Renewable Energy and Indigenous Peoples' Rights: A Comparative Study of New Zealand, Norway and Canada

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To mitigate climate change, the international community turned to renewable energy, which adversely affects indigenous peoples. This article assesses the international human rights that renewable energy projects impact upon and identifies the procedural rights that could inhibit such violations. As the procedural rights have been implemented and developed in various ways at national level, the article carries out a comparative study of indigenous peoples' constitutional rights and institutional representation in New Zealand, Norway and Canada. The article analyses how the different approaches protect indigenous peoples' rights in renewable energy projects and distils the key elements for a powerful indigenous influence on these projects. The article concludes with a recommendation to the Aboriginal and Torres Strait Islander people regarding their call for a constitutionally recognised First Nations Voice.

1. INTRODUCTION

In 2017, Aboriginals and Torres Strait Islanders released the Uluru Statement from the Heart (Uluru Statement).[1] The statement calls for constitutional and structural reform to empower them and to let them take their rightful

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1 Referendum Council *Uluru Statement from the Heart* (2017) at 1.

place in Australia again.[2] They seek the establishment of a constitutionally recognised First Nations Voice, which acts as an indigenous advisory body to Parliament.[3] Through it, they can exercise their right to self-determination.[4] A Makarrata Commission should supervise the agreement-making process between the government and First Nations.[5] One of the Aboriginals' and Torres Strait Islanders' motivations for the Uluru Statement is that they are currently fully dependent on the State authorities and their willingness to recognise and protect First Nations' land and water rights.[6] These rights are crucial for their participation in climate change mitigation strategies.[7] Climate change and renewable energy projects, one of the climate mitigation strategies, disproportionately affect indigenous peoples. By participating in these projects, indigenous peoples can mitigate the adverse effects they would otherwise endure.

This article links renewable energy projects to indigenous peoples and their affected substantive and procedural rights. It carries out a doctrinal and comparative analysis of three countries — New Zealand, Norway and Canada. It compares indigenous peoples' (1) constitutional rights and (2) institutional representation and discusses how this affects the protection of indigenous peoples' substantive rights vis-à-vis renewable energy. The article concludes with a recommendation to the Aboriginal and Torres Strait Islander people regarding their call for a constitutionally recognised First Nations Voice. The First Nations Voice should be considered an equal party in decision-making of matters that concern them and should have more than advisory power. Since a representative body without clear-cut rights to enforce is ineffective, both the First Nations Voice and the indigenous peoples' rights should be constitutionally enshrined.

2 At 1.

3 At 1; Uluru Statement "Voice. Treaty. Truth." <https://ulurustatement.org/>. The websites cited in this article were accessed 15 May 2021.

4 Referendum Council, above n 1, at 1.

5 At 1.

6 Rosemary Hill and others *Indigenous Land Management in Australia: Extent, Scope, Diversity, Barriers and Success Factors* (CSIRO, Cairns, 2013) at 53 and 58.

7 Emily Gerrard "Climate Change and Human Rights: Issues and Opportunities of Indigenous Peoples" (20 August 2008) Australian Human Rights Commission <www.humanrights.gov.au>.

2. INTERCONNECTEDNESS OF RENEWABLE ENERGY PROJECTS AND INDIGENOUS PEOPLES' RIGHTS

2.1 The Paris Agreement and Renewable Energy Production in Australia, Canada, New Zealand and Norway

In 2015, the international community agreed upon the Paris Agreement (PA).[8] Its ultimate goal is to reinforce the international community's response to the climate change threat, whilst taking into account sustainable development.[9] The rise in global average temperature must be limited to well below 2°C, ideally 1.5°C, above pre-industrial levels and Parties to the PA must encourage climate resilience and low greenhouse gas emissions development.[10] All Parties should communicate their long-term low greenhouse gas emissions development strategies.[11] In 2019, IRENA (International Renewable Energy Agency) stated that of the 184 Parties studied, 156 have communicated their nationally determined contributions (NDCs);[12] 140 NDCs referred to renewable energy in the power sector and 105 of them contained quantified targets regarding renewable electricity generation.[13] Consequently, in the battle against climate change and the aim for sustainable development, today's international community strives for clean energy, putting forward renewable energy production goals.

New Zealand, Norway, Canada and Australia generate renewable electricity in varying degrees. Norway leads, with 97.6 per cent of the electricity production coming from renewable energy sources, followed by New Zealand and Canada with 80.3 and 64.3 per cent respectively.[14] Hydropower dominates the renewable energy production in these countries, followed by wind and solar power in Norway and Canada.[15] In New Zealand, geothermal, wind and solar power succeed.[16] In Australia, only 18.3 per cent of the generated electricity is renewable, with a fairly equal division between wind, hydro and solar power.[17]

8 Paris Agreement [PA] UN Doc FCCC/CP/2015/10/Add.1 (2015), arts 1–2.
9 PA, art 2.
10 Article 2.
11 Article 4(19).
12 International Renewable Energy Agency [IRENA] *NDCs in 2020: Advancing renewables in the power sector and beyond, International Renewable Energy Agency, Abu Dhabi* (IRENA, 2017) at 13.
13 At 13.
14 International Energy Agency [IEA] "New Zealand" <www.iea.org>; IEA "Canada" <www.iea.org>; IEA "Norway" <www.iea.org>.
15 IEA, above n 14.
16 IEA "New Zealand" <www.iea.org>.
17 IEA "Australia" <www.iea.org>.

2.2 Renewable Energy Production and its Repercussions

Climate change,[18] and unfortunately also renewable energy projects, disproportionately affects indigenous peoples. Admittedly, solar power generally comes with less significant drawbacks than other types of renewable energy.

Wind farms cause reindeer avoidance of the area, which forces the Sámi to change their herding strategies.[19] Reindeer husbandry is fundamental to Sámi culture and traditions.[20] It is acknowledged as a typical Sámi industry and key to maintain their employment levels.[21]

Hydroelectric dams alter river flows and water quality, which in turn affect river health[22] and biodiversity.[23] The 2014 Māori Eel Symposium concerned hydroelectric dams that greatly impact native fish at the hui fish passage.[24] Māori view fish as a source of mahinga kai (food), and the river as a vital mauri (life force) which is lessened or extinguished by human interference with its flow.[25] The La Grande Hydroelectric Complex affected the Cree — for example, reservoirs flooded their traditionally used hunting ground and their ancestors' burial places.[26] Furthermore, the project forced 2,000 Cree to move from their ancestral lands and relocate to a new town, unsuited for their traditional way

18 *Report of the Special Rapporteur on the Rights of Indigenous Peoples* A/HRC/36/46 (2017) at § 16.

19 Anna Skarin, Per Sandstom and Moudud Alam "Out of Sight of Wind Turbines — Reindeer Response to Wind Farms in Operation" (2018) 8 Ecology and Evolution 9906 at 9912 and 9914.

20 Ministry of Local Government and Regional Development "Norway's Report to the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples" (14 March 2003) at 7.

21 At 7.

22 River health is hard to define. Scientists therefore rely on several indicators in their assessment. See Richard H Norris and Martin C Thoms "What is River Health?" (1999) 41 Freshwater Biology 197 at 198–199.

23 Pierre Senécal and Dominique Egré "Human Impacts of the La Grande Hydroelectric Complex on Cree communities in Québec" (1999) 17 Impact Assessment and Project Appraisal 319 at 322 and 324; New Zealand Conservation Authority "Protecting New Zealand's Rivers" (November 2011) at 12; NSW Aboriginal Land Council "Hydropower Information Sheet" (August 2015) at 3.

24 LMK Consulting *Report on Hydroelectric Dams in New Zealand and Fish Passage* (10 October 2014) at 3.

25 Conservation Authority, above n 23, at 7 and 13; Catherine J Iorns Magallanes "Reflecting on Cosmology and Environmental Protection: Maori Cultural Rights in Aotearoa New Zealand" in Anna Grear and Louis J Kotzé (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar Publishing, Cheltenham, 2015) 274 at 280 and 289.

26 Senécal and Egré, above n 23, at 322 and 324.

of living.[27] Consequently, hydroelectric dams touch upon indigenous peoples' culture and heritage.

Large-scale fluid and heat withdrawal from geothermal fields depletes them.[28] For example, the geothermal power station at Wairakei dwindled the Champagne Pool, a hot spring, and depleted the Wairakei Geyser.[29] The waste water from the Wairakei station polluted the Waikato River,[30] affecting its water quality and ecosystem.[31] The extraction also caused the ground to sink in some places,[32] destroying the geothermal surface and the related ecosystem.[33] Moreover, the Wairakei, Kawerau and Ōhaaki geothermal power stations forced Māori to sell or lease their land to the government.[34] Geothermal power stations thus negatively affect Māori to whom geothermal resources are taonga (a highly valued resource),[35] and have great cultural and spiritual value.[36]

The adverse effects of renewable energy projects are more detrimental to indigenous peoples than to Western society. According to dominant Western liberal beliefs, nature is at service and under rule of humans.[37] In contrast, indigenous peoples believe that humans are part of nature,[38] and the spiritual and natural world are intertwined.[39] They cherish a unique relationship with their traditional territories, lands and natural resources which represent the core of their collective, spiritual and distinct cultural identity and which are key for their physical and economic survival.[40] Consequently, access to and

27 Erica M Bates *The Encyclopedia of Native American Economic History* (Greenwood Press, Westport, CT, 1999) at 144.

28 Blair N Dickie and Katherine M Luketina "Sustainable Management of Geothermal Resources in the Waikato Region" (World Geothermal Congress, Antalya, April 2005).

