

Sara Fusco

Environmental Constitutionalism in the Arctic:

Indigenous Rights Recognition Through
Environmental Restorative Justice



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UNIVERSITY OF LAPLAND

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Abstract

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This doctoral dissertation examines how constitutional law responds to environmental degradation that threatens the cultural survival of Indigenous Peoples in the Arctic. It asks whether constitutional systems, understood not merely as foundational legal texts but as evolving frameworks of justice, can recognise environmental harm as cultural harm and respond effectively to the complex relationship between ecological protection and Indigenous cultural continuity.

To address this question, the dissertation develops Environmental Restorative Justice (ERJ) as an analytical framework for evaluating constitutional responses to environmental conflicts affecting Indigenous Peoples. ERJ operates through three interrelated dimensions: distributed environmental management, meaningful indigenous participation in environmental decision-making, and culturally grounded environmental impact assessments. Together, these dimensions provide a common framework for assessing how constitutional systems accommodate Indigenous rights, knowledge, and legal traditions within environmental governance.

In doing so, the dissertation highlights the role of constitutional and supreme courts, together with national legislative mechanisms, in shaping culturally responsive interpretations of environmental law. Grounded in rights-based constitutionalism, it argues that constitutions are not static blueprints but compromissory legal frameworks capable of evolving through constitutional interpretation, legislative development, and dia-

logue with Indigenous legal traditions and international human rights law. Within this framework, culture is understood not merely as a symbolic or representational right, but as a constitutionally protected collective interest, particularly where environmental degradation threatens Indigenous identity, cultural continuity, and intergenerational relationships. In this respect, ERJ does not replace existing constitutional doctrines; rather, it provides an evaluative framework through which constitutional systems can better accommodate plural conceptions of justice and strengthen the constitutional legitimacy of environmental governance affecting Indigenous Peoples.

Keywords: Indigenous rights; environmental justice; restorative justice; constitutional law; Arctic

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This dissertation is the outcome of several years of study, research, and reflection. Like many doctoral projects, it has been shaped not only by the answers I found, but also by the questions that continued to emerge along the way. Many of those questions remained open, and perhaps they always will. Rather than seeing this as a limitation, I have come to regard it as one of the most valuable aspects of legal research.

Throughout this journey, I often returned to the original meaning of the word culture, from the Latin *colere*, to cultivate. Over time, I realised that this idea captured not only the subject of my research, but also my experience of doing it. Echoing Cicero's notion of *cultura animi*, legal scholarship became, for me, a process of cultivation, seen as learning from questions, to appreciate different ways of understanding the law, and to approach complexity with greater humility. This research has ultimately led me to see law not simply as a body of rules, but as a cultural practice through which societies define justice, negotiate coexistence, and give meaning to their relationship with each other and with the natural world.

When I began my legal studies in 2011, I did not foresee pursuing a doctoral path one day. Over time, however, I came to understand that engaging critically with reality gave me a quest to somewhat social evolution, grounded in a broader commitment to share ideas.

The transition from student to researcher has marked a significant stage in both my academic and personal life. Teaching, and later supervising students, became much more than an academic responsibility during these years. It constantly reminded me why I chose this profession in the first place. Returning to the classroom while writing this dissertation helped me rediscover the foundations of the discipline, but it also gave me the strength to continue when the journey felt particularly difficult. Knowing that others relied on my guidance taught me that academia is not only about producing knowledge, but also about being present for others, encouraging them, and, whenever possible, ensuring that no one is left behind.

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June 2026, Akureyri

List of Original Articles

The dissertation is based on the following original articles, which will be referred to in the text by their numerals 1–3.

1. Sara Fusco (2024) Rethinking insularity in the Canadian constitutional system: how Indigenous knowledge shapes the framework for vulnerable environmental areas in the Arctic Archipelago, *Yearbook of Polar Law*, Volume 15, pp. 56-83

2. Sara Fusco (2025) Restorative Justice in Finnish Constitutional Law: Reconciling Sámi Rights and Ecology”, *The Polar Journal*, pp. 1-24

3. Sara Fusco (2025) Environmental Restorative Justice and the Green Transition: Examining Intergenerational Equity for Sámi Rights under the Norwegian Constitution”, *Arctic Yearbook*, pp. 1-22

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List of Tables and Illustrations

Tables:

Table 1: Mapping Research Questions, Articles, and Answers

Table 2: Restorative Justice and Constitutional Principles

Table 3: Direct and indirect entry of ERJ

Table 4: Distributed environmental management (DEM)

Table 5: Community Engagement

Table 6: Environmental Impact Assessment

Illustrations:

Illustration 1: ERJ and Constitutional Law

Illustration 2: ERJ's evolution

List of Acronyms and Abbreviations

CBD	Convention on Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
Charter	Canadian Charter of Rights and Freedoms
CLC	Parliamentary Constitutional Law Committee (Finland) (Eduskunnan perustuslakivaliokunta)
ECtHR	European Court of Human Rights
ERJ	Environmental Restorative Justice
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
HRC	Human Rights Committee
HR	Council Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LCIP	Local Communities and Indigenous Peoples Platform (UNFCCC)
OECD	Organisation for Economic Co-operation and Development
RJ	Restorative Justice
SCC	Supreme Court of Canada
SDGs	Sustainable Development Goals
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNDRIP	Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UPR	Universal Periodic Review of the United Nations Human Rights Council
WHC	World Heritage Convention

Contents

Abstract.....	4
Acknowledgement	6
1 Introduction.....	14
1.1 Purpose and Relevance of the Study	17
1.2 Contextual Background and Normative Background.....	19
1.3 Research Objectives and Questions	24
1.4 Structure of the Dissertation	27
2 Theoretical and Conceptual Framework.....	29
2.1 Environmental Constitutionalism and Rights-Based Environmental Protection	30
2.2 Indigenous Rights and Constitutional Recognition.....	34
2.3 Environmental Restorative Justice (ERJ) as an Interpretive Constitutional Framework.....	37
2.3.1 ERJ as an Analytical Construct	38
2.3.2 ERJ in relation to positive law and procedural legitimacy.....	40
2.4 Constitutional Viability of ERJ and Judicial Engagement	44
3 History and background of ERJ in constitutional law.....	47
3.1 From Criminal Redress to Ecological Repair: Reframing ERJ in Environmental Contexts	47
3.2 Supreme Courts and Environmental Adjudication	49
3.3 Restorative Dimensions across Procedural Stages	53
3.4 Direct and indirect entry of ERJ	54
4 Research methodology and sources	58
4.1 Research Design and Article-Based Structure	58
4.2 Methodological Approach and Comparative Constitutional Analysis ..	60
4.3 Case Selection: Canada, Finland, and Norway	62
4.4 Limits of the Analysis	63
4.5 On terminology	65

5 Findings.....	69
5.1 ERJ Criteria Analysis	70
5.1.1 Distributed Environmental Management (DEM).....	70
5.1.2 Community Engagement in Environmental Decision-Making.....	73
5.1.3 Culturally grounded Environmental Impact Assessment	76
5.2 Summary of the Findings	79
6 Conclusion.....	86
References.....	89

1 Introduction

This dissertation explores how constitutional law in Arctic states, specifically Canada, Finland, and Norway, can evolve to respond to environmental and cultural harm affecting Indigenous Peoples. It begins from the premise that constitutions are not rigid blueprints, but dynamic frameworks shaped by historical experience and different legal traditions.

This work opens with an *homage* to Gustavo Zagrebelsky, whose reflections on constitutionalism have long shaped the way many jurists understand the nature of constitutional authority. Zagrebelsky (2017) famously described the constitution as resembling *sand*: mutable yet cohesive, not sustained by rigid architectural structures but by the shared values that hold it together. While this metaphor may appear overly poetic, it captures a central premise of this dissertation. Constitutional meaning is not fixed or inert; it is continuously shaped through political struggle, legal interpretation, and social transformation. *Like grains of sand* forming a shoreline, constitutional authority derives its legitimacy not from immobility, but from its capacity to preserve continuity while responding to changing social realities.

Seen in this light, constitutional law is more than a technical instrument. It is a living system that depends on dialogue, negotiation, and adaptation. In *pluralistic societies*, this quality becomes particularly visible when constitutional law operates as a *compromissory* text, a shared normative space in which different legal cultures, values, and worldviews are brought into conversation (Barberis, 2017). The constitution therefore does not merely mediate conflicts *ex post*, but also structures how competing interests are recognised, interpreted, and balanced over time.

Environmental constitutionalism constitutes the normative starting point of this dissertation. It provides the constitutional space in which tensions between environmental protection and Indigenous rights are increasingly negotiated, particularly in the context of the green transition. Constitutions are therefore required to do more than articulate environmental

aspirations as they must also respond to concrete conflicts in which ecological protection intersects with Indigenous cultures, livelihoods, and systems of knowledge.

This forward-looking dimension of constitutionalism has been emphasised by Husa (2020), who argues that constitutions must be capable of anticipating emerging challenges, as for example those arising from ecological degradation and its impact on Indigenous claims to self-determination. Similarly, Albert (2025) argues that constitutionalism and decolonisation should not be viewed as inherently incompatible. Rather, constitutional interpretation, legislative reform, treaty implementation, and judicial adjudication may provide constitutional pathways through which Indigenous self-determination and legal pluralism are progressively accommodated within existing constitutional systems.

Recent constitutional developments across the Arctic illustrate this evolution. In Finland, scholars have identified a shift towards rights-based constitutionalism, whereby constitutional interpretation increasingly engages with international law and evolving understandings of fundamental rights (Lavapuro, Ojanen, and Scheinin, 2011). Similarly, landmark decisions such as *Fosen Vind* (HR-2021-1975-S) in Norway and the 2022 Sámi fishing rights cases in Finland (KKO:2022:25; KKO:2022:26) recognised that environmental degradation constitute cultural harm, thereby extending constitutional protection beyond purely ecological interests (Scheinin, 2023). These developments demonstrate that constitutional interpretation can respond to emerging forms of *harm* even where legislative frameworks remain incomplete or politically contested (Cavaggion, 2019).

This understanding of constitutionalism raises a further question on how constitutional systems can evolve while preserving democratic legitimacy. The findings demonstrate that constitutional systems do not respond to environmental conflicts through judicial intervention alone. Constitutional adjudication plays an important role in recognising violations and reinterpreting constitutional commitments, but lasting change depends on the interaction between courts, legislatures, administrative authorities, and Indigenous institutions. The dissertation is therefore

grounded in the discourse-oriented theory of law most prominently articulated by Jürgen Habermas (1996), according to which legitimacy depends not only on the exercise of state authority, but also on meaningful participation and the public decision-making processes.

From the perspective of Indigenous Peoples, however, this promise of inclusion also reveals an important structural limitation. Constitutional orders have historically operated through forms of recognition that presuppose the authority of the state as the primary source of legal validity. As a result, Indigenous legal orders, epistemologies, and systems of environmental governance have often been translated into state-centred legal categories that do not fully reflect their normative foundations.

Although international instruments such as the UN Study of the Problem of Discrimination Against Indigenous Populations (Cobo, 1986) and Article(1)(b) of ILO Convention No. 169, recognise Indigenous rights to right to develop own institutions, their implementation still remains uneven across Arctic states. Indigenous Peoples therefore continue to operate within systems of legal pluralism in which multiple normative orders coexist without necessarily enjoying equal institutional authority.

As a result, constitutional law becomes particularly significant where legislative and administrative processes fail to accommodate Indigenous rights adequately. In practice, constitutional adjudication provides one of the primary institutional mechanisms through which Indigenous environmental claims can be articulated. Unlike legislative and administrative processes, constitutional courts can respond to emerging forms of environmental harm by reinterpreting existing rights and addressing normative gaps before legislative reform occurs (Worstman, 2019; Beckman, Gover, and Mörkenstam, 2021).

It is within this interpretative space that Environmental Restorative Justice (ERJ) is introduced. Rather than functioning as an alternative to constitutional law, ERJ serves as an analytical framework for evaluating constitutional responses to environmental harm affecting Indigenous Peoples.

This comparative analysis examines three constitutional models of Indigenous environmental governance. Canada represents a predominantly jurisprudential model shaped by section 35 jurisprudence and modern treaties. Finland reflects a preventive constitutional model centred on parliamentary constitutional review. Norway combines explicit constitutional recognition of Indigenous rights and environmental protection under Articles 108 and 112 while illustrating the practical challenges of implementing those commitments during the green transition. Despite the differences, all three jurisdictions use constitutional law to recognise Indigenous rights; however, such recognition does not consistently translate into effective restorative remedies.

In this respect, and in light of the recent passing of Jürgen Habermas (1929–2026), this dissertation may also be read as a *humble* continuation of a constitutional tradition that understands law not as a closed system of rules, but as an evolving process of dialogue, inclusion, contestation, and democratic justification.

1.1 Purpose and Relevance of the Study

This study examines how constitutional law frames and responds to environmental harm affecting Indigenous cultures, collective rights, and intergenerational continuity. While scholarship on Indigenous rights and environmental protection has largely focused on international law and sectoral regulation, less attention has been paid to the constitutional processes through which these conflicts are recognised, interpreted, and resolved. This constitutional perspective is significant because constitutions do more than distribute institutional competences. They determine which interests acquire constitutional protection, how public authority is exercised, and how competing constitutional values are balanced (International IDEA, 2020). However, liberal constitutional systems have traditionally privileged state-centred governance and individual rights, often leaving Indigenous legal orders and relational understandings of land only partially accommodated (Schmidt, 2024).

Throughout this research, the analysis has been situated within the broader development of environmental constitutionalism. By recognising the constitutional implications of environmental degradation, environmental constitutionalism has brought environmental protection into the constitutional sphere and strengthened its connection with fundamental rights, including the right to life, health, and intergenerational equity. In doing so, it has enabled environmental degradation to be understood not merely as a regulatory concern, but as an issue of constitutional significance.

However, while environmental constitutionalism explains why environmental interests have acquired constitutional protection, it provides only a partial account of how constitutional institutions should respond when environmental harm simultaneously threatens Indigenous rights. As recent scholarship has shown, these disputes increasingly involve competing understandings of environmental harm, Indigenous knowledge, and constitutional authority, exposing institutional asymmetries that constitutional adjudication must confront rather than simply acknowledge (Ardila, 2025: 8–9; Fjellheim, 2023:160).

To address this analytical gap, the dissertation introduces Environmental Restorative Justice (ERJ) as an interpretative and evaluative framework within constitutional law. Rather than replacing environmental constitutionalism, ERJ complements it by assessing whether constitutional reasoning moves beyond the formal recognition of rights to engage with participation, institutional responsibility, and restorative responses in environmental disputes involving Indigenous Peoples.

The relevance of this study lies in its contribution to constitutional scholarship by advancing an understanding of constitutional law as a framework that can support reconciliation and intergenerational responsibility when interpreted through restorative and participatory principles.

1.2 Contextual Background and Normative Background

Over the past decades, international legal developments have increasingly influenced constitutional practice, particularly by encouraging states to integrate environmental protection and Indigenous rights into their domestic legal orders. As a result, contemporary constitutional systems cannot be fully understood in isolation from the international legal forces that have shaped their evolution. This interaction operates across different normative levels: international law defines the relevant standards, Indigenous rights give them substantive content, and constitutional law determines their recognition and practical effect within domestic systems.

For this reason, the contextual analysis of this dissertation outlines three interrelated contextual and normative dimensions: (a) the emergence of international environmental and human rights norms relevant to Indigenous Peoples; (b) the constitutional developments within the states under study; and (c), the jurisprudential trajectories through which environmental protection and Indigenous interests have come into tension within constitutional adjudication. This multilevel interaction has contributed to the gradual *constitutionalisation* of environmental concerns, creating the normative conditions under which environmental degradation may acquire constitutional relevance.

Already in its development, environmental constitutionalism, which provides the normative point of departure for ERJ, cannot be understood independently of international law. From the Brundtland Report (1987), which reframed development as “sustainable” only where ecological and cultural limits are respected, to the Rio Declaration (1992), which formally recognised the vital role of Indigenous and local communities in environmental management (Principle 22), international instruments have consistently prompted states to integrate ecological considerations into their constitutional frameworks, thereby reshaping the standards against which constitutional systems are expected to respond to environmental and Indigenous claims. This trajectory was further reinforced by the Convention on Biological Diversity (1992), particularly Article 8(j), later operational-

ised through the Nagoya Protocol (2010), which introduced binding obligations concerning prior informed consent and equitable benefit-sharing.

Parallel developments have strengthened the procedural dimension of environmental governance. The Aarhus Convention (1998) entrenched access to information, public participation, and access to justice as enforceable rights, while the Paris Agreement (2015) explicitly acknowledged the relevance of Indigenous knowledge and rights within climate adaptation and governance. More recently, the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (2018) marked a significant shift from a state-centred to a more community-informed model of international environmental law by expressly recognising the role of Indigenous knowledge in the stewardship of transboundary marine resources (art. 5(1)(b)).

At the same time, cultural heritage instruments have expanded the legal intelligibility of Indigenous identity in relation to environment. The UNESCO World Heritage Convention (1972) protected natural and cultural sites of universal value, many located in Indigenous territories, while the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003) explicitly recognised practices, oral traditions, and knowledge systems as deserving legal protection. The Faro Convention on the Value of Cultural Heritage for Society (Council of Europe, 2005) went further, framing cultural heritage as a human right and as a resource for sustainable development, introducing the notion of *heritage communities*, as a concept closely aligned with Indigenous claims to self-determination and cultural survival (art.2).

Human rights treaties have reinforced this trend by explicitly linking environmental protection with Indigenous self-determination. The International Covenant on Civil and Political Rights (1966, arts. 1 and 27) recognises both the right of peoples to self-determination and the right of minorities to enjoy their culture in community with others, while the International Covenant on Economic, Social and Cultural Rights (1966, arts. 1 and 12) couples self-determination with the right to the highest attainable standard of health, including environmental health. ILO Convention

No. 169 (1989, arts. 6–7) remains the only binding treaty specifically on Indigenous and tribal Peoples, requiring states to ensure meaningful participation in decisions on development and natural resources. The United Nations Declaration on the Rights of Indigenous Peoples (2007, arts. 18, 25–29, 32), though formally a soft-law instrument, has acquired significant normative authority by affirming Indigenous Peoples’ right to determine their development paths, to maintain their spiritual relationship with their lands and waters, and to give or withhold consent over extractive projects.

Collectively, these international developments established a common normative framework for the constitutional recognition of environmental protection and Indigenous rights. Yet international standards alone do not determine how these commitments operate in practice. Their constitutional significance ultimately depends on the historical development, institutional design, and interpretative traditions of domestic constitutional systems. It is therefore necessary to examine how these international influences were progressively incorporated into the constitutional evolution of the jurisdictions under study. Although Canada, Finland, and Norway have all engaged with the same international legal developments, they have done so through distinct constitutional trajectories, producing different institutional arrangements for recognising Indigenous rights and responding to environmental harm.

In this dissertation, Canada provides the first example of how international and Indigenous rights commitments are received through a specific domestic constitutional history. Its constitutional development did not occur through a single founding moment, but through a gradual process shaped by colonial dependency, federalism, and later constitutional patriation. From the Royal Proclamation of 1763 and the British North America Act of 1867 to the Statute of Westminster 1931, Canada’s constitutional order remained closely tied to British legislative authority until the repatriation of the Constitution in 1982. The Constitution Act 1982 marked a decisive shift by entrenching the Canadian Charter of Rights and Freedoms and, crucially, Section 35, which recognises and affirms existing Aboriginal and treaty rights. This constitutional recognition, however, op-

erates within a federal structure that continues to produce asymmetries. While provinces possess constitutional authority within the federation, territories such as Nunavut remain governed through federal statutes, limiting the scope of Indigenous autonomy within the constitutional order. These limits are particularly visible in the Arctic Archipelago, transferred from Britain to Canada in 1880 and later enclosed within Canadian straight baselines in 1986. Although international law, such as UNCLOS and IC-CPR, affirms Canadian sovereignty over these waters, and human rights obligations apply across the whole territory, Inuit participation in marine governance remains institutionally fragmented (Fusco, 2024). This creates a constitutional paradox as Aboriginal and treaty rights are recognised at the constitutional level, yet Indigenous authority over the seas and ice that form the core of Inuit Nunangat remains limited. For this reason, the Arctic Archipelago becomes a case study for examining how constitutional insularity might be reimagined so that ecological vulnerability and Indigenous governance are treated as matters of constitutional concern.

Finland followed a different path, rooted in the Grand Duchy era and consolidated with independence in 1917. The 1995 constitutional reform first recognised Sámi cultural rights (old Constitution, art. 14a), while the 1999 Constitution introduced hierarchical supremacy, stronger rights protection, and duties to safeguard biodiversity and cultural heritage (arts. 17, 20, 22, 121). EU membership and the ratification of the Aarhus Convention deepened these commitments, particularly through Environmental Impact Assessment directives (2011/92/EU, amended 2014/52/EU). Yet practice has lagged law. The 2022 fishing bans on the Teno River exposed the gap between ecological measures and cultural rights: the Constitutional Law Committee ruled that general restrictions disproportionately burdened Sámi fishers and stressed that Articles 17 and 121, together with the Sámi Parliament Act, impose a duty of consultation whenever traditional livelihoods are at stake. The Teno River controversy demonstrates the anticipatory role of Finland's *ex ante* review system, where environmental and cultural safeguards can be integrated into legislative design. At

the same time, it reveals the fragility of Sámi participation, which remains consultative rather than decisional.

Norway represents yet another path. The 1814 Constitution, one of the earliest to articulate popular sovereignty in Europe, laid the foundation for constitutional review by ordinary courts. Over time, explicit recognition of Sámi rights (art. 108, 1988) and environmental protection (art. 112, revised 2014) expanded the constitutional framework. Article 112 affirms every person's right to a healthy environment and obliges the State to preserve it for future generations, while Article 108 enshrines the duty to enable Sámi cultural continuity. Yet enforcement has been uneven: the Alta case (1982) deferred to hydropower development despite Sámi protests, and later decisions such as *Nesseby* (2018) and *Stjernøya* (2016) restricted Sámi land rights. A decisive shift came with the *Fosen Vind* judgment (HR-2021-1975-S), where the Supreme Court held that licences for wind power development violated Sámi reindeer herding rights under ICCPR art. 27, read with Articles 108 and 112. This ruling elevated consultation and impact assessment standards but also revealed the precariousness of Indigenous protections when state-led green transition policies collide with traditional livelihoods.

From a comparative constitutional perspective, three distinct constitutional trajectories already emerge from this contextual analysis. In Canada, the federal–territorial constitutional framework continues to restrict Inuit participation in marine governance; in Finland, ex ante constitutional review provides important preventive safeguards but largely confines Sámi participation to a consultative role; and in Norway, explicit constitutional guarantees remain dependent upon cautious judicial interpretation, with *Fosen Vind* representing a notable, though exceptional, instance of robust constitutional enforcement. These trajectories provide the constitutional context for the comparative analysis developed in the following chapters.

1.3 Research Objectives and Questions

The central research question guiding this dissertation is:

How do constitutional systems in Canada, Finland, and Norway respond to environmental harm affecting Indigenous Peoples, and to what extent can constitutional law reconcile environmental protection with Indigenous rights through restorative justice?

Answering this question requires a comparative constitutional analysis of how different constitutional systems structure and respond to environmental conflicts affecting Indigenous Peoples. The analysis therefore examines first on how environmental constitutionalism operates within national constitutional systems to structure the relationship between environmental protection and Indigenous rights. Rather than focusing solely on constitutional outcomes, it considers how constitutional texts, institutional design, and interpretative practices shape the legal response to environmental harm affecting Indigenous communities. It therefore analyses how different constitutional configurations, such as jurisprudential in Canada, anticipatory-parliamentary in Finland, and textually explicit in Norway, produce distinct responses to comparable environmental conflicts affecting Indigenous Peoples.

Second:

How does environmental constitutionalism in Canada, Finland, and Norway shape the protection and advancement of Indigenous rights in the context of environmental governance?

Here, the analysis turns to the role of environmental constitutionalism in shaping constitutional responses to Indigenous environmental harm. In particular, it examines whether environmental constitutionalism provides

a constitutional framework capable of recognising environmental harm as a matter of constitutional concern where it affects Indigenous rights. The analysis therefore explores how environmental constitutionalism influences constitutional interpretation, institutional arrangements, and the protection of Indigenous rights within environmental governance across the three jurisdictions. Recognising constitutional rights does not, in itself, resolve issues of participation or the repair of harm. Environmental constitutionalism therefore establishes the constitutional framework within which these questions arise, but it does not by itself provide the criteria for evaluating the adequacy of constitutional responses. For this reason, the dissertation draws on ERJ as an evaluative framework for examining how constitutional systems engage with Indigenous environmental harm in practice.

Third:

To what extent can ERJ serve as an evaluative framework for integrating Indigenous rights into environmental governance, particularly with regard to authority, participation, and culturally grounded environmental assessment?

This question explores whether ERJ's core dimensions, distributed environmental management, community engagement, and culturally grounded environmental impact assessment, can be meaningfully operationalised within constitutional law, despite ERJ not constituting a codified legal doctrine. It assesses ERJ's capacity to illuminate both the possibilities and the limitations of constitutional responses to Indigenous environmental harm.

Finally:

What structural opportunities and limitations do Arctic constitutional systems present for embedding ERJ principles, particularly

in relation to legal pluralism, institutional asymmetries, and constitutional adjudication?

This question identifies the common institutional patterns that emerge from the comparative analysis. It examines how constitutional design, legal pluralism, the distribution of authority, and constitutional adjudication shape the capacity of constitutional systems to respond to environmental harm affecting Indigenous Peoples. Particular attention is given to the opportunities created through constitutional interpretation and participatory mechanisms, as well as to the structural limitations that continue to constrain restorative responses, including institutional asymmetries, the absence of Indigenous co-decision powers, and the limited remedial capacity of constitutional adjudication.

In addition to these overarching research questions, each article addresses a set of context-specific questions that operationalise the main inquiry within its respective constitutional framework. These questions emerge inductively from the case studies and guide the article-level analysis without constituting independent research questions.

- **Article 1 (Canada):**
How does constitutional law engage with ecological vulnerability and Indigenous knowledge in the absence of explicit environmental constitutional guarantees, particularly in the Arctic Archipelago?
- **Article 2 (Finland):**
How does anticipatory constitutional review integrate Sámi cultural rights into environmental governance, and what are the limits of consultation-based participation?
- **Article 3 (Norway):**
How do constitutional environmental provisions interact with Sámi rights in the context of the green transition, and what are the limits of judicial remedies in addressing intergenerational and cultural harm?

1.4 Structure of the Dissertation

This dissertation is structured as an article-based doctoral thesis and consists of a set of interrelated chapters that together develop a coherent constitutional analysis of ERJ in Indigenous environmental governance.

Chapter 2 sets out the conceptual and theoretical framework of the study. It situates the research within the broader field of environmental constitutionalism and Indigenous rights and introduces ERJ as an interpretive and evaluative framework. This chapter clarifies how ERJ operates in relation to constitutional principles, judicial engagement, and participatory governance, and establishes the analytical foundations for the subsequent case-based analysis.

Chapter 3 explains the historical development and theoretical foundations of Environmental Restorative Justice (ERJ) within constitutional law. It reconceptualises restorative justice for the environmental context, illustrating how supreme and constitutional courts can engage with restorative principles across different stages of constitutional adjudication.

Chapter 4 presents the research methodology and sources. It explains the article-based research design, the comparative constitutional approach adopted in the dissertation, and the rationale for selecting Canada, Finland, and Norway as case studies. The chapter also discusses terminological choices, methodological limitations, and issues of legal interpretation relevant to Indigenous contexts.

Chapter 5 provides the analysis of the findings emerging from the three articles.

Drawing across the case studies, this chapter identifies conceptual continuities and divergences, systematises the core dimensions of ERJ as they appear in constitutional practice, and reflects on the capacity of constitutional law to reconcile Indigenous rights, ecological restoration, and intergenerational justice.

The concluding chapter (Chapter 6) summarises the main findings of the dissertation, highlights its theoretical and constitutional contributions, discusses its limitations, and outlines avenues for future research. The

conclusion situates the study's results within broader debates on environmental constitutionalism and Indigenous rights, both within and beyond the Arctic context.

All together, these chapters reflect the dissertation's analytical progression and articulate the pathway through which the study examines the capacities and limits of constitutional law in responding to Indigenous environmental harm in the Arctic.

Table 1: Mapping Research Questions, Articles, and Answers

Level	Research Question	Addressed in	Where Answered in the Synthesis (Chapters & Paragraphs)
Main RQ	Constitutional responses to Indigenous environmental harm	Articles 1–3	3.1–3.4
RQ1	Environmental constitutionalism and Indigenous rights	Articles 1–3	2.1; 2.2, 5.2
RQ2	ERJ as evaluative framework (authority, process, content)	Articles 2–3 (and indirectly 1)	Chapter 5; Conclusions
RQ3	Structural opportunities and limitations	Article 3 (comparative)	5.2; Chapter 6
Sub-Q (Canada)	Indigenous knowledge and ecological vulnerability without explicit environmental rights	Article 1	Chapter 2
Sub-Q (Finland)	Anticipatory review and Sámi participation	Article 2	Chapter 2; Chapter 3
Sub-Q (Norway)	Intergenerational equity and judicial remedies	Article 3	2.3; 2.3.1; 2.3.2

2 Theoretical and Conceptual Framework

This chapter develops the theoretical and conceptual framework of the dissertation by moving from the normative terrain of environmental constitutionalism to the introduction of ERJ as an analytical construct. It begins with environmental constitutionalism because this represents the legal point of departure of the study. Before assessing how constitutional systems respond to Indigenous environmental harm, it is necessary to clarify how environmental protection has become constitutionally framed as a matter of rights, democratic responsibility, and constitutional principle rather than as a purely regulatory concern. Moreover, this chapter aims to explain how environmental constitutionalism provides the normative setting within which environmental conflicts involving Indigenous Peoples are articulated at the constitutional level.

In doing so, it considers how environmental norms often emerge from fragmented and context-specific practices that constitutional law subsequently translates into binding legal standards. The central challenge, however, lies in the capacity of environmental constitutionalism to transform ecological vulnerability into constitutionally cognisable harm, particularly where environmental degradation is specifically understood through economic compensation or anthropocentric conceptions of environmental protection alone.

Here, ERJ, grounded in restorative justice theory and informed by debates on constitutional legitimacy, provides the analytical framework through which constitutional responses to environmental harm can be analysed and evaluated from a restorative perspective, with particular regard to the protection of Indigenous rights.

The chapter concludes by examining the constitutional viability of ERJ, with particular attention to the role of courts and constitutional review bodies. The purpose of this final step is to consider whether restorative and relational logics can function within constitutional adjudication without displacing established principles of legality and judicial authority, and

whether constitutional institutions are capable of engaging with forms of environmental harm that are collective, intergenerational, and embedded in cultural relationships to land.

2.1 Environmental Constitutionalism and Rights-Based Environmental Protection

Environmental constitutionalism enters this research through a concrete problem rather than as a settled doctrinal category. In Arctic contexts, environmental degradation is rarely experienced as a purely ecological issue; it directly affects several aspects of Indigenous self-determination: cultures, collective livelihoods, and legal standing. Understanding how constitutional law responds to this overlap is the starting point of the analysis.

Within this setting, environmental constitutionalism is best understood as a conceptual and analytical frame rather than as a single or coherent doctrinal model. Although constitutional environmental provisions have expanded rapidly across jurisdictions, they remain broad and open-textured, and the literature has not converged on a stable definition of the concept (Bookman 2023, 25-40). What unites these diverse approaches is the idea that environmental protection has become a matter of constitutional concern, engaging questions of rights, democratic legitimacy, and the allocation of authority within the state.

A particularly influential strand of the literature adopts a rights-based understanding of environmental constitutionalism, most clearly articulated in the work of May and Daly (2014). From this perspective, environmental constitutionalism rests on the recognition that the environment is a proper subject of constitutional protection and constitutional adjudication. Constitutionalising is seen as offering a pathway for environmental protection precisely where ordinary regulatory mechanisms fall short, positioning constitutional courts as central actors in environmental governance (Bookman 2023, 13-8).

At the same time, environmental constitutionalism remains a contested concept, often used to advance competing normative projects rather than

a unified agenda. As Bookman emphasises, the concept may point either toward a biodiversity-centred model of protection or toward a broader “*way of life*” conception of human well-being, in which environmental degradation becomes constitutionally intelligible as harm to culture and collective existence (Ibidem). Much of the existing literature has approached environmental constitutionalism primarily through the lens of judicial enforcement, treating constitutional rights and litigation as the central mechanisms for securing environmental protection. Doctrines such as *in dubio pro natura* reflect this orientation, reinforcing a classical liberal understanding of constitutionalism centred on limiting state power through courts (Fusco, 2024). While this perspective has strengthened the justifiability of environmental claims, it also risks narrowing constitutionalism to litigation and obscuring the broader institutional and political dynamics that shape environmental governance (Ghaleigh, Setzer and Welikala 2022, 518–19).

This model remains normatively grounded in liberal constitutional traditions centred on individual rights and judicial oversight. Within an increasingly plural and globally interconnected legal order, however, such an approach appears insufficient on its own. Environmental constitutionalism cannot rely exclusively on universal principles or abstract formulations of rights; it must also engage with different normative traditions, including Indigenous and non-Western understandings of environmental governance, if constitutional commitments are to retain legitimacy across diverse constitutional settings (ibid, 522–23).

These tensions become particularly visible in Arctic contexts. Here, Environmental constitutionalism cannot be understood merely as an abstract doctrinal category because it operates through concrete constitutional disputes where environmental protection, territorial governance, and Indigenous self-determination intersect. Decisions concerning land and natural resources inevitably involve questions of cultural continuity and political authority. As Andrea Almirante (2022) observes, environmental norms often develop through fragmented and context-dependent practices before being incorporated into constitutional and legal frameworks as

binding standards. In this sense, constitutional law and *constitutional identity(ies)* become the space through which ecological vulnerability, cultural identity, and competing political interests are continuously negotiated.

Constitutional identity, as discussed by Boyd (2012), Kotzé (2012), Albi (2015), and Orbán (2023), does not remain static but develops at the intersection of domestic autonomy and international standards relating to culture, language, and environmental protection. Within the Arctic, institutions such as Sámi Parliaments, consultative procedures, and engagement with EU and international instruments already form part of this constitutional dialogue. Environmental constitutionalism therefore cannot be confined to judicial forums alone; it necessarily involves parliamentary oversight, executive accountability, and independent advisory mechanisms (Ghaleigh, Setzer and Welikala 2022, 526–27).

From this perspective, the comparative analysis proceeds from a common point of reference: environmental constitutionalism becomes legally meaningful only when it can translate ecological vulnerability into constitutionally cognisable harm, including harm to Indigenous cultural continuity.

The Canadian constitutional experience offers an initial jurisprudential entry point. Section 35 of the Constitution Act, 1982 makes no explicit reference to the environment, yet Canadian courts have increasingly linked Aboriginal and treaty rights to environmental governance. This trajectory is visible in *Misdzi Yikh v Canada* (2020), where Wet'suwet'en hereditary house groups challenged the approval of the Coastal GasLink pipeline. The claim advanced a dual constitutional argument. First, it invoked Sections 7 and 15 of the Canadian Charter of Rights and Freedoms, seeking to extend the rights to life, liberty, security of the person, and equality to protection from climate change. Second, it relied on Section 35, framing ecological degradation as an infringement of Aboriginal rights and traditional livelihoods. In doing so, the claim directly connected environmental harm with cultural harm, particularly in relation to hunting, trapping, fishing, sacred sites, and intergenerational cultural continuity (Thomson, 2022).

