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# A Global Comparative Constitutional Analysis of Natural Resources Protection

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**Abstract:** Natural resources are the foundation for all life on earth, which all living creatures depend on to exist. Thus, it is subject to many sorts of laws and policies. Globally, constitutions follow different approaches to dealing with their respective country's natural resources, which are rooted in the diverging cultures, political, economic, and legal systems, as well as in the distinct historical developments of the diverse constitutional orders. Accordingly, the present contribution discusses the prominent similarities between the inclusion of provisions relating to ownership, exploitation and exploration, and the use of natural resources, be they renewable or non-renewable, but also notes the different perspectives adopted and methods of protection applied in the analysed countries' constitutions. The countries discussed in this paper are South Africa and Chad; Brazil, Cuba, and Bolivia; India and Iran; Germany; and Australia. This paper begins by, firstly, defining 'natural resources' and delineating its overlapping concepts. Secondly, the framework for comparison of the analysed countries is set out. Thirdly, the countries selected are separately discussed. Lastly, the comparative analysis is presented with a few concluding observations.

**Keywords:** comparative constitutional law; constitutions and international law; natural resources; principles and objectives of constitutions; rule of law; environmental rights

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Refer also to Oliver C. Ruppel and Ruda Murray, 'Natural Resources' in *Max Planck Encyclopedia of Comparative Constitutional Law* (MPECCoL, No 393, Oxford University Press, 21 June 2023).

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# 1 Introduction: Defining Natural Resources in the Constitutional Context

## 1.1 Definition of ‘Natural Resources’

While the term ‘natural resources’ is often used in conservation laws and regulations, it has no clear and generally acknowledged definition. It is, however, accepted that they encompass resources stemming ‘from renewable natural stocks that, after exploitation, can return to their previous stock levels by natural processes’, provided they ‘have not passed a critical threshold’ from which ‘regeneration is very slow (e.g., soil degradation), or impossible (e.g. species extinction)’ and non-renewable resources, ‘whose natural stocks cannot be regenerated’ or that can only be regenerated over a considerable period.<sup>1</sup> Apart from this distinction between renewable and non-renewable, a twofold meaning can further be observed, depending on the circumstances in which the term ‘natural resources’ is used.

The first concerns its anthropocentric function – natural resources are the so-called ‘natural capital of the planet.’<sup>2</sup> The Oxford Dictionary defines natural resources as ‘[m]aterials or substances occurring in nature which can be exploited for economic gain.’<sup>3</sup> Similarly, the United Nations (UN) defines them as ‘natural assets (raw materials) occurring in nature that can be used for economic production or consumption.’<sup>4</sup> The European Environment Agency describes them as ‘a feature or component of the natural environment that is of value in serving human needs, e.g. soil, water, wildlife, etc.’<sup>5</sup> Based on those functions, the Organisation for Economic Cooperation and Development subdivides natural resources into four

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1 Henk Westhoek et al., *Systems and Natural Resources: A Report of the Working Group on Food Systems of the IR Panel* (UNEP 2016); Marie Schellens and Johanna Gisladdottir, ‘Critical Natural Resources: Challenging the Current Discourse and Proposal for a Holistic Definition’ (2018) 7 Resources 79.

2 Rio Deswandi, ‘A Case Study of Livelihood Strategies of Fishermen in Nagari Sungai Pisang, West Sumatra, Indonesia’ in Rudi Febriamansyah et al. (eds.), *Redefining Diversity and Dynamics of Natural Resources Management in Asia* Vol 4 (Elsevier 2017) 45.

3 Oxford Dictionary, ‘Natural Resources’ (*Oxford Dictionary*, 4 September 2022) <[https://en.oxforddictionaries.com/definition/natural\\_resources](https://en.oxforddictionaries.com/definition/natural_resources)> accessed 16 March 2023.

4 United Nations Statistics Division, ‘Natural Resources’ (*UN Data*, 2023) <<http://data.un.org/Glossary.aspx?q=natural+resources>> accessed 3 June 2023.

5 European Environment Agency, ‘Natural Resources’ (*Environmental Thesaurus*, 2023) <<https://www.eea.europa.eu/help/glossary/gemet-environmental-thesaurus/natural-resource>> accessed 3 June 2023.

categories, namely: mineral and energy resources, soil resources, water resources, and biological resources.<sup>6</sup>

The second focuses more on the ecological purpose, which natural resources serve – i.e., the ‘essential ecosystem services’ they provide.<sup>7</sup> The Declaration of the UN Conference on the Human Environment, which is considered to be one of the legal foundations of international environmental protection in modern times, proclaims that the natural resources of the earth include ‘the air, water, land, flora and fauna’, which ‘must be safeguarded for the benefit of present and future generations through careful planning or management as appropriate.’<sup>8</sup> The International Institute for Sustainable Development refers to natural resources as ‘naturally occurring living and non-living elements of the Earth system, including plants, fish, and fungi, but also water, soil, and minerals’, which ‘make up a dense web of interdependence.’<sup>9</sup> These ‘elements’ provide ‘fundamental life support’, in the form of both consumptive and ecosystem services.<sup>10</sup> The first denotes the land, water, air, minerals, forests, fisheries, and wild flora and fauna, which natural resources constitute. The second denotes the processes it maintains, including soil productivity, nutrient recycling, the cleansing of air and water, and climatic cycles.