29 Katherine Luketina and Phoebe Parson "New Zealand's Public Participation in Geothermal Resource Development" in Adele Manzella, Agnes Allansdottir and Anna Pellizzone (eds) *Geothermal Energy and Society* (Springer, Dordrecht, 2018) 193 at 201; Carol Stewart "Story: Geothermal Energy" (12 June 2006) Te Ara <teara.govt.nz/en>.

30 Stewart, above n 29.

31 Dickie and Luketina, above n 28.

32 Stewart, above n 29.

33 Dickie and Luketina, above n 28.

34 Luketina and Parson, above n 29, at 201.

35 Dickie and Luketina, above n 28.

36 Luketina and Parson, above n 29, at 201.

37 Magallanes, above n 25, at 277–278.

38 At 278–279.

39 *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* [2004] NZEnvC Auckland A67/2004 at [95].

40 UN organs the Inter-American Commission on Human Rights and Inter-American Court of Human Rights have acknowledged this unique relationship. See, among others, *Mayagna Awas Tingni Community v Nicaragua* [2001] IACHR Series C No 79 at [149]; *Maya Indigenous Community of the Toledo District v Belize* [2004]

control of their territories, lands and natural resources are essential to them and their survival.[41] They must therefore be able to own, preserve and manage their territory, land and resources.[42] Hence, they should be able to fully participate in the decision-making process of renewable energy projects which might affect them. This way, they can enforce all mitigation measures needed to diminish the adverse effects they would suffer otherwise.

2.3 Correlating (Indigenous) Peoples' Rights

Indigenous peoples' rights to self-determination, cultural integrity and control over their ancestral territory, land and resources are based on the general international human right to self-determination and cultural integrity and the prohibition of discrimination of individuals and groups based on, among others, race and ethnicity.[43] These rights are enshrined in the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and the 1965 Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Australia, Canada, New Zealand and Norway ratified the three conventions. Human rights bodies have established extensive jurisprudence on development practices that particularly adversely affect indigenous peoples.[44] For instance, in 2018, the Special Rapporteur on Indigenous Peoples expressed its concern about the increased violence against indigenous peoples in the context of wide-scale projects that concern natural resources such as hydroelectric dams.[45]

Report No 40/04, Case 12.053 at [155]; *Xákmok Kásek Indigenous Community v Paraguay* [2010] IACHR Series C No 214 at [282]; United Nations Economic and Social Council [ECOSOC] *Permanent Forum on Indigenous Issues: Report on the Sixth Session* E/C.19/2007/12 (2007) at [4]–[6]; *Report of the Special Rapporteur*, above n 18, at [17]; *Report of the Special Rapporteur on the Rights of Indigenous Peoples* A/HRC/39/17 (2018) at [12]. The European Court of Human Rights has not delivered any landmark cases regarding indigenous peoples yet.

41 ECOSOC, above n 40, at [6].

42 At [6].

43 International Convention on the Elimination of All Forms of Racial Discrimination A/RES/2142 (1965), arts 1–2; International Covenant on Civil and Political Rights UNTS 999 171 (1966), arts 1 and 27; International Covenant on Economic, Social and Cultural Rights UNTS 993 3 (1966), arts 1 and 15; Lillian A Miranda "Introduction to Indigenous Peoples' Status and Rights under International Human Rights Law" in Randall S Abate and Elizabeth AK Warner (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar Publishing, Cheltenham, 2013) 39 at 50.

44 Miranda, above n 43, at 50.

45 *Report of the Special Rapporteur on the Rights of Indigenous Peoples* A/HRC/39/17 (2018) at [4].

Two key international human rights instruments that specifically apply to indigenous peoples are the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[46] The ILO Convention legally binds its ratifying States.[47] From the countries subject to research, only Norway has ratified the Convention. UNDRIP, adopted by a 2007 UN General Assembly Resolution, is not legally binding yet has normative value.[48] States supporting its adoption express approval of the Resolution, which implies their willingness to uphold the rights enshrined in it. This willingness comes with moral and political force.[49] Norway voted in favour, while emphasising that it is only *legally* bound by the ILO Convention.[50] Australia, Canada and New Zealand opposed the adoption of the Declaration,[51] but shifted their position in its favour over time.[52]

The ILO Convention and UNDRIP encompass indigenous peoples' substantive land and resource rights.[53] Articles 14 to 15 Convention and art 26 UNDRIP include the right to recognition and demarcation of land, territory and resources that indigenous peoples traditionally owned, used, occupied or acquired with due respect to their customs, traditions and land tenure systems. Articles 26(2) and 32(1) UNDRIP entail the right to own, control, use and develop these territories, lands and related resources regardless of formal title. Article 16 Convention and art 10 UNDRIP prohibit a State to forcibly remove or relocate indigenous peoples from their lands. The International Law Association deems art 26(2) customary international law, although it admits that

46 International Labour Organization [ILO] Convention Concerning Indigenous and Tribal Peoples in Independent Countries C169 (1989); United Nations General Assembly [UNGA] *UN Declaration on the Rights of Indigenous Peoples* A/RES/61/295 (2007).

47 Miranda, above n 43, at 44–45.

48 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 at [70].

49 UNGA Plenary "General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' towards Human Rights for All, Says President" (13 September 2007) <www.un.org>; University of Minnesota Human Rights Center "A Study Guide: the Rights of Indigenous Peoples" (2003) <www.hrlibrary.umn.edu>.

50 UNGA Plenary, above n 49; UN Department of Economic and Social Affairs "United Nations Declaration on the Rights of Indigenous Peoples" (2007) <www.un.org>.

51 UN Department, above n 50.

52 UN Department, above n 50.

53 Convention Concerning Indigenous and Tribal Peoples in Independent Countries [ILO Convention], arts 13–19; UN Declaration on the Rights of Indigenous Peoples [UNDRIP], arts 10, 25–26, 32.

indigenous peoples' rights over natural resources are contested.[54] Nonetheless, these resources are usually essential to indigenous peoples' cultural identity and therefore protected by art 26(2) read together with art 31(1) on cultural integrity.[55]

To safeguard substantive rights, the ILO Convention and UNDRIP entail procedural rights. States must consult indigenous peoples and cooperate in good faith to secure free, prior and informed consent (FPIC) in matters that may affect them and/or their lands, territory and resources.[56] This enables indigenous peoples to participate in intergovernmental and State decision-making, allowing them to play a role in the management of their land and resources.[57] This does not mean that they can veto an activity on their lands.[58] The World Bank affirms the mere consultative nature of FPIC.[59] It highlights that this is only its own position, as there is no universally accepted definition.[60] Additionally, the right to self-determination, including the right to autonomy and self-governance, covers indigenous peoples' calls for increased autonomy or participation in continuing their traditional way of life in terms of politics, culture and religion.[61] It also meets their claims for greater control over their lands and resources.[62] The right to self-determination, to be consulted and to FPIC are among the most important, and contested, indigenous peoples' rights.[63]

At a national level, a variety of options exist to implement the applicable human rights instruments and to protect the indigenous peoples' rights. The different national approaches and forms of indigenous institutions will be discussed in the case studies below.

54 International Law Association [ILA] *Interim Report: The Rights of Indigenous Peoples at The Hague Conference* (2010) at 21 and 23.
55 At 21. Other articles on cultural integrity: ILO Convention, art 5 and UNDRIP, arts 8 and 11–13.
56 ILO Convention, arts 6, 7, 15 and 16(2); UNDRIP, arts 10, 19 and 32(2).
57 Miranda, above n 43, at 57–58.
58 At 57–58.
59 World Bank *World Bank Environmental and Social Framework* (2016) at 10.
60 At 10.
61 ILO Convention, preamble; UNDRIP, arts 3–4; Miranda, above n 43, at 51–52.
62 Miranda, above n 43, at 51–52.
63 ILA, above n 54, at 20.

3. CASE STUDIES

3.1 New Zealand: National-level Representation

3.1.1 Constitutionalisation and institutionalisation

(i) Constitutional value of the Treaty of Waitangi

The constitution of New Zealand is not one single written document.[64] It consists of a collection of documents and unwritten norms, to which the courts and statutes have applied constitutional status.[65] The 1840 Treaty of Waitangi, concluded between Māori and the Crown, is recognised as a component of the constitution.[66]

The Treaty is drafted in English and Māori and is the founding document of New Zealand, as it sets the terms on which New Zealand would become a British colony.[67] Māori chiefs cede "all the rights and powers of Sovereignty"[68] (English text) or "complete governance"[69] (Māori text) over their territory to the Crown in return for the Crown's acknowledgement and protection of Māori land and resource rights.[70] Land rights are the "full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess"[71] (English text) or the "unqualified exercise of their chieftainship over their lands, villages and their treasures"[72] (Māori text), alluding to tribal sovereignty.[73] The Crown has an exclusive right to buy Māori land,[74] if, according to the Māori text, Māori *wish* to sell.[75] Although the English and Māori texts do not completely correspond, the Treaty does recognise important Māori (land) rights.

64 State Services Commission *All about the Treaty* (2005) at 18; NZ Parliamentary Library *The New Zealand Constitution* (3 October 2005) at 1.
65 Parliamentary Library, above n 64, at 1.
66 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 at 516; Royal Commission *Report on the Electoral System* (1986) at [3.4]; Parliamentary Library, above n 64, at 1.
67 Treaty of Waitangi, preamble and arts 1–3; State Services Commission, above n 64, at 16 and 18; Naomi Johnstone "Negotiating Climate Change: Maori, the Crown and New Zealand's Emission Trading Scheme" in Randall S Abate and Elizabeth AK Warner (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar Publishing, Cheltenham, 2013) 508 at 514.
68 Treaty of Waitangi, art 1 (English).
69 Article 1 (Māori).
70 Preamble and arts 2–3 (English and Māori).
71 Article 2 (English).
72 Article 2 (Māori).
73 Johnstone, above n 67, at 514.
74 Treaty of Waitangi, art 2 (English).
75 Article 2 (Māori).

