Canada.....	387
IV. Considering an Equal Indigenous Rights Clause for Women.....	393
V. Conclusion.....	398
Conclusion.....	399
<i>Nigel Bankes and Timo Koivurova</i>	
I. Customary Norms and Legal Pluralism.....	399
II. Process and Relationships.....	400
III. Lost in Translation.....	401
IV. Courts, Legislators and Conventions.....	402
V. Pushing the Boundaries of International Law?.....	402
VI. The Identification of the Rights-bearer.....	403
VII. Final Thoughts.....	404
<i>Index.....</i>	405