Drawing on instruments such as UNDRIP, Canadian jurisprudence has begun to operationalise Indigenous legal orders by treating land as living heritage and translating relational ethics into enforceable protections. This discussion highlights how constitutional law can address territorially bounded environmental contexts and culturally specific interests that fall outside uniform regulatory approaches (Fusco, 2024). Comparable dynamics can be observed in other constitutional settings. For instance, the Italian constitutional reform of 2022, by recognising insularity as a condition warranting differentiated treatment, seeks to address long-standing asymmetries in territorial development and administrative accessibility. In a similar way, the Arctic Archipelago reflects a form of constitutional asymmetry, where ecological challenges intersect with cultural and epistemic vulnerability. Recognising these dynamics through constitutional mechanisms could enable Inuit marine governance and heritage to be interpreted as constitutionally protected interests, grounded in a culturally oriented understanding of environmental protection.

Finland presents a different institutional configuration but a similar underlying problem. Article 20 of the Constitution affirms a collective duty to protect the environment, while Article 17(3) guarantees Sámi cultural rights. At the same time, Article 121 leaves natural resource management outside Sámi self-government. In the absence of a constitutional court, Finland relies on the Parliamentary Constitutional Law Committee (CLC) for ex ante review of legislation. The Committee's finding that blanket fishing bans risked indirect discrimination against Sámi fishers illustrates how preventive constitutional oversight can integrate cultural and environmental safeguards into the legislative process itself. In this context, ecological harms were interpreted anticipatorily through principles of equality and cultural integrity (Committee opinions 27/1997, 29/2004, 1/2016; *KKO* 2022:26, para. 2). The conflict with the Constitution was identified not as a remedial afterthought, but as a constitutive element of lawmaking (Fusco, 2024).

Norway provides the clearest textual model. Article 108 protects Sámi rights, while Article 112 enshrines the right to a healthy environment for

present and future generations, requiring that natural resources be managed on the basis of long-term considerations safeguarding this right. In the *Fosen Vind* judgment (HR-2021-1975-S), the Norwegian Supreme Court held that wind farm licences on reindeer herding lands violated both domestic constitutional provisions and Article 27 of the ICCPR. With explicit constitutional guarantees in place, the Court was able to combine environmental protection, cultural survival, and intergenerational equity into a single legal standard. While this represented a success in terms of constitutional justice, subsequent implementation revealed significant shortcomings, raising concerns about enforceability and the rule of law (Fusco, 2024).

2.2 Indigenous Rights and Constitutional Recognition

Environmental constitutionalism acquires its *transformative* significance only when environmental governance intersects with the constitutional recognition of Indigenous rights. This means that constitutional law is not confronted only with questions of environmental protection, but also with deeper issues of legal pluralism, human rights, and self-determination. At this point, it becomes necessary to distinguish these layers more clearly. While international human rights law formulates general standards of protection, constitutional law determines how, and to what extent, those standards acquire legal force within specific domestic contexts. It is here that the limits of a purely rights-based or technocratic approach to environmental protection become visible, and where constitutional law is required to engage with competing normative orders and forms of authority. This development reflects a broader transformation of contemporary constitutionalism. As James Tully (1995) argues, the emergence of cultural diversity as a constitutional concern has challenged traditional models of constitutionalism centred on legal and cultural uniformity. Contemporary constitutional systems are increasingly required not only to recognise diversity formally, but also to accommodate different legal traditions, forms of authority, and conceptions of political community. Within this para-

digm, the constitutional recognition of Indigenous Peoples is no longer understood simply as the protection of a minority group, but as part of a broader reconfiguration of constitutional legitimacy in plural societies.

The importance of this interaction becomes particularly evident when considering Indigenous self-determination. Self-determination is one of the foundational principles of international law and is recognised in the United Nations Charter, Article 1 of the International Covenant on Civil and Political Rights (ICCPR), Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and more explicitly in Articles 3 and 4 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Contemporary international law no longer understands self-determination primarily as a claim to independent statehood. Rather, it is increasingly viewed as the right of peoples to participate in the institutions that govern them, to influence decisions affecting their territories and resources, and to pursue their own economic, social, and cultural development.

As Anaya and Åhrén argue (2025), self-determination functions as a standard of governmental legitimacy. It contains both a constitutive and an ongoing dimension. The constitutive dimension requires peoples to participate in the creation or reform of the institutions that govern them, while the ongoing dimension requires continuous opportunities to influence public decision-making, exercise forms of self-government, and maintain cultural continuity. For Indigenous Peoples, therefore, self-determination is not exhausted by formal recognition. It requires institutional arrangements capable of accommodating Indigenous authority within existing state structures.

On this basis, environmental constitutionalism does not operate in isolation. Its practical effects depend on how Indigenous rights are recognised and embedded within constitutional systems, particularly where environmental decision-making affects Indigenous lands, resources, and ways of life. As Boyd (2012: 318–319) observes, Indigenous Peoples have long practised relational and holistic forms of environmental stewardship grounded in responsibilities toward land and future generations. These

practices resonate with contemporary accounts of environmental constitutionalism, yet their integration into constitutional frameworks remains uneven. As Kotzé (2012: 206–207) cautions, the central challenge lies in ensuring that constitutional recognition enables environmental and cultural rights to function as transformative guarantees rather than remaining largely symbolic or procedural.

This challenge inevitably raises questions of legal pluralism. Indigenous self-determination presupposes that Indigenous Peoples are not merely beneficiaries of rights but also bearers of distinct normative traditions and governance practices.

Legal pluralism is also central as it captures the reality that customary and state legal systems may “support, complement, ignore or frustrate one another”, producing unpredictable patterns of “competition, interaction, negotiation, [and] isolationism” (Griffiths, 1986: 39). From this perspective, constitutional recognition extends beyond the formal acknowledgment of rights. It requires constitutional systems to engage with multiple normative orders and to create institutional spaces in which Indigenous authority can participate meaningfully in constitutional governance. This insight has shaped long-standing debates on the constitutional incorporation of Indigenous law and authority.

Within these debates, different constitutional approaches to Indigenous recognition have emerged. Holzinger et al. (2019) identify three principal models. The first involves explicit constitutional acknowledgement of Indigenous Peoples and their rights, including land tenure, political participation, and self-determination. The second focuses on the recognition and regulation of traditional political organisation, often through integration with state institutions. The third entails the incorporation of customary law, particularly in areas such as resource management and dispute resolution. Taken together, these approaches reveal a spectrum of constitutional possibilities for accommodating Indigenous governance within state legal orders.

Recent institutional developments illustrate how these possibilities operate in practice. The establishment of Sámi parliaments in Fenno-Scandi-

navia demonstrates the constitutional potential of recognising Indigenous authority in both representative and consultative forms (Josefsen & Saglie, 2024). At the same time, international human rights law reinforces and shapes these constitutional pathways. The ICCPR (arts. 1, 25, 27), CERD, and UNDRIP (arts. 18–19) affirm Indigenous rights to self-determination, political participation, and free, prior, and informed consent (FPIC). Importantly, the UN Expert Mechanism on the Rights of Indigenous Peoples (2018) has clarified that FPIC should not be understood as a procedural formality, but as a substantive safeguard that enables Indigenous Peoples to influence outcomes in decisions affecting their lands, resources, and cultural heritage. It is worth mentioning that the incorporation of these standards within constitutional systems remains contingent on domestic interpretation and does not automatically translate into equivalent levels of protection across jurisdictions.

However, these developments show that the constitutional recognition of Indigenous rights raises questions that extend beyond formal acknowledgement. These questions form the conceptual entry point for the next section, which introduces ERJ as an interpretive framework for examining how constitutional systems engage with environmental harm affecting Indigenous Peoples.

2.3 Environmental Restorative Justice (ERJ) as an Interpretive Constitutional Framework

Building on the normative framework of environmental constitutionalism and the constitutional approaches to the recognition of Indigenous rights, this section introduces ERJ as a restorative constitutional perspective for examining how constitutional systems respond to environmental harm affecting Indigenous Peoples. ERJ is not approached as a codified legal doctrine, nor as a substitute for existing constitutional principles. Rather, it complements existing constitutional reasoning by providing a structured basis for examining constitutional practice where environmental degradation intersects with cultural integrity, collective rights, and legal pluralism.

In this dissertation, ERJ does not seek to constitutionalise restorative justice itself. It actually identifies those restorative dimensions capable of informing constitutional interpretation and adjudication. In doing so, it provides a coherent basis for assessing how constitutional systems engage with forms of harm that are relational, collective, and intergenerational, and that often remain only partially visible within conventional adjudicative paradigms. Grounded in restorative justice theory and informed by theories of constitutional legitimacy, ERJ evaluates not simply constitutional outcomes, but the institutional processes and interpretative practices through which environmental conflicts are addressed.

The section proceeds in two steps. First, ERJ is presented as an analytical construct grounded in theories of constitutional legitimacy and procedural justice. Second, ERJ is situated in relation to existing legal and institutional practices, illustrating how restorative and participatory logics may inform constitutional interpretation without crystallising into a binding legal doctrine.

2.3.1 ERJ as an Analytical Construct

As abovementioned, ERJ functions here as an analytical framework for examining constitutional responses to environmental harm affecting Indigenous Peoples. Its role is not to prescribe outcomes, but to provide a basis for assessing how constitutional interpretation engages with participation and repair. Conceptually, ERJ reframes harm in relational terms, recognising not only individuals and communities, but also ecosystems and future generations as bearers of constitutionally relevant interests (Forsyth 2022, 268–273). This analytical positioning allows ERJ to operate across different constitutional systems without being constrained by rigid doctrinal classifications or by the formal content of positive law.

Although ERJ is employed here as an analytical framework, it nonetheless entails an evaluative dimension. This normativity does not derive from external moral prescriptions or from ERJ being embedded in positive law, but from theories of constitutional legitimacy that are internal to constitu-

tional reasoning itself. In other words, ERJ provides criteria for evaluating how constitutional systems justify authority, structure decision-making processes, and articulate the substantive content of constitutional norms.

To this end, the evaluative structure of ERJ adopted in this dissertation is informed by Jürgen Habermas's discourse theory of law, developed in *Between Facts and Norms* (1996). Habermas argues that the legitimacy of law rests not on coercive authority, but on communicative processes capable of securing rational agreement (pp. 37–39, 141–142, 169, 179–180, 449–453). Building on this account, legitimacy may be understood in terms of three interrelated dimensions: authority (who decides), process (how decisions are made), and content (what is decided). While Habermas does not present these elements as a formal “triad,” they are distilled here as a useful analytical structure integrating legitimated authority, procedural fairness, and the rational justification of norms. Accordingly, the evaluative criteria of ERJ are grounded in these three dimensions of constitutional legitimacy.

The first dimension is authority, which concerns *who decides*. This reflects Habermas's notion of legitimated command as not the exercise of instrumental power, but authority discursively justified through participation. In ERJ terms, this entails assessing the extent to which Indigenous Peoples are recognised as constitutional actors with genuine co-decision powers in natural resource governance (corresponding to distributed environmental management, also referred to in the literature as DEM).

The second dimension is process, which concerns *how decisions are made*. Habermas identifies democratic procedures as mechanisms intended to guarantee the rational treatment of political questions (p. 169). Transposed into ERJ, this requires that affected communities are not merely consulted but actively engaged in shaping environmental outcomes (corresponding to community engagement in environmental decision-making).

The third dimension is content, which concerns *what is decided*. For Habermas, democratic legitimacy requires that legal norms be rationally justified and resonate with shared values. Within ERJ, this entails the

substantive incorporation of Indigenous knowledge, cultural values, and ecological principles into constitutional reasoning, for instance through culturally attuned environmental impact assessments (corresponding to culturally oriented EIAs).

The following figure illustrates how the ERJ framework operates in practice, mapping these three dimensions of constitutional legitimacy and showing how they converge within constitutional law as a mode of evaluating restorative and participatory responses to environmental harm.

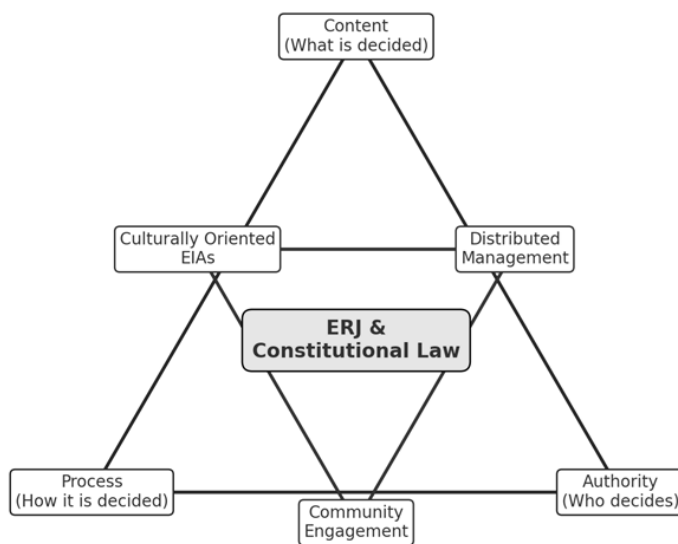


Illustration 1: ERJ & Constitutional Law

2.3.2 ERJ in relation to positive law and procedural legitimacy

ERJ does not operate as a source of positive law, nor does it constitute a legal doctrine recognised or directly applied by courts. In fact, its relevance in this dissertation lies elsewhere. ERJ is used as an interpretive and evaluative framework through which existing legal practices, proce-

dural norms, and institutional arrangements can be examined, particularly where constitutional law engages with environmental harm affecting Indigenous Peoples. In methodological terms, ERJ guides the formulation of research questions and the design of the analytical framework, while the assessment of legal materials, constitutional provisions, legislation, and case law, remains grounded in doctrinal constitutional analysis. From this vantage point, developments at the international level are relevant not because they establish restorative justice as a legal concept, but because they reflect participatory and restorative orientations that resonate with ERJ's evaluative criteria.

At the international level, indeed, several instruments illustrate the gradual incorporation of participatory and restorative orientations into environmental governance, even in the absence of explicit restorative justice terminology. The Aarhus Convention (1998), for example, establishes binding obligations relating to access to information, public participation, and access to justice in environmental matters, thereby reinforcing procedural conditions that enhance democratic legitimacy. Similarly, the Convention on Biological Diversity (1992), particularly Article 8(j), recognises the role of Indigenous knowledge in environmental stewardship, introducing substantive considerations that extend beyond purely technical assessments of environmental harm.

Within the European context, procedural instruments such as Directive 2008/52/EC on mediation and Directive 2004/35/EC on environmental liability further illustrate how non-adversarial and preventive approaches have entered environmental regulation. While these instruments do not articulate a restorative justice framework as such, they contribute to a legal environment in which dialogue, negotiated solutions, and the prevention and remediation of harm are prioritised alongside traditional enforcement mechanisms.

Domestic experiences provide additional illustrations of how such procedural norms operate within constitutional settings. In Finland, the transposition of Directive 2008/52/EC introduced mediation mechanisms that may be used in environmental disputes, although their application

remains limited and non-binding. More significantly, constitutional provisions, particularly Articles 17, 20, and 121 of the Constitution, have been interpreted by the Parliamentary Constitutional Law Committee as requiring attention to Sámi cultural rights and participatory safeguards in environmental decision-making. This was made explicit in the Committee's 2022 opinions concerning fishing restrictions on the Teno River, where proportionality, equality, and cultural impact were treated as constitutionally relevant considerations.

Norway offers a further illustration of how participatory and restorative logics may surface through constitutional interpretation rather than formal doctrine. The Finnmark Act (2005) and the Planning and Building Act institutionalise co-management and participatory planning mechanisms, reflecting an increasing sensitivity to Sámi cultural continuity in land and resource governance. More recently, the Fosen Vind judgment demonstrates how constitutional guarantees under Article 108 can be mobilised to recognise cultural harm linked to environmental decision-making, even though the Court did not frame its reasoning in restorative justice terms.

These examples do not suggest that ERJ has crystallised into a legal concept applied by courts or legislatures. Rather, they show that procedural norms promoting participation, dialogue, and culturally grounded decision-making are already embedded within legal systems, albeit in fragmented and uneven ways. ERJ provides a structured analytical framework through which these developments can be examined systematically, without conflating legal analysis with normative prescription.

For this reason, ERJ is not treated in this dissertation as part of the content of positive law, but as a theoretical framework that supports the evaluation of constitutional practice. It enables the analysis to assess how constitutional systems respond to environmental harm affecting Indigenous Peoples by examining how authority is distributed, how participation is structured, and how cultural and ecological considerations are integrated into constitutional reasoning, while remaining firmly anchored in doctrinal constitutional analysis.

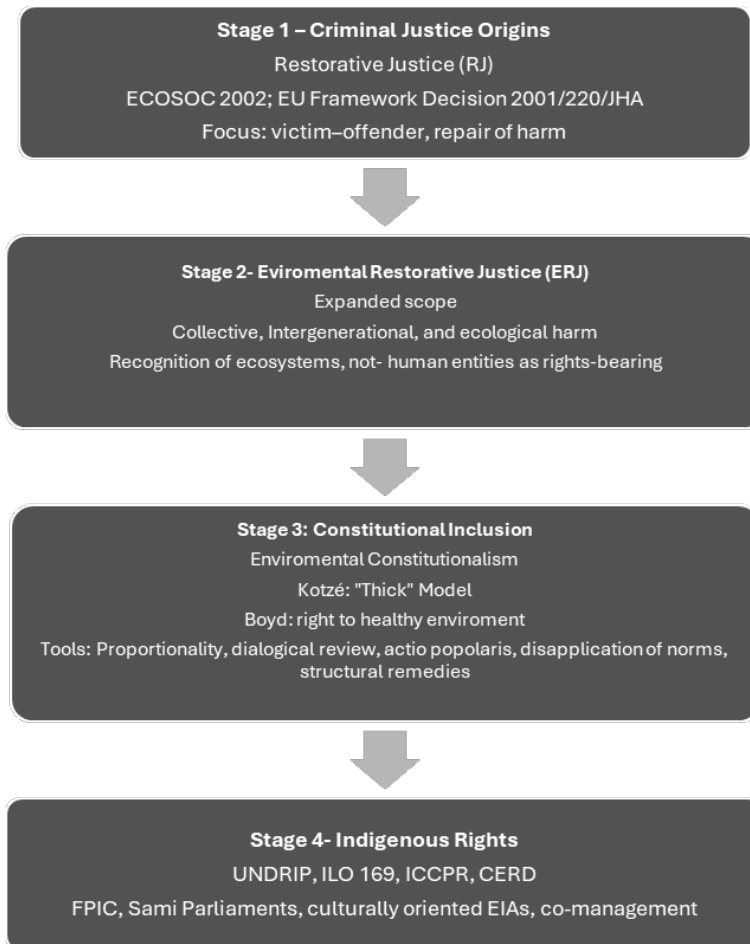


Illustration 2: ERJ's evolution

2.4 Constitutional Viability of ERJ and Judicial Engagement

The constitutional viability of ERJ depends on how judicial and constitutional review bodies engage with forms of harm that do not fit neatly within traditional models of individualised wrongdoing, but instead involve collective, cultural, and ecological dimensions. Historically, constitutional adjudication has been framed as a predominantly retrospective exercise, centred on determining whether public authorities have acted within the limits of legality and whether individual rights have been infringed (Stone 2000). This conception has positioned courts primarily as guardians of legality and interpreters of codified rights, often limiting their capacity to respond to complex and relational forms of harm.

ERJ brings analytical attention to the conditions under which constitutional adjudication may accommodate these broader dimensions of harm without departing from established judicial functions. From this perspective, the question is not whether courts should adopt restorative justice as a doctrine, but whether constitutional reasoning can incorporate evaluative criteria, such as participation, justification, and proportionality, that allow collective and culturally embedded harms to be recognised within existing legal frameworks (Habermas 1996; Forsyth et al. 2021).

Judicial engagement with ERJ-related concerns is often indirect. Courts rarely invoke restorative or dialogical reasoning explicitly, yet they increasingly rely on procedural principles to assess the legitimacy of decision-making processes. Proportionality, reasonableness, and procedural fairness have become central tools through which courts evaluate whether environmental and cultural interests have been adequately considered (*R v Oakes* [1986]; Stone 2000). ERJ provides an analytical framework for examining how these principles operate in practice, particularly where environmental degradation affects Indigenous ways of life and intergenerational cultural transmission (Boyd 2012; Kotzé 2012).

At the same time, constitutional systems differ significantly in how judicial authority is structured and exercised. In some jurisdictions, courts play

a central role in enforcing constitutional rights through ex post review, while in others, constitutional oversight is exercised primarily through preventive or parliamentary mechanisms. These institutional differences shape the extent to which ERJ-related criteria can be operationalised through adjudication. ERJ does not privilege one institutional model over another; rather, it enables a comparative assessment of how different constitutional arrangements distribute responsibility for addressing environmental harm and safeguarding Indigenous rights (Gardbaum 2001; Lavapuro, Ojanen and Scheinin 2011).

A further dimension of constitutional viability concerns the tension between judicial restraint and responsiveness. Courts are often cautious when addressing claims that implicate long-term environmental policy, resource allocation, or competing public interests. This caution is frequently justified by reference to separation of powers and democratic legitimacy. ERJ does not challenge these constraints, but it highlights how procedural engagement, such as requiring meaningful consultation, adequate impact assessment, or reasoned justification, may enhance constitutional legitimacy without compelling courts to substitute their judgment for that of political institutions (Habermas 1996; Husa 2020).

Importantly, ERJ also draws attention to the limits of purely declaratory remedies in cases involving ongoing or structural harm. While constitutional courts may recognise violations of rights or procedural deficiencies, the effectiveness of such judgments often depends on subsequent political or administrative action. From an ERJ perspective, the absence of enforceable follow-up mechanisms may undermine the practical protection of Indigenous rights, even where constitutional recognition is formally robust. This analytical lens thus allows for a critical examination of how constitutional systems translate recognition into implementation, without prescribing specific remedial models.

Finally, ERJ underscores the relevance of constitutional adjudication for intergenerational and future-oriented concerns. Environmental harm frequently unfolds over extended temporal horizons, affecting not only present communities but also future generations. Constitutional pro-

visions that refer to sustainability, environmental protection, or cultural continuity provide entry points for judicial engagement with these temporal dimensions, yet their effectiveness depends on how courts interpret and operationalise such commitments (Boyd 2012; Heinämäki 2023). ERJ offers criteria for analysing whether constitutional reasoning is capable of addressing these forward-looking concerns in a manner that remains consistent with principles of legality and democratic legitimacy.

In this sense, the constitutional viability of ERJ does not rest on its recognition as a legal doctrine, but on its capacity to illuminate how constitutional adjudication and review mechanisms engage with complex forms of environmental harm. By focusing on judicial engagement with authority, process, and content, ERJ provides a structured analytical approach for assessing the strengths and limitations of constitutional responses to Indigenous environmental claims across different legal systems.

3 History and background of ERJ in constitutional law

This chapter bridges the theoretical framework developed in Chapter 2 and the methodological analysis that follows. While ERJ has been conceptualised as an analytical framework grounded in constitutional legitimacy, its relevance ultimately depends on how it can be operationalised within legal and institutional practice. The aim of this chapter is therefore not to introduce ERJ as a legal doctrine, but to examine how restorative logics closely aligned with ERJ's evaluative criteria, enter constitutional law through procedures, institutions, and judicial reasoning.

The chapter proceeds by tracing the movement of restorative justice from its origins in criminal and dispute resolution contexts toward environmental and constitutional settings. It then examines how supreme courts and constitutional review bodies encounter ERJ-like concerns in adjudicating environmental harm affecting Indigenous peoples. Finally, it analyses how ERJ operates across different procedural stages and how it may enter constitutional practice either directly or indirectly. This operational perspective prepares the ground for the methodological choices and case analyses developed in the following chapters.

3.1 From Criminal Redress to Ecological Repair: Reframing ERJ in Environmental Contexts

To begin with, in 2002, the United Nations Economic and Social Council (ECOSOC) defined restorative justice (RJ) as:

“any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, *participate together* actively in the resolution of matters arising from the crime, generally with the help of a facilitator.

Restorative processes may include mediation, conciliation, conferencing and sentencing circles” (art.1)

Initially developed within the criminal justice field, restorative justice (hereafter, RJ) became progressively institutionalised through instruments such as the Council Framework Decision 2001/220/JHA and Directive 2012/29/EU, which consolidated its place also in European legal systems (this particularly important for Finland). Generally speaking, these frameworks affirmed the participatory role of victims, required facilitator training, and broadened the definition of “victim” beyond the confines of criminal prosecution. Reinforced by ECOSOC Resolution 2005/20 and the Council of Europe’s 2018 Recommendation, RJ evolved from a discretionary practice into a recognised rights-based pathway, while also expanding the legal understanding of harm to encompass multiple forms of *victimisation* (Della Giustina, 2022).

Therefore, this *broader* conception of restorative justice creates space for new applications in the fields of environmental and cultural rights. By moving beyond the traditional dyad of victim and offender, ERJ, *in this new form*, can address kinds of harm that are collective, intergenerational, and ecological, and may even extend to recognising ecosystems and non-human entities as rights-bearing. In this respect, ERJ aligns closely with contemporary environmental constitutionalism, which addresses environmental protection within substantive and procedural guarantees. Kotzé (2012: 195–197) characterises this as a “thick” model of environmental constitutionalism, one that integrates not only rights, but the rule of law even in evolving field such sustainable development. Similarly, Boyd (2012: 307–312) observes that more than one hundred constitutions worldwide now enshrine a right to a healthy environment, enabling citizens, so Indigenous communities, to hold governments accountable for ecological harm.

Within constitutional adjudication, ERJ can manifest through several procedural avenues. Courts may adopt dialogical and participatory review, requiring governments not only to remedy rights violations but also to

engage affected communities in shaping solutions. Proportionality review, already central to constitutional adjudication, can be reframed to weigh ecological and cultural harm together, recognising that environmental degradation may also constitute a breach of fundamental rights. Other possibilities include constitutional complaints (*actio popularis* or individual petitions), which open the way for collective environmental claims without the barrier of strict standing requirements. Finally, ERJ suggests the development of structural and ongoing remedies: courts may require periodic compliance reviews (as in *Grootboom v South Africa*), mandate meaningful consultation with affected groups (as in *Haida Nation v British Columbia*) or integrate cultural and environmental impact assessments into adjudication (as urged in the Finnish “*Sami Fishing Cases*” of 2022). The limits exposed in the *Fosen Vind* case suggest the risks of leaving implementation to political discretion, where the absence of enforceable standards may prevent the consolidation of a constitutional right and confine justice to extra-judicial arenas.

3.2 Supreme Courts and Environmental Adjudication

However, the adjudication of emerging forms of *harm*, such as cultural loss resulting from environmental degradation, may come into tension with the principle of *nullum crimen sine lege*, which prohibits punishment without a pre-existing legal basis (Cagossi, 2015). This is often the outcome in practice, as courts are reluctant to extend liability to harms not expressly codified. Such limitations risk obstructing the recognition of new forms of harm, including Indigenous cultural rights closely tied to the environment. As previously mentioned, a possible way forward is to broaden the idea of *ius dicere*, the judicial role of “saying the law”, so that courts don’t limit themselves to applying existing rules after the fact but, instead, they can engage in a more dialogical and forward-looking form of constitutional interpretation. This is where the three evaluative criteria of Environmental Restorative Justice become crucial. Indeed, constitutional adjudication *needs* and *can* shift from a reactive practice focused on breaches of law

to a restorative and dialogical process, through the activation of programmatic norms and the application of conflict-attenuating measures such as the annulment or modification of incompatible provisions.

In practice, courts can operationalise these restorative criteria in several ways. They may take action against the conflicting act, as seen in the Finnish 2022 Sámi fishing cases, where the Constitutional Law Committee also recommended differentiated legislation to safeguard Sámi culture and livelihoods. Courts can also require participatory procedures and meaningful consultation, as in *Haida Nation v. British Columbia*, where the duty to consult and accommodate created an ongoing framework for dialogue with Indigenous communities. Other reparative outcomes may involve more innovative remedies, such as the inclusion of co-management arrangements or continued judicial supervision to ensure compliance. However, there are several limitations of this approach, as it is visible in *Fosen Vind*, where the Norwegian Supreme Court recognised cultural harm but deferred remedial action to political discretion.

As the table below illustrates, the comparative experience of Canada, Finland, and Norway shows both convergence and divergence on these issues. All three uphold *nullum crimen sine lege* as a cornerstone of legality and foreseeability. Yet they differ markedly in how participatory and restorative processes are integrated into constitutional practice, and this variation reflects distinct constitutional histories and legal cultures.

Table 2: Restorative Justice and Constitutional Principles

Constitutional Principle	Canada	Finland	Norway
Nullum crimen sine lege	<i>Canadian Charter of Rights and Freedoms</i> , s. 11(g); <i>Criminal Code</i> , R.S.C., 1985, c. C-46, s. 9.	<i>Constitution of Finland</i> (731/1999), § 8. <i>Criminal Code of Finland</i> (39/1889), Ch. 3, § 1.	<i>Constitution of Norway</i> (Grunnloven), Arts. 96 and 97. <i>Human Rights Act</i> (Menneskerettsloven), 1999, §§ 2–3 (incorporates ECHR Art. 7).
Ius dicere	<i>Constitution Act</i> , 1867, ss. 96–100. <i>Canadian Charter of Rights and Freedoms</i> , ss. 7, 11(d). <i>Criminal Code</i> , R.S.C. 1985, c. C-46, ss. 717, 718.2(e) (Restorative justice and sentencing principles).	<i>Constitution of Finland</i> (731/1999), §§ 98–99. <i>Act on the Judiciary</i> (673/2016), § 3.	<i>Constitution of Norway</i> (Grunnloven), Arts. 88–90. <i>Human Rights Act</i> (Menneskerettsloven, 1999), ensuring judicial autonomy in applying ECHR and ICCPR. <i>Criminal Procedure Act</i> (Straffeprosessloven), §§ 71a–71c.
Participatory justice	<i>R. v. Gladue</i> , [1999] 1 S.C.R. 688.	<i>Constitution of Finland</i> (731/1999), § 21. <i>Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts</i> (394/2011).	<i>Constitution of Norway</i> (Grunnloven), Arts. 100, 110, 112. <i>Criminal Procedure Act</i> (Straffeprosessloven), §§ 71a–71c.
Indigenous participation	<i>Constitution Act</i> , 1982 recognizes Aboriginal rights; extensive restorative practices (e.g. Gladue courts, sentencing circles) integrate Indigenous traditions.	<i>Sami Act</i> ensures some participation (art.9); less developed in criminal justice; <i>Constitution</i> protects cultural rights.	<i>Sami rights</i> recognized; increasing involvement in restorative processes; <i>Constitution</i> includes Indigenous protections (art. 108).

Constitutional Principle	Canada	Finland	Norway
Legal pluralism	Constitution Act, 1982, s. 35. R. v. Van der Peet, [1996] 2 S.C.R. 507. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010. R. v. Gladue, [1999] 1 S.C.R. 688.	<i>Constitution of Finland</i> (731/1999), §§ 17(3), 121(4). Act on the Sámi Parliament (974/1995).	Constitution of Norway (Grunnloven), Arts. 108, 110(c), 112. Sami Act (1987). Finnmark Act (2005). NOU 2001:34 Samerett og forvaltning av land og vann i Finnmark (Official Report on Sámi Law and Land Management).
State's obligation to punish	Canadian Charter of Rights and Freedoms, ss. 7–12. Criminal Code (R.S.C., 1985, c. C-46). R. v. Powley, [2003] 2 S.C.R. 207.	<i>Constitution of Finland</i> (731/1999), §§ 2(3), 8. <i>Penal Code</i> (39/1889). <i>Criminal Procedure Act</i> (689/1997).	<i>Constitution of Norway</i> (Grunnloven), Arts. 96–97. <i>Human Rights Act</i> (1999). ECHR, Arts. 2, 3, 13.
Rehabilitation as a punitive goal	Canadian Charter of Rights and Freedoms, ss. 7, 12. Criminal Code, R.S.C. 1985, c. C-46, s. 718(d)	Constitutionally recognized (art. 7 and 8); Criminal Code includes rehabilitation as an explicit goal; strong emphasis on reintegration of offenders. (<i>Criminal Code of Finland</i> (39/1889), Ch. 6 § 1.)	Criminal Code emphasizes rehabilitation and reintegration (<i>Criminal Code</i> (Straffeloven, 2005); <i>Execution of Sentences Act</i> (Straffegjennomføringsloven, 2001); Constitution aligns with ECHR obligations to respect human dignity (art. 93; 96).

3.3 Restorative Dimensions across Procedural Stages

Another procedural aspect to consider is how the interaction between ERJ and constitutional adjudication can be mapped across different procedural stages. Duff (2012) has suggested that an *ideal* process should not be limited to the retrospective allocation of guilt and punishment but should instead operate as a structured journey from the recognition of harm, through inclusive dialogue and participation, to the identification of responses capable of addressing both the underlying conflict and its broader social consequences.

Community engagement is crucial because process and outcome cannot be separated. Constitutional guarantees of equality and access to justice require that affected communities, particularly Indigenous Peoples, participate meaningfully in decisions concerning their territories. As Duff argues in the context of criminal proceedings (2023), the legitimacy of an outcome depends on the opportunity for effective participation in the process through which it is reached; similarly, environmental decision-making can only be considered constitutionally legitimate when those affected are recognised as active participants rather than passive recipients of decisions. In Sarah Summers' words on epistemic ambition of trial (2023), the legitimacy of an adjudication depends on the inseparable relationship between process and outcome. A verdict is justified only when it emerges from a fair procedure that allows effective participation by those subject to judgment, reflecting the trial's role as a process of public accountability. In this sense, Preston (2011) demonstrates that restorative responses to environmental harm aim to create spaces for meaningful participation by victims, offenders, local communities, and environmental stakeholders. The legitimacy of the response is therefore linked not only to the final outcome but also to the inclusiveness of the process through which it is reached. Nevertheless, mandatory prosecution systems often limit such participatory opportunities, exposing a tension between the dialogical aspirations of Environmental Restorative Justice and the legality principle requiring the prosecution of every offence (pp. 140–141).

As the process moves from participation to adjudication, the trial phase focuses on the recognition, interpretation, and legal qualification of harm, determining whether and how the concerns raised by affected communities are reflected in the final decision. So, it's safe to assume that the criterion of culturally oriented Environmental Impact Assessments (EIAs) should be the main tool. Here, the judiciary, exercising its *ius dicere*, plays an important role in ensuring that ecological and cultural impacts are evaluated through procedures that respect Indigenous knowledge systems. Judicial oversight becomes a guarantee of fairness as it protects the equality of arms and ensures that restorative processes remain consistent with due process and impartiality. As the European Forum for Restorative Justice (2020) notes, restorative environmental justice requires that harm be understood as both ecological and social, which makes culturally informed EIAs indispensable tools for achieving procedural and substantive balance.

At the sentencing or remedial stage, the criterion of distributed environmental management comes to the fore. Instead of confining remedies to punishment or compensation, courts may design co-management arrangements, long-term monitoring duties, or other structural solutions that directly address ecological and cultural loss. Killean (2025) argues that transitional justice should extend to “*other-than-human*” harms such as ecocide, recognising that environmental degradation erodes cultural identity as well as ecosystems. In constitutional adjudication, this reasoning translates into remedies that restore Indigenous stewardship of land and waters, linking environmental repair to cultural renewal and embedding reconciliation in the very execution of judicial orders.