The Treaty is only legally enforceable if legislation refers to it.[76] Legislation usually does not refer to the Treaty itself, but to the principles flowing from it.[77] The principles capture the intention and spirit of the whole Treaty.[78] They enable its application to present-day circumstances and end the language discrepancy.[79] In a 1987 Court of Appeal case, President Cooke mentions that a "broad, unquibbling and practical interpretation" of the Treaty is necessary.[80] The Court recognised two core principles. The principle of partnership obliges the Crown and Māori to act reasonably, honourably and in good faith, which includes the duty to make informed decisions through consultation.[81] The principle of active protection obliges the Crown to actively protect, to the fullest extent practicable, Māori in the use of their lands and waters.[82]

(ii) Māori Representation Act

Following the Treaty of Waitangi, the General Assembly of New Zealand adopted the 1867 Act to provide for the better Representation of the Native Aboriginal Inhabitants of the Colony of New Zealand (Māori Representation Act) to involve Māori in mainstream politics and in the national Parliament.[83] All Māori men older than 21 can vote in Māori seats.[84] By not requiring them to own, lease or rent property, contrary to the general voting right,[85] the Act recognised that Māori mostly commonly, instead of individually, owned land. Additionally, the Act established four electorates, or seats, in Parliament specifically for Māori.[86] The Act was initially temporary but became permanent in 1876.[87]

In addition to the attributed seats in Parliament, the mixed member proportional (MMP) system was adopted in 1993.[88] It bases the amount of Māori seats on the number of people on the Māori roll,[89] which creates a more effective Māori representation than equality of vote.[90] The number of Māori

76 State Services Commission, above n 64, at 14.
77 At 14.
78 *New Zealand Maori Council*, above n 66, at 513.
79 State Services Commission, above n 64, at 14.
80 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 661.
81 At 664, 682, 692–693 and 702.
82 At 664.
83 Maori Representation Act 1867.
84 Section 2.
85 New Zealand Constitution Act 1952, s 7.
86 Maori Representation Act, s 3.
87 Maori Representation Act Amendment and Continuance Act 1872, s 2; Maori Representation Acts Continuance Acts 1876, s 2.
88 NZ History "Maori and the Vote" (20 December 2018) <www.nzhistory.govt.nz>.
89 NZ History, above n 88.
90 Royal Commission, above n 66, at [3.2].

electorates grows in proportion with the number of Māori on the Māori roll.[91] In 1996, the original number of Māori electorates increased from four to five and in 2002 to seven.[92]

The effectiveness of the separate electoral system for Māori has been the subject of debate ever since its adoption.[93] Whereas this article did not observe direct achievements by the Māori seats regarding Māori rights vis-à-vis renewable energy projects, the mere potential that the seats can influence parliamentary decisions in this regard strengthens the position of Māori in national politics.

(iii) Treaty of Waitangi Act

The 1975 Treaty of Waitangi Act, which establishes the Waitangi Tribunal, refers to the Treaty of Waitangi and its principles.[94] A (retired) Judge of the High Court or Chief Judge of the Māori Land Court acts as the Chairperson of the Tribunal that consists of from two up to 20 members.[95] The Minister of Māori Affairs, based on a person's knowledge and experience in the matters that are likely to be brought before the Tribunal, recommends members of the Tribunal to the Governor-General who appoints them.[96] The Tribunal can render recommendations on claims that concern the practical application of the Treaty principles, and has exclusive authority to determine the meaning and effect of the Treaty.[97] It can also decide whether actions or (proposed) legislation are inconsistent with the Treaty principles.[98] However, as the Tribunal can only make recommendations, the government decides on whether or not to settle the claim.[99] If so, the Office of Treaty Settlements, representing the Crown, negotiates with the claimants.[100] If the parties agree, they sign a deed and the Crown passes legislation in Parliament to give it effect and removes the Tribunal's ability to inquire further into those claims.[101]

91 New Zealand Parliament "150 Years of Maori Representation in Parliament" (10 October 2017) <www.parliament.nz/en/>.
92 New Zealand Parliament, above n 91.
93 NZ History, above n 88.
94 Treaty of Waitangi Act 1975, preamble, s 4(1).
95 Section 4(2).
96 Section 4(2).
97 Preamble, s 5(1)–(2).
98 Preamble, ss 6(1), 8(1), 8A(2)(a)(ii), 8HB(1)(a)(ii).
99 State Services Commission, above n 64, at 19.
100 At 19.
101 At 19.

3.1.2 Achievements and challenges

(i) General conservation legislation

There is an extensive framework on conservation legislation. However, work is still to be done — for example, the National Parks Act 1980 does not protect the water in the river and the part of the river that falls outside of the park.

The Resource Management Act 1991 (RMA) promotes sustainable management of natural and physical resources.[102] It hereunder understands that people and communities must use, develop and protect these resources in a way that they can fulfil their economic, social and cultural needs while securing the possibility for future generations to meet their needs and while protecting air, water, soil and ecosystems as well as the environment as a whole.[103] This rules out non-sustainable extraction of geothermal resources and, to some extent, the construction of new hydropower plants.

Three RMA provisions specifically deal with Māori interests and rights. First, decision-makers must take the Treaty of Waitangi principles into account when promoting sustainable management.[104] Second, they need to consider matters of national importance — for example, Māori's relationship with ancestral lands, sites, water, waahi tapu (sacred sites) and other taonga (treasured things) based on their culture and traditions.[105] Third, decision-makers must have particular regard to, amongst others, kaitiakitanga (guardianship by the tribe of the area), efficient use and development of physical and natural resources, efficient end use of energy, inherent value of ecosystems, maintenance of quality of the environment, and benefits of using and developing renewable energy.[106] These provisions have protected Māori interests during and in review of decision-making processes. For example, the Environment Court obliged the Matamata-Piako District Council to consult with relevant Māori on the impact of a development proposal on their interests.[107] In the 2007 *Outstanding Landscape* case, the Environment Court acknowledged that, although renewable energy is important, it cannot outweigh all other values.[108] The Court rejected the proposed wind farm, since its adverse effects on the outstanding landscape and the associated spiritual values of Māori outweighed the advantages of renewable energy generation.[109] However,

102 Resource Management Act 1991 [RMA], s 5(2).
103 Section 5(2).
104 Section 8.
105 Section 6.
106 Section 7 read together with s 2.
107 *Mason-Riseborough v Matamata-Piako District Council* [1997] 4 ELRNZ 31.
108 *Outstanding Landscape Protection Society Inc v Hastings District Council* [2007] NZEnvC 87 at [116]–[118].
109 At [116]–[118].

since the three Māori factors are weighed against 17 other factors mentioned in the provisions,[110] the Waitangi Tribunal finds that the RMA does not live up to the promised level of protection of Māori culture and tradition.[111] To strengthen the position of Māori in decision-making processes, the Tribunal proposes to amend the provision on the Treaty of Waitangi.[112] Instead of merely considering the Treaty, it should require decision-makers to act *consistently with* the Treaty.[113]

In response to the 1970s and 1980s conservation campaigns, among them the campaign to save Lake Manapōuri from a hydro scheme, the Wild and Scenic Rivers Amendment to the Water and Soil Conservation Act 1967 was adopted, which introduced water conservation orders (WCOs).[114] In 1991, WCOs were carried over to the RMA to protect the outstanding quality and intrinsic value of water bodies.[115] WCOs can protect a water body in its natural state or, if modified, specific characteristics of a water body or to which a water body contributes, that are of outstanding significance consistent with tikanga Māori (Māori customary values and practices).[116]

In its 2007 Ōreti River Report, the Special Tribunal declared that the upper reaches of the Ōreti River are of outstanding significance in accordance with tikanga Māori.[117] The Tribunal accepted the WCO vis-à-vis the Ōreti River and discussed its consequences for renewable energy projects in the region.[118] Although the WCO excludes future hydropower development on the river, it does not have de facto implications as, for practical reasons, hydropower development would not be desirable.[119] The WCO does not impair wind generation projects, making renewable energy generation in the region still possible.[120] The Tribunal declared the WCO consistent with the Treaty of Waitangi's principles.[121]

Learning from the problematic language discrepancies within the Treaty of Waitangi, the RMA refers to Māori concepts in Māori. Written or spoken

110 RMA, ss 6–8.
111 Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity. Te Taumata Tuarua* (2011) at 280.
112 At 280.
113 At 280.
114 Conservation Authority, above n 23, at 15.
115 RMA, s 199(1).
116 RMA, s 199(1), (2)(a), (c) read together with s 2.
117 Special Tribunal *Report on a Water Conservation Order Application for the Oreti River* (November 2007) at [266].
118 At [266], [276] and [278].
119 At [276].
120 At [277].
121 At [278].

evidence in Māori is also allowed in special tribunals' hearings regarding WCOs.[122] For example, to prove the outstanding value of the Ōreti River, Māori concepts were used.[123]

Today, WCOs cover 13 (parts of) rivers and two lakes.[124] Instead of protecting a wide range of rivers, WCOs are mainly used for rivers under threat.[125] In general, the *Report on Hydroelectric Dams in New Zealand and Fish Passage* recommends discussion with Māori on renewable energy projects, especially on hydroelectric dams.[126] At the Māori Eel Symposium, it was decided: "The Grantee shall design, install, operate and maintain a native fish passage on the following Dams … following consultation with the Ngai Tahu Maori Trust Board."[127]

