

The Article I

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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.

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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 recomposing 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 A18 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 Bursay, 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>