3.4 Direct and indirect entry of ERJ

Assessing the viability of ERJ within constitutional law depends mainly on how judicial institutions approach forms of harm *that do not fit within the traditional model* of individualised wrongdoing but instead involve collective, ecological, and cultural dimensions. For much of its history, constitutional adjudication has been conceived as a retrospective task, with

courts assessing alleged violations of codified rights and reviewing whether public authorities have acted in conformity with legality (Stone, 2000). This understanding has traditionally cast courts as guardians of legality and interpreters of fundamental rights, but it has also confined them to a role that is largely retrospective and declaratory. Restorative approaches, by contrast, suggest that constitutional courts are not limited to reviewing past breaches but may also design procedures that are dialogical and participatory. This requires seeing judges less as neutral technicians and more as actors rebuilding constitutional justice for the common good. Rosalyn Higgins made a similar point about international adjudication: while many of her contemporaries regarded law as a neutral set of rules to be applied mechanically, she argued that judges inevitably make authoritative decisions among competing claims, weighing not only the interests of the parties but also those of the broader community. By the same token, constitutional judges should be understood not merely as appliers of rules, but as participants in distributing values within the constitutional order (Higgins, 1968).

This reorientation requires a further reconsideration of the idea of *ius dicere* (Foddai, 2016). Conventionally, constitutional authority rests with the judiciary, which delivers binding pronouncements that define the law. Restorative justice, however, distributes elements of *ius dicere* more widely, acknowledging that victims, communities, and in environmental contexts even ecosystems must have a role in both defining the scope of harm and shaping the remedies to address it. From a constitutional perspective, this participatory dimension reflects broader commitments to democratic engagement, equality, and the right to be heard (Barberis, 2017). Moreover, it also raises a persistent tension on how to reconcile the inclusion of plural voices with the constitutional values of consistency, predictability, and the rule of law. Courts are therefore placed in the difficult position of balancing openness to relational and dialogical remedies with the need to maintain procedures that are legally coherent and institutionally reliable (Ibidem).

Many Indigenous legal traditions conceive of harm not as a discrete violation of a legal rule but as a rupture in the fabric of social and ecological relations, and consequently the appropriate response lies in repair, dialogue, and the restoration of balance rather than punishment (Department of Justice of Canada, 2001). When constitutional courts interpret Indigenous rights in light of these traditions, they move beyond purely symbolic recognition and instead affirm constitutional commitments to multiculturalism, legal pluralism, and self-determination. International instruments such as UNDRIP reinforce this approach by making clear that harm must be understood in cultural, spiritual, and environmental as well as legal terms. Judicial engagement with such perspectives allows constitutional systems to support Indigenous rights with remedies that correspond more closely to lived experience rather than relying solely on abstract legal categories.

Table 3: Direct and indirect entry of ERJ

Country	Incidental Entry Points	Fortuitous Entry Points	Procedural Openings for ERJ
Norway	Art. 108 Sámi rights, Art. 112 environment	Courts recognise cultural harm as constitutional injury (Fosen Vind)	Balancing tests, potential structural remedies (consultations, co-management, impact assessments)
Finland	Ex ante review by Constitutional Law Committee	Legislative debates embed ERJ principles	Preventive differentiated legislation; Sámi participation in lawmaking
Canada	Section 35 justification test; duty to consult	Broad interpretation of Charter rights to cover cultural/environmental harm	Judicially enforceable consultation, accommodation, structural remedies (land governance, co-management)

While these direct (or incidental) and indirect (or fortuitous) entry points demonstrate the theoretical viability of ERJ within constitutional reason-

ing, their practical significance depends on the structure of constitutional adjudication in each jurisdiction. The concrete opportunities and limitations emerging from these institutional configurations are examined in the summary of findings.

4 Research methodology and sources

This chapter sets out the research methodology and sources used in the dissertation. It explains how the research questions identified in the theoretical and conceptual framework are addressed through established methods of legal research. In particular, the chapter clarifies the overall research design, the methodological approach adopted, the rationale for case selection, and the sources and terminological choices underpinning the analysis. The aim is to ensure transparency and methodological coherence in examining constitutional responses to environmental harm affecting Indigenous Peoples.

4.1 Research Design and Article-Based Structure

Although ERJ is examined in greater detail in Chapters 2 and 3, including its normative and procedural dimensions, it is important to clarify here its role within the research design of this dissertation. ERJ is not employed as a research method, nor as a legal doctrine, but as a theoretical and normative evaluative framework that informs the formulation of the research questions and the criteria through which constitutional practice is analysed. ERJ did not originate within constitutional law, but in the fields of criminal justice and alternative dispute resolution. Its dialogical and participatory orientation, however, makes it particularly suitable for constitutional contexts, which are themselves interpretive, open-ended, and responsive to evolving societal conflicts.

From a methodological perspective, the analysis conducted in this dissertation is based on doctrinal and comparative constitutional research. The doctrinal dimension focuses on constitutional texts, jurisprudence, and constitutional review practices, while the comparative dimension examines how different constitutional systems address similar tensions between environmental protection and Indigenous rights. ERJ does not replace these methods; rather, it provides a normative guidance that helps

to identify which questions are constitutionally relevant when environmental harm also entails cultural and collective dimensions.

The choice to focus on constitutional law is justified by the limits of ordinary regulatory and administrative approaches, which tend to address environmental harm through individualised and sectoral mechanisms. Constitutional adjudication differs from administrative and criminal adjudication because its primary purpose is not the allocation of individual liability or the review of administrative legality, but the protection and development of constitutional rights. As Young (2010) demonstrates, constitutional courts may adopt deferential, conversational, experimentalist, managerial, or peremptory forms of review, allowing them to respond flexibly to emerging social problems through rights-based interpretation and institutional dialogue. This flexibility makes constitutional adjudication particularly suitable for addressing complex harms affecting Indigenous Peoples, including environmental degradation, cultural loss, and inter-generational injustice. As Hölzinger et al. (2019) observe, constitutional recognition of Indigenous Peoples often develops through processes of political negotiation, institutional adaptation, and post-conflict constitutional transformation rather than through fixed and fully entrenched constitutional commitments. This makes constitutional adjudication particularly important, as courts are frequently required to interpret open-ended constitutional principles in order to address emerging claims and evolving forms of harm. In this context, Environmental Restorative Justice (ERJ) provides an evaluative framework through which constitutional responses can be assessed, emphasizing democratic participation, culturally grounded understandings of harm, and inclusive approaches to repair and restoration (Al-Alosi & Hamilton, 2019; Braithwaite, 2002).

Building on Forsyth's work and Habermas's discourse theory of law (Section 2.3.2), the evaluative structure applied in the case studies is organised around three interrelated criteria, derived from Habermas's understanding of legitimacy as resting on authority, process, and justification (Habermas, 1996). These dimensions are translated into constitutional terms as follows:

1. **Distributed Environmental Management (DEM):** the decentralisation of state authority over environmental regulation through collaborative arrangements involving public authorities, Indigenous institutions, and other relevant actors (Forsyth et al., 2021, p. 20).
2. **Community Engagement in Environmental decision-making process:** the extent to which Indigenous Peoples' participatory rights are recognised and protected within environmental decision-making processes, including consultation, procedural justice, and culturally appropriate forms of dialogue (ibid.).
3. **Culturally grounded impact environmental assessment:** the integration of Indigenous knowledge, cultural values, and relational understandings of harm within environmental assessment processes, particularly through Environmental Impact Assessment mechanisms. This criterion does not assess the substantive legality of administrative decisions as such, but examines whether assessment procedures move beyond technical evaluation to address cultural and social impacts (ibid., p. 21).

These criteria allow the analysis to follow how constitutional values move from regulatory practice into constitutional interpretation. They also make it possible to assess how courts and review bodies engage with environmental harm as cultural harm within the limits of legal reasoning.

4.2 Methodological Approach and Comparative Constitutional Analysis

This dissertation is grounded in doctrinal and comparative constitutional analysis. It develops through a close reading of constitutional texts, judicial decisions, and constitutional review practices in Canada, Finland, and Norway. The focus of this analysis extends beyond the formal outcomes of constitutional disputes to the reasoning through which constitutional actors conceptualise environmental protection, Indigenous rights, and the

relationship between them. Particular attention is paid to the interpretative practices, justificatory arguments, and institutional arrangements through which constitutional systems respond to environmental harm affecting Indigenous Peoples.

Accordingly, the dissertation is primarily concerned with constitutional reasoning and constitutional structures rather than with evaluating the effectiveness of policy implementation. At the same time, constitutional commitments are examined as they take shape within legislative frameworks, consultation procedures, environmental assessment regimes, and co-management arrangements that influence Indigenous participation in environmental governance. This approach makes it possible to assess not only how constitutional principles are articulated, but also how they are translated into institutional mechanisms that structure decision-making concerning land, resources, and environmental protection.

Where constitutional actors engage with international instruments such as the ICCPR, UNDRIP, or ILO Convention No. 169, these sources are analysed as elements incorporated into constitutional reasoning and interpretation, rather than as external normative standards operating independently of the domestic constitutional order.

Futhermore, the comparative dimension of the study does not arise from an abstract juxtaposition of constitutional systems, but from the legal problems they confront.

In this perspective, attention is given to the institutional configurations that shape constitutional responses, including judicial review in Canada and Norway, the distinctive *ex ante* constitutional review performed by the Finnish Parliamentary Constitutional Law Committee, and the legislative and administrative frameworks through which constitutional commitments concerning Indigenous rights and environmental protection are implemented.

4.3 Case Selection: Canada, Finland, and Norway

The selection of cases in this dissertation has both analytical and methodological significance. The cases were not chosen simply to illustrate the application of predefined criteria; rather, they revealed recurring constitutional challenges that informed the development of the analytical framework itself. Examining constitutional practice in Canada, Finland, and Norway made it possible to identify situations in which environmental protection measures affected Indigenous cultural rights, participation, and access to traditional lands and resources. These constitutional tensions highlighted dimensions of environmental harm that were not fully captured by existing approaches to environmental constitutionalism. As a result, ERJ was adopted and further developed as an evaluative perspective capable of assessing how constitutional systems address the collective, relational, and intergenerational consequences of environmental decision-making for Indigenous Peoples

In this perspective, Canada, Finland, and Norway are selected as case studies because they present distinct constitutional arrangements and institutional mechanisms, while confronting comparable challenges related to Indigenous rights, environmental governance, and the use of natural resources in Arctic contexts. The selection is therefore not based on formal constitutional similarity, but on functional comparability. All three jurisdictions recognise Indigenous Peoples within their constitutional or legal frameworks yet differ significantly in the constitutional status of Indigenous rights, the institutional location of constitutional review, and the role of courts or parliamentary bodies in mediating environmental conflicts.

In the Canadian context, the analysis focuses on constitutional jurisprudence developed under section 35 of the Constitution Act, 1982, and its interaction with environmental governance. Cases such as *Haida Nation v British Columbia* and *Tsilhqot'in Nation v British Columbia* are selected because they illustrate how Indigenous rights are protected through judicial interpretation, particularly with respect to consultation duties, land-related rights, and the constitutional relevance of environmental impacts.

These cases provide insight into how environmental harm may be framed as constitutionally significant even in the absence of explicit environmental rights in the constitutional text.

With respect to Finland, the case selection reflects the distinctive role of ex ante constitutional review exercised by the Parliamentary Constitutional Law Committee. Rather than focusing on judicial decisions, the analysis examines constitutional opinions addressing conflicts between environmental regulation and Sámi cultural rights, particularly in relation to traditional livelihoods. These materials are selected because they demonstrate how constitutional assessment operates within the legislative process, and how environmental and cultural considerations may be integrated into constitutional reasoning prior to the adoption of binding norms.

In Norway, the selection centres on constitutional adjudication by the Supreme Court, with particular attention to cases involving Sámi rights and environmental protection. The *Fosen Vind* judgment is included as a key example of how constitutional provisions on Indigenous rights and environmental protection are applied in the context of the green transition. The case is also relevant for highlighting the role of constitutional adjudication in addressing conflicts that generate effects extending beyond present interests, including intergenerational considerations and the limits of judicial remedies in large-scale environmental disputes.

4.4 Limits of the Analysis

This dissertation is subject to a number of methodological and conceptual limitations, which help define the scope of the analysis. First, the constitutional systems of Canada, Finland, and Norway differ significantly in their structures, historical development, and recognition of Indigenous self-determination, mostly *internal*. Rather than treating this asymmetry as a limitation, the study regards it as a comparative strength. Applying common ERJ criteria across these jurisdictions enables the identification of systemic gaps and promising practices alike. This approach responds to

Hirschl's critique that comparative constitutional law risks incommensurability (Hirschl, 2005), by showing that distinct systems can be evaluated against common normative benchmarks without collapsing their differences.

Second, the culturally embedded and relational character of ERJ entails a degree of interpretive flexibility. This raises two interrelated concerns. One is the risk of essentialism, as reducing Indigenous rights to static cultural categories rather than recognising them as dynamic and evolving (Shachar, 2001; Kymlicka, 2007). The other is the charge of normative bias, namely that ERJ imports external values into constitutional adjudication by privileging restorative or dialogical outcomes over more conventional forms of reasoning. Both concerns are mitigated by grounding ERJ in concrete legal indicators and situating it within broader trends of rights-based and pluralistic constitutionalism (Lavapuro, Ojanen and Scheinin 2011).

At the same time, a further limitation arises from the state-centric nature of constitutional law itself. Even when constitutions recognise Indigenous rights, such recognition is articulated through state-based legal vocabularies and institutions that may not fully reflect Indigenous epistemologies or normative traditions. Constitutional recognition may therefore reproduce existing power relations by requiring Indigenous claims to be articulated through state-defined legal categories rather than engaging with Indigenous peoples as autonomous normative orders. Recognition is employed in this dissertation primarily as a constitutional and legal concept rather than as a normative endorsement of recognition theory. Nevertheless, the dissertation acknowledges the broader scholarly debate regarding the limits of recognition as a mechanism for addressing historical and structural inequalities.

Another methodological challenge is conceptual translation. Principles such as free, prior and informed consent (FPIC), participatory justice, and restorative mechanisms are not uniformly understood across the jurisdictions under study. In Canada, FPIC is articulated primarily through section 35 jurisprudence; in Finland, through statutory consultation duties influenced by international law; and in Norway, through constitutional provi-

sions such as Articles 108 and 112. Rather than imposing a single definition, the study compares how these principles are operationalised in each context, allowing both divergence and convergence to emerge.

Finally, constitutional provisions on Indigenous and environmental rights often operate at a programmatic rather than directly justiciable level, particularly in Finland, where oversight is primarily exercised through parliamentary review. This raises the concern that constitutional frameworks may be too weak to deliver enforceable remedies. Here again, ERJ does not overcome these constitutional limitations. Rather, it provides an analytical framework for evaluating how constitutional systems respond to these institutional constraints and where opportunities for more inclusive governance may emerge.

In light of these concerns, the analysis never attempted to offer a *one-size-fits-all* solution. Instead, each case study is designed to respond to the specific institutional and cultural context under examination, testing how ERJ criteria may operate in practice avoiding the reduction of diverse Indigenous experiences to simplified or essentialised categories.

4.5 On terminology

A central challenge in this dissertation is to clarify the key definitional foundations of constitutional environmental law as it intersects with Indigenous rights in the Arctic. Much of the existing scholarship lacks precise and historically grounded definitions, which weakens both conceptual clarity and enforceability. This is particularly acute in the treatment of *culture*, often reduced to language or folklore while neglecting its ecological and intergenerational dimensions (Shachar, 2000; Kymlicka, 2007). For Indigenous communities, culture is inseparable from land, subsistence practices, and seasonal cycles; environmental degradation thus amounts to cultural harm, raising constitutional questions about how law recognises this interdependence (Fredman, 2011).

As for the concept of *harm*, this research adopts a relational understanding that goes beyond the conventional legal notion of harm as a

material loss or an isolated violation of an individual interest (Feinberg, 1984). Harm is conceived here as a *break* in cultural, social, and ecological relations, which aligns with both restorative justice theory (Zehr, 2002; Llewellyn and Howse, 1999) and Indigenous legal traditions. At the international level, this broader conception is reflected in instruments such as Article 27 of the International Covenant on Civil and Political Rights (UN HRC, 1994), Article 8(j) of the Convention on Biological Diversity (CBD, 1992), and Articles 26 and 32 of UNDRIP (UNGA, 2007).

National jurisdictions have also begun to recognize harm in this relational sense. In Finland, Section 17(3) of the Constitution guarantees the Sámi the right to maintain and develop their culture, and the Constitutional Law Committee opinions on fishing rights acknowledged that uniform restrictions caused disproportionate harm to Sámi culture (Parliamentary Constitutional Law Committee, 2022). In Norway, the Supreme Court in the *Fosen Vind* case ruled that large-scale wind power development in reindeer herding areas constituted cultural harm in violation of Article 108 of the Constitution and Article 27 ICCPR (Supreme Court of Norway, 2021). In Canada, Indigenous traditions such as the Cree concept of *wahkohtowin* describe harm as the disruption of reciprocal relations between individuals, community, and the natural environment (Craft, 2017). This understanding has influenced both restorative justice practices (Ross, 1996) and judicial recognition of Indigenous rights in cases such as *Delgamuukw* (Supreme Court of Canada, 1997) and *Tsilhqot'in* (Supreme Court of Canada, 2014).

The problem of definition extends also to *equality*. Comparative constitutionalism often conflates formal equality with substantive equality, though the latter is indispensable for evaluating differentiated measures aimed at Indigenous or minority groups (Fredman, 2011). Canada, through section 35 of the Constitution Act, 1982, provides directly justiciable protections, including recognition of Aboriginal and treaty rights. By contrast, Finland and Norway rely on legislative action to realise Sámi rights, revealing weaker constitutional enforceability (Young, 2012; Hovland, 2020). These differences illuminate deeper theoretical tensions between person-

alist constitutionalism, which views rights as inherent to human dignity and community, and positivist traditions, which treat rights as state grants (Lavapuro, Ojanen and Scheinin, 2011).

A further complexity arises from the overlapping categories of Indigenous Peoples, minority communities, majority communities, and colonial Peoples. Under international law, Indigenous Peoples are recognised as rights-holders entitled to self-determination, cultural survival, and land-based continuity (UNDRIP, 2007; ILO 169, 1989). Minorities, by contrast, are generally protected under Article 27 ICCPR and the Framework Convention for the Protection of National Minorities, which focus on cultural and linguistic rights. Yet, the categories often overlap: the Sámi, for example, are recognised both as an Indigenous people and a national minority in Finland, creating fragmented protection (Scheinin, 2024). Colonial Peoples, as defined in UN General Assembly Resolution 1514 (1960) and clarified in Resolution 1541 (1960), were historically those under foreign domination. However, many Indigenous groups frame their current struggles as forms of *internal colonialism*, where state constitutions reproduce extractive and assimilationist structures despite formal decolonisation (Kuokkanen, 2020).

The different constitutional approaches to Indigenous self-determination also raise a broader question concerning the capacity of constitutional systems themselves to accommodate Indigenous legal orders. If constitutional recognition remains limited to the protection of existing rights without addressing the institutional distribution of authority, can constitutional systems genuinely respond to Indigenous claims for self-determination? It is within this broader discussion that the contemporary debate on decolonised constitutionalism has emerged.

From here emerges the debate on *decolonised constitutions*. Scholars like Tully (1995) and more recently Kuokkanen (2020) argue that formal recognition of Indigenous rights is insufficient unless constitutions themselves are restructured to reflect multiple legal orders and to undo embedded colonial hierarchies. This requires moving beyond symbolic inclusion toward genuine constitutional pluralism, where Indigenous institutions

co-govern land and resources. In environmental law, this means constitutions must anticipate ecological and cultural vulnerabilities and embed restorative mechanisms into their design (Kotzé, 2012; Husa, 2020).

Similarly, the notion of intergenerational equity, originating in the Brundtland Report (*Our Common Future*, 1987), has become a constitutional concept, particularly in Norway's Article 112. It bridges environmental sustainability with obligations to future generations, while also protecting Indigenous intergenerational cultural transmission (Heinämäki, 2023). The exact meaning is still uncertain, as some view it as part of sustainable development, others as a legal right, and others again as a constitutional value.

Finally, the dissertation introduces Environmental Restorative Justice (ERJ) as its analytical framework. ERJ is neither codified nor jurisdiction-specific; rather, it provides evaluative criteria for assessing how constitutional systems respond to environmental harm affecting Indigenous Peoples through the distribution of authority, meaningful participation, and culturally grounded environmental assessment (Forsyth et al., 2021; Braithwaite, 2002). This approach resonates with recent scholarship on decolonised constitutionalism. Rather than viewing constitutionalism and decolonisation as inherently incompatible, Albert (2025) argues that contemporary constitutionalism itself may provide legitimate and non-violent pathways through which Indigenous Peoples pursue self-determination, recognition, and institutional transformation. Building on this perspective, the present dissertation does not propose a model of decolonised constitutionalism. Instead, it examines whether existing constitutional systems possess the interpretative and institutional capacity to evolve in ways that better accommodate Indigenous rights within environmental governance. In this context, ERJ serves as an evaluative framework for assessing both the transformative potential and the structural limitations of constitutional law in responding to Indigenous environmental claims (345-346).

5 Findings

This chapter presents the findings of the dissertation as they emerge from the three peer-reviewed articles that constitute the core of the study. The three articles are as follows:

1. **“Rethinking insularity in the Canadian constitutional system: how Indigenous knowledge shapes the framework for vulnerable environmental areas in the Arctic Archipelago”** (*Yearbook of Polar Law*, Vol. 15, 2024) [Article 1], which examines how constitutional law can engage with ecological vulnerability and Indigenous knowledge in contexts lacking explicit constitutional environmental guarantees, using Inuit governance in Nunavut as a central case study.
2. **“Restorative Justice in Finnish Constitutional Law: Reconciling Sámi Rights and Ecology”** (*The Polar Journal*, 2025) [Article 2], which applies ERJ as an analytical tool to assess how constitutional and parliamentary mechanisms in Finland address environmental harm in relation to Sámi cultural rights.
3. **“Environmental Restorative Justice and the Green Transition: Examining Intergenerational Equity for Sámi Rights under the Norwegian Constitution”** (*Arctic Yearbook*, 2025) [Article 3], which evaluates the Norwegian constitutional framework through the lens of ERJ, with particular attention to intergenerational equity and the limitations of judicial remedies in Indigenous environmental conflicts.

5.1 ERJ Criteria Analysis

The purpose here is not to restate the doctrinal analysis developed in each article, but to make explicit what the analysis reveals when the same questions are asked across jurisdictions and across different constitutional settings. The chapter therefore proceeds in two steps.

First, each criterion is examined in turn. For each criterion, the discussion identifies how the relevant constitutional connection is articulated in Canada, Finland, and Norway, and how it operates in practice through constitutional reasoning, institutional arrangements, and review mechanisms. The emphasis is placed on what constitutional actors do with these concepts in concrete disputes, rather than on presenting an ideal model of governance. For ease of reading, each criterion section is accompanied by an illustrative table that summarises the key constitutional linkages across the three jurisdictions.

Second, the chapter closes with a summary of findings that draws the three criteria together. This final section moves from the individual criterion-based discussion to an integrated and comparative reading of the results, highlighting the conceptual continuities across the three articles and the patterns that emerge when constitutional practice is assessed through ERJ.

5.1.1 Distributed Environmental Management (DEM)

Here, distributed environmental management (DEM) is seen not just as a management tool, but to understand how governing land, water, and resources connects Indigenous stewardship with the state's constitutional duty to protect the environment. While DEM is often described in environmental law as a relatively recent response to the rigidity of "command-and-control" regulation (Forsyth, 2021: 5), in the Arctic it embodies longstanding Indigenous demands for authority over natural resources. For Inuit in Nunavut and for the Sámi in Finland and Norway, as well as for representative organisations such as the Inuit Circumpolar Council (ICC)

and the Sámi Council, distributed governance is not an innovation of environmental policy, but a constitutional claim grounded in self-determination, cultural continuity, and historical legal traditions. As Kuokkanen (2020) warns, frameworks that remain consultative rather than decisional risk reducing constitutional rights to mere cultural accommodation.

In Canada, DEM is constitutionally established in section 35 of the Constitution Act 1982, which protects Aboriginal and treaty rights. Nunavut Tunngavik Incorporated (NTI) has identified co-management under the Nunavut Land Claims Agreement (NLCA) as a foundational constitutional right covering land, water, and marine governance. Yet NTI's *Annual Report on the State of Inuit Culture and Society* (2021–2022) highlights uneven implementation, with federal departments retaining overriding authority in key sectors such as marine conservation and mineral development. The ICC has likewise called for full Inuit jurisdiction over marine and wildlife governance in the Arctic Archipelago, pointing to the Tallurutiup Imanga Inuit Impact and Benefit Agreement as an Inuit-led model still constrained by statutory limits. Canadian jurisprudence (e.g., *Calder v British Columbia* [1973] SCR 313; *R v Powley* [2003] 2 SCR 207; *R v Pamajewon* [1996] 2 SCR 821) has progressively affirmed Indigenous rights under section 35, and the NLCA has been amended to clarify ownership of natural resources. Nevertheless, legislation such as the *Nunavut Waters and Nunavut Surface Rights Tribunal Act* (last amended 2019) preserves federal oversight, limiting the constitutional promise of co-management to partial implementation.

In Finland, DEM is shaped by Article 17 of the Constitution, which protects the Sámi language and culture, and Article 121, which provides for cultural self-government in the Sámi Homeland. Yet in practice, distributed management is exercised through Metsähallitus, which administers about 80 per cent of state-owned land under the *Nature Conservation Act*. The Sámediggi (Sámi Parliament of Finland) has repeatedly demanded statutory co-decision powers over land and water governance in Sápmi, including Metsähallitus-managed territories. Similarly, the Sámi Council has argued that, while constitutional rights are formally recognised, they are under-

mined by sectoral laws, such as the *Mining Act* and the *Metsähallitus Act* that entrench state and commercial priorities (Fusco, 2025).

In Norway, DEM has a clearer constitutional foundation under Article 108 of the Constitution, which obliges the state to create conditions enabling the Sámi to preserve and develop their culture. The *Finnmark Act* 2005 operationalises this by transferring approximately 95 per cent of county land to the Finnmark Estate (FeFo), a statutory body co-managed by Sámi and non-Sámi representatives. While the Sámediggi (Sámi Parliament of Norway) has recognised this as a major constitutional advance, it has noted that decisive control remains with the state, particularly under the *Minerals Act*. The UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP 2024) has therefore recommended that Norway amend both the *Reindeer Husbandry Act* (Act No 15/2007) and the *Marine Resources Act* to institutionalise free, prior, and informed consent (FPIC) as a constitutional standard and to strengthen co-management regimes.

Here follows a comparative table that sets out these constitutional connections across Canada, Finland, and Norway.

Table 4: Distributed Environmental management (DEM)

Country	Constitutional/ Legal Framework	Indigenous Position	Main Limitations	Overall Assessment
Canada	Section 35 Constitution Act 1982; Nunavut Land Claims Agreement (NLCA); amendments to clarify resource rights	Inuit organisations (NTI, ICC) claim co-management as a foundational right	Federal departments retain overriding authority (e.g. marine conservation, mineral development); statutory limits in <i>Nunavut Waters and Surface Rights Tribunal Act</i>	Strong constitutional basis, but uneven implementation and persistent federal oversight

Country	Constitutional/ Legal Framework	Indigenous Position	Main Limitations	Overall Assessment
Finland	Section 17 Constitution (cultural rights); Metsähallitus Act; Nature Conservation Act	Sámediggi and Sámi Council demand statutory co-decision powers over Sápmi lands and waters	State controls ~80% of land via Metsähallitus; consultative rather than decisional participation; sectoral laws (Mining Act, Metsähallitus Act) prioritise state/commercial interests	Weak co-management: protections exist but are undermined by state-centric framework
Norway	Constitution Article 108; Finnmark Act 2005 (95% of county land to FeFo, co-managed); Minerals Act	Sámediggi recognises advance in Finnmark Estate, but seeks stronger FPIC and co-decision	State retains decisive authority over resource allocation; insufficient FPIC in legislation (Reindeer Husbandry Act, Marine Resources Act)	Moderate to strong: significant statutory transfer, but incomplete recognition of Sámi authority

5.1.2 Community Engagement in Environmental Decision-Making

Community engagement forms the second criterion of this analysis. It asks whether Indigenous Peoples are treated as genuine participants in decision-making or remain confined to the role of consultees. Within the ERJ framework, this dimension reflects Habermas's concern with *process* (how decisions are made) and highlights the constitutional demand that participation be more than symbolic. Participation gives effect to self-determination, strengthens substantive equality through the differentiated protection of minorities, but also reveals ERJ's capacity to reframe environmental harm as cultural and collective harm. In practice, courts have linked participation with the proportionality principle. In *R v Sparrow* and *Haida Nation* in Canada, the duty to consult and accommodate functions as a constitutional test of whether restrictions on Aboriginal rights are justified. In Finland's 2022 Fishing Right Cases, the Supreme Court held that uniform fishing bans disproportionately interfered with Sámi cultural rights precisely because participatory safeguards were absent. Similarly, in

Norway's *Fosen Vind* case, the lack of effective Sámi involvement rendered state measures disproportionate under both Article 108 of the Constitution and Article 27 ICCPR. These examples show how participation is not merely procedural but a substantive guide in assessing whether state actions impose disproportionate restrictions on Indigenous cultural and environmental rights.

The principle of community engagement finds strong support in international law, notably in the requirement of free, prior, and informed consent (FPIC) under Article 6 of ILO Convention No. 169, Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and Article 27 of the International Covenant on Civil and Political Rights (ICCPR). In many Indigenous justice systems, participation is inseparable from collective dialogue, as disputes are resolved through processes of communal engagement rather than adversarial proceedings (Claassens and Budlender, 2014: 75). Constitutional frameworks must therefore remain open to the dynamic nature of Indigenous customary law, ensuring that these systems evolve with community needs while respecting fundamental rights (Claassens and Budlender, 2014: 89–90).

In Canada, the Nunavut Land Claims Agreement Act 1993 (NLCA) institutionalises Inuit participation in the governance of land, water, and marine resources (Art. 8), in line with Section 35 of the Constitution Act 1982. Inuit decision-making often draws on customary principles, with Elders' councils ensuring governance reflects both community values and ecological knowledge (Van Schilfgaarde, 2024: 140). Yet Inuit organisations, including Nunavut Tunngavik Incorporated, have noted that implementation remains uneven when federal authorities retain overriding control, particularly in marine conservation and mineral development.

In Finland, the Sámi Climate Council, established under the Climate Act (423/2022) and detailed by Government Decree 435/2023, was appointed by the Government on 24 August 2023 to bring Sámi knowledge into climate policy. Rather than focusing on a single strategy document, recent scholarship highlights broader process gaps: the lack of specific cultural policy instruments for Sámi rights, the repeated stalling of the Sámi Par-

liament Act reform in the Constitutional Law Committee, and the need to decolonise cultural policy to strengthen Sámi linguistic and cultural rights (Valoma, 2024). Alongside these developments, in 2021 Finland has also established a Truth and Reconciliation Commission concerning the Sámi People, reflecting a growing acknowledgment of historical injustices.

In Norway, Chapter 4 of the Sámi Act 1987 obliges authorities to consult the Sámi Parliament on matters directly affecting Sámi interests (s 4–2). This statutory duty reflects FPIC standards in ILO 169 and UNDRIP and is reinforced by Article 108 of the Constitution. While these mechanisms provide a comparatively strong framework, the Sámediggi and the UN Expert Mechanism on the Rights of Indigenous Peoples have called for stronger guarantees, including amendments to the Reindeer Husbandry Act and the Marine Resources Act, to ensure that engagement is substantive rather than procedural.

Table 5: Community Engagement in Enviromental Decision- Making

Country	Constitutional / Legal Framework	Indigenous Position	Main Limitations	Overall assessment
Canada	Section 35 Constitution Act 1982; Nunavut Land Claims Agreement Act 1993 (Art. 8)	Inuit organisations and Elders' councils ensure governance reflects community values and knowledge	Federal authorities retain overriding control, especially in marine conservation and mineral development	Engagement grounded in Section 35; uneven implementation weakens justiciability
Finland	Section 17 Constitution (cultural rights); Sámi Climate Council (Decree 423/2022); Cultural Environment Strategy	Sámediggi demands decisional—not only consultative—powers; stresses living Sámi law	Participation remains primarily consultative; sectoral laws prioritise state interests	Cultural rights recognised, but weak constitutional entry into decision-making
Norway	Constitution Art. 108; Sámi Act 1987, Ch. 4 (s 4–2 consultation duty); ILO 169	Sámediggi involved in formal consultations; supported by UN EMRIP	State retains decisive control; lack of substantive FPIC in key laws (Reindeer Husbandry Act, Marine Resources Act)	Stronger constitutional anchoring (Art. 108), but participation often procedural

5.1.3 Culturally grounded Environmental Impact Assessment

The third evaluative criterion is the use of Environmental Impact Assessment (EIA) as a mechanism for advancing Indigenous self-determination and constitutional justice. When understood as more than a procedural requirement, EIA can include Indigenous values, knowledge, and perspectives in decision-making, ensuring that environmental governance reflects both ecological sustainability and cultural continuity (Arctic Council, 2019). That is the reason why EIAs need to be interpreted as culturally oriented.

Its constitutional relevance emerges from several principles: the right to a healthy environment (Finland, ss 20–22; Norway, art 112), cultural rights (ICCPR art 27; Finland, s 17; Norway, art 108), and intergenerational equity, which together frame EIA as a gateway for Indigenous rights to become enforceable in constitutional adjudication. Indigenous Peoples in the Arctic and beyond have long argued for EIAs that reflect more than tokenistic consultation. The Arctic EIA Final Report (Arctic Council, 2019) stresses that effective EIAs require dialogue, trust, and respect, integrating Indigenous knowledge systems alongside Western science. Such integration acknowledges the epistemological pluralism of environmental decision-making. It also aligns with ERJ, which reframes EIAs as tools for recognising intergenerational and cultural harms, challenging the anthropocentrism of conventional assessments (Killeen, 2022). In this light, meaningful participation in EIA is not only procedural but tied to substantive self-determination, as recognised in UNDRIP (art 32) and the CBD Akwé: Kon Guidelines (2004).

As mentioned previously, a recent legal-theoretical perspective argues that self-determination has both constitutive and ongoing dimensions: the former requiring Indigenous consent in creating or reforming governance, the latter ensuring conditions for continuous cultural, social, and economic development (Anaya and Åhrén (2025)). EIAs provide a vehicle for both. When structured as co-governance frameworks, they embody constitutive self-determination; when applied as continuous oversight, they secure ongoing self-determination by safeguarding Indigenous authority

over resources. International instruments reinforce this role. UNDRIP (arts 18, 19, 32) and the CBD require inclusive and culturally sensitive EIAs, while the Akwé: Kon Guidelines offer practical standards for incorporating Indigenous knowledge and traditions.