(ii) Specific conservation legislation

The Māori claims on redress for Treaty breaches in relation to rivers before the Waitangi Tribunal led to Settlement Claims Acts.[128] River-specific legislation is enacted due to the protection lacking under general conservation legislation and out of concern for proposed hydro schemes.[129]

The 2010 Waikato-Tainui Raupatu Claims Settlement Act (WTR Claims Settlement Act) pursues the restoration and protection of the health and well-being of the Waikato River for future generations.[130] This includes the protection of streams and watercourses that flow into the Waikato River and associated lakes.[131] The Act recognises the River's personality as believed by Tainui and their close spiritual relationship.[132] In contrast to previous legislation, it acknowledges the River as a single indivisible being, including its metaphysical being.[133] The Act assigns the powers of co-governance and co-management to Tainui.[134] It establishes the Waikato River Authority, a co-governance body wherein Māori and government representatives are equally represented.[135] This

122 RMA, s 39(1), (2)(b).
123 Special Tribunal, above n 117, at [39], [123], [209], [264] and [266].
124 Ministry for the Environment "Existing Water Conservation Orders" <www.mfe.govt.nz>.
125 Conservation Authority, above n 23, at 30.
126 LMK Consulting, above n 24, at 50.
127 At 44.
128 Conservation Authority, above n 23, at 14.
129 Waikato-Tainui Raupatu Claims Settlement Act 2010, preamble (12) and (14); Conservation Authority, above n 23, at 19.
130 Waikato-Tainui Raupatu Claims Settlement Act, s 3.
131 Section 6.
132 Preamble (1) and s 8(3).
133 Section 8(3).
134 Preamble (2) read together with s 8(3) and preamble [11]; Magallanes, above n 25, at 301.
135 Waikato-Tainui Raupatu Claims Settlement Act, s 22(1), sch 6 and s 2.

enables Tainui to demand a stronger respect for the environment consistent with their cosmology.[136] The Act also includes co-management arrangements, such as integrated river management plans that Waikato-Tainui and concerned government authorities jointly prepare and joint management agreements between local authorities and Māori.[137]

The 2014 Whanganui River Deed of Settlement Ruruku Whakatupua — Te Mana o Te Awa Tupua (Whanganui River Deed of Settlement) establishes a new framework for the Whanganui River which is recognised as Te Awa Tupua (an indivisible and living whole).[138] The Deed echoes the WTR Claims Settlement Act by acknowledging the personification of the River and the spiritual relationship.[139] It nonetheless surpasses the novelty of the Act by identifying the River as a legal person and attributing to it all the rights and duties of a legal person.[140] Any authority must adhere to the legal status of the River and must acknowledge the associated values.[141] Te Pou Tupua (the human face of the River) consists of two persons, one appointed by the iwi with an interest in the River and one by the Crown.[142] It acts in name of the River and in its interest.[143] Additionally, Te Kopuka (a strategy group), in which iwi and governments work together to improve the health and well-being of the River, developed Te Heke Ngahuru (a strategy document).[144] To further support the River's health and well-being, the Deed establishes a fund, funded by the Crown.[145]

The 2017 Te Awa Tupua (Whanganui River Claims Settlement) Act implements and gives legal effect to the Deed, translating the legal personality of the Whanganui River into binding national legislation.[146] Similarly, 2014 Te Urewera Act acknowledges the spiritual value of the Te Urewera National Park and assigns legal personality to it.[147] The Te Urewera Board acts on behalf of and in the name of the National Park.[148]

An adverse effect of river-specific legislation with distinct management bodies is the fragmented decision-making. In general, Māori enjoy a strong position in New Zealand. The positive evolutions to respect and include

136 Magallanes, above n 25, at 301.
137 Waikato-Tainui Raupatu Claims Settlement Act, ss 35(2) and 41.
138 Whanganui River Deed of Settlement Ruruku Whakatupua 2014, s 1.1.
139 Section 2.1 and 2.6–2.7.
140 Sections 2.2–2.3 and 3.4.4.
141 Section 2.9, 2.10.2, 2.10.14, 2.10.19, 2.11 and 2.12.2.
142 Section 3.9.
143 Section 3.1–3.2.
144 Sections 4.1 and 5.1–5.3.
145 Section 7.1–7.2.
146 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, ss 3(b) and 14.
147 Te Urewera Act 2014, ss 3–4 and 11(1).
148 Section 11(2).

Māori in developing and managing renewable energy projects are due to the constitutional Treaty of Waitangi that drives the protection and development of Māori rights.

3.2 Norway: The Sámi Parliament

3.2.1 Constitutionalisation and institutionalisation

(i) Constitutional protections

In 1978, the Norwegian Water Resources and Energy Directorate proposed a hydroelectric dam and power plant on the Alta-Kautokino River, which the Sámi used for wild salmon fishing and which ran through the core area of their reindeer herding industry.[149] The Sámi protested massively and took the case to court.[150] Although the Supreme Court ruled in favour of the State and the project was finished in 1987, the protests forced the government to go into dialogue with Sámi organisations and change their policies.[151] In 1980, the Ministry of Justice appointed the Sámi Law Committee to report on the Sámi's legal rights.[152] The report proposed to insert a Sámi provision in the Constitution and to adopt the Sámi Act.[153]

Article 110 of the Constitution deems State authorities responsible for enabling every person that is capable of work to earn a living by working. The 1988 amendment added art 110(a), obliging State authorities to enable the Sámi to preserve and develop their language, culture and way of life. The 1992 amendment included the right to an environment in art 110(b). To safeguard this right, the State must inform citizens on the environment and on the effects of any encroachment they plan or have started. In 1994, art 2 read together with art 110(c) was added, obliging State authorities to respect and secure human rights.

149 Sophia Callahan "The Alta Dam Controversy" Environment & Society Portal <www.environmentandsociety.org>.

150 Alta case [1980] Rt 569.

151 Joey Watson and Annabelle Quince "How Might an Indigenous Voice to Parliament Work? Here's Some Ideas from Nordic Nations" (5 December 2018) ABC <www.abc.net.au>; Eva Josefsen *The Saami and the National Parliaments: Channels for Political Influence* (2010) at 14.

152 Ministry of Local Government and Regional Development, above n 20, at 2.

153 Ministry of Justice *Norwegian Official Report No 18: Om Samenes rettstilling* (Oslo, 1984).

(ii) Sámi Act

In 1987, the National Parliament (*Storting*) adopted the Act concerning the Sámi Parliament and other Sámi Legal Matters (Sámi Act).[154] In conformity with art 110(a) of the Constitution, the objective of the Sámi Act is to enable Sámi in Norway to develop and safeguard their language, culture and way of life.[155] Therefore, "the Sámi people are to have their own nation-wide *Sámediggi* elected by and among the Sámi population".[156] The *Sámediggi* (Sámi Parliament) can review any Sámi-related matter, comment on it or refer it to private institutions and public authorities.[157] Public bodies should, before taking a decision, consult the *Sámediggi* in these matters.[158] The *Sámediggi* may establish boards, committees and councils and delegate them authority, unless otherwise provided.[159]

Since the *Sámediggi* opened in 1989, it has developed a strong dialogue with the Norwegian government.[160] The *Sámediggi* interacts with the State authorities to ensure that the Sámi's national and international rights are taken into consideration in State-based decisions and enforced at national level.[161] The Sámi are therefore to be seen as equal partners in decision-making and governance.[162] Public bodies must consult the *Sámediggi* on renewable energy projects, since these projects might affect Sámi. The *Sámediggi* is thus an example of indigenous self-government and participation in decision-making regarding renewable energy projects.

Additionally, the *Sámediggi* actively participates at the international level — for example, in the Facultative Working Group of the Local Communities and Indigenous Peoples Platform, a separate working group of indigenous people under the UNFCCC.[163]

154 Act of 12 June 1987 No 56 concerning the Sámeting and other Sámi Legal Matters; Watson and Quince, above n 151.

155 Sámi Act, § 1-1.

156 Paragraph 1-2.

157 Paragraph 2-1.

158 Paragraph 2-2.

159 Paragraph 2-12.

160 Watson and Quince, above n 151.

161 Irina L Stoyanova "The Saami facing the Impacts of Global Climate Change" in Randall S Abate and Elizabeth AK Warner (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar Publishing, Cheltenham, 2013) 295 at 311.

162 At 311.

163 Inuit Circumpolar Council, Saami Council, Sámi Parliament of Sweden, of Finland and of Norway *Local Communities and Indigenous Peoples' Platform: Submission via the UNFCCC Portal as per decision-2/CP.24 para 23* (2018).

(iii) National Parliament

The Sámi have neither considered nor demanded separate seats or direct representation in the *Storting*, as they would always be in minority due to the equal weighing of ballots.[164] They instead call for their own Parliament, and look for other solutions to express their voice in the *Storting*.[165] The Sámi use two ways: directly through elected Sámi representatives in *Storting* and by influencing a Norwegian party's Sámi policies.