## 1.2 Delineation of Overlapping Concepts

Since the environment is a concept closely related to natural resources, it is regularly found in constitutions that the conservation of natural resources and environmental protection are mentioned concurrently.<sup>11</sup> The environment, however, has a broader meaning and not only encompasses physical and biological factors, but also social factors, including aesthetic and cultural components.<sup>12</sup> For this paper, the term environment denotes the entire range of living and non-living factors that influence life on earth, and their interactions, while the term natural resources refer to products of the environment exploited by humans and considered economically

6 OECD, *Economic Significance of NR in EECCA* (OECD 2011) 9.

7 UN, *Resource Management System: An Overview of Concepts, Objectives and Requirements* (UNECE energy series vol 68, United Nations 2021) 2.

8 Principle 2, *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (UN).

9 Jennifer Bansard and Mika Schröder, *The Sustainable Use of Natural Resources: The Governance Challenge* (Brief No 16 IISD 2021) 1.

10 Iyyanki Muralikrishna and Valli Manickam, *Environmental Management: Science and Engineering for Industry* (Butterworth-Heinemann 2017) 23.

11 For example, Article 35 of the Constitution of the Republic of Burundi 2018; Article 84 of the Constitution of the Republic of Togo 1992 (as amended to 2007).

12 UNEP, *Training Manual on International Environmental Law* (2006) 15.

useful. The term ‘natural resources’ is narrower than nature, but broader than biological diversity since it also encompasses non-living organisms including water, soil, and land.<sup>13</sup> Therefore, because of this overlap, constitutional provisions designed for the protection of the environment could and do apply to the conservation of natural resources.<sup>14</sup> The environmental aspects are concerned with the conservation, protection, and sustainable use of natural resources and the ecosystems they form part of.<sup>15</sup> However, given its more narrow delineation, not all elements of the environment will be protected by provisions that apply to the protection of natural resources.<sup>16</sup>

## 2 Functions that Constitutions Perform in the Governance of Natural Resources

When it comes to natural resources a few factors must be borne in mind, which most constitutions provide for. These functions will be used as the basis of comparison regarding the selected countries.

This includes, firstly, defining natural resources and delineating their scope.<sup>17</sup> In the context of constitutions, the most common approach is to describe natural resources widely by inexplicitly listing examples with few express distinctions between renewable and non-renewable resources.<sup>18</sup> Thereby, the term is used rather broadly, but one can, however, note that its economic function has been

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<sup>13</sup> Ulrich Beyerlin and Vanessa Holzer, ‘Conservation of Natural Resources’ in *Max Planck Encyclopedia of Public International Law* (OUP 2013).

<sup>14</sup> For example, Article 39(4) of the Constitution of the Republic of Azerbaijan 1995 (as amended to 2016); Article 5 of the Constitution of the Kingdom of Bhutan 2008; Article 68 of the Political Constitution of Peru 1993 (as amended to 2021).

<sup>15</sup> For example, Article 54 of the Constitution of the Republic of Lithuania 1992 (as amended to 2019); Section 13(d) of the Constitution of the Republic of Malawi 1994 (as amended to 2017); Section II Article 7 of the Constitution of the Republic of Paraguay 1992 (as amended to 2011).

<sup>16</sup> See Article XIII of the Constitution of the Republic of Uganda 1995 (as amended to 2017); Article 7 of the Constitution of the Czech Republic 1993 (as amended to 2013).

<sup>17</sup> As one of the few to contain a definitions section, the Constitution of the Republic of Kenya 2010 defines natural resources in Article 260 as the physical non-human factors and components, whether renewable or non-renewable, including (a) sunlight; (b) surface and groundwater; (c) forests, biodiversity and genetic resources; and (d) rocks, minerals, fossil fuels and other sources of energy.