In Canada, decentralisation under sections 25 and 35 of the Constitution Act 1982 has enabled Indigenous-led governance frameworks. The 1995 policy recognising the inherent right to self-government has supported agreements reflecting Indigenous legal traditions. Inuit communities prioritise co-management of land and marine resources, as seen in the Nunavut Land Claims Agreement Act (1993) and the Tallurutiup Imanga Inuit Impact and Benefit Agreement (2019). These instruments illustrate how EIAs can integrate Inuit ecological knowledge and institutionalise co-governance, aligning with UNDRIP obligations. Yet fragmentation across federal, territorial, and local levels continues to constrain Inuit law-making authority.

In Finland, EIAs are governed by the Act on the Environmental Impact Assessment Procedure (252/2017, amended 2023), complemented by the Nature Conservation Act, Land Use and Building Act, and Mining Act. These laws require collaboration with the Sámi Parliament and Skolt Village Assembly in Sápmi. The Constitution (ss 20–22) enshrines environmental rights, and section 17 protects Sámi cultural rights. However, as scholars note (Kuokkanen, 2024; Heinämäki et al., 2017), implementation has been narrow, often treating cultural rights as secondary. The Länsman cases before the UN Human Rights Committee and the fishing rights cases of 2022 (KKO:2022:25; KKO:2022:26) demonstrate that cumulative cultural impacts are insufficiently captured, revealing a gap between constitutional provisions and EIA practice.

In Norway, EIAs are mandated under the Planning and Building Act (2008, s 4-2), complemented by sectoral regimes in the Energy, Minerals, and Husbandry Acts. The Constitution explicitly protects Sámi rights (art 108) and environmental interests (art 112). In Fosen Vind (HR-2021-1975-S), the Supreme Court found that grazing lands were unlawfully compromised, affirming that EIAs excluding Sámi perspectives can breach

constitutional and international standards. Yet uneven municipal practice and reliance on procedural compliance limit their substantive effect (Scheinin, 2024; May, 2020).

Comparatively, EIAs illustrate both constitutional promise and limitation. In Canada, Indigenous-led frameworks show how assessments can advance reconciliation and cultural autonomy, though institutional fragmentation persists. In Finland, constitutional environmental rights provide a strong normative base, but EIAs remain largely procedural and insufficiently attentive to cultural dimensions. In Norway, constitutional clauses anchor Indigenous and environmental rights directly, but implementation varies and risks becoming symbolic. Read through ERJ, these examples reveal the transformative potential of EIAs: to operationalise Indigenous rights, connect environmental protection with cultural survival, and embody both the constitutive and ongoing dimensions of self-determination.

In article 3, focused on Norway, this constitutional function of EIAs is sharpened when considered with intergenerational equity. For Indigenous Peoples, whose relationships to land and water are inherently communal and forward-looking, participation in assessment processes is not only about present governance but about safeguarding continuity for future generations (Weiss, 1989; UNDRIP, art 25). The Brundtland Report (1987) and subsequent jurisprudence, from *Oposa v Factoran* (Philippines, 1993) to *Saramaka v Suriname* (IACtHR, 2007), underscore that development projects must integrate the rights of future generations and protect the cultural integrity of Indigenous communities. International instruments reinforce this perspective. The Convention on Biological Diversity (art 8(j)), ILO Convention No. 169, and UNDRIP (arts 8, 9, 26, 32) all require that Indigenous knowledge, cultural practices, and institutions guide decision-making. Cases such as *Kichwa of Sarayaku v Ecuador* (IACtHR, 2012) and *Endorois v Kenya* (ACHPR, 2010) illustrate how participatory frameworks serve as safeguards against collective cultural harm.

However, article 112 of Norwegian Constitution that establishes the right to a healthy environment *for future generations as well* remains pretty much programmatic in nature with small application history.

Table 6: Culturally grounded Environmental Impact Assessment

Country	Constitutional/ Legal Framework	Indigenous Position	Key Cases / Issues	Overall Assessment
Canada	<i>Impact Assessment Act (2019)</i>	Indigenous knowledge integration; UN-DRIP alignment; co-management in agreements	<i>Tallurutiup Imanga IIBA</i>	Jurisdictional fragmentation
Finland	<i>Act on the EIA Procedure (252/2017, am. 2023); Nature Conservation Act; Land Use and Building Act; Mining Act</i>	Mandatory EIA for reindeer husbandry; Sámi Parliament and Skolt Assembly collaboration	<i>Länsman I–III</i> (cumulative effects); 2022 fishing rights cases	Narrow interpretation of s 17 cultural rights
Norway	<i>Planning and Building Act (2008); Energy Act; Mineral Act; Husbandry Act</i>	Consultation with Sámi Parliament in EIA; constitutional arts 108, 112	<i>Fosen Vind</i>	Uneven municipal implementation; art. 112 programmatic in nature

5.2 Summary of the Findings

This sub-section summarises how the three articles collectively respond to the research questions guiding this dissertation.

The analysis has always aimed to respond this central question:

How do constitutional systems in Canada, Finland, and Norway respond to environmental harm affecting Indigenous Peoples, and to what extent can constitutional law reconcile environmental protection with Indigenous rights through restorative justice?

Across the three jurisdictions, constitutional systems do respond to environmental harm affecting Indigenous Peoples, but they do so through different institutional pathways.

In Article 1, the Canadian context was examined through the lens of insularity and territorial remoteness in the Arctic Archipelago. Environmental harm was not treated as a purely technical regulatory issue, but it became constitutionally relevant once linked to Aboriginal title and self-government under section 35 of the Constitution Act 1982. Jurisprudence such as *Calder v British Columbia* [1973] SCR 313, *R v Sparrow* [1990] 1 SCR 1075, and especially *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257, confirmed that land is not only economic space but constitutional space. Environmental degradation therefore implicates governance authority and cultural continuity. However, Article 1 also showed that co-management under the Nunavut Land Claims Agreement remains structurally constrained. Federal oversight in marine governance and mineral development limits the transformative reach of section 35.

In Article 2, the Finnish constitutional framework was analysed through the 2022 fishing rights cases (KKO:2022:25; KKO:2022:26). Here, environmental conservation measures were formally grounded in ecological protection. Yet the Supreme Court held that uniform salmon fishing bans disproportionately interfered with Sámi cultural rights under section 17 of the Constitution because participatory safeguards had not been adequately integrated. The Constitutional Law Committee's *ex ante* review mechanism emerged as a central site of constitutional mediation. Article 2 demonstrated that reconciliation in Finland often operates preventively. However, structural authority over land remains concentrated in *Metsähallitus*, and the stalled reform of the Sámi Parliament Act reveals the limits of parliamentary constitutionalism.

In Article 3, the Norwegian context was examined through *Fosen Vind* (HR-2021-1975-S). There, large-scale renewable energy development was found to violate Sámi cultural rights under Article 108 of the Constitution and Article 27 ICCPR. Article 112, which recognises the right to a healthy environment for present and future generations, framed the broader constitutional setting but remained largely programmatic in its direct application. Article 3 showed clearly that environmental transition policies can themselves produce constitutional violations when cumula-

tive cultural impacts are not assessed. Yet post-judgment political negotiations revealed that judicial recognition does not automatically translate into restorative outcomes.

Generally speaking, the findings show that constitutional law in all three systems can recognise *environmental harm as cultural harm*. It can recalibrate environmental protection measures when they disproportionately affect Indigenous communities. However, reconciliation remains partial. Courts and review bodies correct excesses; they do not consistently restructure governance relationships.

Secondly, the analysis asks:

How does environmental constitutionalism shape the protection and advancement of Indigenous rights in environmental governance?

The findings demonstrate that environmental constitutionalism provides the normative architecture within which Indigenous claims become constitutionally intelligible.

In Article 1, although Canada lacks an explicit environmental clause in its Constitution, environmental constitutionalism emerged through judicial interpretation of section 35. Aboriginal title jurisprudence connected land, governance, and ecological stewardship. Environmental governance was therefore reframed as a question of constitutional authority rather than administrative discretion.

In Article 2, section 20 of the Finnish Constitution, which establishes environmental responsibility, interacted with section 17 on Sámi cultural rights. The fishing cases demonstrated that conservation cannot be constitutionally neutral. Environmental measures must account for differentiated cultural impacts. Environmental constitutionalism here functions as a balancing framework, but one that can recognise cumulative harm.

In Article 3, Norway's Articles 108 and 112 explicitly anchor both Indigenous and environmental rights. The analysis showed that constitutional environmentalism in Norway is textually strong but jurisprudentially cau-

tious. *Fosen Vind* represents a moment in which environmental constitutionalism and Indigenous rights converged, forcing the Court to confront the distributive burdens of the green transition.

A further comparative finding concerns the structure of constitutional adjudication and its implications for the embedding Environmental constitutionalism within environmental governance. The practical force of environmental constitutionalism depends less on the abstract recognition of rights and more on how constitutional review is institutionally organised and accessed. In Canada, constitutional adjudication operates through strong-form judicial review, allowing Indigenous communities to invoke section 35 of the Constitution Act 1982 directly before superior courts. This model provides binding remedies and enables courts to invalidate or suspend state action. However, such review remains litigation-driven and reactive, typically addressing specific projects rather than restructuring long-term governance arrangements. In Finland, constitutional control is primarily exercised *ex ante* through the Parliamentary Constitutional Law Committee, and there is no separate constitutional court. Although sections 17 and 121 of the Constitution recognise Sámi cultural rights and self-government, access to constitutional justice is mediated through legislative processes and ordinary courts, which limits the structural redistribution of decision-making authority. In Norway, constitutional adjudication is formally strengthened by Articles 108 and 112 of the Constitution, which protect Sámi rights and environmental interests, including those of future generations. Yet the interpretative practice surrounding these provisions has often treated environmental rights cautiously, and remedies remain constrained by institutional and political considerations. During the later stage of this research, ERJ has been observed as capable to enter constitutional reasoning either directly through rights-based judicial review or indirectly through preventive and parliamentary mechanisms. Its operationalisation is therefore conditioned by institutional design: where review is adversarial and binding, restorative outcomes are possible but fragmented; where review is preventive and politically embedded, participatory principles may be incorporated earlier but remain dependent on

legislative willingness. This structural dimension significantly shapes how environmental constitutionalism influences environmental governance and determines the depth of its impact on Indigenous self-determination.

Further, the analysis applied ERJ and evaluative framework, assessing whether:

To what extent can ERJ serve as an evaluative framework for integrating Indigenous rights into environmental governance?

The application of ERJ's three criteria across the three articles demonstrates its analytical utility.

Under *distributed environmental management*, Article 1 showed that Canadian co-management under the NLCA embodies constitutional recognition but remains constrained by federal oversight. Article 2 demonstrated that Finland constitutionally recognises cultural autonomy under section 121, yet lacks statutory co-decision powers in land governance. Article 3 examined Norway's Finnmark Act 2005, which transferred approximately 95 per cent of county land to the Finnmark Estate (FeFo), co-managed by Sámi and non-Sámi representatives. Despite this advance, mineral governance remains state-dominated. ERJ thus exposes the distance between recognition of stewardship and genuine redistribution of authority.

Under *community engagement in environmental decision making process*, Article 1 analysed the Canadian duty to consult as a constitutional proportionality mechanism. Article 2 showed how the absence of adequate participatory safeguards rendered environmental restrictions disproportionate in the fishing cases. Article 3 linked deficient participation in EIAs to constitutional violations in *Fosen Vind*. In all three contexts, participation influences constitutional justification analysis. Yet participation remains primarily consultative rather than decisional.

Under *culturally grounded environmental impact assessment*, Article 3 developed the strongest argument, especially through the integration of intergenerational equity (Weiss 1989; UNDRIP art 25). International ju-

risprudence such as *Saramaka v Suriname* (IACtHR 2007), *Kichwa of Sarayaku v Ecuador* (2012), and *Endorois v Kenya* (2010) reinforced the argument that assessments must account for collective cultural harm. Article 2 demonstrated that Finnish EIAs often remain procedural and insufficiently attentive to cumulative cultural impacts. Article 1 illustrated how Inuit-led agreements, such as the Tallurutiup Imanga Inuit Impact and Benefit Agreement (2019), provide more culturally integrated models.

Finally, the research identified major opportunities and limitations:

What structural opportunities and limitations do Arctic constitutional systems present for embedding ERJ principles?

Opportunities for ERJ in constitutional law in Norway, Finland, and Canada arise where constitutional frameworks can reconceptualise ecological harm as legally cognisable harm affecting cultural continuity, livelihoods, and other constitutional principles (such as dignity and equality). In Canada, entrenched Indigenous rights under section 35 provide a strong basis for framing environmental degradation as constitutional injury. Finland offers a preventive opportunity through anticipatory constitutional review, allowing rights-based scrutiny at the legislative stage. Norway's explicit constitutional protection of Sámi culture and the environment creates a textual bridge between ecological integrity and intergenerational justice. Across these systems, ERJ depends on treating participation as a structural condition of legitimacy rather than a procedural formality. It also requires remedies capable of reopening governance processes, not merely awarding compensation after harm has occurred.

Limitations include the absence of binding co-decision powers, reliance on judicial remedies that cannot fully restructure governance, and the political fragility of parliamentary reform processes. In Norway, Article 112's limited justiciability constrains intergenerational environmental claims. In Canada, fragmentation across federal and territorial levels limits Indig-

enous law-making authority. In Finland, political deadlock around Sámi self-governance reform illustrates institutional asymmetry.

6 Conclusion

This dissertation has shown that constitutional systems in Canada, Finland, and Norway are no longer neutral when environmental harm affects Indigenous Peoples. Courts and constitutional review bodies increasingly recognise that ecological degradation can interfere with constitutionally protected cultural rights. Yet what also emerges clearly from the three articles is that recognition is not the same as repair and intervention remains episodic. This is where ERJ operates without creating new constitutional rights. It does not replace proportionality analysis or judicial balancing either. Its contribution lies in shifting the analytical focus of constitutional adjudication. Instead of asking only whether a restriction on Indigenous rights is justified, ERJ asks deeper questions:

Who holds authority over land and resources? Who participates meaningfully in environmental decision-making? Are cumulative and intergenerational impacts constitutionally visible?

Through distributed environmental management, ERJ exposes whether governance arrangements genuinely redistribute power or merely institutionalise consultation. In Canada, co-management under the Nunavut Land Claims Agreement reflects constitutional recognition, yet federal oversight remains strong. In Finland, cultural autonomy is recognised under sections 17 and 121 of the Constitution, but land governance through Metsähallitus remains centralised. In Norway, the Finnmark Act represents a significant transfer of land, yet mineral governance continues to reflect state dominance. ERJ makes these asymmetries analytically visible.

Through community engagement, ERJ reframes participation as a dimension of constitutional legitimacy. The duty to consult in Canadian jurisprudence, the proportionality reasoning in the Finnish fishing cases, and the participation failures highlighted in *Fosen Vind* show that courts already consider procedural fairness. ERJ deepens this analysis by treating participation not as a procedural formality but as a condition for the validity of environmental governance itself.

Through culturally grounded environmental impact assessment, ERJ connects constitutional reasoning to intergenerational responsibility. Article 112 of the Norwegian Constitution recognises environmental rights for future generations, but its practical application remains limited. ERJ highlights that for Indigenous communities, future generations are not abstract legal categories; they are part of the collective whose cultural continuity depends on present ecological choices. When environmental assessments fail to account for cumulative cultural impacts, constitutional protection becomes incomplete.

The added value of ERJ, therefore, lies in its capacity to reveal the structural dimension of constitutional harm. It shows that environmental degradation affecting Indigenous Peoples is not only a matter of balancing interests. It brings these dimensions into constitutional analysis without transforming itself into a rigid doctrine.

At the same time, this dissertation does not suggest that constitutional adjudication alone can deliver restorative justice. Courts can recognise violations, suspend projects, and reinterpret legislation. They cannot, by themselves, redesign governance structures or eliminate institutional asymmetries. The findings show clearly that post-judgment political processes, such as those following *Fosen Vind*, remain essential.

What constitutional adjudication can do, however, is create openings. It can requalify environmental harm as cultural harm. It can acknowledge cumulative impacts. It can require states to justify not only environmental measures, but also the distribution of their burdens. In this sense, ERJ strengthens constitutional reasoning by making it more attentive to relational and intergenerational dimensions of justice.

Ultimately, the contribution of this dissertation lies in demonstrating that constitutional law in Arctic contexts is not static. It is capable of engaging with ecological crisis and Indigenous claims in a way that goes beyond formal recognition. In doing so, ERJ offers a framework for understanding constitutional adjudication not merely as dispute resolution, but as an ongoing process of negotiating authority, participation, and re-

sponsibility in contexts where land, culture, and future generations are inseparable.

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List of Original Articles

The dissertation is based on the following original articles, which will be referred to in the text by their numerals 1–3.

1. Sara Fusco (2024) Rethinking insularity in the Canadian constitutional system: how Indigenous knowledge shapes the framework for vulnerable environmental areas in the Arctic Archipelago, *Yearbook of Polar Law*, Volume 15, pp. 56-83

2. Sara Fusco (2025) Restorative Justice in Finnish Constitutional Law: Reconciling Sámi Rights and Ecology”, *The Polar Journal*, pp. 1-24

3. Sara Fusco (2025) Environmental Restorative Justice and the Green Transition: Examining Intergenerational Equity for Sámi Rights under the Norwegian Constitution”, *Arctic Yearbook*, pp. 1-22

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The Article I

Sara Fusco (2024) Rethinking insularity in the Canadian constitutional system: how Indigenous knowledge shapes the framework for vulnerable environmental areas in the Arctic Archipelago, *Yearbook of Polar Law*, Volume 15, pp. 56-83

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Rethinking insularity in the Canadian constitutional system: how Indigenous knowledge shapes the framework for vulnerable environmental areas in the Arctic Archipelago.

Sara Fusco¹

Introduction

1 Introductory part: Canadian Constitution

1.1 Application of Canadian Constitutional provisions in Provinces and Territories

1.1.2 The Arctic Archipelago

2 Part 1: How Constitutional law addresses environmental vulnerabilities: Canada and the islands.

2.1.1 Eco-centric approach in Canadian constitutional law

2.1.2 Life, liberty and security of person- section 7

2.1.3 Equality rights – section 15

2.2 “Insularity” in Canadian Constitution: enhancing decentralization and cultural autonomy.

3 Canadian Constitutional approach to modern treaty implementation and self-government in Arctic Archipelago

3.1.1 Indigenous Coastal Peoples of Canada

3.2 Distinctions-Based Approach: Addressing Water claims.

4 Part 2: Limited Indigenous Led-Governance in the Arctic Archipelago

4.1.2 Access to Indigenous Marine Heritage

5 Procedural and doctrinal advantages of Insularity in Canadian Constitution

5.1 Revisiting Insularity in doctrinal and procedural application in environmental law and Indigenous law: Final notes

6 Conclusion

Abstract

The article offers an analysis of the potential of the *insularity* concept into the Canadian constitutional framework considering environmental degradation and Indigenous rights. The analysis highlights how ecological conservation supports the right to self-determination of the most vulnerable social groups, island communities and Indigenous Peoples, as the Inuit in the Arctic Archipelago. The discussion introduces the most recent interpretation of article 7, 15 and 35 of the Canadian Constitutional law and the distinctions-based approach of the modern treaties. For these reasons, the article is a valid exercise in legal transplants among different constitutional cases of *insularity*.

Keywords: Insularity; Canadian constitution; Indigenous Rights; Water Governance; Arctic Archipelago

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Introduction

In recent years, the legal protection of the environment has also affected constitutional guidelines as an advanced stage of this constant meta-legal development. The concept of “the environment” is descriptive of a plurality of different phenomena and capable of being developed under multiple exceptions. The constitutional protection of the environment, therefore, calls for the protection of human, cultural and ecological rights. Faced with the negative effects of climate change, many jurisdictions have provided for specific constitutional revisions in order to conserve biodiversity and the human rights connected to it. As noted by the UN Special Rapporteur on Climate Change², the climate crisis has strengthened environmental and social vulnerabilities that require tailored conservation and mitigation policies targeted on regional base. These socio-cultural vulnerabilities include the islands and the Indigenous Peoples³.

In light of the latest developed constitutional doctrine, the concept of *insularity* represents a valid example of a place-based mechanism implementing the protection of human, Indigenous and environmental rights. In the context of this article, *insularity* serves as a tool for analysing the role of Canadian constitutional law in addressing socio-environmental vulnerabilities in the Territory of Nunavut, specifically in the Arctic Archipelago.

The analysis has two main objectives. The first one is to analyse the role of constitutional law in the domestic implementation of international environmental principles in support of Indigenous rights. Secondly, the article aims to demonstrate how the application of place-based effectiveness mechanisms reinforces the right of self-determination of Indigenous Peoples in the environmental context.

The article is structured in three parts. The introductory part offers an overview of regional application of Canadian constitutional law. This section includes the eco-oriented approach of the Canadian Constitution in articles 7 and 15 and the concept of insularity as legal instrument to promote regional biocultural diversity.

The first part focuses on the socio-environmental characteristics of the Arctic Archipelago including the limited Indigenous led-governance and its legal making processes. This section introduces existing on-place effectiveness mechanisms as the modern treaties and their distinctions-based application.

The second part focuses on the procedural and doctrinal benefits on possible insularity into the Canadian Constitution.

The methodology applied to this article is doctrinal and comparative through the consultation of legislative and jurisprudential materials.

For these reasons, the article is a valid exercise in legal transplants at a constitutional level by dealing with constitutional cases of *insularity* in different jurisdictions.

1 Introductory part: Canadian Constitution

The Canadian Constitution is the set of fundamental laws of Canada. Unlike other constitutions, Canada's supreme law is a body of constitutional enactments that outlines the federal structure of government, policy, and includes the political rights of citizens and residents.

Article 52.2 of the 1982 Constitution encapsulates the exact composition of Canadian constitutional law. To this body of law, the Canada Act of 1982 definitively marks the beginning of a new phase of legislative independence. In fact, with the Canada Act of 1982, the United Kingdom delegates and recognizes the exclusive legislative competence of the federal

² The appointment has been established by the UN Human Rights Council at its 48th session in October 2021 ([RES/48/14](#)). The position has been officially finalized in April 2022.

³ United Nations, General Assembly, *Promotion and protection of human rights in the context of climate change*: report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, A/77/226 (26 July 2022), available from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/438/51/PDF/N2243851.pdf?OpenElement>

state. The evolutionary interpretation of the 1982 law recalls the constitutional law of 1867 and subsequent amendments, unwritten sources, and legal precedents.

The first Canadian constitutional form was the Royal Proclamation of 1763 which formed the present region of Quebec. The events that followed 1783, such as the Treaty of Paris and the American War of Independence, saw a progressive disintegration and territorial recompositing of Canada into provinces (Nova Scotia, Cape Breton Island, Prince Edward Island and New Brunswick, Lower Canada (Southern Quebec) and Upper Canada (from southern Ontario to lower northern Ontario). Some of these territories united into Dominions, like a form of regionalism. In 1931, an imperial charter granted full supremacy to the British Dominions. Canada however did not find unanimous approval on the question of independence. This asymmetry of intentions between the different parts of Canada developed until 1999 with the creation of 10 Provinces and three Territories (Yukon, Northwest Territories, Nunavut).

The lack of independence determined the continuation of legislative competence by the British Parliament also on Canadian constitutional affairs. With the Canada act of 1982, Canada reached consensus on full legislative and jurisdictional supremacy, relieving the United Kingdom of any responsibility. For these reasons, the transfer of jurisdiction is also referred to as "repatriation of the Canadian constitution"⁴.

To date, the Canadian Constitution is made up of several legal sources including: the 1867 law, the 1982 "repatriated" constitution, unwritten laws and principles, legal precedents, the 1689 English Bill of Rights and the Act of Settlement of 1701. Finally, there are numerous references to English imperial decrees and statutes as well as to the English Constitution, which is also made up of several higher-ranking documents.

For the purposes of this research, the 1982 Constitution represents a modern and guarantor spirit that encompasses Indigenous rights and recognizes human rights. It contains Canadian Charter of Rights and Freedoms, which guarantees equal rights (art. 15), legal rights (art. 7). Article 25 of the same Charter guarantees that "certain rights and freedoms shall not be construed as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada"⁵.

1.1 Application of Canadian Constitutional provisions in Provinces and Territories

The Parliament together with the Provinces and Territories can legislate on Canadian territory. The legislative competence of the Parliament extends to the whole country, while the Provinces and Territories can legislate on areas of outstanding regional priority: for example, education, property, civil rights, and the administration of justice. At the constitutional level, territories and provinces differ in terms of applicability and amendment. Under section 30 of the Canadian Charter of Rights and Freedoms, the constitutional guarantees of the Charter are as applicable to Territories as they are to Provinces.

On the contrary, while the Parliament and the Provinces have the possibility to amend their own constitution, the Territories cannot make any changes. Territories are granted enactment with their own basic charter. The constitution of the Northwest Territories is the Northwest Territories Act, while Nunavut observes the Nunavut Act. Both acts are federal statutes, which can only be amended by the Canadian Parliament. These Acts devolve many powers to the Territories, as already happens in the Provinces. Another difference between Territory and Province is the form of government. The territories are governed by Consensual Governments, while the Provinces by a party-political system⁶.

1.1.2 The Arctic Archipelago

Canada never claimed the sovereignty over the Arctic Archipelago⁷. In 1880, Great Britain transferred the legal title on the Arctic Archipelago by the Imperial Order-in-Council. As traced by Bartenstein, the first legal policy emerged only in the mid-1950s along with the ICJ Anglo-Norwegian Fisheries case, which considered the waters within coastal archipelagos as historic internal waters and enclosed by straight baselines⁸. In 1986, Canada established the boundaries

⁴ McConnell, W.H.. "Constitutional History of Canada". The Canadian Encyclopedia, 18 August 2022, Historica Canada. www.thecanadianencyclopedia.ca/en/article/constitutional-history. Accessed 06 May 2023.

⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁶ Government of Canada. "Provinces and Territories." Intergovernmental Affairs - Canada.ca. / Gouvernement du Canada, September 6, 2022. <https://www.canada.ca/en/intergovernmental-affairs/services/provinces-territories.html>.

⁷ Mark E. Gaillard (2001) Canada's Sovereignty in Changing Arctic Waters, *The Northern Review*, No. Winter 2001, Yukon University, p.184. Last accessed on 6th May 2023 on <https://thenorthernreview.ca/index.php/nr/article/view/234>

⁸ Bartenstein, K., and Chircop, A. (eds) (17 Apr. 2023). *Shipping in Inuit Nunangat*, Leiden, The Netherlands: Brill | Nijhoff. Pp. 219-221 Available From: Brill <https://doi.org/10.1163/9789004508576> [Accessed 14 January 2024] *From the same issue*: Bartenstein, "Chapter 10 Canada and the Future of Arctic Coastal State Jurisdiction", pp. 213-242

up to latitude 83 1/4 which included seventy-three major islands larger than fifty square miles in area and 18,114 small insular lands⁹.

Despite continuous international claims on the archipelago, part II of the UN Convention of Law of Sea (UNCLOS) clarified the Canadian sovereignty by establishing the “territorial sea and contiguous zone”¹⁰. According to article 2 of UNCLOS that “the sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea”¹¹. Moreover, the question was raised whether land rights could be equated with water claims. According to article 2(1) of the International Convention on Civil and Political Rights (ICCPR), every individual of a member state is entitled to the rights expressed by the treaty across the entirety of the state's geographical expanse¹². Article 29 of the Vienna Convention on the Law of the Treaty (1969) stated that in the absence of a territorial clause, all treaties are binding in every single part of the state. Therefore, the extension of the effectiveness of the treaties in the states that include islands and coasts includes internal waters and the territorial sea¹³. This assumption was then highlighted by the Human Rights Committee, according to which the aim of the ICCPR is to guarantee every citizen the ownership of treaty rights even outside the state territory¹⁴. Observance of rights within the treaties to which the member state participates must not be limited by territorial boundaries, as stated by the International Tribunal of Justice in 2004¹⁵. With regards to governance and Indigenous tenure rights over marine resources, the Article 13(a) of ILO 169, read in conjunction with Article 25 of the Universal Declaration of Indigenous Peoples rights, governments must respect “the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories” and “waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard”. According to Articles 27 ICCPR, 15 ILO 169 and 32 UNDRIP, Indigenous Peoples have the right to be consulted in advance on matters concerning traditional lands over which they have rights to harvest and manage natural resources. Inuit peoples also enjoy additional rights to *fast ice land*. In 2012, on the occasion of the 12th General Assembly of the Inuit Circumpolar Council (ICC), the Kitigaaryuit Declaration was signed which reiterates the principles expressed on the protection and access to marine resources of the Circumpolar Inuit Declaration on Resources Development Principle in Inuit Nunaat¹⁶ (2011).

The Territory of Nunavut incorporates most part of the Arctic Archipelago, which is partially inhabited by Indigenous Inuit population, located on the many islands of inland waters. In fact, the Arctic Archipelago is part of the homeland of the Inuit of Canada, Inuit Nunangat in Canadian Inuktitut, which includes land, water and ice¹⁷. Recent studies have demonstrated how the Arctic Archipelago affected by climate change ‘effect, especially the sea level rise’¹⁸. The unpredictability of the climate and environmental degradation has affected the traditional activities of these communities which are forced to relocate to have access to other services. The communities that inhabit the archipelago mainly complain about the exclusion in the processes of for co-decision in economic issues, marine resources, conservation of the cultural marine environment and in the recent climatic debates. Only three coastal Indigenous communities of Nunavut participate to the Ocean Protection Plan on the protection of coasts and waterways. The purpose of this paper is to understand how a constitutionalized insularity can effectively contribute to Indigenous coastal communities rights¹⁹, especially in governments with limited jurisdiction such as the Territory of Nunavut.

⁹ Ibid. Gaillard, pp.184-9

¹⁰ Mark Killas, The Legality of Canada's Claims to the Waters of Its Arctic. Archipelago , 19 Ottawa L. Rev. 95, p. 119 (1987). Last accessed on 7th May 2023 on https://rdo-olr.org/wp-content/uploads/2018/02/olr_19.1_killas.pdf

¹¹ UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, available at: <https://www.refworld.org/docid/3dd8fd1b4.html> [accessed 7 May 2023]

¹² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

¹³ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <https://www.refworld.org/docid/3ae6b3a10.html> [accessed 14 January 2024]

¹⁴ Lalonde, S., and Bankes, N. (2023). Chapter 17 Indigenous Self-determination and the Regulation of Navigation and Shipping in Canadian Arctic Waters. In *Shipping in Inuit Nunangat*, Leiden, The Netherlands: Brill | Nijhoff, pp.412-413 Available From: Brill https://doi.org/10.1163/9789004508576_018 [Accessed 13 January 2024]

¹⁵ Ibidem

¹⁶ Inuit Circumpolar Council (ICC), the Kitigaaryuit Declaration, 2012. Available at: <https://iccalaska.org/wp-icc/wp-content/uploads/2016/01/2014-Kitigaaryuit-Declaration-Final-Signed.pdf>

¹⁷ Inuit Tapiriit Kanatami, “Maps Of Inuit Nunangat (Inuit Regions Of Canada)”. Available at: <https://www.itk.ca/maps-of-inuit-nunangat/>

¹⁸ Xianmin Hu & Paul G. Myers (2014) Changes to the Canadian Arctic Archipelago Sea Ice and Freshwater Fluxes in the Twenty-First Century under the Intergovernmental Panel on Climate Change A1B Climate Scenario, *Atmosphere-Ocean*, 52:4, pp. 331-350, DOI: 10.1080/07055900.2014.942592

¹⁹ Coastal Indigeneity is a reality in the Arctic. The Saami of Lapland are distinguished by: Mountain Saami and Coastal Saami. See Brattland

Camilla, Mapping Rights in Coastal Sami Seascapes, *Arctic Review on Law and Politics*, vol. 1, 1/2010 p. 28–53. ISSN 1891-6252. Last accessed on 13th May 2023 https://site.uit.no/arcticreview/wp-content/uploads/sites/101/2012/11/AR2010-1_Brattland.pdf

2 Part 1: How Constitutional law addresses environmental vulnerabilities: Canada and the islands

International environmental law (hereinafter IEL) has demonstrated to be unsuccessful in managing the global socio-ecological crisis. According to Kotzé, the failure of the IEL must be found in authority's deficiency of international law followed by the wide states' margin of appreciation in adapting environmental treaties on domestic legislation. The 2009 United Nations General Assembly (UNGA) resolution was the first attempt to establish the right to a healthy environment after the 1982 World Charter for Nature (WNC). On the same opinion, Venn considers the limitation of UN mechanisms as another call for a "place-based" approach to assess the country capacity of environmental vulnerability²⁰. Constitutional law therefore plays a fundamental role in the domestic application of international law since the Charter of Rights and Freedoms aligns with the international human rights law' standards²¹. Canadian reception towards international law is a hybrid jurisdiction with monistic and dualistic elements: While treaties need legislative implementation, customary international law doesn't require it²².

In the context of this research, environmental vulnerability means the aptitude of an environmental unit to undergo permanent degradation because of external pressures. Environmental vulnerability needs to be assessed also from a socio-economic perspective. Recent international legal literature has been enriched with many tools for recognizing and assessing the ecological fragility of some areas, such as islands, which halt the process of sustainable development from an economic and social point of view²³.

Islands face the negative effects of pollution, port and shipping development and overcrowded fisheries. Global warming has brought adverse biological responses, such as ecological composition and the extinction of autochthonous species.

For these reasons, environmental vulnerability has entered in constitutional law²⁴. Many constitutions in the world have adopted environmental provisions aimed at the conservation of natural resources. Virtuous constitutional examples are Ecuador and Bolivia which recognize juridical personality to Nature itself. Other constitutions, as the Canadian one, recognize the right to a healthy environment through the protection of the right to life, equal rights, and the citizens' duty to protect the environment²⁵. These examples establish important theoretical precedents by recognizing substantive environmental rights at the Constitutional level and recognize the socio-economic impacts of climate change.

2.1 Eco-centric approach in Canadian constitutional law

Canadian constitutional law does not provide specific measures on environment, and on climate, but the right to a healthy environment is included in many provincial regulations. Quebec, for example, passed the Environmental Quality Act in 1978, followed by Ontario, respectively with the Environmental Bill of Rights in 1993. In 2009, Parliament passed Bill C-469, the Canadian Environmental Bill of Rights. The act passed a second reading by the House of Commons in 2011 with the aim to include substantive rights to environmental quality and procedural rights to participate in environmental protection²⁶.

2.1.2 Life, liberty, and security of person-section 7

Despite the immense natural resources of its territory, the Canadian constitution has not yet adopted a specific provision on the healthy environment. Scholars have advanced an evolutive interpretation of article 7 on the right life, liberty, and security. Article 7 states that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". From its wording, Article 7 protects the right to life which cannot be deprived by the state. Human security concerns the protection of the physical and psychological integrity of every individual. As previously stated, recent legal and diplomatic developments have focused

²⁰ Venn, Alice. "Universal Human Rights? Breaking the Institutional Barriers Facing Climate-Vulnerable Small-Island Developing States", *Climate Law* 7, 4 (2017): 322-346, doi: <https://doi.org/10.1163/18786561-00704005>

²¹ Van Ert, Gib, *The Domestic Application of International Law in Canada* (August 31, 2018). The Oxford Handbook of Comparative Foreign Relations Law (Oxford University Press, Forthcoming). Pp.1-2, Available at SSRN: <https://ssrn.com/abstract=3277884>

²² Ibidem

²³ UNEP 2014. Emerging issues for Small Island Developing States. Results of the UNEP Foresight Process. United Nations Environment Programme (UNEP), Nairobi, Kenya

²⁴ Gupta, A.K. & Nair, S.S. "Environmental Legislation for Disaster Risk Management, Module-I. Environmental Knowledge for Disaster Risk Management Project", National Institute of Disaster Management & Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, New Delhi, 2012, pages 13-26. Available at https://www.preventionweb.net/files/30127_30127legal1.pdf

²⁵ Section 51A Indian Constitution; Section 24 of chapter 2 of the South African constitution; Section 16 of the Philippine ; Article 50 of the Constitution of the Ukraine.