Since 1999, the *Sámeálbmot Bellodat* (Sámi People's Party) is accepted as a nationwide party.[166] Moreover, Sámi representatives have been elected via Norwegian party lists, giving them the opportunity to actively work on Sámi political issues.[167] However, as resolutions are adopted with majority, the Sámi in the party might end up legitimising a policy that contradicts their interests.[168]

Putting Sámi on the ballot in the *Sámediggi* as a candidate from and under the name of a Norwegian party[169] connects both the *Storting* and *Sámediggi*. The Norwegian parties' lists for *Sámediggi* elections have encouraged the development of their Sámi policies.[170] For example, the Sámi Policy Board of the Labour Party advises the Party's *Storting* Group, the Party's ministries' management and the Party's Sámi Parliament Group.[171] Especially through this approach the Sámi influence Norwegian parties.[172]

Sámi can also participate at local and regional level by casting their vote and being on the ballot.[173] This has led to their election at both levels.[174]

3.2.2 Achievements and challenges

(i) Legislation

Following arts 110a Constitution, 5 ILO Convention and 27 ICCPR on cultural integrity, the State must protect the reindeer husbandry industry, which is of traditional and cultural importance for Sámi. The 1978 Reindeer Husbandry Act regulates the industry and acknowledges its importance for Sámi culture.[175] The text, however, contradicted Sámi traditions, and under

164 Josefsen, above n 151, at 6, 11, 14, 18.
165 At 6, 14 and 18.
166 At 14.
167 At 14.
168 At 20.
169 At 18.
170 At 18.
171 At 18.
172 At 22.
173 At 23.
174 At 14.
175 Reindeer Husbandry Act 1978, s 1.

pressure of the *Sámediggi*, Norwegian authorities revised it.[176] Although the Sámi Rights Committee emphasised the importance of the Sámi customary right to reindeer herding during the preparatory work of the 1996 revision, it was not included in the revised Act.[177] In 2007, a new Reindeer Husbandry Act was adopted, revoking the one of 1978.[178] The Act confirms the importance of reindeer herding for Sámi and references applicable international law.[179] In the selection of traditional Sámi reindeer grazing areas, an assumed right to reindeer grazing exists and Sámi have the right to conduct reindeer herding.[180] The Act contains rules on, for example, management and use of a district's resources, and use of reindeer grazing area to ensure that reindeer live, graze and migrate undisturbed.[181] It also establishes a reindeer husbandry board of seven members, four appointed by the King and three by the *Sámediggi*.[182] The board advises the reindeer husbandry administration, research institutions and supervisory service.[183]

Additionally, the *Sámediggi* influenced the text of the Finnmark Act, the resource management Act of the Finnmark area.[184] Following the Act's first proposal, the *Sámediggi* demanded further preliminary work.[185] It advised to include immemorial usage, custom and indigenous peoples' rights as the basis of Sámi rights in the Act, and required to be consulted through a functioning dialogue before the adoption of the Act.[186] Afterwards, the multi-party Parliamentary Committee stated that the Act will meet international law requirements and that no law will be presented for legislation unless the *Sámediggi* approved it.[187] Considerable consultations between the Parliamentary Committee, the *Sámediggi* and the Finnmark County administration took place, through which the *Sámediggi* influenced the Act.[188] This marked the beginning of a new policy-making era.[189] The purpose of the Act is to manage land, watercourses and natural/renewable resources in the Finnmark County in a

176 Tom G Svensson "Interlegality, a Process for Strengthening Indigenous Peoples' Autonomy: The Case of the Sámi in Norway" (2005) 51 Journal of Legal Pluralism 51 at 56–57.
177 At 57.
178 Reindeer Husbandry Act 2007.
179 Sections 1 and 3.
180 Section 4.
181 Sections 22, 57, 63 and 65.
182 Section 71.
183 Section 71.
184 Finnmark Act 2005, s 1.
185 Svensson, above n 176, at 72–73.
186 At 72–73.
187 At 72–73.
188 At 72–73.
189 At 72–73.

"balanced and ecologically sustainable manner ... as a basis for Sámi culture, reindeer husbandry, use of non-cultivated areas, commercial activity and social life"[190] and in accordance with international law concerning indigenous peoples — ie the ILO Convention.[191] The Act furthermore confirms the concept of immemorial usage.[192] In compliance with the Act, *Finnmarkseiendommen* (Finnmark Estate), an independent legal body, manages the land and natural/renewable resources in Finnmark.[193] The Finnmark County and the *Sámediggi* elect three board members each.[194] At least one of the *Sámediggi* elected members represents the reindeer husbandry.[195] The *Sámediggi* can issue guidelines regarding changes in use of uncultivated land, which the authorities and *Finnmarkseiendommen* must take into account when assessing the impact of proposed changes on Sámi culture and life.[196] Moreover, if a minority within the *Finnmarkseiendommen* board expresses concern for Sámi regarding a change in uncultivated land use, the collective minority can claim a referral to the *Sámediggi*.[197] Additionally, the *Sámediggi* can assert its opinion when a decision on the transfer of property is approved by three or less board members.[198] However, this does not count for properties allocated for development plans following the Planning and Building Act.[199] The Act also establishes the Finnmark Commission and a Special Tribunal.[200] The Commission investigates land and water rights in Finnmark County, whilst the Tribunal settles disputes in that regard.[201] The King appoints both institutions' members,[202] and there is no minimum of Sámi representatives required.

The 2008 Planning and Building Act has been revised to include internationally recognised indigenous peoples' rights,[203] more specifically art 27 ICCPR on cultural integration, art 7 ILO Convention on participation and cooperation, and on the need for environmental impact assessments of new planned activities in Sámi areas.[204]

190 Finnmark Act, ss 1–2 and 21.
191 Section 3.
192 Section 5.
193 Sections 6 and 21.
194 Section 7.
195 Section 7.
196 Sections 4 and 10.
197 Section 10.
198 Section 10.
199 Section 10.
200 Sections 5, 29 and 36.
201 Section 5.
202 Sections 29 and 36.
203 Ministry of Local Government and Regional Development, above n 20, at 7.
204 Planning and Building Act 2008, s 3.1; Ministry of Local Government and Regional Development, above n 20, at 7.

(ii) Legal Aid Office and the District Court of Inner Finnmark

In 1987, the Legal Aid Office of Inner Finnmark was established in Karasjok and offers free legal aid in all core Sámi areas.[205] It contributes to making Norwegian law more qualified to cope with the cultural diversity in the country.[206]

Following the Sámi's claim for a court that meets their needs, especially considering their cultural distinctiveness, the District Court of Inner Finnmark with authority over core Sámi area was established in 2004.[207] The Court, although part of the Norwegian court system, must consider Sámi customs and legal perceptions in addition to Norwegian law.[208] It must use the Sámi language, develop Sámi legal terminology and consider cultural diversity.[209] For example, oral evidence has full value.[210] The Court aims for equal treatment before law.[211] Members of the Court, the chief judge and secretary must prove competence and sufficient background in Sámi language and culture.[212] However, the Court's competences are limited — for example, the Stjernøy case about Sámi rights was beyond its competence and the Sámi's claim to move the trial to the District Court was dismissed.[213]

(iii) Judicial decisions

To acquire title and rights of use of land and water in accordance with traditional Norwegian law, one must prove its long, continuous and undisputed use.[214] Contrary to farming and agriculture, reindeer herding does not leave visible traces in the landscape,[215] or use areas continuously and undisrupted. Traditional Norwegian law also fostered a concept of State original title, which considers all land without individual title State property.[216] For Sámi, on the contrary, immemorial usage and Sámi customs are crucial.[217] Through immemorial usage — ie long-term use — use or property rights can be acquired.[218]

205 Svensson, above n 176, at 59–60.
206 At 61.
207 At 65–67.
208 At 66.
209 At 66.
210 *St.meld nr.* 23 (2000–2001).
211 Svensson, above n 176, at 66.
212 At 67.
213 At 70.
214 Øyvind Ravna "The Draft Nordic Saami Convention and the Assessment of Evidence of Saami Use of Land" in Nigel Bankes and Timo Koivurova (eds) *The Proposed Nordic Sáami Convention: National and International Dimensions of Indigenous Property Rights* (Hart Publishing, Oxford, 2013) 177 at 180.
215 At 180.
216 At 180.
217 At 179; Svensson, above n 176, at 52.
218 Finnmarkskommisjonen "Rettserverv ved langvarig bruk" <www.domstol.no/>.

In the 1931 Dergafjeld and 1955 Marsfjell cases, the Sámi failed to establish land rights based on immemorial usage.[219] The tide turned with the 1968 Brekken and 1968 Altevann cases, which set the concept of State original title aside.[220] The Supreme Court stated in the Brekken case that the Sámi's long-time use went further than a simple right of use or public access.[221] It therefore confirmed the Sámi's right to hunt and fish in their traditional areas on private properties.[222] In the Altevann case, the Court acknowledged that reindeer herding rights were based on immemorial usage.[223] However, in practice, it was still difficult for Sámi to acquire land rights based on immemorial usage.[224]

The Supreme Court stated in the 1981 Trollheim case that an occasional passage of reindeer in an area is insufficient to acquire pastoral rights.[225] The Court also required intensive and regular use of land by reindeer herders in the 1988 Korssjøfjell and 1997 Aursund cases.[226] The *Sámediggi* highly criticised the cases, since the Court did not show willingness to consider Sámi's land claims, despite Norway's international obligations.[227] That the Court based its Aursund judgment on a judgment of 1897 also alarmed the *Sámediggi*, as it "cautioned a sharp setback for Sámi rights in general".[228]

The judiciary's aversion towards reindeer herding threatened the South Sámi reindeer husbandry activities with extinction.[229] Therefore, the Supreme Court handled the 2001 Selbu case on acquisition of Sámi's land rights in plenary session.[230] To acquire a land right, the Court required (1) a certain level of usage, (2) in good faith, (3) over a long time period.[231] Based on the Reindeer Husbandry Act, the burden of proof lies on the landowner,[232] which creates a presumption in favour of existing pastoral rights in reindeer husbandry. Oral Sámi tradition must be considered when evaluating evidence, and Sámi history and their way of life must be taken into account when assessing pastoral rights.[233] Therefore, uninterrupted use of land cannot be required of Sámi to acquire right of use.[234] Consequently, the Court based its recognition of the

219 Dergafjeld case [1931] Rt 57; Marsfjell case [1955] Rt 361.
220 Brekken case [1968] Rt 394; Altevann case [1968] Rt 429.
221 Brekken, above n 220, at 401.
222 At 396.
223 Altevann, above n 220, at 435.
224 Ravna, above n 214, at 185.
225 Trollheim case [1981] Rt 1215 at 1225.
226 Korssjøfjell case [1988] Rt 1217 at 1225; Aursund case [1997] Rt 1608 at 1610.
227 Sámediggi *Sametingets plenum — Møtebok 4/97*, 25–28 November 1997, at 14.
228 At 14.
229 Ravna, above n 214, at 186.
230 Selbu case [2001] Rt 769 at 779; Ravna, above n 214, at 186.
231 Selbu, at 788–789.
232 At 787–788.
233 At 792 and 789.
234 At 789.

reindeer husbandry districts on the concept of immemorial usage.[235] The Court's rules on immemorial usage and on evidence assessment now require that the intensity and continuity of the use in Sámi areas is assessed in light of the characteristics of the use *in casu*.[236] This has now become the norm, for example in the 2008 Tydal case.[237]

The 2001 Svartskog case concerns ownership rights of State property, which the local community in Manndalen, mostly Sámi, used as commonage.[238] The Court acknowledged that Sámi do not traditionally think of ownership rights, as they have a tradition of collective ownership and natural resource use.[239] It found that the Sámi's collective use of the area creates ownership rights through immemorial usage and upheld the local community's ownership claim.[240] Maintaining the State's property right would violate art 14(1) ILO Convention on the rights of ownership and possession over traditional lands.[241]

Over the last decade, the Sámi reindeer herding community has initiated multiple court cases regarding *Fosen Vind*, the largest Norwegian onshore wind project.[242] The courts, from low to high, deemed the development decision legal.[243] In the 2020 Court of Appeal case on two of the Fosen wind parks, the Court found the reindeer avoidance of the wind turbines so significant that it deemed the reindeer grazing area lost.[244] It threatens the reindeer husbandry industry's existence and in principle violates art 27 ICCPR on cultural integrity.[245] However, due to the awarded monetary compensation which considered the economic loss and the industry's cultural significance for Sámi, the ICCPR was not violated.[246] Since Sámi have been consulted in the preparation process, the procedural obligation of art 27 was not violated either.[247] The Supreme Court admitted the appeal and will handle it in its Grand Chamber.[248] The case exemplifies that, along with the State's duty to consult the *Sámediggi* regarding renewable energy projects that may affect Sámi, the

235 At 798.
236 At 780.
237 Judgment 4 December 2008 (LF-2008-50209); Ravna, above n 214, at 195.
238 Svartskog case [2001] Rt 1229.
239 At 1252.
240 At 1252–1253.
241 At 1252.
242 Motvind Norge og Naturvernforbundet i Ávjovárri "Vindkraft eller Reindrift?" Temarapport 3 Del C Erfaringer med vindkraft i reindriftsområder (2020) at 34.
243 At 34.
244 *Statnett SF and Fosen Vind DA v Fosen Reinbeitedistrikt Sørgruppen and Fosen Reinbeitedistrikt Nordgruppen* [2020] LFSIV 150314 at 17.
245 At 26.
246 At 26 and 33.
247 At 25.
248 *Statnett SF and Fosen Vind DA v Fosen Reinbeitedistrikt Sørgruppen and Fosen Reinbeitedistrikt Nordgruppen* [2020] HRU 2268-U; *Statnett SF and Fosen*

State's willingness to listen to the *Sámediggi*'s advice is essential in protecting Sámi rights.

3.3 Canada: Indigenous Self-governance

3.3.1 Constitutional rights

All governments, including the indigenous, must obey the Constitution and the Charter of Rights and Freedoms.[249] Section 35 of the 1982 Constitution Act perceives the Indian, Inuit and Métis as aboriginal people of Canada.[250] It recognises the *existing* aboriginal and treaty rights, with "treaty rights" meaning the rights enshrined in land claims agreements. The 1983 *Report on Indian Self-Government* (Penner Report) and the 1992 *Consensus Report on the Constitution* (Charlottetown Accord) advised to amend this section to explicitly include the right to self-government of Indian First Nations and all First Peoples respectively.[251] The national referendum, however, rejected the Charlottetown Accord.[252] Nonetheless, in 1995, the federal government and, in 1996, the Royal Commission on Aboriginal Peoples reported that the right to self-government and self-determination respectively are understood under s 35 of the Constitution Act.[253]

3.3.2 Achievements and challenges

(i) Land claims agreements
Individual indigenous communities turned to land claims agreements, and since 1995 also to self-governance agreements, to certify self-government.[254]

Vind DA v Fosen Reinbeitedistrikt Sørgruppen and Fosen Reinbeitedistrikt Nordgruppen [2021] HRU 15-J.

249 Canadian Charter of Rights and Freedoms 1982.

250 Constitution Act 1982.

251 House of Commons Special Committee on Indian Self-Government *Report on Indian Self-Government* (1983) at 44; *Consensus Report on the Constitution: Final Text: Charlottetown* (28 August 1992) at [41]–[42].

252 Office of the Commissioner of Official Languages "Canadians Vote NO to the Charlottetown Accord" <www.clo-ocol.gc.ca/en/>.

253 Government of Canada *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (1995) at 3; RCAP *Report of the Royal Commission on Aboriginal Peoples* (October 1996) at 647.

254 Sophie Thériault "Canadian Indigenous Peoples and Climate Change: The Potential for Arctic Land Claims Agreements to Address Changing Environmental Conditions" in Randall S Abate and Elizabeth AK Warner (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar Publishing, Cheltenham, 2013) 243 at 246 and 249.

Following the 1973 *Calder* case, in which the Supreme Court acknowledged the existence of aboriginal title to land for the first time, the federal government started a comprehensive land claims process.[255]

The 1975 James Bay and Northern Quebec Agreement (JBNQA), a land claims agreement, is protected by s 35 of the Constitution Act. The Cree and Inuit drafted the Agreement with the governments of Canada and Québec and the Hydro-Québec company in response to the James Bay Hydroelectric Project, which would greatly impact their lands and way of life.[256] JBNQA defines Category I, II and III Lands.[257] Category I, the smallest area, and II Lands are especially important to preserve the culture and economy of the Cree and Inuit.[258] They have the right to exclusively use Category I Lands and, according to s 7, the right to self-government over these lands.[259] This is the foundation of Cree Nation Governance.[260] The government of Québec, nonetheless, retains the right to use Category I Lands for public purposes and has certain expropriation powers.[261] Regarding Category II Lands, the Cree and Inuit have exclusive hunting, fishing and trapping rights, yet no special right of occupancy.[262] Category III Lands, the vast area, are turned over to Québec without exclusive rights or privileges for the Inuit or Cree.[263] Nonetheless, Québec must ensure that the Cree and Inuit are able to carry out their harvesting activities.[264] To adapt to the altering needs of the Cree, the Agreement has been amended by 24 Complementary Agreements that were adopted over time.[265]

Northern Québec signed a companion agreement to JBNQA, the 1978 Northeastern Quebec Agreement (NEQA).[266] Section 7 establishes the Naskapi's right to self-governance over their allocated lands. Following s 9 JBNQA and s 7 NEQA, the Cree, Naskapi and government of Canada negotiated the 1984 Cree-Naskapi (of Québec) Act (CNA),[267] the first federal

255 Thériault, above n 254, at 245; *Calder et al v British Columbia* [1973] SCR 313 at 314 and 316; Jeanette Armstrong "Land & Rights" <www.indigenousfoundations.arts.ubc.ca>.

256 James Bay and Northern Quebec Agreement [JBNQA], s 8; WB Henderson "Indigenous Self-Government in Canada" <www.thecanadianencyclopedia.ca/en/>; Yanick Turcotte "James Bay and Northern Quebec Agreement" <www.thecanadianencyclopedia.ca/en/>.