²⁶ Driedzic A. "Environmental Rights: Bill C-469 moves forward", Environmental Law Centre. Last accessed on 3rd April 2023 to <https://elc.ab.ca/environmental-rights-bill-c-469-moves-forward/>

on climate change recognizing the strong impact on human rights. For these reasons, the Supreme Court of Canada has never found it necessary to create a new environmental instrument, as ecological degradation would already be considered a violation of Article 7. However, this environment- oriented interpretation of article 7 raised questions whether it requires a positive or negative obligation by the state²⁷. This interpretation has shown further applicable limitations.

The first problem is related to the causal relation between environmental degradation, whether it's caused by anthropic or natural causes, to human health. Moreover, the ecological degradation resulting from climate change precludes the determination of culpability. Statistical data and probability formulas cannot determine the hazards associated with the potential harm and consequentially the quantification of the damage is unlikely resolved²⁸.

For example, *Misdzi Yikh v. Canada* was the first case in which an Indigenous community sued the Canadian Government for failing to comply with climate change mitigation policies and non-inclusive decision-making processes²⁹. In particular, the Government was criticized for not respecting agreements on the reduction of greenhouse gas emissions and various international treaties such as the 1988 International Conference on the Changing Atmosphere, 1992 United Nations Framework Convention on Climate Change, the 1998 Kyoto Protocol, the 2009 Copenhagen Accord, the 2010 Cancun Agreement, and the 2015 Paris Agreement. The case was declared inadmissible in the second instance. The court affirmed that the plaintiff suffered from a substantive defect, being unable to bring any legal action. The court stated that "[t]he issue of climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government"³⁰.

According to Boyd, the right to a healthy environment can be alternatively approached in two different ways. In the first approach, the healthy environment is an independent right that extends far beyond the substantive provisions already existing in international law³¹. The second approach, theorized also by Collins, constructs the right to a healthy environment from already existing rights such as the right to life, personal safety, equality and the right to health³². Respect to the first approach, IEL has proved ineffective in embracing climate change's damages. The latter method comes closest to respecting Indigenous rights. Alternatively, Canadian law may recognize environmental hazards and cumulative effects as another risk to human health³³.

The Supreme Court has suggested the "sufficient causal connection" as an element for establishing liability for damages. However, very few cases have been successful under the environmentally oriented interpretation of Article 7 of the Charter.

2.1.3 Equality rights – section 15

The interpretation and application of article 7 is often intersect with article 15 on equality rights. Article 15 of the Charter provides the fair enjoyment of substantive rights and benefits conferred by law without any kind of discrimination. The Supreme Court of Canada has consistently implemented novel methodologies and proportionality tests to determine whether a treatment is discriminatory. To this end, the Court established that even the same treatment can generate discrimination based on race, ethnicity, culture, religion and gender. Since the enactment of 1985, article 15 gradually expanded the list of discriminatory grounds. It is imperative that the application of Article 7 is harmonized with Article 15, to guarantee the right of healthy environment including the most vulnerable social groups, such as Indigenous peoples and future generations.

²⁷ Esha Grewal. A New Threat to Life: Examining the Environmental Reach of Section 7 of the Canadian Charter of Rights and Freedoms *Gadfly Undergraduate Journal of Political Science/ Gadfly journal de science politique du premier cycle* (2023), Legal Analysis / L'analyse juridique, P.40- Last access November 2023 <file:///C:/Users/LENOVO/OneDrive%20-%20Menntask%C3%BD/Desktop/Grewal+PDF.pdf>

²⁸ Lauren Worstman, "'Greening' the Charter: Section 7 and the Right to A Healthy Environment" (2019) 28 Dal J Leg Stud 1. P.251 Last access on 5th May 2023 to <https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1397&context=djls>

²⁹ See case *Lho'imgin et al. v. Her Majesty the Queen* explained by *Sabin Center for Climate Change Law* - U.S. Litigation Chart made in collaboration with *Arnold & Porter Kaye Scholer LLP*. Available on <http://climatecasechart.com/non-us-case/gagnon-et-al-v-her-majesty-the-queen/>

³⁰ Ibidem

³¹ Lauren Worstman, (2019), p.248

³² Lynda M Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71. (2015) pp. 520-533 .DOI: <https://doi.org/10.60082/2563-8505.1322>

³³ Ibidem. Wortzman (2019)

2.2 Insularity in Canadian Constitution: enhancing decentralization and cultural autonomy.

The Italian constitution has recently incorporated the concept of insularity, acknowledging the vulnerability of islands³⁴ in article 119(6). Paragraph 6 states that [“the peculiarities of the Islands”] require the State intervention along with [“... the measures necessary to remove the disadvantages deriving from insularity”]³⁵. This acknowledgement prompts the reinforcement of the regulations and investment aim to protect the social and cultural rights of the individuals inhabiting the islands and the archipelagos.

In addressing environmental issues, constitutional law supports the fragmentation of power, enhancing the decentralization processes to accommodate the diverse territorial identities³⁶. According to Arietti, the concept of insularity contributes to the creation of asymmetric federalism, as the transition away from a unitary state structure to the creation of special autonomies. Asymmetric federalism may manifest in various ways such as recognition of special autonomy in the unitary state, federalism and regionalism.³⁷

Territories sharing insularity condition are disparate from the continental state by a distinct cultural identity, geographical-natural fragility, economic development deficit, and environmental weakness³⁸. As previously asserted, climate challenges suggest a stronger response from states in mitigating its negative impacts. In 2015, the 2030 Sustainable Development Agenda set out the aspiration to “leave no one behind for a better future”³⁹. The anthology of human rights has thus encompassed the ecological rights and the protection of biodiversity to guarantee essential services such as food, health, access to water and the enjoyment of spiritual and cultural rights. During the universal session of the UN Environmental’s Governing Body, the governments of the world “welcomed the important contributions made to sustainable development by environmental law and constitutional provisions and rights of some countries related to nature”⁴⁰.

Unfortunately, the acknowledgement of the insularity condition does not automatically follow the application of the necessary constitutional guarantees to protect it. For example, the debate on the insular cases in US has highlighted the dichotomy between constitutional rights and Indigenous rights with the aim of preserving the cultural autonomy of those territories⁴¹.

The Canadian Constitution addressed the issue of cultural autonomy in the case of *Tsilhqot’in Nation v. British Columbia*, in which an Indigenous group complained about a government-issued license to exploit resources on lands traditionally occupied by their community⁴². During the case, the court interpreted the occupation from a “culturally sensitive” profile. As the court stated, to establish the pre-existence of legal rights prior to European colonization, the judge cannot not rely only on the conditions provided by the modern common law, but also on the standards recognized by traditional Indigenous law to constitute sufficient occupation (sufficient use, continuous and exclusive). Once the Aboriginal title has been established, the Crown must consult the community for any type of incursion that complies with the proportionality test in accordance with art. 35 of the constitutional charter of 1982. Article 35 thus replaced the doctrine of interjurisdictional immunity envisaged by the Constitution, which prevented the two jurisdictional levels (provincial and federal) from interfering in their respective areas of competence. In fact, the Aboriginal title under Article 35 allows communities to regulate and manage their lands in total autonomy.

Canada has already experienced a form of asymmetric federalism by granting more authority to certain provinces. The culturally sensitive approach based on the dual perspective between Indigenous rights and Common law could recall another type of federal asymmetry based on legal pluralism. Some states have recognized special status of autonomy to

³⁴ Italian Constitutional Law of 2nd November 2022, n.2

³⁵ Italian Constitution (1946 amended.), art.119(6). Available at: <https://www.senato.it/istituzione/la-costituzione/parte-ii/titolo-v/articolo-119>

³⁶ Frosini E.T., “Insularità e Costituzione”, *Rivista Giuridica del Mezzogiorno*/a XXXIV,2020, pp.50

³⁷ Arietti R., “Ripensare l’insularità nel sistema costituzionale italiano, tra suggestioni scandinave e rinegoziazione dei rapporti centro-periferia”, *DPCE Online*, [S.l.], v. 54, n. Sp, nov. 2022, pp.639-641. ISSN 2037-6677. Available at: <https://www.dpceonline.it/index.php/dpceonline/article/view/1712>>. Date accessed: 24 feb. 2023

³⁸ Ibid. p.634

³⁹ UN Sustainable Development Group, Universal Values: Principle Two: Leave No One Behind, <https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind>

⁴⁰ Kreilhuber A., “New Frontiers in Global Environmental Constitutionalism”, in *New Frontiers In Environmental Constitutionalism*, Edited by Professors Erin Daly et al., Published by the United Nations Environment Programme (UN Environment) ISBN No. 978-92-807-3670-0, Nairobi, May 2017, pp.24-29 Available at: <https://www.unep.org/resources/report/new-frontiers-environmental-constitutionalism>, last accessed 24.02.2023

⁴¹ Villazor C. R., Commentary, Problematising the Protection of Culture and the Insular Cases, 131 HARV. L. REV. F. 127 (2018), Available at: <https://harvardlawreview.org/2018/04/problematising-the-protection-of-culture/>, last accessed 2.02.2023

⁴² *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256

the islands by virtue of their distinctive identity in a way to support their political participation and counteract insular disadvantages⁴³.

As previously asserted, insular vulnerability is not an entirely unexplored topic on the legal ground. Many constitutions have been amended to protect the fragile ecosystem of the islands by guiding governments towards more inclusive administrative structure allowing greater economic support. Recognizing insularity as a legal principle means investing in the socio-economic complexity of the island and protect its natural and cultural system.

Article 174 of the Treaty on the Functioning of the European Union recalls the need to resolve the gap "to promote the harmonious development of the Union as a whole". The treaty includes islands among the least favoured regions together with "rural areas, areas affected by industrial transition and regions with severe and permanent natural or demographic handicaps, such as northernmost regions with very low population density and [...], cross-border and mountain". The Maastricht Treaty also treats the insularity factor as an outermost region requiring specific aid according to the subsidiarity principle⁴⁴.

Baldacchino believes that supporting insularity as a sub-national jurisdiction means defending and promoting minority identities. This especially affects Indigenous Peoples with whom the Canadian Government has negotiated agreements on natural exploitation and participatory rights. To date, Nunavut appears to be one of the political units with the highest Indigenous representation in the world (85% of its inhabitants are Inuit)⁴⁵. According to Lemmen, coastal communities in Arctic Canada are already experiencing climate change effects, such as: declining of sea-ice, earlier ice broke up, later freeze-up, increasing of free-ice open water season, and coastal erosion⁴⁶. Such changes have had negative implications on the live hood of Indigenous populations especially in the destruction and access to marine food resources⁴⁷. Many coastal communities have already been relocated to safer environs creating social disruptions among members of the same community⁴⁸. Furthermore, many traditional activities are no longer possible given the constant melting of ice which does not allow mobility on the frozen docks. Many of these practices are possible only with the help of technological tools for monitoring the weather and ice.

3 Canadian Constitutional approach to modern treaty implementation and self-government in Arctic Archipelago

3.1 Indigenous Coastal Peoples of Canada

The most accredited definition of "Indigenous Peoples" is the one proposed by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his Study on the Problem of Discrimination against Indigenous Populations of 1981.

In his report, Cobo defined Indigenous Peoples as "those who, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them". Over the years, this definition has been interpreted in a more extensive way, including other factors that have become socially important and sensitive.

Cobo's explanation did not enshrine a unanimous definition. Therefore, the denomination of "coastal Indigenous Peoples cannot be defined as exhaustive. According to Montemayor, Indigenous coastal communities are self-identified minorities residing on seacoasts⁴⁹. Coastal Indigenous Peoples live in various parts of the world. Some coastal communities managed to organize themselves in a governmental and structured manner and they cooperate with the Government in marine

⁴³ For example, Italy has recognized special status of autonomy to Sardegna and Sicilia, among other realities such as Trentino-Alto Adige/Südtirol, Aosta Valley and Friuli Venezia Giulia.

⁴⁴ European Union, *Treaty on European Union (Consolidated Version)*, Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, available at: <https://www.refworld.org/docid/3ae6b39218.html> [accessed 14 May 2023] [https://www.senato.it/application/xmanager/projects/leg18/attachments/documento_evento_procedura_commissione/files/000/133/601/Prof. To_mmaso_Edoardo_FROSINI.pdf](https://www.senato.it/application/xmanager/projects/leg18/attachments/documento_evento_procedura_commissione/files/000/133/601/Prof._To_mmaso_Edoardo_FROSINI.pdf)

⁴⁵ Baldacchino, G. (2009). Governance in small places: the unleashing of asymmetric federalism. in G. Baldacchino, L. Felt, & R. Greenwood (Eds.), *Remote control: governance lessons for and from small, insular, and remote regions* (pp. 114-134). St. John's, Nfld.: ISER Books.

⁴⁶ Lemmen, D.S. and Warren, F.J. (2016): Synthesis; in Canada's Marine Coasts in a Changing Climate, (ed.) D.S. Lemmen, F.J. Warren, T.S. James and C.S.L. Mercer Clarke; Government of Canada, Ottawa, ON, p. p.5-6. Available at: https://natural-resources.canada.ca/sites/www.nrcan.gc.ca/files/earthsciences/pdf/assess/2016/Coastal_Assessment_Synthesis_en.pdf

⁴⁷ Ibidem

⁴⁸ Ibidem

⁴⁹ Cisneros-Montemayor, Andrés & Pauly, Daniel & Weatherdon, Lauren & Ota, Yoshitaka. (2016). "A Global Estimate of Seafood Consumption by Coastal Indigenous Peoples" (Introduction). PLOS ONE. 11. e0166681. 10.1371/journal.pone.0166681

heritage conservation projects as well as in the construction of transport monitoring, navigation, and safety services at sea.

The recognition of Indigenous Coastal Peoples is new concept in the Canadian legal experience. However, the Northwest Coastal Indigenous Communities is an organization made up of nine First Nations communities residing in the Pacific part of British Columbia. This alliance agreed on the Coastal First Nations Declaration for Clean Energy & Climate Adaptation, a document in which the nine communities commit to cooperate in the conservation and management of land and marine resources⁵⁰. This strong cultural diversity among Canada's Indigenous Peoples has required a distinct approach in negotiating land claims and modern treaties. Indeed, local, and regional administration is significantly important to the Indigenous Peoples as economic development is influenced by the strong social and spiritual attachment to traditional lands.

Indeed, in 2020 the Organization for Economic Co-operation and Development (OECD) identified four areas to support Indigenous economic development at the regional level. Among these areas, the OECD has highlighted the importance of recognizing and managing and developing Indigenous lands and strengthening the place-based governance of Indigenous economic development.

According to OECD reports, Indigenous Peoples mostly live in rural areas. Considering also that a fair part of the Indigenous populations lives in the Territories, it is necessary to remember that Territories enjoy less autonomy than the provinces. This greatly affects Indigenous territorial governance and the participation of these communities in decision-making and legislative processes. According to the 2016 Community Well Being Index (CWB), Indigenous Peoples of Canada have very low scores in terms of wages, education and housing. Among the 100 lowest-scoring communities, 98 are First Nations communities. Nonetheless, a place-based approach is needed as there are regional differences between communities. Communities living in rural regions have significantly lower employment outcomes than communities near urban areas. Even lower are the results of the island communities compared to the communities linked to the mainland due to the difficulty in transport services, access to educational and health facilities. According to the software⁵¹ developed to monitor the well-being of these communities, some small island populations such as Sanikiluaq, Coral and Sachs Harbour have data far below the Inuit average of other regions⁵².

Control over the natural resources is therefore an essential element for the protection of Indigenous rights. Natural resources create economic opportunities that require ongoing negotiations with the Canadian government. Some Indigenous Peoples still do not have access to land or water rights. From 1701 to 1973, the Crown and Indigenous Peoples entered historical treaties⁵³. Some of these are treaties have been renegotiated with new conditions, strengthened entitlement claim proceedings to resolve land issues, or negotiated Impact-benefits Agreements (IBAs)⁵⁴. Since 1973, at least 25 land claims have been signed and more than 460 specific claims have been negotiated. At the heart of these claims are informational and participatory rights such as the FPIC included in the UNDRIP⁵⁵.

The Canadian government has set up several regional development programs for Indigenous Peoples. However, much more could be done for those living in rural areas like Nunavut. This is because geolocation shapes the Indigenous market a lot. The Indigenous business model is usually very limited with few product types destined for the external market (manufactured goods, food). The remote populations of the Arctic Archipelago find it difficult to develop their own business when access to financial instruments is very limited (only 3 out of 25 communities have access to a banking institution). Another issue that will be addressed later in this article is the limitation of remote Indigenous communities to access and strengthen their civil rights. Civil rights include housing, negligence, and labour law. This limitation is due to the lack of adequate legal services, the language used and the lack of training courses and teaching hours on human and civil rights in schools⁵⁶.

⁵⁰ Coastal First Nation, Coastal First Nations Declaration. Available to <https://coastalfirstnations.ca/our-communities/cfn-declaration/>

⁵¹ Note: The Government of Canada has developed an interactive map to calculate the CWB index. It include data from 2016 CWB from First Nations, Inuit and non-Indigenous communities. It is available to <https://www.sac-isc.gc.ca/SAC-ISC/CWB/index-map-en.html>

⁵² Government of Canada, Community Well-Being index map. Last accessed on 14th May 2023 at <https://www.sac-isc.gc.ca/SAC-ISC/CWB/index-map-en.html>

⁵³ Government of Canada, "Treaties and agreements". Available at: <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>

⁵⁴ Ibid, p.9-10

⁵⁵ OECD (2019), Linking Indigenous Communities with Regional Development in Canada, OECD Publishing, Paris p.8 <https://doi.org/10.1787/fa0f60c6-en>

⁵⁶ Ibid, p.11-14

In 2016, the Canadian government formulated the Ocean Protection Plan, which establishes a forum for dialogue with Indigenous communities by inviting them to be training programs and inclusion of decision-making processes⁵⁷.

3.2 Distinctions-Based Approach: Addressing Water claims.

Although section 35 of the Canadian Constitution and the UNDRIP recognize Aboriginal rights, jurisprudence has underlined the need of agreements that reflect the differences between the three Indigenous groups. After the *Calder et al. case v. Attorney-General of British Columbia*, in 1973, first recognized such Indigenous rights, Supreme Court of Canada has confirmed that section 35(1) of the Constitution Act, 1982, includes a recognition of the “distinctive societies” of Indigenous Peoples, with “their own practices, traditions, and cultures”⁵⁸. This approach was then confirmed by the case *R. v. Powley* in which the Supreme Court supported that First Nations and Inuit are “distinctive societies” that pre-existed the arrival of Europeans, as sovereigns over their territories; and, the Métis are “distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their [First Nations] or Inuit and European forebears”⁵⁹.

The Canadian Government has agreed to 26 modern treaties, constitutionally protected agreements, with Indigenous Peoples. Some of these contain self-government provisions or associated self-government agreements according to a distinctions-based approach. These agreements cover approximately 40% of Canada's land surface and are tools for reconciliation between the Government and Indigenous communities. Furthermore, modern treaties are made considering article 37 and 36 of the UNDRIP which calls on Canada to collaborate with Indigenous Peoples to develop legislative, political and administrative mechanisms to respect their right to self-determination (*R. v. Pamajewon*, 1996).

By virtue of this approach, Article 35 has always maintained a flexible nature without cataloguing Aboriginal rights. As argued by Borrows, constitutional law must be the product of state law and Indigenous law⁶⁰. The drafting of the modern treaties has given space to a new vision of decentralization as a means of including Indigenous Peoples to conclude self-government arrangements⁶¹. Especially regarding the management of natural resources, the government has stressed that Indigenous Peoples must be included in “wildlife management and the use of water and land”⁶².

The enactment of modern treaties has not replaced historical treaties⁶³. The Supreme Court of Canada rules also on the rights included in the historic treaties which honour the treaty relations and reconciliation between the Government and the Indigenous Peoples⁶⁴.

In 1993, Inuit from the Nunavut Settlement Area (NSA) and Her Majesty the Queen signed the Nunavut Land Claims Agreement Act (NLCA) on wildlife, land, and water management. The Agreement is one of the modern treaties, which include all the marine areas and part of Canada's Arctic Archipelago including the territorial sea along the coast of the Ellesmere, Devon, Bylot and Baffin Islands⁶⁵. NLCA is one of the modern treaties which sets specific Inuit rights on land resources such as the treaty's obligation and specific rules regarding co-management, public government, and self-government organization under the Nunavut Settlement Act⁶⁶. Other agreements that include marine resource management are the Inuvialut Agreement (1984), the Nunavik Inuit Land Claims (2006), and the Labrador Inuit Land Claims Agreement (2005). Canada needs to seek advice to Inuit Treaty Organization in case the federal programs are planned to be applied to Inuit regions⁶⁷. NLCA grants a limited law-making authority to Inuit institutions, as the Hunters and Trappers Organization (HTOs) which is responsible to apply community-based norms. However, fishing, navigation, and shipping fall under the exclusive law-making authority of the Federal Government⁶⁸. Moreover, the Government of

⁵⁷Government of Canada, Stronger partnerships with Indigenous and coastal communities

<https://tc.canada.ca/en/campaigns/protecting-our-coasts-oceans-protection-plan/stronger-partnerships-indigenous-coastal-communities>

⁵⁸ R. v. Van der Peet, 1996/2, S.C.R. 507. para. 31.

⁵⁹ R. v. Powley, 2003, 2 S.C.R. 207. para. 10

⁶⁰ Borrows, John. (2002). *Recovering Canada : the resurgence of Indigenous law*. Toronto ; Buffalo : University of Toronto Press. p. 57

⁶¹ Government of Canada, “Modern treaties”. Available at: <https://www.rcaanc-cirnac.gc.ca/eng/1677073191939/1677073214344>

⁶² Ibidem

⁶³ Michael Chalupovitsch, Economics, Commercial Fishing Under Aboriginal and Treaty Rights: Supreme Court of Canada Decisions, Resources and International Affairs Division, No. 2018-40-E https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201840E#txtnote

⁶⁴ Government of Canada, “Principles respecting the Government of Canada's relationship with Indigenous peoples

”. Available at: <https://www.justice.gc.ca/eng/csi-sjc/principles-principes.html>

⁶⁵ Nigel Bankes, “Modern Land Claims Agreements in Canada and Indigenous Rights with Respect to Marine Areas and Resources” in: Allen, Bankes and Ravna (eds.) *Indigenous Peoples in Marine Areas*, pp. 174-204 (Bloomsbury 2019)

⁶⁶ Government of Canada, “Inuit Nunangat Policy”. Available at: <https://www.rcaanc-cirnac.gc.ca/eng/1650556354784/1650556491509>

⁶⁷ Fitzmaurice M., “Indigenous Peoples in Marine Areas. Whaling and Sealing”, in: Allen, Bankes and Ravna (eds.) *Indigenous Peoples in Marine Areas* (Bloomsbury 2019) 69-95.

⁶⁸ Ibid. Nigel Bankes

Canada needs to consult the Nunavut Wildlife Management Board (NWMB) in marine management concerning communities in the NSA⁶⁹.

4 Part. 2: Limited Indigenous-led Governance in the Arctic Archipelago

As seen in the previous paragraphs, the Canadian Constitution already recognizes various forms of political, economic, fiscal and administrative decentralisation. This decentralization is enhanced by the cultural plurality that the Canadian Constitution recognizes in articles 35 and 25. Although insularity and decentralization are two different concepts, there may be scenarios in which decentralization can resolve the disadvantages or support the benefits of insularity. The fair distribution of legislative powers and full participation in decision-making processes makes the system more flexible and less susceptible to negative factors.

The Canadian Government recognizes the right of Indigenous Peoples to determine their own governance structure. Each community has created its own offshoot of powers that still have been in use since time immemorial. In 1995, the Government has issued The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government which recognises the right of Indigenous Peoples to govern themselves their internal affairs according with their cultures, traditions and institutions⁷⁰.

According to the directives of the Canadian Government, the right to self-determination could be strengthened by the activity of the courts and the establishment of legal precedents. However, the case must go through different instances of justice for it to arrive at the establishment of a juridically relevant legal precedent for future litigations. Therefore, the Government has repeatedly reiterated that the litigation is the last resolution with respect to the establishment of new negotiations. Article 25 of the Canadian Charter of Human Rights and Freedoms which reconfirms the application of the democratic principles of the charter also to Aboriginal populations. Indigenous self-governance cannot be applied in a "ONE-SIZE-FITS-ALL" manner⁷¹. Canadian Indigenous Peoples, First Nations, Metis, Inuit, respond to different needs and aspirations. For example, if First Nations communities require greater efforts for a more complete autonomy and the replacement of the Indian Act, the Inuit Peoples aspire to better management of land claim settlements. Agreements between the Government and Indigenous communities must be mutually determined and comply with constitutional law, provincial law, and Canadian criminal law. Most of these agreements include issues such as education, employment, housing, and fiscal policy⁷².

Among the subjects that the Government could accept as an object of negotiation we have those of public order (elections, internal constitutions...), social (education, schooling) and natural resources management. The last category includes agriculture and aquaculture, hunting, fishing and trapping on Aboriginal lands local transportation, licensing, regulation and operation of businesses located on Aboriginal lands.

For the purposes of this paper, self-government means the faculty granted to social groups to administer themselves independently and through elected persons autonomously from the state⁷³. In the face of the climate crisis, the right to water has become a relevant argument in the context of human rights against environmental degradation. Many Indigenous populations have claimed ownership and sovereignty over water and marine resources because also to their spiritual attachment. Indigenous-led water governance has become an alternative to recent environmental law approaches⁷⁴.

In Canada, the management of marine resources and the right to water has always been implicitly included in Indigenous land claims. Historical inequalities have meant that this right has been constantly limited. This problem has been exacerbated by Canada's administrative fragmentation, where governance is divided between state, provinces, and

⁶⁹ Ibidem

⁷⁰ Government of Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" Available at: <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#PartI>

⁷¹ Government of Canada, The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government. Available to <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>

⁷² Government of British Columbia. "Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples- Distinctions-Based Approach Primer", 2023. Pp.1-9. Available at: https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/distinctions_based_approach_primer.pdf

⁷³ Treccani, <https://www.treccani.it/vocabolario/autogoverno/#:~:text=%E2%80%93201.,autonomia%20nei%20confronti%20dello%20stato>.

⁷⁴ Bakker, K., Simms, R., Joe, N., & Harris, L. (2018). Indigenous Peoples and Water Governance in Canada: Regulatory Injustice and Prospects for Reform. In R. Boelens, T. Perreault, & J. Vos (Eds.), *Water Justice* (pp. 193-209). Cambridge: Cambridge University Press. doi:10.1017/9781316831847.013

municipalities. At the root of these conflicts has always been the insufficient degree of consultation of Indigenous Peoples in decision-making processes regarding the conservation and management of marine resources.

In 1992, and subsequent amendments, the Nunavut Land Claims Agreement Act was established with the objective of “to provide for certainty and clarity of rights to ownership and use of lands and resources and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore”⁷⁵. Under this act, the Nunavut Waters Regulations⁷⁶, on marine resource management, and the Nunavut Waters and Nunavut Surface Rights Tribunal Act⁷⁷ on compensatory terms for damages due to misuse of licenses and negligence due to mismanagement of wastes in waters. However, as previously mentioned, NLCA has not been able to guarantee full law-making decision authority to Inuit Institutions.

4.1.2 Indigenous Island knowledge for the Indigenous Marine Heritage

According to the Nunavut Coastal Resource Inventory (NCRI), coastal areas contain a unique heritage in terms of both environment (plants and fauna) and culture (traditional activities, worship, and subsistence traditions). In 2014, the Coastal Resource Inventory surveyed countless coastal communities in Nunavut by interviewing senior citizens and hunters. The coastal resources analysed included animals and plants that live in the ocean, and also on the bottom of the sea, lakes and streams.

Coastal areas in Nunavut are many and highly diverse. These differences are mainly due to their geolocation, extending over 27° of latitude and 60° of longitude, which can present different geomorphologies, such as climate, and the presence of vastly different animal and plant species. Oceanographically, geolocation results in a diverse marine environment influenced by residual circulation, tidal range, tidal currents, tidal mixing, fast land drift, ice edge upwelling, topographic upwelling, and polynyas⁷⁸. Therefore, it is impossible to unambiguously define marine cultural heritage, if not also Indigenous heritage, as it includes human, non-human and natural elements. For the same reasons, climate impacts also differ from one coastal community to another.

In 2019, the Qikiqtani Inuit Association and the Canadian Government entered into the Tallurutiup Imanga National Marine Conservation Area Inuit Impact and Benefit Agreement⁷⁹ with the aim of conserving the ecosystem and the right to Indigenous self-determination. In the preamble, the Inuit Qikiqtani community affirmed their strong spiritual connection with the sea, identifying themselves as “coastal people, and have been so from time immemorial, with cultural values and identities intrinsically connected to our Arctic marine environment and wildlife”. Also, the Inuit Qikiqtani community supports the “close relationship with the land, sea, ice and environment” as “part of the land and sea. Inuit rely on marine wildlife for physical sustenance and cultural renewal and in turn Inuit are the stewards of the marine environment dedicated to ensuring its long-term health and sustainability”⁸⁰.

The agreement defines the use of resources in a way that is sustainable and inclusive, and also, the circumstances in which the parties must resolve future disputes. In addition, the agreement requires the Government to consider Indigenous ecological knowledge through dialogue with Inuit elders and of the holders of the Inuit culture. The document makes a specific reference to the Nunavut Agreement, in particular to Article 8 on the management of the “National Parks”, or “terrestrial natural regions as described in National Parks System Plan 1990 published by Environment Canada”⁸¹. Furthermore, the parties jointly refer to the principles of the Convention on Biodiversity, which have subsequently established themselves in international law as *opinio iuris*⁸². In fact, Article 1(7) mentions the precautionary principle which allows the most serious and permanent outcomes to be avoided, with preventive, proactive and shared measures

⁷⁵ Nunavut Land Claims Agreement Act (S.C. 1993, c. 29), Preamble

⁷⁶ Nunavut Waters Regulations (SOR/2013-69)

⁷⁷ Nunavut Waters and Nunavut Surface Rights Tribunal Act (S.C. 2002, c. 10)

⁷⁸ Department of Environment/ Nunavut Coastal Resource Inventory – Clyde River (2014), Nunavut Coastal Resource Inventory, p.9 https://www.gov.nu.ca/sites/default/files/ncri_clyde_river_en.pdf

⁷⁹ Government of Canada, Tallurutiup Imanga National Marine Conservation Area Inuit Impact and Benefit Agreement, <https://parks.canada.ca/amnc-nmca/cnamnc-cnmca/tallurutiup-imanga/entente-agreement#preamble>

⁸⁰ Ibidem

⁸¹ Ibid. Tallurutiup Imanga National Marine Conservation Area Inuit Impact and Benefit Agreement., Part.1

⁸² Catherine Tinker, Responsibility for Biological Diversity Conservation Under International Law, 28 Vanderbilt Law Review 777 (2021), p.795 Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol28/iss4/9>

for the defence of the ecosystem⁸³. The agreement also establishes the creation of administrative and evaluation (Aulattiqatigitt) and monitoring (Inuit Advisory Committee) bodies, aimed at maintaining the pacts.

5. Procedural and doctrinal advantages of Insularity in Canadian Constitution

The Canadian Constitution lacks concrete legal literature addressing the principle of insularity. Consequently, it becomes imperative to assess the constitutional capacity for the environmental protection to hypothesize how insularity might assess the socio-environmental disadvantages associated to it.

First of all, the Canadian constitutional amendment mechanism can take place through three procedures:

The first, a direct amendment, through the approval of the Parliament and the majority of the provinces, secured within a three-years period;

The second, a dispute in which the court refers to the specific article.

The third, a judicial reference in which the decision makes an implicit reference to a particular section⁸⁴.

This process can apply to any section of the Constitution. If an amendment is aimed at recognizing environmental well-being, such mechanisms could be put in place under Articles 7 and 10.

This important acknowledgment certainly entails greater investments, in terms of funds and institutional bodies, called to best comply with these new priorities. According to the Public Trust doctrine, the duty of the Canadian Government to establish greater collaboration with Indigenous communities in the management and conservation of coastal areas and natural resources in specific areas (zoning) would be contemplated. The legal foundation of this doctrine is precisely Article 35(1) of the Constitution, which recognizes "the existing aboriginal and treaty rights of the aboriginal peoples of Canada". In Canada, the aboriginal rights are explicitly defined in historical and modern treaties according to the distinctions-based approach. In areas not covered by these treaties, governments have to consult and accommodate with aboriginal people⁸⁵.

The most recent literature on the topic has hypothesized the extension of Indigenous rights to the conservation of marine heritage, especially if they include important sites for Indigenous culture. In this regard, the federal law Canada National Marine Conservation Areas Act addresses marine conservation purposes with a serious extension to traditional ecological knowledge. In 2021, a National Marine Conservation Area was created in Nunavut, the Tallurutiup Imanga National Marine Conservation area. This area became operational through the signing of an Inuit Impact Benefits Agreement (IIBA) between the federal government and the Qikiqtani Inuit Association⁸⁶. The signing of the IIBA concluded a phase of the negotiation that began in 2017, when the federal government and the same association had agreed on another document, the memorandum of understanding (MoU), a bilateral agreement which is however not legally binding even though it was established in contractual form⁸⁷. This proceeding created an administrative precedent which led to the examination of other marine areas (Pond Inlet, Tuvaqjuittq Marine Protected area...) in Nunavut.

Following the case *Haida v. BC*, it has been established that the signing of the IBA falls within the duty of care of the Government (or Crown) to respect Indigenous rights and the agreements established with Aboriginal peoples under Article 35 of the Constitution. To this analysis, however, it is worth hypothesizing whether the inaccuracy of the IBA or the failure to comply with the benefit-sharing agreement could constitute constitutional illegitimacy and recourse to the justice of the court.

⁸³ Nunavut Agreement. Available to <https://nlca.tunngavik.com/>

⁸⁴ David R. Boyd, Emmett Macfarlane, Should environmental rights be in the constitution? *Web d'Options politiques* (2014). Last accessed on 13th March 2023 on <https://policyoptions.irpp.org/fr/magazines/second-regard/boyd-macfarlane/>

⁸⁵ Woodward & Co. and by the Nanwakolas Council, Benefit Sharing Agreements In British Columbia: A Guide For First Nations, Businesses, And Governments, p.3-4. Last access on 2nd April 2023 to https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/great-bear-forest/hw03b_benefit_sharing_final_report.pdf?fbclid=IwAR3JTd9y80RWGR-gvt3v5Vo5BpiGsrHigZSVXAWMAqU1c158YvG9Z9hFCeg

⁸⁶ Her Majesty the Queen in Right of Canada, as represented by the President & Chief Executive Officer of the Parks Canada Agency, 2021 Catalogue No.: R61-63/2021E-PDF ISBN 978-0-660-40330-4. Last accessed on 31st March 2023 to <https://parks.canada.ca/agence-agency/bib-lib/rapports-reports/elnhc-scnp/2021#section-5-3>

⁸⁷ Government of Canada, Memoranda of Understanding (MoU) Writing Guidelines. Last accessed on 2nd April 2023 <https://www.canada.ca/en/departement-national-defence/corporate/reports-publications/military-law/memoranda-of-understanding-mou-writing-guidelines.html>

Canadian Common Law jurisprudence has recorded many cases in which Indigenous communities have complained that the crown has violated the IBA due to the inaccuracy of its stipulation (i.e, *Yahey v. BC* of 2021⁸⁸, *Southwind v. Canada* and by *Ermineskin Cree Nation v. Canada*)⁸⁹.