257 JBNQA, Philosophy of the Agreement read together with s 4.

258 Philosophy of the Agreement.

259 Philosophy of the Agreement read together with s 9.

260 Turcotte, above n 256.

261 JBNQA, Philosophy of the Agreement.

262 JBNQA, Philosophy of the Agreement.

263 JBNQA, Philosophy of the Agreement.

264 JBNQA, Philosophy of the Agreement.

265 Turcotte, above n 256.

266 Henderson, above n 256.

267 Cree-Naskapi (of Québec) Act 1984, preamble.

legislation that establishes indigenous self-governance.[268] It enables the Cree and Naskapi bands to act as a local government authority over a demarcated area of land, and replaces all legislation normally applicable to the Cree and Naskapi, except for JBNQA.[269] However, conflicts about funding between the indigenous and federal government made the Act a less successful model of native self-government.[270] The JBNQA also led to several disputes as, for example, the proposed Great Whale River Hydroelectric Project threatened to cause severe environmental and social damage to the Cree.[271] Therefore, le gouvernement du Québec and the Cree of Québec adopted the 2002 Agreement concerning a New Relationship (Paix des Braves). It started a new partnership regarding development of, for instance, forestry and hydroelectric resources.[272] The partnership is based on a nation-to-nation relationship which gives the Cree more autonomy and the capacity to protect their needs.[273] For instance, Cree consent is required to carry out the EM 1 Hydroelectric Project and Eastmain 1-A/Rupert Project.[274] Additionally, instead of proceedings on JBNQA and Paix des Braves before court, the Agreement creates a Standing Liaison Committee in which both parties are equally represented.[275] It should resolve disputes in good faith and offer mutually acceptable solutions.[276]

With similar objectives as Paix des Braves, the government of Canada and the Cree of Eeyou Istchee concluded the 2008 Agreement concerning a New Relationship (Federal New Relationship Agreement) with a Standing Liaison Commission.[277] Additionally, the Agreement provides a negotiation process for the creation of a Cree Nation government with extensive powers and authority.[278] The Cree Nation shall develop its own constitution, and Canada shall amend the CNA to assign by-law-making powers to the Cree Nation government regarding the Cree community and its economic development.[279]

The 2012 Agreement on Governance in the Eeyou Istchee James Bay Territory between the Cree of Eeyou Istchee and le gouvernement du Québec

268 Henderson, above n 256; Canadian History "The 1984 Cree Naskapi Act" <www.canadianhistory.ca>.
269 Cree-Naskapi (of Québec) Act 1984 [CNA], arts 3–5 and 21(a).
270 Canadian History, above n 268.
271 Cree Nation Government "Main Agreements of the Cree Nation Government" <www.cngov.ca>.
272 Paix des Braves, § 2.4–2.5(c).
273 Paragraph 2.5(a).
274 Paragraphs 2.5(f), 4.7and 4.11.
275 Paragraphs 2.5(e), 9.35, 11.1, 11.6 and 12.5.
276 Paragraph 11.8.
277 Federal New Relationship Agreement 2008 at §§ 2.1(a) and (g), 8.1 and 8.6.
278 Paragraphs 2.1(d) and 3.1(b).
279 Preamble, §§ 2.1(c), 3.1(a), 3.2, 3.3 and 3.10.

of 2012 builds on JBNQA and Paix des Braves.[280] Regarding Category II Lands, the Cree Nation government has the right to exercise "the jurisdiction, functions and powers attributed to a municipality" in, for instance, matters of land use and (economic) development, watercourses and lakes management and power.[281] Cree have the exclusive right to develop hydroelectric projects of max 50 MW and wind energy projects under Cree Energy Projects.[282] Vis-à-vis Category III Lands, the Agreement established a new regional government, in which Cree and Jamésien are equally represented.[283] It has jurisdiction, functions and powers over, for instance, municipal management, land and resource planning and (economic) development.[284] Consequently, since 2014, the Cree and Jamésien come together in the Eeyou-Istchee-Baie-James municipality, Québec's first co-managed municipality.[285] The Agreement enables the Cree to fully participate in the State's political, economic, social and cultural life and to strengthen the special relationship of Cree with their territories, lands and resources.[286] According to Valérie Courtois, CBI's Senior Advisor for Aboriginal Relations, it epitomises a full implementation of the UNDRIP principles.[287]

The 2008 Federal New Relationship Agreement led to the 2017 Agreement on Cree Nation Governance and the 2017 Constitution of the Cree Nation of Eeyou Istchee (Cree Constitution). Both must respect JBQNA.[288] They expand Cree self-governance on Category IA, a subcategory of Category I, Lands.[289] The Cree govern these lands through two bodies.[290] The Cree First Nation and Cree Nation government act as a local and regional government respectively.[291] Both have law-making, instead of by-law-making, power vis-à-vis, for

280 Agreement on Governance in the Eeyou Istchee James Bay Territory 2012, preamble, §§ 3 and 16.
281 Paragraphs 17–18.
282 Paragraph 1(n) read together with 44.
283 Paragraphs 76–77 and 83.
284 Paragraphs 124 and 126.
285 Network in Canadian History & Environment [NiCHE] "Hydroelectric Development in Eeyou-James Bay" (19 September 2016) <www.niche-canada.org>.
286 Cree Nation Government, above n 271.
287 Canadian Boreal Initiative "Canadian Boreal Initiative Applauds the New Agreement on Governance in the Eeyou Istchee James Bay Territory between the Cree and the Government of Québec" (24 July 2012) <www.newswire.ca>.
288 Agreement on Cree Nation Governance, s 2.4; Cree Constitution, s 2.2.
289 Agreement on Cree Nation Governance, ss 1.1 and 2.1; Cree Constitution, ss 2.1 and 17.1.
290 Agreement on Cree Nation Governance, s 2.2.
291 Sections 5.6 and 7.1.

instance,[292] land and resource use and planning.[293] Federal law still prevails over Cree law in case of conflict, and the Court of Québec, a non-indigenous court, has jurisdiction over Cree law cases.[294] Cree First Nations have the exclusive right to use and benefit from Category IA Lands and resources.[295] Nonetheless, expropriation is possible if the necessary requirements are fulfilled.[296]

Additionally, other indigenous communities signed land claims treaties creating self-governance.[297]

(ii) Judicial decisions

In the 1990 *Sparrow* case, the Supreme Court tested s 35 of the Constitution Act and its referral to "existing aboriginal rights" for the first time.[298] The Court established the *Sparrow* test to define the scope of aboriginal rights and the justifications for reasonable infringements on them by the government.[299] "Existing aboriginal rights" should be interpreted liberally and flexibly to ensure they can evolve over time.[300] When assessing an aboriginal right, attention must be paid to its sui generis character and to the aboriginal perspective on it.[301] Although a constitutional aboriginal right is not absolute, s 35 holds "the Crown to a substantive promise".[302] A government's action infringes upon a constitutional aboriginal right when the limitation of the right is unreasonable, when the action imposes undue hardship, or when it precludes the right-holder from exercising his/her/their right.[303] A prima facie interference is justifiable if it serves a valid legislative objective — for example, conservation and resource management — and if the regulation is assessed in light of the special fiduciary relationship and government's responsibility towards aboriginals.[304] Depending on the situation, other requirements must be fulfilled — for example, the smallest infringement possible to meet the desired result, fair compensation in case of expropriation, consultation of the aboriginals in case of conservation measures.[305]

292 Agreement on Cree Nation Governance, ss 4.7–4.8, 4.11 and 6.2(1); Cree Constitution, ss 3.15, 4.1–4.19 and 11.1–11.4.
293 Agreement on Cree Nation Governance, s 6.3.
294 Section 4.4–4.5 and 4.19.
295 Section 10.1(2).
296 Section 11.2.
297 Among others Nisga'a Final Agreement 1999, Labrador Inuit Land Claims Agreement 2005 and Tla'amin Final Agreement 2014.
298 *R v Sparrow* [1990] 1 SCR 1075.
299 At 1091–1115.
300 At 1076–1077.
301 At 1078.
302 At 1078.
303 At 1112.
304 At 1079 and 1113–1114.
305 At 1079–1080 and 1119.

The 1997 *Delgamuukw* case concerns aboriginal title.[306] The Royal Proclamation of 1763, setting out the basis of British colonial governance in Canada, recognises aboriginal title.[307] It is the collective, inalienable, sui generis aboriginal right to exclusively use and occupy land to exercise aboriginal traditions, customs and practices that are integral to a distinctive aboriginal group's culture.[308] The right must be interpreted broadly to include present-day needs — for example, mineral extraction — but the use cannot interfere with the land's ability to sustain future aboriginal generations.[309] As constitutional aboriginal rights are not absolute, the Supreme Court repeats the justifications of the *Sparrow* test.[310] The Court expands the valid legal objective by accepting general economic development — for example, hydroelectric power and the related infrastructure and buildings.[311] It intensifies the requirement of fiduciary relationship, stating there is always a duty of notification and consultation, which mostly goes deeper than mere consultation, and that fair compensation is necessary when aboriginal title is infringed upon.[312]

In its 1996 *Van der Peet* decision, the Supreme Court established the *Van der Peet* test.[313] To recognise an activity as a constitutional aboriginal right, it must be part of a tradition, custom or practice that is integral — ie central and significant — to its distinctive culture.[314] The aboriginal peoples' perspective must be framed in a way known to the Canadian constitutional and legal structure.[315] The test itself counts 10 criteria, among others, continuity with the traditions, customs and practices existing *prior to* European contact.[316] The Court changed this pre-contact requirement vis-à-vis Indians into pre-control in its 2003 *Powley* case vis-à-vis Métis.[317] Activities having continuity with traditions, customs and practices existing post-contact yet prior to effective political and legal European control meet the pre-control criterion.[318] To meet the continuity requirement, the activity must be traced back to the past, limiting the flexibility and progressivity of aboriginal activities and culture and thereby contradicting the *Sparrow* decision to interpret aboriginal rights liberally and

306 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1021.
307 Anthony J Hall "Royal Proclamation of 1763" (7 February 2006) <www.thecanadianencyclopedia.ca>.
308 *Delgamuukw*, above n 306, at 1014–1015, 1080–1083 and 1090.
309 At 1015, 1021and 1112.
310 At 1020–1021and 1107–1108.
311 At 1021–1022 and 1111.
312 At 1021–1022 and 1112–1113.
313 *R v Van der Peet* [1996] 2 SCR 507 at 509 and 548.
314 At 509, 553 and 560.
315 At 509 and 550–551.
316 At 509 and 550–562.
317 *R v Powley* [2003] 2 SCR 207 at 217 and 226.
318 At 219 and 226–227.

flexibly. The continuity requirement was heavily criticised, among others, by two judges in their dissenting opinions.[319]