The evolutionary interpretation of Article 7 of the Canadian Constitution deals with the right to a healthy environment for the protection of legal rights. However, this interpretative approach has sparked the debate on how its doctrinal and procedural application can strengthen environmental law and conversely Indigenous law. Canada's source system includes statutes, common law, and jurisprudence. Although the statutes and the Common Law provide the traditional remedy and the principles of the tort of law (e.g public nuisance, negligence, property damages), they alone cannot define the responsibilities of the Government in compliance with environmental policies. Conversely, constitutional law offers evidentiary advantages and grants access to justice to a wider audience, such as underprivileged communities.) As far as probative liability is concerned, applicants do not have to prove that they have been directly offended, but the violation of the Constitution only requires a "sufficient causal connection" to the head of a public entity (e.g government or dislocated administrative entity) and not limited to the private sector.

As regards access to justice for the most disadvantaged people, constitutional law is better known and more widely applied. In fact, environmental constitutional law would protect from potential damages (Precautionary Principle) and would prevent the regression of environmental rights due to continuous amendments of the statutes (principle of non-regression)⁹⁰.

5.1 Revisiting *Insularity* in doctrinal and procedural application in environmental law and Indigenous law.: Final notes

Contemporary anthropocentric thought suggests a new interpretation of the role of the island with respect to climate policies. According to Pugh and Chandler⁹¹, the island would cover an emblematic figure of the Anthropocene, understood as a human footprint on the environment. In recent years, in fact, the island, originally considered as a geopolitical actor devoid of decision-making powers of a prescribed destiny, is progressively rewriting its path towards centrality in the international climate debate. Therefore, as the environmental question has raised the Indigenous one, the same can be said for climate change with respect to the island and the condition of the islanders. For these reasons, Farbotko, reconnect the Anthropocene to the decolonization process, as the anthropic factor has created the foundations for the Indigenous climatic disquisition in different geographical areas of the world⁹².

It appears clearer how constitutionalism has abandoned its Western meaning to assume pluralistic characteristics that redesign the interactions between stakeholders regarding powers and benefits in environmental matters⁹³. This hypothesis recalls the postulates of the concept of Environmental Justice, both from the procedural point of view "all people regardless of race, ethnicity, income, national origin or educational level" to have "meaningful involvement" in environmental decision-making, and in its meaning substantive (or distributive) which guarantees "the equitable distribution of environmental responsibilities and benefits"⁹⁴.

Self-determination is an important factor in the delivery and evaluation of environmental policies that can be supportive of remote Indigenous communities, as well as islanders. This approach was adopted in the case of the Torres Archipelago. These communities were asked to define what a successful policy is. The Australian Government is currently responsible to invest funds to increase Indigenous capacity and create culturally acceptable guidelines. Furthermore, the evaluation of the EIA, BIA and SIA have also been questioned, as the term "evaluate" means to put the values as a measure. Evaluations cannot simply be external, as these reports have a significant impact on Indigenous rights. For these reasons,

⁸⁸ Sharon Singh, Deirdre Sheehan, David Burse, Radha Curpen, Tegan Heywood and Erik Coates, Recent Developments in Aboriginal Law: Cumulative Effects, Equitable Compensation and Duty to Consult (2021). Last accessed on 13th May 2023 to <https://www.bennettjones.com/Blogs-Section/Recent-Developments-in-Aboriginal-Law-Cumulative-Effects-Equitable-Compensation-Duty-to-Consult>

⁸⁹ Ibidem

⁹⁰ Ibid. Wortsman.p.256-259

⁹¹ Chandler, D., & Pugh, J. (2021). Anthropocene islands: There are only islands after the end of the world. *Dialogues in Human Geography*, 11(3), 395–415. <https://doi.org/10.1177/2043820621997018>

⁹² Farbotko, C., Watson, P., Kitara, T., & Stratford, E. (2023). Decolonising methodologies: Emergent learning in island research. *Geographical Research*, 61(1), 96–104. <https://doi.org/10.1111/1745-5871.12519>

⁹³ Navraj Singh Ghaleigh, Joana Setzer, Asanga Welikala, The Complexities of Comparative Climate Constitutionalism, *Journal of Environmental Law*, Volume 34, Issue 3, November 2022, Pages 517–528, <https://doi.org/10.1093/jel/eqac008>

⁹⁴ Newcastle and Oxford University, joint project "Global justice and environment" Available at: https://www.staff.ncl.ac.uk/g.m.long/environmental_justice.html

understanding the elements of self-determination is very important so that the Constitution can implement them correctly⁹⁵.

6 Conclusion

On 30 November 2022, the Italian Constitutional Law no. 2/2022 incorporated article 119(6) stating out that the Republic of Italy "recognizes the peculiarities of the Islands and promotes the necessary measures to remove the disadvantages deriving from insularity". In force of this novel provision, the Italian state intends that the Republic (understood as the entire public administration such as regions, provinces and municipalities) acknowledges the distinct environmental, social and economic situation of the islands and ensures the fair enjoy of constitutional rights between all citizens without any regional distinctions (art.5). Although the process of implementing Article 119 was far to be easy, its formulation highlighted the disadvantages of the insularity condition such as transport, environmental fragility and reduced economic activity followed by a substantial depopulation of the islands.

The constitutionalizing of the insularity concept ignites the political and legal debate, and indeed also raises several questions about the relevance of environmental protection for human rights. This article got inspired but this latest Italian amendment, and aimed to speculate whether the Canadian Constitution protects the environment and consequently the aboriginal rights. In force of this exercise, the situation of Inuit in the climate- fragile Arctic Archipelago was considered as case study.

Currently, Canada does not provide specific provisions on the environment protection, instead it recognizes important instruments to ensure access to marine resources and the preservation of marine cultural heritage. The insularity condition has raised many debates regarding territorial integrity, often heated in the determination of state boundaries. Insularity has been also translated in terms of costs, from transport, tourism to the economic-energy sector. While it is clear that climate change has contributed to the geographical vulnerability of islands, the negative effects on island culture are often left out from the advancement of the insularity concept. Oral traditions and Indigenous storis are the important sources of that knowledge.

Scholars have challenged the doctrine with article 7, on right to life, liberty, and security, speculating if the deprivation of a healthy environment might negatively affect the existing rights. In this view, the environmental quality becomes a prerequisite for the fair enjoyment of rights. In conjunction with art.15, the right into the art. 7 must be guaranteed equally among all citizens. Besides the applicable limitations, this innovative interpretation entails a greater equitable and supportive economic, social, and natural resource distribution. In fact, the possible introduction of insularity in the Canadian Constitution would promote the legislative and judicial evolution on conservation of marine heritage and Indigenous-led governance of natural resources in Nunavut. Intergovernmental relations, between Indigenous Peoples and the Crown, have been always defined by modern treaties which benefit from constitutional guarantees. Considered as instruments of national building and reconciliation process under art. 35 of the Constitution, modern treaties have highlighted Indigenous priorities and aspiration. Their distinction-based approach addresses the Indigenous cultural plurality supporting future and locally tailored treaties renegotiations.

This article also denotes a further benefit of the constitutional amendment regarding insularity, namely the general welfare for the entire Canadian community. The sustainable development of the islands is essential for the entire planet, and many have begun to draft a strategy on insularity. Among the possible disadvantages are the lack of political will and the difficulty of having a constitutional amendment in the short to medium term.

Finally, this article indirectly aspired to the definition of insular Indigeneity. In the absence of specific literature, the preamble of the Tallurutiup Imanga National Marine Conservation Area Inuit Impact and Benefit Agreement makes a succinct reference to the life of the Indigenous peoples who live on the coasts of the Canadian Arctic Islands of Nunavut. Below is the entire text with reference to the extract included in paragraph 5.1:

"Our understanding of how we fit into the world is based on our close relationship with the land, sea, ice and environment. We are a part of the land and sea. Inuit rely on marine wildlife for physical sustenance and cultural renewal and in turn Inuit are the stewards of the marine environment dedicated to ensuring its long-term health and sustainability".

⁹⁵ Government of Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government", last accessed on 5th May 2023 to <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>

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ARTICLE



Restorative justice in Finnish constitutional law: reconciling Sámi rights and ecology

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ABSTRACT

This paper examines the application of *environmental* restorative justice within constitutional frameworks, addressing both ecological degradation and historical injustices experienced by the Sámi People in Finland. It investigates the intersection of Sámi rights and environmental regulation, proposing a model of justice that respects Indigenous autonomy while safeguarding ecological integrity and contributing to long-term sustainability. Through the study of the Finnish environmental legal framework, including recent case law, legislative reforms, and the growing relevance of international instruments, this research highlights the evolving ecological perspective of the Finnish Parliamentary Committee of Constitutional Affairs. The study also evaluates how constitutional interpretation has shifted towards a more rights-based and ecological understanding of Sámi cultural practices, especially with regard to land use and traditional livelihoods. Ultimately, the paper argues that environmental restorative justice advances the fulfilment of Sámi rights within their Homeland by reconnecting ecological restoration with social healing, democratic participation, and respect for cultural continuity across generations.

KEYWORDS

Sámi rights; Finland; constitutionalism; environmental restorative justice; Indigenous peoples; Arctic

1. Introduction: reconciling Sámi rights and ecology

Nature constitutes an essential component of Indigenous rights, inherently linked to cultural heritage, identity, and traditional knowledge systems.¹ However, environmental policies frequently adopt a conservation-oriented approach that prioritises ecological recovery while disregarding the cultural and territorial rights of Indigenous Peoples.² This misalignment gives rise to legal tensions when restoration measures impose restrictions on access to ancestral lands, limit traditional resource governance, or fail to accommodate Indigenous conceptions of sustainability. To reconcile these conflicts, legal frameworks governing environmental restoration must transcend a strictly ecological perspective and recognise a healthy environment as both a fundamental right of Indigenous Peoples and an intrinsic element of their cultural heritage. As proposed by modern legal studies,³ *environmental*

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¹Herrmann and Heinämäki, "Experiencing and Safeguarding the Sacred in the Arctic," 1.

²Forsyth et al. "Agenda Environmental Restorative Justice?," 18–20.

³The first literature review on this topic appears around 2022.

restorative justice is increasingly recognised as an experimental mechanism for reconciling environmental governance with the protection and affirmation of Indigenous rights. As a fundamental doctrine of environmental law, it seeks to redress ecological harm while addressing historical injustices through remedial and participatory measures.⁴ It finds expression in principles such as intergenerational equity and the right to a healthy environment, as well as in legal doctrines such as the *in dubio pro natura*.⁵

Despite its underexplored status, environmental restorative justice has spawned various principles, including the equitable distribution of managerial responsibilities, participatory conservation, environmental justice, social licencing, and green criminology.⁶ These branches respond to the imperative of greater rights-holders' inclusion in decision-making processes, as well as the need for increased transparency and justiciability of actions that affect the environment.⁷ The constitutionalising of environmental protection represents a potential application of environmental restorative justice, aligning with the increasing prominence of sustainable development in legal discourse. Crucially, this shift moves beyond the mere textual recognition of Indigenous rights, embedding environmental principles into constitutional frameworks that enable the substantive integration of Indigenous governance in the development and implementation of environmental law at national level. In concrete terms, constitutional law embeds both substantive and procedural provisions and it establishes clear obligations for state and non-state actors, ensuring the stability and enforceability of environmental protection measures.⁸

The article argues that environmental conservation is essential for Indigenous rights, given their intrinsic link to environmental well-being. While numerous international instruments recognise the cultural and environmental rights of Indigenous Peoples, this paper focuses specifically on their implementation within Finnish constitutional law. It examines the progressive integration of international principles at the national level, identifying key mechanisms of restorative justice, particularly through Articles 17 and 121 of the Finnish Constitution, that are essential for safeguarding Sámi cultural rights in the context of environmental governance. The analysis relies on existing literature and opinions of the Finnish Parliamentary Committee for Constitutional Affairs (hereafter, 'Committee') in cases addressing the preservation of biodiversity and Sámi traditional activities.

The paper first develops with an introductory part on environmental restorative justice. This is followed by an overview of constitutional law in Finland and its progressive inclusion of environmental protection. 'Section 4' explores the core of this reconciliation as it examines current limitations faced by the Sámi in managing natural resources and their cultural environment. The last section analyses procedural instances in which the Committee stated how remedial measures for ecological degradation must be proportionate and respect Sámi rights, both nationally and internationally.

⁴Ibid; and Forsyth, 18–20.

⁵Fusco, "Dubio pro natura," 1.

⁶Ibid; and Forsyth M. et al., 20–7.

⁷Idem.

⁸Kotzé "Arguing Global Environmental Constitutionalism," 400–8.

2. An alternative legal pathways for ecological and Indigenous rights: restorative justice

To begin with, existing environmental regulations fail to consider the social priorities of minority communities, which are disproportionately impacted by external factors such as climate change and the exploitation of natural resources. These regulations frequently neglect past discriminatory practices against Indigenous Peoples, which could potentially be addressed through reconciliation proceedings.^{9,10} An alternative approach, called *environmental restorative justice*, has been proposed to integrate community-based environmental practices, recognising the link between human rights and the need for reparative measures to protect future generations. Under this doctrine, enhanced participation by all rights-holders is seen as essential to promoting Indigenous self-determination through best practices in representation and access to justice. Within the scope of this study, environmental restorative justice is understood as addressing relational and physical harm between humans and the environment, with a focus on direct participation, including storytelling and dialogue, and a commitment to transparency through the clear identification of offenders and victims. For these reasons, environmental restorative justice may be applicable at various levels of governance.¹¹ In the context of this article, environmental restorative justice will be analysed solely within a domestic judicial framework ('Section 3').

However, it is also essential to consider the international legal instruments incorporated into Finnish law, particularly those with constitutional relevance, as they increasingly reflect the intrinsic connection between nature and Indigenous rights. First of all, the rights of Indigenous Peoples to exercise their traditional knowledge, cultural practices, and *ways of life* are broadly recognised and safeguarded under various international legal instruments, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),¹² the International Covenant on Civil and Political Rights (ICCPR),¹³ the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁴ and the ILO Convention No. 169 on Indigenous and Tribal Peoples.¹⁵

UNDRIP provides the most detailed articulation of Indigenous cultural rights to date, underscoring the integral relationship between Indigenous identity, traditional knowledge, and collective practices. Article 11(1) affirms Indigenous Peoples' right to 'practise and revitalise their cultural traditions and customs', including ceremonies, designs, and technologies, while Article 12(1) secures the right to 'manifest, practise, develop and teach their spiritual and religious traditions'. Further, Article 31(1) protects the right to 'maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions'. These provisions reflect a holistic understanding of culture as inherently linked to Indigenous autonomy, identity, and collective memory.¹⁶ UNDRIP also recognises

⁹Truth and Reconciliation Committee Concerning the Sámi People, "Mandate," 2021.

¹⁰See also *supra* note 9: According to The Truth and Reconciliation Concerning Sámi People in Finland, reconciliation aims to identify past and ongoing injustices against the Sámi, assess their current impacts, and propose measures to improve Sámi – state relations.

¹¹*Ibid.*; and Forsyth, 18–20.

¹²United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007.

¹³International Covenant on Civil and Political Rights (ICCPR), 1966.

¹⁴International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966.

¹⁵ILO, Convention No. 169 on Indigenous and Tribal Peoples, 1989.

¹⁶Committee on Economic, Social and Cultural Rights' General Comment No. 21, 2009.

the cultural dimension of Indigenous relationships to land: article 25 upholds the right to maintain spiritual and cultural relationships with traditionally owned territories, and article 29 affirms the right to conserve and protect the environment of those lands. Although Finland has not ratified ILO Convention No. 169 and is therefore not a party to it, the Convention remains the only binding international treaty that specifically protects the rights of Indigenous and tribal peoples. It affirms their right to self-determination and control over their own development (Article 7). The Convention requires that Indigenous Peoples be consulted through appropriate procedures whenever legislative or administrative measures may affect them (Article 6). It protects their rights to land and natural resources traditionally occupied or used (Articles 13–19), recognising land as central to their identity and survival.¹⁷ Article 14 acknowledges the collective nature of land rights, while article 15 safeguards their rights to participate in the use, management, and conservation of those resources.

Regarding ICCPR, the Human Rights Committee's General Comment No. 23 (HRC) on article 27 of the ICCPR reinforces the cultural significance of land and livelihood for Indigenous communities.¹⁸ It explicitly recognises that 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources'.¹⁹ This is particularly relevant for Indigenous Peoples whose subsistence activities, such as hunting, fishing, and gathering are expressions of cultural identity and survival. The HRC also highlights that Indigenous Peoples may require 'special measures' to ensure the full enjoyment of their cultural rights²⁰ and emphasises that any restriction on these rights must meet the tests of necessity, proportionality, and legitimacy.²¹

On ICESCR, the Committee on Economic, Social and Cultural Rights, in General Comment No. 21, offers a robust interpretation of cultural rights under article 15(1)(a). It states clearly that 'Indigenous Peoples have the right to act collectively to ensure access to their own culture', including language, knowledge systems, customs, religious beliefs, and control over cultural heritage.²² Paragraph 49(c) further calls upon States to respect Indigenous rights to 'preserve, control, protect and develop their cultural heritage, traditional knowledge and cultural expressions'. Importantly, the Committee recognises the inseparability of culture from land and natural resources,²³ affirming that the ability to sustain cultural practices often depends on access to ancestral territories. The comment also underscores the necessity of free, prior and informed consent when Indigenous cultural rights may be affected (para. 55), aligning with UNDRIP's procedural safeguards for participation and self-determination.

According to the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), *Nature* is recognised as part of the cultural heritage of Indigenous Peoples under international law.²⁴ The Universal Declaration on Cultural Diversity,²⁵ in its preamble, further clarifies that culture encompasses not only art and literature but also 'the set of distinctive spiritual, material, intellectual and emotional characteristics' of a society,

¹⁷International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169.

¹⁸Human Rights Committee's General Comment No. 23, 1994.

¹⁹Ibid; Committee on Economic, Social and Cultural Rights, para 3.2.

²⁰Ibid; and para 7.

²¹Ibid; and para 9.

²²Ibid; and Committee on Economic, Social and Cultural Rights, para 36.

²³Ibid; and para 50.

²⁴Human Rights Council "Repatriation of ceremonial objects," para 29.

²⁵UNESCO Universal Declaration on Cultural Diversity (2001).

including lifestyles, systems of values, traditions, and beliefs.²⁶ Similarly, article 2 of the Convention for the Safeguarding of the Intangible Cultural Heritage defines intangible cultural heritage as knowledge passed down through generations, often through interaction with nature.²⁷ The second paragraph of this provision explicitly acknowledges the transmission of such heritage through ‘practices concerning nature and the universe’.²⁸

For these reasons, it is crucial to establish guidelines in Indigenous territories that respect their rights. For example, the Convention on Biological Diversity’s section 8 (j), the Akwé: Kon Voluntary Guidelines, recognise the importance of conducting cultural, environmental, and social impact assessments on Indigenous lands. This means that, as the protection of cultural heritage calls for a shared responsibility, businesses require to respect Indigenous participatory rights, by acquiring free, prior and informed consent (hereinafter, ‘FPIC’), and compensate for negative impacts of their projects on Indigenous land.²⁹ As a contracting party under Section 8(j), Finland is legally bound to comply with the same best practices in its development processes.³⁰ For instance, the Faro Convention acknowledges that ‘every person has the right to engage in the cultural heritage of their choice, while respecting the rights and freedoms of others, as part of the right to freely participate in cultural life’.³¹ This highlights that the protection of cultural heritage is closely linked to the preservation of Indigenous Peoples’ culture and the safeguarding of their land rights.³² In this context, the use of natural resources is inherently tied to the principle of intergenerational equity. As Weiss notes, the exploitation of natural resources raises concerns about their future quality, quantity, and accessibility, potentially threatening biodiversity and cultural preservation.³³ Indeed, the Human Rights Council states that ‘the destruction of, or damage to, cultural heritage may have a detrimental and irreversible impact on the enjoyment of cultural rights’.³⁴

2.1. Constitutional approach

So far, efforts to apply international environmental standards at the national level have been undermined by disjointed governance and unclear legal definitions, especially when external interventions override local customary systems.³⁵ According to Daly, it is constitutional law that, instead, offers a more coherent framework for environmental restorative justice as it unites human rights principles with environmental protection to address ecological degradation.³⁶ Indeed, constitutionalism encompasses both substantive and procedural rights, with constitutional justice defined by its rigidity, judicial rulings amending legal norms, and the disapplication of laws manifestly contradicting to the Rule of Law.³⁷ Courts of legitimacy, therefore, can reopen the legislative process when laws are found to be

²⁶Idem.

²⁷UNESCO, Convention for the safeguarding of the intangible cultural heritage, art. 2.

²⁸Ibid; and para 2.

²⁹Secretariat of the Convention on Biological Diversity Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment, 25.

³⁰Convention on biological diversity, June 1992.

³¹Council of Europe Framework Convention on the Value of Cultural Heritage for Society, 2005 (Preamble).

³²Vadi, “Cultural Heritage in International Law,” 57–9.

³³Fitzmaurice, “Indigenous Peoples and Intergenerational Equity,” 194–195.

³⁴Human Rights Council in its recent Resolution 33/20 (2016), para. 5.

³⁵Ibid; and Forsyth, 6.

³⁶Daly Erin, “Constitutional Protection for Environmental Rights,” 74–7.

³⁷Corte Costituzionale d’Italia ‘La corte costituzionale’, (The Constitutional Court”, English version).

manifestly in conflict with constitutional principles.³⁸ In this way, constitutional law guarantees societal needs against power abuses, providing a collective rational framework that protects diverse interests. This is achieved by extrajudicial interpretations,³⁹ enabling a reconciliatory legislative approach vital to Indigenous rights and environmental.⁴⁰ Rühls and Jones describe several ways to achieve such inclusive and collective *environmental constitutionalism*.⁴¹ Primarily, the recognition of a healthy environment may be framed as a cultural or human right, consistent with an anthropocentric perspective; alternatively, it may involve the development of novel categories of rights that move beyond strict anthropocentrism, or, in its most eco-centric form, entail the acknowledgement of nature's rights and its legal personhood.⁴² In each of these approaches, constitutional substantive rights, such as the rights to life, dignity, and health, can be identified, alongside procedural rights that allow communities to challenge historical harm and take part in environmental decision-making. Together, they offer a viable foundation of restorative justice, which aims to build lasting reconciliation between Indigenous Peoples and environmental protection.

3. Nature restoration and Finnish constitutional reception

3.1. Constitutional approaches to environmental protection in Finland

Since this paper aims to propose an alternative way to reconcile Sámi rights with ecological integrity under constitutional law, it is important to trace the origins of Finnish constitutionalism. This will help to understand its progressive integration of environmental protection with Indigenous rights and the role of the Committee.

First, the foundation of Finnish constitutionalism traces back to the early 19th century. Finland experienced its constitutional awakening during the Grand Duchy era (1809–1917) and the 1919 with the transition to an independent republic, underpinned by the principles of parliamentary democracy.⁴³ The 1995 amended constitution acknowledged the Sámi culture under article 14, safeguarding their entitlement to preserve and enhance their language. Section 14a underscored the collective duty to uphold 'the natural world and its diversity, the environment, and cultural heritage', urging public authorities to facilitate 'the right to a healthy environment and participation in decisions regarding one's living environment' for all individuals.⁴⁴ The initial integration of the constitutional framework established key principles for preserving biodiversity to ensure future generations enjoy the same benefits, in line with the equality principle in 'Section 5'.⁴⁵ The new 1999 constitution, adopted with more than two-thirds required majority in Parliament, introduced hierarchical superiority, procedural safeguards for legislative enactment, and a mechanism for informal alteration via customary regulations, exemplified by the *poikkeuslaki* or exceptive

³⁸Idem.

³⁹Extrajudicial interpretations refer to the role of other institutions, outside the courts, that contribute to construct constitutional meanings (e.g.; parliaments, agencies, committees, social actors etc).

⁴⁰De Visser Maartje and Neo L. Jaclyn, "What would pluralist institutional constitutional interpretation look like?," 1887–90.

⁴¹Rühls, Nathalie and Aled Jones, "Implementation of Earth Jurisprudence," 9.

⁴²Ibid; and Daly, 74–75.

⁴³Jussila O, Hentilä S. et al. "Storia politica della Finlandia 1809–2003," 83– 94.

⁴⁴Finnish Constitution, art.14a.

⁴⁵Finnish Constitution, article.5(1) (2).

act. In concrete, an exceptive act is law that breaches the Constitution, enacted under the procedure for constitutional revision.

The constitution was amended few times after the Constitutional Act 731/1999.⁴⁶ However, the culmination of Finland's integration into the EU manifested in the 2012 constitutional amendment.⁴⁷ This amendment, occurring seventeen years post-accession, indicative of Finland's commitment to European legal harmonisation⁴⁸ and international cooperation.⁴⁹ In particular, the European Environmental Impact Assessment (EIA) Directives, the first in 2011⁵⁰ (2011/92/EU, amended in 2014),⁵¹ have played a crucial role in biological conservation and sustainable development, aligning with the objectives outlined in the Finnish constitution (articles 6, 17, 20, 22). Specifically, the EIA directives supported Finland in its environmental law development through a more inclusive licencing systems for proposed projects, including infrastructure developments, industrial facilities, and other activities with significant environmental transformations.⁵² The 2014 amendment further promoted public participation by including climate change and biodiversity loss in the list of environmental issues requiring EIA reporting and requiring detailed analysis of cumulative effects.⁵³ Furthermore, participation mechanisms have been strengthened so that informed consent is obtained, and this is reflected in the final decisions.⁵⁴

In 2004, Finland ratified the Aarhus Convention after amending corresponding legislative acts subject to Parliamentary approval of government bill (165/2003). Indeed, according to the constitution (article 94), the approval of Parliament is required for such treaties and other international obligations. Two amendments were then passed: one to the Nuclear Energy Act (769/2004) and a new Act on Expropriation Permits Required by Certain Projects with Environmental Impacts (768/2004). The objectives of the Aarhus Convention, namely ensuring the public access to environmental information, participation in environmental decision-making, and the access to justice, were incorporated into Finnish legislation by presidential decree (866/2004).⁵⁵ Despite the EU Nature Restoration Law debates beginning in 2022, Finland has remained proactive in environmental legislation, exemplified by the 2021 Helmi Habitats Programme⁵⁶ and the 2023 amendment to the 1996 Nature Conservation Act to bolster biodiversity, protect landscapes, and support climate adaptation.⁵⁷ Nowadays, the protection of the environment and its biodiversity are currently guaranteed by article 20 of the current constitution. According to articles 20 and 22, the responsibility for the protection of the 'environment and the national heritage are

⁴⁶Following amendments: Acts 596/2007, 802/2007, and last by Act 1112/2011.

⁴⁷Constitution of Finland, art. 1(1); Amed. (2012), articles 1(3), 94(2), and 95(2).

⁴⁸Mutanen A., "Towards Non-sovereignists Constitution Finland."

⁴⁹According to the author, the innovative legal initiative originated from relevant international conventions, such as the United Nations Framework Convention on Climate Change (UNFCCC), 1992, The Convention on Biological Diversity (CBD), 1992. The Kyoto Protocol to the UNFCCC, established in 1997, and the Aarhus Convention (1998 but in force since 2001) were implemented by Finland later.

⁵⁰2011/92/EU.

⁵¹2014/52/EU.

⁵²Ministry of the environment, "Second Aarhus Convention Implementation Report."

⁵³European Parliament. 'Transposition and implementation of the 2014 Directive on the assessment of the effects of certain public and private projects on the environment', Implementation of EIA Directive 2014/52/EU.

⁵⁴Ibid., articles 6, 8, 8bis, and 9.

⁵⁵Ministry of the Environment, 2.

⁵⁶Government Resolution on the Helmi Programme.

⁵⁷Nature Conservation Act (No. 9 of 2023).

the responsibility of everyone', while 'the public authorities shall guarantee the observance of basic rights and liberties and human rights'.⁵⁸

3.2. The Parliamentary Committee of Constitutional Affairs

At this point, it is necessary to define the role of the Committee in affirming constitutional environmental protection and Indigenous rights. Its responsibilities concerning the implementation of international obligations are defined in Articles 93(2), 94, 95, and 73. Finland follows a dualistic system, meaning that international treaties must be incorporated into domestic law through a separate legislative process before they can enter into force.⁵⁹

Eighteen legal experts form the body, which is mandated to ensure that proposed legislation adheres to both constitutional and international legal frameworks.⁶⁰ The constitutional review is conducted *ex ante*, prior to the enactment of any law. Given its *ex ante* nature, the committee is inherently politicised, with a tacit agreement that a member of parliament must resign before assuming a position within the Committee. While the Committee's composition is intended to be neutral, its neutrality is not absolute and is contingent upon the quality of the statements provided by its members.⁶¹ These statements are mandatory and grounded in constitutional customs.⁶²

Regarding cases of evident conflict with the constitutional provisions, articles 95, 73 and 106 apply mechanisms of limited derogation. To some extent, the Committee regulates the hierarchy of international legal sources. For instance, in 1990, it ratified the European Convention of Human Rights (ECHR) and its protocols, thereby granting them prevalence over domestic laws following the first regulatory conflict, where national law was initially favoured over European law (Uoti case).⁶³ The review process also involves oversight by the Chancellor of Justice and the Parliamentary Ombudsman. Finland's international compliance is likewise subject to international monitoring under the UN treaty system.

4. Applying restorative justice to constitutional Law

In domestic criminal law, restorative justice advances relational approaches between the parties, conceptualising crime not solely as a violation of legal norms, but as an infringement on interpersonal relationships and social cohesion.⁶⁴ In contrast to offender-centered models, restorative justice shifts the focus to those harmed by a crime, primarily victims and survivors, seeking their active inclusion in the justice process.⁶⁵ This approach empowers victims to participate more fully than in traditional criminal proceedings, aligning with the broader rehabilitative aims of punishment. Dialogical processes, particularly Alternative Dispute Resolution (ADR) mechanisms, thus embody the

⁵⁸S. 22, Finnish Constitution (Amed. 2012).

⁵⁹Ministry of the Environment of Finland, 2nd Aarhus report, (2007).

⁶⁰Eduskunta, "Constitutional Law Committee."

⁶¹Sormunen M, "Politicizing Constitutional Review."

⁶²*Idem*.

⁶³*Uoti v Finnish Environmental Authority* [2023] 2 KHO 344.

⁶⁴University of Wisconsin Law School, "About Restorative Justice."

⁶⁵*Ibid*.

restorative model's commitment to relational justice.⁶⁶ Within the framework of constitutional law in Finland, this rehabilitative dimension finds support in the systematic interpretation of Sections 7 and 8 of the Constitution, which establish that criminal liability must be personal and grounded in law. In this analysis, Environmental Restorative Justice (ERJ) advances dialogic justice by fostering renewed relationships with Indigenous Peoples recognising their participatory rights and emphasising cooperation in matters such as environmental governance.⁶⁷ Natural resource management has increasingly been integrated into reconciliation processes across various jurisdictions, including New Zealand, Canada, and the Nordic countries, often through institutions like Truth and Reconciliation Commission, as restorative justice body addressing historical injustices against Indigenous Peoples and promoting government accountability.⁶⁸

Rooted in the broader concept of the democratisation of law,⁶⁹ these mechanisms enhance dialogue among institutions and societal actors.⁷⁰ For these reasons, ERJ encourages alternative interpretations and legal pathways, advancing a pluralistic constitutional model capable of integrating diverse rights-holders into environmental law-making processes.⁷¹ This approach is supported by instruments like EU Directive 2008/52/, equally implemented in Finnish law.⁷²

In terms of ERJ, Finnish constitution affirms that Sámi Peoples have 'the right to maintain and develop their own language and culture',⁷³ while calling for collective responsibility to protect the environment.⁷⁴ In light of section 8(j) of CBD, articles 17 and 121 of the Finnish constitution reinforce the idea on that aforementioned legal pluralism with various multi-level norms aimed at respecting Sámi cultural expectations from ecological restoration.⁷⁵ Constitutional law thus emerges as a suitable foundation for ERJ, given its growing receptiveness to sub-national legal systems, even in the absence of binding international obligations regarding Indigenous customary practices.⁷⁶ This gradual acknowledgement of Indigenous customary law reflects a steadfast commitment to decolonisation and respect for the self-determination rights of Indigenous Peoples, recognising traditional practices like reindeer husbandry, grazing, *siida* organisation, hunting, land use, and natural resource management.⁷⁷ This commitment mitigate the adverse impacts of the doctrine of discovery by affording 'constitutional space [...] for Indigenous Peoples' sovereignty, jurisdiction, and legal orders'.⁷⁸

⁶⁶Pareek P, "Integrating Restorative Justice Practices," 818–824.

⁶⁷Definition from the Government of Canada, "Reconciliation."

⁶⁸Beyond Truth and Reconciliation Committees in Fenn Scandinavia, other examples of repair and mediation systems in Canada and New Zealand are sentencing circles and Restorative Justice Conferences.

⁶⁹Fusco, "Participation, Sharing, and Cooperation."

⁷⁰Ibid. De Visser, Maartje, and Neo L. Jaclyn, 1890, 1893–4.

⁷¹Directive 2004/35/CE of the European Parliament and of the Council of April 21, 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

⁷²Act on Mediation in Civil Disputes and Certification of Settlements (Laki riita-asioiden sovittelusta ja sovinnon vahvistamisesta yleisissä tuomioistuimissa), codified as Act No. 394/2011.

⁷³Finnish Constitution, art. 17(3).

⁷⁴Finnish Constitution, art. 20.

⁷⁵Bunikowski, D. "Indigenous Peoples, Rights and Customary Laws," 75–85.

⁷⁶Heinämäki, L., Herrmann, R., and Green, C. 'Towards Sámi Self-Determination over Their Cultural Heritage: The UNESCO World Heritage Site of Lapland in Northern Sweden', 1–3.

⁷⁷Åhren M, "Indigenous Peoples' Culture, Customs," 63–112.

⁷⁸UN Economic and Social Council, "Study impacts Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress" (E/C.19/2014/3).

4.1. Practical guidelines for application

To understand how ERJ is implemented through constitutional law, it is necessary to first remind constitutional justice operates. In broader terms, according to the European Venice Commission, constitutional justice operates through constitutional adjudication and judicial review, respectively manipulative rulings and the disapplication of conflicting norms.⁷⁹ While the concept of justice traditionally suggests punitive measures, constitutional justice does not have a genuine punitive character. Instead, it adheres to principles that are widely accepted by both society and the international community, which the constitutional system itself has helped implement.⁸⁰ Thus, although constitutional justice may appear abstract, it is, in fact, the primary driver of the legislative process, particularly in jurisdictions such as Finland, where constitutional checks are applied *ex ante*. The Committee's statement practice follows own previous opinions based on expert testimonies in constitutional law. The judicial review of law (*ex post*) remains with courts, which interpret constitutional provisions and ensure laws align with the constitution, especially to protect human rights.⁸¹ The Committee demands the disapplication of the norm in evident conflict with the constitution (art. 106).⁸²

Said that, ERJ can guide constitutional law in a way that sufficiently safeguards both the environment and Sámi culture by aligning legal practices with international law standards. As Forsyth outlines, the ERJ's framework encompasses distributed environmental management, participatory consultation, environmental justice, social licence, and green criminology.⁸³ For this reason, this section first analyses the legislation under which the Committee operates and ensures the correct domestic implementation in compliance with international law. It will be followed by the last section on the judicial approach to its application.

The first element, *distributed environmental management*, advocates for a collaborative regulatory framework that ideally involves bipartite (community/state) or tripartite (community/state/company) relationships in environmental decision-making. The second one, *participatory consultation*, emphasises a value-based approach, recognising the participatory rights of all rights-holders impacted by environmental decisions, including those related to climate change, and Free, Prior, and Informed Consent (FPIC). *Environmental justice*, a core principle of restorative environmental justice, underscores community engagement in environmental decisions and the issuance of social licences to operate. The final tool, *green criminology*, is a specialised branch of criminal law focused on advancing eco-justice.⁸⁴

For methodological clarity, the evaluation of the application of environmental restorative justice to the Finnish constitution in this article is based on three key categories derived from Forsyth's review.

⁷⁹Dürr S R, "Constitutional Justice – Key Mission Venice Committee," 229–3.

⁸⁰European Committee For Democracy Through Law (Venice Committee) "Comments On The Implementation Of International Human Rights Treaties In Domestic Law And The Role Of Courts," 8–10

⁸¹See Chapter 2 for further information on constitutional justice in Finland.

⁸²Article 106: "Courts of law must apply the Constitution when a law, regulation, or other provision conflicts with it. In cases where a provision of an Act of Parliament is in conflict with the Constitution, and it is evident that the provision is unconstitutional, the court must give precedence to the Constitution."

⁸³Forsyth et al., "Agenda Environmental Restorative Justice," 17–40.

⁸⁴Idem.

The first category, *Distributed management of natural resources (DEM)*, focuses on the inclusion of the Sámi in the governance of natural resources, ensuring that their rights and knowledge are respected in resource management decisions. In 2023, Finland revised its Cultural Environment strategy, emphasising the roles of individuals, communities, and Public Administration in managing cultural and natural resources.⁸⁵ The strategy aims to harness Finland's social diversity to adapt to social, technological, and economic changes. It also advocates for more inclusive environmental organisations, particularly in Lapland, where climate change effects are already evident.⁸⁶ Although co-management has been proposed as a solution to address uncertainties around Indigenous cultural property rights, criticism suggests that it may not fully support Indigenous self-determination.⁸⁷ Co-management was conceived as a solution to the uncertainty due to Indigenous cultural property rights, especially intangible property, while maintaining Indigenous participatory rights (e.g. Heritage site of Laponia).⁸⁸ Among the activities that are part of Sámi self-identification are reindeer herding (regulated by the Act on Reindeer Husbandry, 1990). Unlike Norway and Sweden, in Finland any EU citizen residing in the Sámi Homeland has the right to be allowed to conduct reindeer herding business. Unlike forestry, reindeer herding is not as profitable, and the number of people involved in this activity is decreasing every year. Reindeer herding is subject to many threats, including climate and state economic activities. Nowadays, Metsähallitus is responsible for the conservation of natural heritage, about 90% of the region. 80% of this area is under the Nature Conservation Act (1096/1996), which ensures ecological compensation and prohibits the undermining of Sámi livelihood rights.⁸⁹ Metsähallitus also manages the traditional landscape, the old Sámi settlements and in close collaboration with the Sámi Museum and the Finnish Heritage Agency.⁹⁰ The repatriation of archaeological artefacts found in Sápmi is highly debated, especially now that the Sámi Parliament and the Sámi Museum have a stronger role in the administration of archaeological heritage in Sápmi.⁹¹

The second category, *community engagement in environmental decision*, addresses the participation of the Sámi in legislative and governmental processes related to environmental and climate policy. Forsyth argues that meaningful participation helps to build stronger, more sustainable environmental governance systems, as it empowers communities to contribute their knowledge and actively engage in restorative practices.⁹² In terms of Sámi community engagement in climate crises, the new Climate Act (2022) establishes that the Government must monitor progress in terms of ecological sustainability and propose new measures to combat pollution. The act also obliges the Government to present an Annual Report to the Parliament and include the Sámi Parliament to draft new climate policies. The Sámi Parliament has been involved in the first Climate Policy Round Table of 2020 (which is not a decision-making process) to draft climate measures in Finland. Moreover, representatives of the Sámi Parliament are always invited by the Government in the national delegation in negotiation in

⁸⁵Finnish Government, Government Resolution for the Cultural Heritage Strategy 2023–2030, 2023, Helsinki, 1–15.

⁸⁶Ibid., 26–29.

⁸⁷Ibid.

⁸⁸Ibid.

⁸⁹Ibid; Heinämäki, 93.

⁹⁰Ibid.

⁹¹Harlin EK, "Sámi Archaeology Fear Political Involvement," 254–284.

⁹²Ibid., and Forsyth, 18–21.

international for climate change.⁹³ The major novelty of the Climate Act is the creation of the Sámi Climate Council, the organisation of which was made explicit in detail by a specific decree (423/2022).⁹⁴ The Sámi Climate Council (hereafter, ‘SCC’) is an independent expert body which ensures Sámi participation in the stipulation of climate policies and the assessment of impacts on indigenous culture. It is made up of a chairperson and ten members.⁹⁵ Although the SCC is still in an embryonic stage, it represents the recognition by the Finnish government of the strong link between Sámi culture and the environment and therefore vulnerable to transformations due to climate change. The work of the SCC is in parallel with the objectives of the Truth and Reconciliation Commission, established in Finland in 2021, which includes a more transparent collaboration between Sámi Parliament with Skolt Village Assembly and the state in the preservation and development of indigenous culture, including traditional livelihoods.⁹⁶

The final category pertains to *Environmental Impact Assessment* (EIA) practices, emphasising the need for assessments to incorporate Sámi cultural perspectives holistically, ensuring that impacts on Sámi ways of life are anticipated and respected within environmental and developmental policies. Forsyth stresses the importance of including local and Indigenous communities in the EIA process, ensuring that their perspectives and traditional knowledge are integrated to assess potential harms and benefits holistically.⁹⁷ From reading articles 20 and 22 of the Constitution, the EIAs reflect ERJ, through the engagement of rights-holders in the evaluation and monitoring of the environmental impacts of the projects.⁹⁸ In Finland, EIA and SIA are both regulated by the Act on the Environmental Impact Assessment Procedure, which entered into force in Finland in 2017 and subsequently amended in 2023. Annexes I and II of the Act on the Environmental Impact Assessment Procedure provide the list of projects that required EIA and which geographical characteristics that must be met for the project approval. Annex I required EIA for all activities that may impact animal husbandry and fish farming, while Annex II further necessitates the assessment of the abundance, quality and regenerative capacity of the project location.⁹⁹ The use of EIAs is defined in other legislations such as the Nature Conservation Act (1096/1996), Land Use and Building Act (132/1999) and Mining Act. The Mining Act includes regulations that must be included in the exploration permit, such as consultation with the Sámi Parliament and the Skolt Village Assembly regarding projects in their Homeland (articles 51(2)(3), 52(4) and 54(3)). However, the final decision-making authority in the environmental legal domain is linked to an authorisation mechanism that limits court intervention.¹⁰⁰ Therefore, improved coordination between primary and secondary laws is crucial to fulfil the objectives under article 20 of the Finnish constitution. Article 20(1) underscores environmental conservation as a collective responsibility.

⁹³ Croatian Presidency of the Council of European Union, “Submission by Croatia and The European Committee On Behalf Of The European Union And Its Member States,” 3–6.

⁹⁴ Valtioneuvoston päätöksen mukaisesti säädetään ilmastolain (423/2022) [in English: Climate Act (423/2022)].

⁹⁵ Ministry of the Environment of Finland (2023). Government adopts Decree on Sámi Climate Council.

⁹⁶ Truth and Reconciliation Committee In Finland, “Establishing truth reconciliation committee concerning Sámi people.”

⁹⁷ Ibid; and Forsyth (2021), 17–20.

⁹⁸ Jalava K. et al., “Precautionary Principle Management of Uncertainties,” 280–3.

⁹⁹ Act on the Environmental Impact Assessment Procedure, Annex I and II.

¹⁰⁰ Raitanen, “National Constitution Basis Furthering Human,” 8–9.

While there is no explicit provision on nature's rights or legal personality attributed to the environment, article 20 holds a declarative function, with possible constraints of property rights.¹⁰¹ Environmental rights must be read in conjunction with article 22 of the Constitution, which mandates the Government to operate considering state welfare and human rights. The Government Bill on the new Nature Conservation Act¹⁰² includes the precautionary principle in article 7 with positive impact on the constitutional environmental right (article 20) by strengthening everyone's responsibility for nature and providing voluntary ecological compensation.¹⁰³ Indeed, section 114 of the Finnish Nature Conservation Act grants the Finnish government the authority to expropriate land or specific rights for the creation of protected areas or for other conservation purposes. The government may decide on the expropriation, and the Ministry of Environment is responsible for granting expropriation permits, particularly for areas included in nature protection programs or the Natura 2000 network. Before proceeding with expropriation, the government must, if possible, negotiate with landowners.¹⁰⁴ It is unclear whether the expropriation process, which allows the state to determine land use for nature conservation or Natura 2000 areas, will limit Sámi access to these lands for traditional activities or offer the Sámi the opportunity to be consulted. This provision could either restrict Sámi land rights or serve as a chance for meaningful dialogue, depending on how the consultation process is implemented and whether Sámi communities' interests are adequately considered.

5. Reconciling legal norms and cultural practices: core challenges and perspectives

Before delving into procedural examples of ERJ applied to constitutional justice, this section aims to provide a broader understanding of the core principles of reconciliation. It seeks to highlight the current limitations faced by the Sámi in managing natural resources and their cultural environment, while also shedding light on their role in shaping Finland's constitutional law and environmental policies.

5.1. The Sámi autonomy in Finnish constitutional Law

As previously stated, Finland expresses a commitment to adhering to international legal instruments and domestic laws that specifically protect Sámi culture, guided by principles of equality and non-discrimination (Article 6, Constitution), even if its practice has at times been questioned in UN Human Rights Committee jurisprudence. Article 1 of the Finnish Constitution guarantees individual freedoms and rights, particularly emphasising peace preservation, reflecting the country's regional commitment to fostering harmonious relations among all communities. Historically, Sámi People have always advocated for increased representation in national and international bodies. In the 1970s, Sámi political participation was formalised with the Sámi Committee's (1971) recommendation to create a representative body to promote Sámi culture. However, the 1972 elected body lacked authority and was

¹⁰¹KHO:2014:57 (Supreme Administrative Court of Finland, April 8, 2014).

¹⁰²HE 76/2022.

¹⁰³HE 76/2022, Chapter 11.

¹⁰⁴Nature Conservation Act, 2023 (Art. 114).

limited to issuing statements. The Sámi Language Act¹⁰⁵ and research into land rights emphasised the need for a Sámi Act, which was proposed in 1990 but ultimately defeated due to opposition.¹⁰⁶ In 1995, Finland recognised the Sámi as an Indigenous Peoples with ‘cultural autonomy’ within their home region. However, the Sámi Parliament Act, passed the same year, confined self-government to cultural and language matters,¹⁰⁷ excluding authority over land and resources.¹⁰⁸ Along with the 1999 amendment, the Finnish constitution incorporated article 17, ensuring Sámi rights in developing and maintaining their culture.¹⁰⁹ Article 17(3) of the Finnish Constitution corresponds to article 27 of the ICCPR, ratified by Finland in 1975, which acknowledges the right of minority members to preserve and enhance their cultural heritage. Consequently, the Finnish government is obligated under both article 17(3) and article 27 to undertake affirmative measures to sustain the cultural livelihoods of the Sámi.¹¹⁰ This includes Finland’s obligation to provide legal and procedural tools that allow the Sámi to participate in decisions that shape their way of life and to acquire FPIC before accepting projects in the Sámi Homeland. The threshold for determining significant harm is weighed on a case-by-case basis through international legal practice. For example, the Committee, when the Mining act was renewed, suggested a threshold that could harmonise with the constitution and ICCPR and CERD.¹¹¹ Also, when Finland adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it recognised autonomy and self-determination under Article 4.¹¹² However, article 121 of the constitution acknowledges only the Sámi linguistic and cultural autonomy in their Homeland.¹¹³ If understood according to principle of EU subsidiarity, similar to a regional governance structure,¹¹⁴ this autonomy should incorporate sectoral mechanisms with Sámi Parliament’s competences in the region.¹¹⁵ This perspective has been partially endorsed by Savaşan, who hypothesised a dual narrative of article 121’s concept of autonomy, as territory-based administrative autonomy rooted in culture and land use.¹¹⁶ However, a memorandum of the Finnish Ministry of Justice on the negotiation obligation under Section 9 of the Sámi Parliament Act (OM 2/551/2017), drawing on the Constitutional Law Committee’s opinion (PeVM 17/1994 vp), clarified that the Sámi Parliament has no direct powers over resource management. Instead, state authorities are legally required to conduct genuine negotiations with it on all significant measures affecting the Sámi as an Indigenous Peoples, including land use, state lands, conservation areas, and natural resource exploitation.¹¹⁷ On the other hand, in a similar

¹⁰⁵ Passed in 1992, later amended in 2024.

¹⁰⁶ Kuokkanen, “Problem Culturalizing Indigenous Self-determination,” 152-3.

¹⁰⁷ Article 9 “Obligation to Negotiate.”

¹⁰⁸ Ibid., Kuokkanen.

¹⁰⁹ Article 17 (3) states: ‘The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act’.

¹¹⁰ Ibid.; and Heinämäki L, 88.

¹¹¹ Ibid.; and Heinämäki L, 84–90.

¹¹² Article 4: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

¹¹³ Article 121: “In their native region, the Sami have linguistic and cultural self-government, as provided by an Act.”

¹¹⁴ Nordic Sámi Convention. Draft available here: <https://www.sametinget.se/105173>.

¹¹⁵ Bunikowski, “Indigenous peoples, their rights and customary laws,” 75–85.

¹¹⁶ Savaşan, “Land Rights Under Cultural Autonomy,” 1–11.

¹¹⁷ Finnish Ministry of Justice, “Memorandum on the negotiation obligation under Section 9 of the Sámi Parliament Act” OM 2/551/2017 §2–3, citing Constitutional Law Committee, PeVM 17/1994 vp, 2–3.

vein, the Committee on the European Charter of Local Self-Government (1991) stated that Sámi autonomy, as endorsed in Article 121 of the Finnish Constitution, should be understood as a form of administrative supremacy comparable to that of local authorities, even if restricted to areas such as economics, transport, and the electoral system.¹¹⁸ Instead, linguistic and cultural autonomy has never posed a major issue, as previously acknowledged in Article 52a of the Parliamentary Rules of Procedure, which guarantees the Sámi the right to be heard in Parliament on matters within their competence.¹¹⁹ However, this series of systemic contradictions emerged in 2017 with the Arctic Railway project's access to Sápmi. The project was harshly criticised by the Sámi Parliament for negative impacts on traditional activities (reindeer herding, fishing, and hunting). In that occasion, the Sámi Parliament cited article 17 of the Finnish constitution which reads “the right [of Sámi people] to maintain and develop their own language and culture ‘which includes reindeer herding, hunting, and fishing’”. Furthermore, the Sámi Parliament cited article 121 referring to article 9 of the Sámi Parliament Act according to which the authorities have the obligation to obtain consent from the Sámi community for all activities in the Homeland where cultural autonomy applies.¹²⁰

5.2. *Enduring legal impediments to Indigenous involvement in environmental decision-making*

Despite legal amendments and provisions ensuring Sámi consultation on land use, the Sámi Parliament continues to face significant limitations in its decision-making authority over natural resources. These constraints that are embedded in both national and international legal frameworks. In Finland, due to the aforementioned persistent *culturalization* of Sámi self-determination, the Sámi self-government is solely a cultural autonomy.¹²¹ Even if Finnish law mandates consultation with the Sámi on actions impacting their homeland, inadequate consultation continues to impede their participation in environmental decision-making, revealing the persistent gap between legal obligations and actual practices.¹²²

In terms of international law, Finland's ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) is the one that presents the most challenges. More generally, the Committee on the Elimination of Racial Discrimination has repeatedly recalled the obligation of member states to respect Indigenous rights and environmental conservation.¹²³ In its General Recommendation XXIII, it declared that states need to ‘have substantive and procedural obligations to protect human rights against the adverse impacts of environmental harm’.¹²⁴ Substantive obligations include the rights to a healthy environment and property, while procedural obligations involve EIA processes, Indigenous participation in decision-making,

¹¹⁸ Report archives are available at: <https://www.congress-monitoring.eu/en/23-pays.html>.

¹¹⁹ Finland: Parliament Act of 1928.

¹²⁰ *Ibid.*, Heinämäki L, 86.

¹²¹ *Ibid.*, Kuokkanen, 158–60.

¹²² *Ibid.*

¹²³ Report of the Committee on the Convention on the Elimination of All Forms of Racial Discrimination for the Seventieth and Seventy-first sessions, Consideration of Reports, Comments and Information Submitted by States Parties: Democratic Republic of the Congo, 1 October 2007, U.N. Doc. A/62/18, 332.

¹²⁴ UNOHCHR, “Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment,” Report No. 3, 9.

compensation for land exploitation, and access to legal remedies.¹²⁵ To determine the terms of liability for environmental harm, the CERD Committee has constantly emphasised that Indigenous rights must inform land use licencing and pollution mitigation, urging states to halt support for large-scale projects threatening traditional Indigenous life.¹²⁶ In Finland, the implementation of CERD, which took place via presidential decree, therefore below the Acts of Parliament, required the amendment of other domestic regulations such as the Penal Code and the Non-Discrimination Act. The Committee expressed concerns especially with the permits licenced for machine gold prospecting in Sápmi.¹²⁷ It required further clarification on the definition of Sámi land rights as, in tandem with the Human Rights Committee, regarding decisions on the right to vote in Sámi elections.¹²⁸ Also, the CERD Committee calls on Finland to amend the Act on the Metsähallitus (Act on the Forestry Management Agency, 234/2016) which doesn't include the obligation to reach consent from Sámi Parliament before any projects ran in Homeland.¹²⁹

Recent developments within the framework of Finland's fourth-cycle Universal Periodic Review (UPR) further underscore the persistence of these legal frictions. Member states have raised concerns regarding Finland's non-ratification of ILO Convention No. 169.¹³⁰ Recommendations from several states, as Australia, Canada, Denmark, Ireland, and Norway, underscore the urgent need to amend the Sámi Parliament Act to better align Finland's laws with Indigenous self-determination principles.¹³¹

6. Procedural examples

The following two cases from 2022 provide excellent examples on how constitutional law, in application of ERJ, can reconcile state and Indigenous Rights on ecology. In those cases, the Supreme Court of Finland ruled on conflicts between the Sámi rights and domestic regulations aiming to restore specific biodiversity standards in Teno river.¹³² These cases are important because the Committee provided opinions by demonstrating novel cultural sensitivity in its approach to environmental protection. This marked a shift from earlier decisions, such as the Vuotos case,¹³³ which focused primarily on the need for environmental impact assessments and precautionary measures to address potential ecological harm, without substantially considering Indigenous cultural dimensions.

¹²⁵CERD. Report of the Committee on the Convention on the Elimination of All Forms of Racial Discrimination for the Sixty-fourth and Sixty-fifth sessions. 2004, U.N. Doc. A/59/18, 190.

¹²⁶CERD. Report of the Committee on the Convention on the Elimination of All Forms of Racial Discrimination for the Sixty-second and Sixty-third sessions, 2007, U.N. Doc. A/62/18, 12(i).

¹²⁷Pentikäinen M. "Impact of United Nations Human Rights Treaties," 500–9.

¹²⁸HRC, Concluding observations on the seventh periodic report of Finland (CCPR/C/FIN/CO/7), s.4 CESCR Concluding observations on the seventh periodic report of Finland s.50 (E/C.12/FIN/CO/7).

¹²⁹CERD, Concluding observations on the twenty-third periodic report of Finland (CERD/C/FIN/CO/23) s.16.

¹³⁰HRC. Summary of stakeholders' submissions on Finland. Report of the Office of the United Nations High Committeer for Human Right. Forty-first session 2022 A/HRC/WG.6/41/FIN/3.

¹³¹HRC. Report of the Working Group on the Universal Periodic Review. Universal Periodic Review. Fifty-second session 2023 A/HRC/52/9.

¹³²KKO:2022:25; and KKO:2022:26.

¹³³The Vuotos case involved a proposed dam and reservoir project on the upper course of Finland's Kemijoki River in 1992. The project faced significant environmental concerns, including potential harm to ecosystems and increased emissions of nutrients and heavy metals. In 2002, Finland's Supreme Administrative Court denied the permit, citing substantial harmful changes to the natural environment (KHO 2002:86).

In the first case, a Sámi man was prosecuted for fishing salmon without a state permit in the Veahčajohka river, part of his family's traditional fishing area.¹³⁴ At first, the Supreme Court found that the limitations imposed by the Tenojoki Tributary Decree were justified under Article 52 of the Fishing Act, which authorises restrictions of stationary nets in cases of stock depletion. Indeed, the fishing season was shortened by approximately one and a half months under Article 9 of the Decree to promote the sustainable recovery of migratory fish populations. The Court emphasised that the rights of the Sámi are not absolute and may be limited for purposes such as biodiversity conservation disregarding article 17(3) of the Finnish constitution, which safeguards the cultural rights of the Sámi as an Indigenous Peoples.¹³⁵ In a subsequent opinions, the Committee affirmed that maintaining sustainable salmon populations was integral to fulfilling the State's obligation to protect the Sámi's collective cultural rights under Section 17(3) as 'conducive to promoting the continuity of the Sámi culture also in the future'.¹³⁶ However, the Committee condemned the lack of proportionality between the two measures was in violation of article 27 of the ICCPR, which ensures 'the survival and continued development of the cultural, religious and social identity of the minorities concerned'.¹³⁷ The Supreme Court concluded that, in light of the Sámi people's cultural rights under Section 17(3) of the constitution, the restriction imposed by Section 9 of the Decree was constitutionally invalid under Section 107. As a result, the District Court's acquittal was affirmed.¹³⁸

The second case pertained instead to charges against certain Sámi individuals for fishing without proper authorisation as per article 10 of the Criminal Code.¹³⁹ Article 10 of the Fishing Act (379/2015), read in conjunction with article 2 of the Act on the Municipality of Domicile, granted the right to obtain a free fishing permit in Upper Lapland from Metsähallitus. Paragraph 2 of the same section required a specific permit for fishing in salmon and trout migration areas (Tenjoki) in state-owned waters. Despite the Committee had not previously addressed article 10 of the Fishing Act bill (192/2014), the Court recognised its evolving doctrine, which acknowledges reindeer herding, hunting, and commercial fishing as integral aspects of Sámi cultural heritage.¹⁴⁰ Indeed, the Court affirmed that the preparatory work of the Fishing act adhered to environmental goals (Section 20) of the constitution, but ruled they did not justify overriding Sámi constitutional rights. In this case, the court referred to the Committee's opinions, which confirmed that treating the Sámi People the same as non-Sámi fishers amounted to a breach of Article 17(3) of the Constitution and Article 27 of the ICCPR. This interpretation revealed a clear inconsistency with constitutional protections, justifying the use of Article 106 to set aside the conflicting legal provision.¹⁴¹

In conclusion, the Finnish Supreme Court affirmed that Sámi fishing rights are living cultural rights, not frozen in historical tradition. They encompass modern practices and

¹³⁴Fishing restriction imposed on the Sámi indigenous people and its relationship to their fundamental rights (fishing offence) R2019/424; ECLI:FI:KKO:2022:25.

¹³⁵Supreme Court, KKO:2022:25, "Summary of the Case," 3.

¹³⁶Ibid., 3.

¹³⁷United Nations Human Rights Committee, "CCPR General Comment No. 23: Article 27," §9.

¹³⁸Ibid.

¹³⁹Fishing restriction imposed on the Sámi indigenous people and its relationship to their fundamental rights (game offence) R2019/425 ECLI:FI: KKO:2022:26.

¹⁴⁰Committee's opinions: 27/1997, 29/2004, and 1/2016) See also: Supreme Court, "Summary of Case," KKO:2022:26, 2.

¹⁴¹Ibid.

are protected against criminalisation when expressing Sámi identity under Constitutional protection. In those cases, the Committee recognised these rights as transmissible to future generations and gave legal weight to the Sámi Parliament's interpretations, reinforcing Indigenous authority in managing of natural resources in force of their collective rights with ecological sustainability.¹⁴²

7. Conclusions

Environmental restorative justice serves as alternative tool for reconciling ecological restoration efforts with the protection of Indigenous rights. While ecological restoration has traditionally been framed within the confines of biodiversity conservation, it is important to broaden this perspective to encompass the social, cultural, and governance dimensions affecting Indigenous communities. Recent deliberations by Finnish Parliamentary Committee on Constitutional Affairs reflect a notable shift towards integrating Sámi rights into legal and policy decisions concerning environmental governance. In its examination of the Temporary Ban on Salmon Fishing Act¹⁴³ the Committee assessed the legislation considering Article 20 of the Finnish Constitution, which establishes the collective responsibility for safeguarding the environment, biodiversity, both living and non-living, and cultural heritage.¹⁴⁴ The Committee emphasised that the intrinsic value of nature constitutes a fundamental human right and must be preserved for future generations. Representatives of the Sámi Parliament actively participated in those discussions,¹⁴⁵ underscoring the significance of Indigenous engagement in environmental decision-making.¹⁴⁶ In its legal analysis, the Committee reaffirmed core principles of environmental restorative justice: as the necessity of Sámi *co- management of natural resources* in Teno river and *community engagement in environmental decision* by introducing the Sámi Parliament's interpretations on restorative measures. However, while interpreting Sámi rights under Articles 17(3), 20, and 121 of the Finnish Constitution, the Committee acknowledged that the right to traditional livelihoods is not absolute and may be subject to limitations for the purpose of ecological restoration.¹⁴⁷ Any such restrictions must, however, satisfy the principles of proportionality and necessity, ensuring that limitations on Sámi land use or governance are justified within the broader framework of environmental protection. This procedural safeguard represents an innovative application of the precautionary principle, incorporating culturally sensitive environmental assessments for prospecting activities. It aims to prevent ecological objectives from disproportionately encroaching on the Sámi's constitutional rights and supports the protection of their cultural heritage. Finally, pursuant to Article 106 of the Constitution, the Committee ultimately disapplied the domestic legislation, deeming it to be in manifest conflict with both the

¹⁴²Scheinin M, "Indigenous Peoples' Right to Fish-Recent Recognition," 43–47

¹⁴³HE 56/2022 vp.

¹⁴⁴Parliament Committee on Constitution Affair: Valiokunnan lausunto PeVL 27/2022 vp HE 56/2022 vp Perustuslakivaliokunta Hallituksen esitys eduskunnalle laiksi lohenkalastuksen määräaikaisesta kieltämisestä Tenjoen vesistössä [Government Proposal to the Parliament for an Act on the Temporary Ban on Salmon Fishing in the Teno River Basin] §5.

¹⁴⁵Sarita Kämäräinen from Saamelaiskäräjät [Sámi Parliament].

¹⁴⁶Ibid., Parliament Committee on Constitution Affair, §6.

¹⁴⁷Ibid., §11.

Finnish Constitution and international law. The decision acknowledges that enforcing the law could undermine Sámi rights and set a harmful precedent. The Committee's evolving jurisprudence signals a shift towards restorative environmental justice, promoting a governance model that balances ecological integrity with Indigenous cultural preservation.

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The Article III

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Environmental Restorative Justice and the Green Transition: Examining Intergenerational Equity for Sámi Rights under the Norwegian Constitution

Sara Fusco

This article applies the concept of Environmental Restorative Justice (ERJ) to examine how constitutional law can reconcile environmental protection with Sámi collective rights within Norway's legal framework. It centres on intergenerational equity to show how land, culture, and development rights are deeply connected for Indigenous Peoples. Positioned within the context of the green transition, the article highlights how emerging environmental policies, while aimed at ecological restoration, can produce systemic tensions and cultural displacement when imposed without Indigenous participation. It argues that environmental justice requires recognizing Indigenous Peoples as rights-holders, whose customary norms and relationships with land must inform legal and environmental systems. In this context, environmental restorative justice offers a pathway to rebalancing legal systems in ways that honour Indigenous sovereignty and the continuity of their lifeways. The paper analyses the Fosen Vind dispute in Norway to illustrate the conflicts that may arise when environmental policies disregard Indigenous cultural survival. It proposes three evaluative criteria – distributed-management of natural resources, community engagement, and the inclusion of Indigenous perspectives in environmental impact assessments – to assess the enforcement of core international environmental principles into constitutional frameworks. The article demonstrates how constitutional law can serve as an interface between international obligations and the domestic protection of Indigenous rights, advocating for participatory governance models that align ecological sustainability with the preservation of Indigenous heritage.

Introduction: Green Transition and the need for Restorative Environmental Justice

The accelerating green transition presents a paradox for Indigenous Peoples. While it seeks to respond to urgent ecological challenges through renewable energy projects and environmental conservation, its implementation often disregards Indigenous rights and lifeways. Large-scale renewable initiatives, such as wind farms, hydroelectric facilities, and conservation zones, have increasingly affected ancestral territories without meaningful consultation or consent. For instance, in the Fosen case in Norway, the Supreme Court found that the construction of wind turbines on Sámi grazing land violated their rights under Article 27 of the ICCPR, emphasizing the lack of

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adequate consultation and the disproportionate burden placed on reindeer herding practices (Mósesdóttir, 2024: 3–5). These developments, although environmentally motivated, risk reinforcing historical patterns of exclusion and cultural erosion. The UNFCCC’s Katowice Committee also notes that response measures can exacerbate vulnerability and inequality when Indigenous and local communities are excluded from planning processes (UNFCCC KCI, 2023: 6–7). Normann (2021: 78) discusses this phenomenon as a form of “green colonialism,” where environmental policy is leveraged to justify new waves of land dispossession in the Nordic Sámi context. Likewise, McGregor et al. (2020: 36–37) warns that sustainability transitions, if not grounded in justice and self-determination, may perpetuate settler colonial dynamics. As such, the green transition itself becomes a site of legal tension, raising important questions about how environmental goals can be pursued in a just and inclusive manner. At the same time, the present analysis reveals a dual contradiction within contemporary environmental governance. On one hand, there is growing recognition of the need to involve Indigenous Peoples through participatory mechanisms and rights-based approaches. On the other, these mechanisms are often undermined by policies that prioritize national environmental targets over Indigenous territorial and cultural rights. Similarly, conservation regimes grounded in restrictive moratoria frequently fail to acknowledge differentiated cultural responsibilities, reinforcing a one-size-fits-all model of environmental justice (Fitzmaurice, 2017: 199–200). These contradictions underscore the need for constitutional frameworks to recognize culture as a justiciable and enforceable category in environmental law.

This article advances Environmental Restorative Justice (ERJ) as an analytical framework for assessing how Norwegian constitutional system mediates these tensions between global environmental commitments and Indigenous rights (Forsyth et al., 2021: 19–20). As developed by Forsyth et al. (2022), ERJ is an emerging interdisciplinary framework that applies restorative principles to ecological harm. Grounded in restorative and social-ecological theory, ERJ provides normative guidance for legal and institutional systems to integrate environmental and social justice (pp.3–6). In this article, ERJ is used as a normative-analytical framework to evaluate how constitutional law can integrate principles of restoration, participation, and equity. Its procedural dimension guides the assessment of participatory rights, while its substantive dimension informs the analysis of how constitutional and legislative provisions distribute environmental benefits and burdens across peoples and generations. This study reinterprets Forsyth et al.’s ERJ’s structure in three criteria – *distributed management, community engagement, and environmental impact assessment (ELA)* – to examine how Norwegian constitutional law protects environmental and Indigenous rights through Articles 108 and 112. Drawing on intergenerational equity, ERJ reinterprets constitutional law as a reconciliatory framework linking ecological protection and Sámi cultural continuity.

To structure this analysis, the article proceeds as follows. Section 1 introduces the methodological and analytical foundations of the study, including a detailed explanation of the ERJ framework and its relevance within the green transition. Section 2 explores international legal principles underpinning intergenerational equity and their application to Indigenous Peoples’ rights, particularly the right to development and collective interests. Section 3 examines the constitutional dimensions of Indigenous land claims in Norway, highlighting the role of the Sámi Parliament in environmental governance. Section 4 applies the ERJ framework to the Fosen case in Norway, assessing how domestic legal responses align with or depart from restorative environmental justice. Section 5 reflects on spiritual harm and epistemic injustice as unresolved challenges in

environmental jurisprudence, before concluding with a call for a constitutionally grounded, participatory model of ecological justice.

1. Methodology

1.1 Environmental Restorative Justice as Analytical Framework

This article adopts a qualitative doctrinal methodology, combining legal analysis of constitutional jurisprudence, international legal instruments, and Indigenous rights frameworks. The approach is grounded in the normative intersections between environmental constitutionalism (Boyd, 2012), intergenerational equity (Brown Weiss, 1989), and environmental restorative justice (ERJ) (Forsyth et al., 2021). Within this framework, ERJ is not treated as a legal doctrine but as a structured analytical lens for evaluating the cultural inclusivity of constitutional environmental law (Wessels, 2022:101–103). It serves to critically examine how constitutional law can strengthen the cultural dimensions of environmental protection, with a focus on Norway. The research addresses two central questions: (1) How does environmental protection intersect with the rights of Indigenous Peoples, particularly their right to development and intergenerational knowledge transmission? (2) How can constitutional law facilitate the domestic incorporation of international environmental obligations in a culturally inclusive and legally enforceable manner?

At broader levels, this article also aims to illustrate how Norwegian constitution either supports or constrains Indigenous Peoples' ERJ and their rights to intergenerational equity within the framework of the Green Transition.

1.2 Evaluation Criteria: Distributed-management, Community Engagement, and EIA

To operationalize the ERJ framework, the article employs three interrelated evaluation criteria drawn from Forsyth's conceptual formulation of environmental restorative justice:

- **Distributed management of Natural Resources:** Decentralisation of state control in environmental regulation through collaborative mechanisms involving government, industry, and Indigenous community actors (Forsyth et al., 2021, p. 20).
- **Community Engagement:** The recognition and protection of Indigenous Peoples' participatory rights in environmental law-making and administrative procedures. This includes access to consultation, procedural justice, and culturally sensitive negotiation processes (Ibid.).
- **Environmental Impact Assessment (EIA):** The inclusion of Indigenous cultural knowledge and values in assessing the socio-environmental effects of state-led projects. This criterion evaluates whether EIAs are merely technical or also address cultural impacts (Ibid: 21).