The continuity requirement was, however, confirmed in the 2014 *Tsilhqot'in Nation* case.[320] Its three-fold test for aboriginal title requires occupation of land to be sufficient, exclusive and continuous — ie present occupation must link back to pre-sovereign occupation.[321] Being the first case in which the Court granted aboriginal title to a vast area of land, the *Tsilhqot'in Nation* case also positively contributed to the development of indigenous peoples' rights.[322] Aboriginal title is an ownership right that encompasses the right to use and manage land and decide upon the sort of use, the right to enjoy, possess and occupy land, and the right to its economic benefits.[323] Before title is proven, the Crown must consult in good faith and accommodate, if appropriate, the interests of the aboriginal peoples before carrying out the activity that could adversely affect them.[324] The Court hereby confirms its 2002 *Haida Nation* and 2004 *Taku River Tlingit First Nation* cases.[325] Once title is established, an infringement is justifiable based on the *Sparrow* test.[326] The Court adds the duty to consult and accommodate the interests of the aboriginal peoples as an indispensable requirement to the test.[327] It specifies the fiduciary duty condition, requiring proportionality, and the Crown's respect towards the collective character of aboriginal title — ie an infringement is unjustifiable if it would substantially deprive future generations of the land's benefits.[328] The Court hints that consent is a way to avoid allegations of infringement or failure to consult.[329]

In its 2000 *Campbell* decision, the Supreme Court of British Columbia analysed the *Delgamuukw* case, which recognised that aboriginal title includes the community's right to decide upon the use of land.[330] The Court concluded that the Constitution Act protects the political structure needed to make those decisions, and hence acknowledged the constitutional protection of a limited right to self-government and legislative power.[331] This right is not absolute —

319 *Van der Peet*, above n 313, at 597 (L'Heureux-Dube, J) and 632 (McLachlin, J).
320 *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256 at 260 and 277.
321 At 260, 277 and 284.
322 At 260 and 319; CBC News "Tsilhqot'in First Nation granted B.C. title claim in Supreme Court ruling" (26 June 2014) <www.cbc.ca>.
323 *Tsilhqot'in Nation*, above n 320, at 293.
324 At 261, 295 and 298–299.
325 *Haida Nation v British Columbia* [2004] 3 SCR 511 at 520 and 530–531; *Taku River Tlingit First Nation v British Columbia* [2004] 3 SCR 550 at 562 and 566.
326 *Tsilhqot'in Nation*, above n 320, at 261, 274 and 295–296.
327 At 261 and 295.
328 At 261 and 297–298.
329 At 261.
330 *Campbell v British Columbia* [2000] BCSC 1123 at [137]–[138].
331 At [137] and [143].

compare the *Sparrow* test.[332] Although the *Campbell* decision is a strong case, the 1996 *Pamajewon* case remains the only higher-court decision on indigenous self-governance.[333] The Supreme Court considered, yet did not confirm, the right to self-government in context of s 35.[334] The constitutional right to self-government thus remains a contentious issue.

(iii) Clean energy project participation

Today, a strong partnership between Canada and indigenous peoples regarding clean energy projects (CEPs) exists, as the federal, provincial and territorial, including indigenous, government policies create a demand for indigenous participation in the CEPs.[335] The 2016 Pan-Canadian Framework on Clean Growth and Climate Change even described indigenous peoples as leaders of the transition to a low-carbon economy and recognises the key role of their governments.[336] Key features to the CEPs are respect for their rights, and ecological integrity and sustainability which conform to their culture and traditions.[337] Through their participation in CEPs, indigenous peoples reassure their rights and territories, gain revenue and create jobs which serve the community's socio-economic development.[338]

4. COMPARATIVE STUDY

The case studies show the various ways in which the procedural rights can be implemented. Canada, Norway and New Zealand include indigenous peoples' rights, to varying degrees, in their constitutions. They take different approaches regarding the implementation of the procedural rights of self-determination and FPIC. New Zealand ensures electoral seats earmarked for Māori in the national Parliament, Norway established the *Sámediggi*, and Canada agreed on indigenous self-governance by land claims treaties and other agreements.

The comparative study leads to three remarks. First, a State's founding document determines and influences its position vis-à-vis the development and

332 At [183].
333 *R v Pamajewon* [1996] 2 SCR 821.
334 At [24] and [27].
335 Lumos Clean Energy Advisors "Powering Reconciliation: A Survey of Indigenous Participation in Canada's Growing Clean Energy Economy" (10 October 2017) <www.newswire.ca>.
336 Environment and Climate Change Canada Department *Pan-Canadian Framework on Clean Growth and Climate Change: Canada's Plan to Address Climate Change and Grow the Economy* (2016) at 40.
337 Lumos Clean Energy Advisors, above n 335.
338 Lumos Clean Energy Advisors, above n 335.

recognition of indigenous peoples' rights. The Treaty of Waitangi expresses the transfer of sovereignty (English text) or complete governance (Māori text) by Māori in exchange for the Crown's recognition and protection of their (land) rights. Likewise does the Royal Proclamation Act of Canada recognise aboriginal title. Norway, on the contrary, has no colonial history. A White Paper of the *Storting* states that Norway is established on the territory of two peoples, the Norwegians and the Sámi.[339] How States look at their history affects the current position of indigenous peoples in the respective countries. The degree to which the different constitutions recognise indigenous peoples' rights illustrates this status.

Second, the level of constitutional protection of indigenous peoples' rights depends on the State's executive, legislative and judicial branches. The policy of the executive branch towards indigenous peoples influences the legislative and judicial branches. The Parliament can amend the constitution, which the courts can interpret and give meaning to. The constitutional embodiment of indigenous peoples' rights is the strongest in New Zealand. The courts recognised the constitutional value of the Treaty of Waitangi and developed its principles, which now strongly influence the legislature and judiciary to the benefit of Māori and their rights — compare the RMA and case law of the Environment Court and Special Tribunal. The Norwegian Constitution entails the Sámi right to cultural integrity and refers to human rights in general. The cultural integrity provision has influenced legislation and case law — compare the Reindeer Husbandry Act, Finnmark Act and Selbu case — and even led to the establishment of the District Court of Inner Finnmark. However, the constitutional protection of Sámi rights is less elaborate and influential than the Treaty of Waitangi. The positive evolutions come from the *Sámediggi*'s work rather than from the moral force of the constitutional provisions on the legislature and judiciary. Whereas the Norwegian Constitution is more specific, the Canadian Constitution Act only vaguely refers to aboriginal rights. Case law developed and specified the scope of the constitutionally protected aboriginal rights, making them more inclusive than the provisions in the Norwegian Constitution. Nevertheless, the development of the constitutional aboriginal rights depends on the willingness of the State authorities to conclude a constitutionally protected land claims treaty and of the judiciary's willingness to affirm the constitutionally recognised aboriginal rights. This is not evident — compare the concept of continuity which turned the aboriginal rights section of the Canadian Constitution Act into frozen rights. Whereas the Treaty of Waitangi principles are already fully and strongly developed and influence the State's governance, the scope of the Constitution Act is still

339 *St.meld nr.* 52 (1992–1993).

being developed. Therefore, the Constitution Act is less influential than the Norwegian Constitution and Treaty of Waitangi.

Third, the procedural right of FPIC vis-à-vis renewable energy projects is acknowledged in all three countries. The States took different approaches regarding the implementation of the right to self-government. New Zealand established separate electoral seats for Māori in its national Parliament through which they can influence parliamentary decisions. Furthermore, co-governance and co-management bodies have been established — ie regarding rivers — and several reports have pinpointed the importance of Māori participation in renewable energy projects. Norway founded the *Sámediggi* with advisory power in Sámi-related issues such as renewable energy projects. In Canada, land claims treaties and agreements established indigenous governments. The level of self-governance that indigenous peoples have obtained has led to indigenous participation in renewable energy projects. This gives them control over the projects' construction and management and thus over their own rights. Sámi on the contrary do not participate in the projects themselves, but are merely consulted. They are, after the consultation, fully dependent on the willingness of the State to listen to their advice — compare the *Fosen Vind* project. In New Zealand, the situation is different. Although Māori do not participate in renewable energy projects to the same extent as the indigenous peoples in Canada, their rights are well considered by the State — compare the personification of the Whanganui River. This does not mean that their rights are untouchable — compare the 2012 freshwater claim by the Māori Council on Māori rights to geothermal resources.[340]

5. CONCLUSION: A RECOMMENDATION TO THE INDIGENOUS PEOPLES OF AUSTRALIA

Renewable energy projects infringe on indigenous peoples' right to culture and their territory, land and resource rights. Indigenous peoples can protect these substantive rights by means of the procedural rights to self-determination, entailing the right to self-governance, and FPIC, encompassing the right to be consulted and to participate in a State's decision-making. These rights are enshrined in multiple international human rights instruments, which (partly) bind New Zealand, Canada and Norway. States can implement the procedural rights in various ways.

Based on the comparative study, this article recommends the Aboriginals and Torres Strait Islanders in Australia to aim for a constitutional recognition of their First Nations Voice and of their rights. The example of the Sámi shows

340 Decision on Application of Urgent Hearing [2012] Wai 2357 and Wai 2358.

that it is undesirable and ineffective to be empowered through an advisory body, without having any rights to enforce and without having any decisive power. The First Nations Voice should have more than advisory power, it should be an equal during consultation and in decision-making regarding matters that concern it. The three case studies demonstrate that the State authorities' willingness is decisive in how indigenous peoples' rights are protected. Therefore, the indigenous peoples must aim for a structure that makes them the least dependent on this willingness. Vis-à-vis renewable energy projects, partnership is the form in which to do it.