ERJ evaluates justice through two complementary dimensions: procedurally, it examines whether institutions ensure inclusiveness, access to information, and meaningful consultation; substantively, it assesses whether constitutional or legislative frameworks redistribute power, protect collective rights, and recognise environmental degradation as a form of cultural harm. Applying these criteria to constitutional law serves a dual purpose: (1) it enables the reinterpretation of existing legal domestic instruments in light of restorative and intergenerational principles, and (2) it provides a normative guide to assess whether constitutional frameworks endorse or invalidate governance mechanisms that fail to achieve reconciliation. In this sense, constitutional law provides an *adaptive* structure through which legal and institutional mechanisms can respond to environmental

degradation and cultural loss. Comparative experiences reinforce this analytical approach. In South Africa, judicial review, rights interpretation, and structural judgments have been used to redress historical exclusion, particularly in cases involving customary land and environmental governance (Claassens & Budlender, 2014: 75–78). These judgments often recognise collective rights and integrate international legal principles—such as sustainable development and the right to a healthy environment—into domestic constitutional frameworks. Similarly, Ozoemena (2014: 105–108) highlights the role of living customary law as a conduit for procedural protection, notably through free, prior, and informed consent (FPIC), and as a foundation for constitutional reform that incorporates community knowledge systems. Within this restorative framework, constitutional justice becomes an anticipatory tool of interpretation, distinguishing between governance models that perpetuate harm and those that advance repair. ERJ thus foregrounds participatory rights, encourages culturally responsive legal processes, and promotes flexible mechanisms capable of addressing the enduring legacies of colonialism and land dispossession (Barra & Jessee, 2024: 212–219). Empirical evidence supports this view: conservation initiatives led or co-managed by Indigenous Peoples and Local Communities (IPLCs) yield better ecological and social outcomes than top-down models, while exclusion reproduces both environmental and cultural loss (Dawson et al., 2021: 19–22).

1.3 Green Transition as a Source of Legal Tension

The green transition introduces new dynamics of exclusion and cultural displacement for Indigenous Peoples. Although pursued in the name of climate mitigation and sustainability, green transition policies often replicate colonial patterns of land appropriation and legal marginalization (Sun et al., 2023: 5–7). Large-scale wind farms, conservation zones, and emissions trading schemes may encroach upon Indigenous lands without respecting consent protocols or participatory governance mechanisms (Loginova et al., 2025: 2–4). These conflicts are not merely political or economic—they are legal. As documented in Arctic and sub-Arctic contexts, communities frequently report that consultation mechanisms remain extractive or symbolic, failing to substantively incorporate Indigenous legal traditions or decision-making frameworks (Loginova et al., 2025: 6–8). Then, the relationship between ERJ and the green transition lies in its shared objective to repair ecological harm while ensuring procedural and distributive fairness. For Indigenous Peoples, whose ties to land have long been marginalized, ERJ promotes recognition of their knowledge systems and legal traditions in environmental governance (Killeen, 2022: 4–6). It reinforces intergenerational equity by safeguarding constitutional rights across generations (Pali, Forsyth, & Tepper, 2022: 12–14) and operationalizes these rights through procedural safeguards that shape judicial mechanisms (Hazrati & Heffron, 2021: 4–6).

2. International Legal Principles on Intergenerational Equity and Indigenous Rights

2.1 Reframing Intergenerational Equity for Indigenous Peoples

Intergenerational equity, when applied to Indigenous Peoples, must go beyond environmental preservation to account for collective rights and the right to development. By failing to fully recognize the central role of land in Indigenous identity and governance, historical legal systems have often narrowed the scope of self-determination, thereby constraining meaningful pathways to decolonization (McDonnell & Regenvanu, 2022: 237–8). In 1987, the Brundtland Report,

entitled “Our Common Future” finally emerged as first potentially transformative legal ground, emphasizing meeting present needs without compromising the ability of future generations to meet theirs (World Commission on Environment and Development [WCED], 1987:43). The current sustainable development framework, intended as interdependence of environmental protection, economic growth, and social equity, offers a set of guiding principles for balancing competing state priorities, while creating normative space for “responsive, inclusive, participatory and representative decision-making at all levels” (United Nations, 2015: SDGs 13,15–17). In this perspective, integrating sustainability with justice requires reorienting legal obligations to recognize historical harm and support culturally specific, future-oriented forms of governance, especially by shifting beyond state-centric models of intergenerational responsibility. (Yap & Watene, 2019: 145–9). In this analysis, intergenerational equity is not treated as a purely temporal concept but rather emerges from the convergence of two foundational elements: the right to development and the principle of collective interest. When interpreted in tandem, these elements articulate a sophisticated vision of justice that is both forward-looking and relational, linking the temporal duties owed to future generations with the spatial justice claims of Indigenous Peoples whose identities and livelihoods are intimately tied to land (Farchakh, 2003: 3–4; Yap & Watene, 2019: 3–5). This approach reflects a dual shift: first, from individual to collective entitlement; and second, from instrumental resource access to a recognition of Indigenous Peoples as active agents of sustainability (Corn tassel, 2008: 116–121; Daes, 2004: 4–5; UNPFII, 2007). Instruments such as the Faro Convention (2005) and the UN Declaration on the Rights of Indigenous Peoples (UN General Assembly, 2007: arts. 3, 23, 32(1)) reinforce this expanded understanding by affirming the right to shape development according to one’s cultural heritage and legal traditions, while international instruments like the Stockholm Declaration (Principle 21) the 1992 Rio Declaration (Principle 2), and UN Watercourses Convention provide supporting obligations to prevent significant harm.

2.2 International Environmental Law and Principles

International legal frameworks increasingly confirm how intergenerational equity for Indigenous Peoples must be founded in collective rights and the right to development. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes development as a fundamental right for Indigenous communities, with a strong focus on self-determination and responsibilities to future generations, as outlined in Articles 8, 9, and 26. Further, article 3 guarantees the right of Indigenous Peoples to determine their political status and pursue economic, social, and cultural development, free from external interference. Articles 20 and 23 also support this by ensuring that development aligns with Indigenous values and priorities and is based on Free, Prior, and Informed Consent (FPIC). The International Labour Organization (ILO) Convention No. 169 (1989) strengthens these protections by specifically addressing Indigenous Peoples’ rights to development, requiring states to consult Indigenous communities on development projects affecting them and to protect their cultures and knowledge systems. The Convention on Biological Diversity (CBD, 1992: 8) further supports Indigenous development by recognizing the importance of traditional knowledge in biodiversity conservation, ensuring equitable benefit-sharing for Indigenous Peoples. Other international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) affirm the right to self-determination, reinforcing that development must respect Indigenous identities and aspirations.

These treaties contribute to a broader understanding of the right to development, ensuring that Indigenous communities can engage in development processes that do not undermine their rights. The inclusion of Indigenous knowledge in environmental governance, reinforced by frameworks like the Ramsar Convention (Resolution XIII.15) and the Convention on International Trade in Endangered Species (CITES: Module 3), specifically its Module 3, further exemplifies the crucial role that Indigenous Peoples play in preserving ecosystems for the benefit of future generations (e.g. Guidance Document to Ramsar Convention, 2022).

2.3 Case Law Relevant to Intergenerational Equity

Intergenerational equity for Indigenous Peoples is recognized in international jurisprudence as a principle of distributive justice. The UN System “Common Principles on Future Generations” frame intergenerational equity as a legal duty of fairness across time, emphasizing equitable distribution of benefits and burdens, and the institutionalization of long-term stewardship in governance (UN HLCP, 2024: 4). This shift has moved intergenerational justice beyond environmental sustainability, integrating it into rights-based and development frameworks. Legal scholarship reflects this pluralization (Bertram, 2023: 129–130). An example is *Minor Oposa v. Factoran* (1993), where the Philippine Supreme Court affirmed the standing of children representing future generations. The Court ruled that the constitutional right to a balanced and right to a healthy environment was enforceable across generations, marking a foundational articulation of intergenerational legal standing. In *Saramaka People v. Suriname* (2007), the Inter-American Court of Human Rights held that the Saramaka’s right to collective land ownership could not be overridden without their free, prior, and informed consent. The Court grounded its reasoning in the principle of cultural survival across generations, recognizing that land and resources are integral to transmitting traditions, language, and identity (Ibid: paras. 82, 86, 121). The Court reaffirmed this logic in *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012), where it found that unauthorized oil exploration on Sarayaku territory violated their collective rights. The intrusion into sacred sites disrupted ceremonial and ecological relationships that underpin intergenerational knowledge systems. By emphasizing the significance of FPIC and spiritual continuity, the ruling positioned procedural rights as essential mechanisms of intergenerational justice (para. 165, 167-8). Similarly, in *Endorois Welfare Council v. Kenya* (2010), the African Commission on Human and Peoples’ Rights found that the forced displacement of the Endorois people from ancestral lands violated rights to culture. It stressed that severing land ties disrupts the transmission of cultural identity and weakens intergenerational coherence (African Commission, 2010, para. 250).

3. Constitutional Dimensions of ERJ in Indigenous Land Claims

Before examining the Norwegian constitutional framework, Bixler et al. (2015: 169–170) explain why participatory governance should be analyzed across constitutional law with other two interconnected levels: collective choice, and operational. According to them, at the constitutional level, states must recognize substantive environmental rights that embed cultural and spiritual dimensions, providing the legal foundation for restorative claims (Ibid., 2015: 172). At the collective choice level, legislative frameworks must establish procedures, such as distributed-management agreements, culturally grounded environmental impact assessments, and Indigenous consultation mechanisms that enable affected communities to participate in governance and decision-making processes (Ibid., 2015: 174–175). Finally, at the operational level, community-led

initiatives must be empowered to manage, monitor, and restore their territories in ways that reflect traditional knowledge systems and relational worldviews. However, while some constitutions incorporate principles of environmental justice or intergenerational equity, Indigenous Peoples were often absent from early constitutional frameworks. Their inclusion has typically emerged through political negotiation or post-conflict reform, rather than as a foundational legal commitment (Holzinger et al., 2019: 1776–1779). Even when constitutional language exists, it may fall short in practice. Palmer (2006), using a framework of "constitutional realism," shows that the effectiveness of Indigenous rights protections depends not just on written provisions, but on how these are interpreted and implemented. In Canada, a judicialized constitution has enabled courts to advance Indigenous claims, whereas in New Zealand, political negotiation and public accountability have played a more central role (Palmer, 2006: 2–4, 14–15). Alaska thus serves as a further example of constitutional omission: despite the inclusion of references to ecological and intergenerational equity in Article VIII of the Alaska Constitution, judicial interpretation has not extended these provisions to Indigenous land claims (Fusco, 2024).

3.1 Constitutional Foundations of Environmental Rights in Norway

Environmental principles rooted in the 1814 Constitution reflect a deep commitment to popular sovereignty and democratic legitimacy. Unlike post-Napoleonic European models that framed constitutions as monarchical grants or elite contracts, Norway's founding document was conceived as a delegation of authority from the people to state institutions (Holmøyvik, 2018: 275–278). This democratic foundation enabled Norway to pioneer judicial review in Europe, with the Supreme Court asserting constitutional supremacy over legislation and administrative acts (Holmøyvik, 2018: 295). While lacking a specialized constitutional court, Norwegian courts, especially the Supreme Court, exercise constitutional review within ordinary proceedings, and their decisions, though formally *inter partes*, are broadly respected and functionally binding. Through a dualist system, Norway incorporates international human rights treaties through domestic legislation, granting them precedence over conflicting national laws (Kierulf, 2011: 24; Human Rights Act 1999, § 3). This dualist approach is essential because it situates the Constitution as the link between international obligations and domestic implementation. Within this constitutional framework, Article 112 of the Constitution embody both substantive and procedural guarantees, affirming every person's right to a healthy and productive environment and mandating state action to preserve it for future generations (May, 2020: 1). In practice, however, the interpretation of Article 112 has been tested. The Supreme Court has recognised both positive and negative State obligations from article 112, while maintaining a high threshold for judicial intervention, particularly where Parliament has acted. As a result, Article 112 functions as a constitutional safeguard more than a directly enforceable right (Norwegian Human Rights Institution, 2021: ch.4). This tension emerged particularly in the Nature and Youth (Young friends of the Earth Norway) and Greenpeace Nordic v. Norway (hereinafter, "Arctic Oil" case), where environmental organizations challenged the government's issuance of oil production licenses in sensitive Arctic regions, arguing that these licenses violated constitutional rights to a healthy environment. The courts ruled in favour of the state, concluding that existing regulations fulfilled the government's obligations under Article 112 despite potential environmental harm (Ibid., 2020: 3–6). Norwegian courts demonstrate a jurisprudential preference for a flexible, principle-based approach that prioritizes balancing economic development with environmental and intergenerational concerns over strict, enforceable rights (Sjåfjell & Halvorsen, 2016: 58).

3.1.2 Judicial Reluctance

This interpretative stance reflects broader structural tensions within Norway's transition strategy as well, as noted by Korsnes et al. (2023: 2–3, 9–10), which simultaneously promotes climate leadership and sustains oil and gas production. Such an approach has the potential to marginalize intergenerational and distributive justice in policy processes, revealing a judicial reluctance to enforce hard rights that would otherwise constrain extractive economic activities. In fact, as seen in the Arctic Oil case, courts have historically hesitated to enforce these rights robustly when they conflict with economic or development interests. This cautious approach has also characterized the judiciary's treatment of Sámi rights, constitutionally recognized in Article 108 since 1988. Although supporting legislation such as the Sámi Act (1987), Reindeer Husbandry Act (2007), and Finnmark Act (2005) provide a legal framework for Indigenous autonomy, jurisprudence has often constrained Sámi self-determination. In cases like HR-2018-456-P (Nesseby) and HR-2016-2030-A (Stjernøya), the Supreme Court upheld administrative authority over Indigenous land claims and declined to interpret ILO 169 as an independent source of rights (Ravna, 2021:10–13). Even pivotal moments like the Alta case (1982), which acknowledged Article 27 of the ICCPR, resulted in deference to state interests in hydropower development (Henriksen, 2008: 104–106). Earlier cases like Selbu and Svartskogen recognized immemorial use as a basis for Sámi property rights, but these remained exceptions rather than the norm (Ravna, 2020). Before the 2021 Fosen judgment, which found a breach of Sámi cultural rights due to wind energy development, Norway's judiciary had largely refrained from enforcing FPIC or intergenerational equity. Consequently, the Arctic Oil litigation's invocation of Article 112 not only tests the enforceability of environmental rights but also marks a critical juncture for aligning constitutional practice with international Indigenous and ecological norms (May, 2020: 6–8).

3.2 The Role of the Sámi Parliament in Green Transition

In the context of this article, it is important to note how Norway's green transition now defines its economic and environmental policy, positioning it as a global sustainability leader. With approximately 98% of its electricity generated from renewable sources, primarily hydropower, Norway has long been at the forefront of clean energy (IEA, 2022). This commitment is further demonstrated by Statkraft, the state-owned utility and Europe's largest producer of renewable energy, which plans to expand its capacity by 2.5–3 GW annually through 2025 and 4 GW by 2030 (Reuters, 2024). The Norwegian Climate Act enshrines the nation's commitment to reducing greenhouse gas emissions by 55% by 2030, aiming for a low-emission society by 2050 (SGI, 2024). Economically, this transition aligns with a positive outlook. However, while these economic signals continued prosperity, it also raises critical questions about how economic development intersects with legal obligations and Indigenous rights. In Norway, the protection of Sámi rights and environmental governance is intertwined across diverse legislative frameworks. Article 108 of the Norwegian Constitution commits the state to facilitate conditions that enable the Sámi to preserve and develop their language, culture, and *way of life* (Constitution of Norway, 1814/2018: §108). While this symbolic commitment is foundational, its realization often depends on sector-specific legislation. For example, the Planning and Building Act (2008: § 4(2); 14(2)) includes provisions for Environmental Impact Assessments (EIA) but has been criticized for inadequately incorporating Sámi knowledge systems and failing to ensure early, meaningful consultation

(EMRIP, 2025: 21–22). At the same time, the Sámi Parliament (hereafter, *Sámediggi*) has persistently advocated for strengthened rights of participation, especially through the legal principle of FPIC (Joona, 2023: 10). Generally speaking, Sámediggi has taken a proactive role in Norway's green transition as its approach has been described as “*breaking in*”, integrating Sámi perspectives into mainstream Norwegian policy and legislation (Josefsen & Saglie, 2024: 115–117). This includes influencing environmental laws and decisions, such as those related to land use, resource extraction, reindeer husbandry, and wind power development (Ibid.). A clear example is the Sámediggi's influence on the Finnmark Act (2005: §5), which recognized Sámi land use as the basis for legal rights, and formalized distributed-management through shared governance of the Finnmark Estate (ibid: §120–121). Distributed-management models, such as those applied to reindeer husbandry and fisheries, have been heralded as promising, yet still face challenges regarding equitable power-sharing (Kuokkanen, 2024: 159). The Norwegian Truth and Reconciliation Commission, established in 2018, highlighted the historical marginalization of Sámi voices in natural resource governance, recommending legal reforms to embed Indigenous perspectives across public decision-making (TRC, 2023: 111).

4. Applying ERJ in Norway: Environmental Law and Indigenous Cultural Preservation

This final section situates the evaluative criteria of Environmental Restorative Justice (ERJ) – *distributed management of natural resources, community engagement, and environmental impact assessment* – within Norwegian environmental law and constitutional justice. In a dualist system where constitutional law mediates between domestic and international norms, these criteria gain normative force through constitutional interpretation, proportionality review, and judicial mechanism (e.g. act annulment). Norwegian constitutional law can thus uphold ERJ's substantive and procedural dimensions by ensuring that environmental governance aligns with international obligations, such as ILO Convention No. 169. Substantively, this entails safeguarding Sámi cultural survival and land-based practices through constitutional guarantees of equality (art.98), sustainability (art. 112(1)), and intergenerational equity (art. 112(2)). Procedurally, it requires meaningful participation and access to information, reflected in mechanisms such as environmental impact assessments and the recognition of free, prior, and informed consent. The following analysis of the Fosen case demonstrates how the failure to uphold these safeguards leads to systemic harm and how restorative justice mechanisms can support repair and structural reform.

4.1.1 Distributed-management of Natural Resources

The Finnmark Act of 2005 represents Norway's most significant attempt to recognize Sámi land rights and distributed-management within the territory of Finnmark County. Adopted following Norway's ratification of ILO Convention No. 169 (1989), it transferred ownership of approximately 95% of Finnmark's land to the Finnmarkseiendommen (FeFo), a land management body jointly governed by the Sámi Parliament and the Finnmark County Council. The Act acknowledges Sámi land rights through recognition of collective ownership and traditional usage (Government of Norway, 2005). It also created the Finnmark Commission to investigate land tenure and the Utmarksdomstol (Outland Court) to adjudicate disputes (Ibid.) Despite these intentions, the Act faces major limitations. Key criticisms include the delayed implementation of land clarification, FeFo's conflicting roles as both trustee and developer, ethnic deadlock in board decisions, and the lack of guaranteed financial support from the state (Spitzer & Selle, 2023: 292-

295). The Karasjok Case (2023) illustrates these tensions: the Finnmark Commission affirmed local Sámi ownership of land, but FeFo rejected this finding, escalating the matter to the Supreme Court (Spitzer & Selle, 2023: 300–304). In its 2024 ruling (HR-2024-982-S), the Supreme Court concluded by majority that the population of Karasjok does not collectively own the unregistered land in the municipality. While acknowledging that Sámi individuals and *siidas*¹ possess traditional usage rights, the Court found insufficient evidence of collective land management over time to establish ownership through immemorial use. It also ruled that ILO Convention No. 169 does not compel recognition of collective ownership unless specific groups have exercised de facto control as owners. A dissenting minority of justices argued that Sámi customary practices did meet this threshold and warranted collective ownership (Supreme Court of Norway, 2024). Complementary provisions in the Norwegian Constitution (Article 108) and the Sámi Act (Act of 12 June 1987 No. 56) aim to support Sámi cultural preservation, particularly in relation to land-based practices. However, the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has urged Norway to strengthen protections through improved legislation, such as the Minerals Act and Reindeer Husbandry Act (Act of 15 June 2007 No. 40), and to institutionalize Sámi FPIC in domestic governance structures (EMRIP, 2025: paras. 4–9).

4.1.2 Community Engagement

Established under the Sámi Act, the Sámediggi serves as the democratically elected representative body of the Sámi people, with a formal mandate to protect and promote Sámi linguistic, cultural, political, and economic interests. Following a major amendment to the Sámi Act in 2021, the Norwegian legal system now includes a dedicated consultation chapter, Chapter 4, which codifies the state's obligation to consult with the Sámi Parliament and other relevant Sámi bodies in any matter that may directly affect Sámi interests (Norway, 1987: Ch. 4). Section 4(2) of the Act provides that consultation must occur at an early stage and be conducted in good faith to obtain FPIC. This provision builds on Norway's obligations under ILO Convention No. 169 and UNDRIP, both of which affirm FPIC as a fundamental procedural and substantive right for Indigenous Peoples.

However, despite this progressive legal framework, the actual influence of Sámediggi in environmental and resource governance remains limited. While Sámediggi is consulted on broad legislative and regulatory issues, in project-specific contexts, such as wind power or mineral extraction, consultations are typically carried out with local reindeer herding *siidas* rather than with the Parliament itself (Ravna, 2023:169). However, these consultations are often limited in scope and duration, sidelining broader Sámi political structures and knowledge systems. In the case of Southern Sámi resistance to Fosen wind energy projects, affected communities have criticized state-led processes for their lack of meaningful dialogue and the exclusion of Indigenous perspectives. As Normann (2021: 88–89) notes, the Truth and Reconciliation Commission, established to address historical injustices, has also been critiqued for failing to sufficiently address ongoing land conflicts and environmental dispossession, thus undermining efforts toward genuine reconciliation. Even in this context, EMRIP has expressed concern that Norwegian authorities often treat consultation as a procedural formality rather than a pathway to meaningful consent. In particular, the use of "advance possession" rules, which allow for resource permits to be granted before consultations are concluded, has been identified as incompatible with FPIC principles (EMRIP, 2025: paras. 48–52, 66–67). Moreover, environmental legislation such as the Minerals Act (Act of

19 June 2009 No. 101) and Reindeer Husbandry Act does not incorporate binding consent requirements, nor do recently revised instruments like the Energy Act (Act of 29 June 1990 No. 50) or Planning and Building Act (Act of 27 June 2008 No. 71), which have delegated some licensing powers to municipalities without ensuring a strengthened role for Sámi governance institutions (EMRIP, 2025, paras. 15, 84–85)

4.1.3 Environmental Impact Assessment (EIA)

Regarding EIAs, Norway's domestic legal framework mandates their use primarily through the Planning and Building Act (2008). Under Section 4-2, an EIA is required for projects likely to have significant effects on the environment, natural resources, or society. Section 33-4 further stipulates that the project developer must bear the cost of preparing the EIA. This framework applies broadly to large-scale initiatives such as infrastructure, industrial activities, and energy development. Additionally, sector-specific legislation reinforces EIA obligations: the Energy Act (1990) mandates environmental assessments for energy facility licenses (Section 3-1); the Minerals Act (2009) requires EIAs for exploration and extraction projects under Sections 2-1 and 7-1; and the Reindeer Husbandry Act (2007) emphasizes the need to consider reindeer herding rights, especially under Sections 2 and 4, when evaluating land use proposals that may affect Sámi territories. Despite this legal foundation, Sámi participation in EIA processes remains insufficiently institutionalized. Research shows that Sámi perspectives are often marginalized, with public consultations occurring late in the process and rarely shaping core decisions (Eyþórsson & Thuestad, 2015: 134–138). From a Sámi standpoint, meaningful engagement requires not only early involvement but also sustained dialogue that respects seasonal rhythms such as reindeer migration, fishing, and berry gathering (Arctic Economic Council, 2020: 1–2). Moreover, conventional EIAs frequently fail to address cumulative impacts, the compounded effects of multiple projects across space and time, which is critical for safeguarding Sámi cultural landscapes and the ecological basis of traditional livelihoods (Blom, 2023: 6–7). To address these gaps, innovative Indigenous-led methods are emerging. The Indigenous-Led Participatory and Cumulative Impact Assessment (IPCIA) model developed by *Protect Sápmi* employs participatory mapping and Sámi community-defined criteria to analyse how industrial activities affect Sámi territories in cumulative and culturally relevant ways (Ibid.: 38–41). By centring Traditional Ecological Knowledge (TEK) within formal EIA processes, IPCIA offers a practical mechanism to align Norway's legal duties, under instruments like ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples, with Indigenous rights to land, culture, and self-determination (Eyþórsson & Thuestad, 2015:144–146; Larsen et al., 2019:16–18).

4.2 The Fosen Wind Case

Rather than representing an example of Environmental Restorative Justice (ERJ) in practice, *Fosen* offers a useful case through which ERJ's evaluative criteria can be applied to assess the constitutional framework. Analysing the case through ERJ's substantive and procedural dimensions reveals how constitutional law either enables or fails to ensure reparation, participation, and intergenerational protection. The case concerns the construction of wind farms on the Fosen Peninsula, a region traditionally used by the Sámi for reindeer herding and developed by the Norwegian state and private companies since the early 2000s. The largest project, the Fosen Vind project, includes multiple wind farms that span thousands of hectares of land. The case was brought by the South-Fosen sijte and North-Fosen siida, concerning the loss of winter grazing lands due to the Roan and Storheia wind farms. They argued that the construction and operation of these wind

farms would severely disrupt their traditional livelihoods, particularly their ability to move their herds across the land, as wind turbines and associated infrastructure occupy large areas that are critical for grazing (Ravna, 2022: 157). The Supreme Court found that this amounted to a “substantive negative impact” on reindeer herding under Article 27 ICCPR, even without a total denial of cultural practice (HR-2021-1975-S, paras. 83–84, 111, 119; Ravna, 2022: 168). Moreover, the Court emphasized cumulative impact and ruled that consultation never override a serious rights violation (HR-2021-1975-S, para. 121; Ravna, 2022: 169). In fact, the Supreme Court ruled that general benefits from the “green shift” cannot justify violations of Article 27 ICCPR, as the provision does not allow for a proportionality test (HR-2021-1975-S, para. 119; Ravna, 2022: 171). It also emphasized that cultural sustainability depends on economic viability, making reindeer herding unfeasible may itself breach rights (Ravna, 2022: 172). Substituting traditional practices, like replacing natural grazing with winter feeding, could amount to cultural displacement (HR-2021-1975-S, paras. 84–85; Ravna, 2022: 173). The Court affirmed the *siidas*’ standing as collective rights-holders and stressed the need for direct engagement in decisions impacting their land (HR-2021-1975-S, para. 110; Ravna, 2022: 170).

The Supreme Court articulated a multi-factor test for assessing violations of Article 27 ICCPR, focusing on:

1. The severity and cumulative impact of the interference;
2. The level of consultation and influence given to affected minorities;
3. Whether the practice remains economically viable;
4. Whether mitigation measures respect cultural integrity (Ravna, 2022: 174).

As a result, the Court invalidated the wind farm licenses due to non-compliance with Norway’s obligations under international human rights law (HR-2021-1975-S, para. 174). However, as of late 2023, the wind farms continue to operate, raising concerns about state compliance with the ruling (Ravna, 2022: 175).

4.3 Discussion: Where Fosen Failed—A Missed Opportunity for ERJ?

When examined through the evaluative frame of Environmental Restorative Justice (ERJ), the *Fosen* wind farm case, despite affirming Sámi cultural rights, highlights persistent gaps in Norway’s green energy governance, especially concerning procedural Sámi inclusion and intergenerational safeguards. First, in terms of *distributed management of natural resources*, Sámi participation was largely symbolic. Despite formal consultations, the Sámi had no decisive influence over land-use outcomes, and key decisions were shaped by central authorities, who simultaneously acted as license grantor, project stakeholder, and rights arbiter (Mósesdóttir, 2024: 8). This concentration of power undermines the aims of ERJ, which require genuine *engagement of affected communities* rather than mere advisory participation. Second, the *Environmental Impact Assessment (EIA)* process was structurally deficient. Though mandated under the Planning and Building Act and implemented by the Norwegian Water Resources and Energy Directorate (NVE), the EIA for the *Fosen* project failed to account for cumulative impacts, ignored Sámi Traditional Ecological Knowledge (TEK), and was outsourced to private consultants with limited community input (Mósesdóttir, 2024: 4–5). The Supreme Court later found that these failures materially undermined the reindeer herding culture, affirming that Article 27 ICCPR had been breached notably due to inadequate recognition of the cultural and ecological dimensions of Sámi land use (Supreme Court of Norway, 2021: para

119). Third, the project illustrates how economic bias within the green transition can cause cultural and spiritual harm. The Fosen wind farms were justified under the “green shift” narrative, prioritizing national climate goals and economic efficiency over Indigenous rights (Mósesdóttir, 2024: 6). The government’s dismissal of Sámi objections, and its framing of the project as environmentally progressive, masked deeper structural inequalities. The Court rejected this utilitarian logic, emphasizing that human rights violations cannot be legitimized by broader societal gains (HR-2021-1975-S: para. 119). Lastly, the case demonstrates a failure of intergenerational equity. The Finnmark Act’s limited territorial scope excluded areas such as Fosen, creating a legal and epistemic gap: while its co-management model embodies ERJ principles of co-governance and procedural equity, these safeguards were unavailable to the affected herders. Following the Supreme Court’s ruling, 2023 agreements granted compensation and temporary veto rights until 2043 and 2045, yet the turbines remain, and the cultural harm may be irreversible for the future Sámi generations in Fosen area (Mósesdóttir, 2024: 7).

Could the Fosen case have delivered a more transformative outcome, one that extended beyond the affirmation of Article 27 rights, if had ERJ been fully embraced through constitutional adjudication? Maybe. A genuinely transformative approach would have required the Court not only to recognize the rights violation, as it did, but also to mandate structural remedies, such as the dismantling of the wind farms, institutional reform of consultation procedures, and the integration of Sámi Traditional Ecological Knowledge (TEK) into all future Environmental Impact Assessments (EIAs). Such measures would have operationalized key ERJ criteria, which, as Forsyth et al. (2021: 21–22) note, depend on direct participation, distributed accountability, and responsive flexibility. Yet the Norwegian framework reveals a further structural paradox: the Finnmark Act (2005) introduced Sámi land co-management only in Finnmark region, leaving the Sámi communities in Fosen area outside its scope and thereby creating both spatial and intergenerational inequities in Sámi rights protection. The Supreme Court’s ruling not only failed to reinforce Article 112 of the Constitution but also deepened the paradox between Norway’s regionalized approach to Indigenous governance and its broader constitutional commitments to environmental *and* cultural sustainability.

This cautious constitutionalism mirrors earlier judicial tendencies, as earlier explained in chapter 4. For example, in HR-2018-456-P (*Nesseby*), the Supreme Court upheld the Finnmark Estate’s authority over lands claimed by the Sámi, despite evidence of immemorial use, limiting collective Sámi control. In HR-2016-2030-A (*Stjernøya*), the Court ruled that ILO Convention No. 169 could not be used independently to expand Sámi rights beyond the internal limits of the Finnmark Act. Even in the *Alta* case (1982), a turning point for Sámi political activism, the Court acknowledged Article 27 of the ICCPR but permitted a hydropower project to proceed, citing insufficient harm (Henriksen, 2008: 104–106). Only in *Selbu* and *Svartskogen* (2001) did the Court recognize immemorial Sámi land use as a basis for property rights, but even these were exceptional and limited in scope (Ravna, 2020). Taken together, these cases suggest that Norwegian courts have historically recognized Sámi rights only within the narrow confines of existing administrative frameworks. In this light, Fosen was not a failure of constitutional law per se, but rather a missed opportunity to use constitutional justice as a vehicle for embedding ERJ in Norway’s green transition. To fill this gap, Article 112 should be reinterpreted as an enforceable constitutional norm that not only ensures a healthy environment but also advances intergenerational equity within the green transition. A possible reinterpretation would apply Archibald’s (2023: 17–20) relational

theory of rights, construing rights not merely as individual protections but as legal constructs delineating relationships among the state and the Sámi future generations. This construction would enable Article 112 to function as a dynamic constitutional provision, facilitating the incorporation of Sámi perspectives and ensuring that Sámi can challenge environmental decisions that violate constitutional rights.

5. Conclusion: A Greener Future: But Will Justice Be Green Too?

This analysis begins by asking a fundamental question: how does environmental protection intersect with the rights of Indigenous Peoples, specifically in relation to their right to development and the continuity of intergenerational knowledge systems? While Environmental Restorative Justice conceptualises environmental protection and Indigenous rights as mutually reinforcing, the political aftermath of the *Fosen* case demonstrates that, in practice, the absence of restorative mechanisms can render these domains temporarily competing. For Indigenous Peoples, development is not merely economic; it is cultural, ecological, and spiritual. Their right to development encompasses the capacity to maintain traditional livelihoods but also to contribute and share to current scientific knowledge. These collective interests are explicitly recognized in international legal frameworks such as ILO Convention No. 169, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and Article 27 of the ICCPR, which together articulate a normative commitment to intergenerational equity grounded in cultural survival and territorial integrity.

The *Fosen* case in Norway illustrates the profound consequences of failing to fully operationalize these norms. Despite a landmark ruling recognizing the violation of Sámi reindeer herders' rights, the case ultimately fell short of achieving ERJ. Procedural inclusion did not equate to substantive empowerment, as the only establishment of institutional mechanisms for Indigenous participation doesn't necessarily translate into genuine involvement or decision-making power. The consultation process lacked co-decision authority, the EIAs ignored cumulative cultural harm, and the project's justification under the "green shift" masked a deeper economic bias that displaced traditional practices. Though the Court upheld Article 27 rights, its decision deferred practical enforcement to political negotiations, thereby reinforcing the very structural asymmetries that ERJ seeks to correct. Had constitutional justice in *Fosen* been mobilized to its full potential, it could have served as a model for introducing Indigenous legal orders into environmental governance.

This brings us to the second question: How can constitutional law serve as a bridge between international environmental standards and domestic implementation in a culturally inclusive and legally enforceable manner? The answer lies in reconceptualizing constitutional law not merely as a static repository of national values, but as a dynamic interface capable of integrating transnational obligations with local and Indigenous epistemologies. As shown in comparative contexts like Selbu, Svartskogen, and in the *Fosen* judgment, constitutional courts have the capacity, though not always the political will, to recognize Indigenous rights in relation to land, culture, and environmental integrity. When courts engage with international recognised principles like FPIC, intergenerational equity, and TEK, they do more than interpret law as they shape the normative infrastructure of environmental justice.

However, for this potential to be realized, several conditions must be met. Norwegian constitutional justice offers a partial foundation for ERJ in the green transition, particularly through Article 112, which obligates the state to protect the environment for future generations. This

provision aligns conceptually with ERJ by recognizing ecological integrity and intergenerational responsibility. Still, its effectiveness is limited by lack of enforceability, as courts have been hesitant to interpret Article 112 as a basis for legal action against environmentally harmful state policies. Moreover, the constitution lacks specific procedural guarantees for reconciliatory processes, especially for Indigenous and local communities affected by such developments. As a result, while Norway's constitutional framework expresses environmental and cultural concern, it provides insufficient legal mechanisms to implement restorative aims in a meaningful or binding way during the energy transition.

As the world moves toward a greener future, we must ask: will justice be green too? The answer depends on whether environmental transitions are grounded not only in carbon metrics but also in ethical frameworks that address historical and ongoing harms. Within this context, constitutional law is adaptive and sufficiently potent to operate through the framework of Environmental Restorative Justice (ERJ), reframing environmental harm as cultural harm and extending protection to culturally embedded forms of degradation

Notes

1. *Siida* (North Sámi, plural *siiddat*) and *sijte* (South Sámi) refers to a traditional Sámi social and economic unit based on collective use and management of land and resources. Historically, each *siida* comprised families cooperating in reindeer herding, fishing, or hunting within a defined territory. Today, the concept continues to inform Sámi governance structures.

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