<sup>18</sup> For example, Article 20(3) of the Constitution of the People’s Democratic Republic of Algeria 2020; Section 8(5)(a)(vii) of the Constitution of the Republic of Botswana 1966 (as amended to 2016); Article 9 of the Constitution of the People’s Republic of China 1982 (as amended to 2018); Article 53 of the Constitution of the Socialist Republic of Vietnam 2013.

adopted in most (if not all) constitutions.<sup>19</sup> It is also standard for constitutional provisions to combine the economic and environmental functions of natural resources – with the former often taking precedence.<sup>20</sup> This is unsurprising given humanity's tumultuous history with natural resource extraction and exploitation.<sup>21</sup>

Secondly, ownership – to whom does the relevant state or country's natural resources belong? Ownership of natural resources is a regulatory instrument often found in national constitutions in complementation to the international law principle of permanent state sovereignty.<sup>22</sup> Mostly, the sovereign state<sup>23</sup> or the people are defined as the owners of natural resources.<sup>24</sup> Usually, it is stated that ownership contains a socioeconomic element establishing it as being owned for the benefit of the people and present and future generations.<sup>25</sup> Both the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social, and Cultural Rights 1966 in their respective Articles 1(2) provide individuals with fundamental rights to the natural resources in their countries.<sup>26</sup>

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**19** For example, Article 8 of the Constitution of the Federal Republic of Yemen 1991 (as amended to 2015); Article 23 of the Constitution of United Arab Emirates 1971 (as amended to 2009); Article 25-1 of the Constitution of the Republic of Senegal 2001 (as amended to 2016); Articles 135–136 of the Constitution of the Republic of Romania 1991 (as amended to 2003); Article 11 of the Constitution of the Sultanate of Oman 1996 (as amended to 2011).

**20** See Article 53 of the Constitution of the Republic of Turkmenistan 2008 (as amended to 2016); Section 45(2) of the Constitution of the Kingdom of Spain 1978 (as amended to 2011).

**21** For a discussion refer to Sneha Krishnan, 'Exploitation of Mineral Resources: Its Impact on Environment in Nauru, Pacific Island and International Law' (2019) 4 IJMER 1.

**22** UNGA, Permanent Sovereignty over Natural Resources Res 1803 (XVII) (14 December 1962) GAOR 17th Session Supp 17, 15.

**23** For example, Article 11 of the Constitution of the Kingdom of Bahrain 2002; Chapter 3 Section 172 of the Constitution of the Islamic Republic of Pakistan 1973 (as amended to 2018); Article 248 of the Constitution of the Republic of Maldives 2008 (as amended to 2019); Article 23(2) of the Constitution of the State of Eritrea 1997; Article 127(4) of the Constitution of the Republic of Moldova 1994 (as amended to 2019).

**24** For example, Article 13 of the Constitution of the Republic of Ukraine 1996 (as amended to 2019); Preamble of the Constitution of the Sovereign State of Solomon Islands 1978 (as amended to 2018); Article 88(5) of the Constitution of the Federal and Democratic Republic of Ethiopia 1994.

**25** See Section 2 Article 149 of Title VII in the Constitution of the Republic of Niger 2010 (as amended to 2017); Article 41(3)(c) of the Constitution of the Republic of South Sudan 2011 (as amended to 2015); Chapter XII Section 210(2) of the Constitution of the Kingdom of Eswatini 2005.

**26** International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3. See also Article 21(1) of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58.

Flowing therefrom, constitutions often clarify the extent to which property rights affect said ownership.<sup>27</sup> Illustrated through specific provisions concerning the exploitation, exploration, mining, utilisation, etc. rights of the government or individuals to (mostly) economically viable (i.e., non-renewable) natural resources.<sup>28</sup>

Thirdly, a prevalent issue in many countries is the recognition (or absence) of indigenous people's rights to exercise their traditional ownership and usage of certain natural resources in constitutions.<sup>29</sup> Provisions regarding the ownership of natural resources are regarded as essential and are usually elaborated in those countries that have substantial mineral or forest resources, and where the expansion of agriculture plays a key economic role. Consequently, owing to their economic value, few constitutions guarantee unconditional rights to indigenous peoples over the (non-renewable) natural resources in their territories.

Fourthly, most constitutions contain provisions designating responsible parties to manage and regulate natural resources.<sup>30</sup> This concerns regulation regarding the question of who is entitled to utilise it; what happens with revenues resulting from its utilisation; and how they are to be protected. Such duties are often prescribed by national constitutions either directly in the form of state obligations or as directives to the legislature to enact related statutory laws.

Lastly, it is necessary to provide protection mechanisms to conserve natural resources and regulate their sustainable use. However, few constitutions offer separate provisions for the protection of natural resources. Many constitutions recognise the right to a healthy environment, which then serves as the legal

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27 For example, Section 30(1) of the Constitution of the Republic of Fiji 2013; Article 18 of the Constitution of the Hellenic Republic of Greece 1975 (as amended to 2019); Article 122 of the Constitution of the Republic of Kosovo 2008 (as amended to 2016); Article 16 of the Constitution of the Republic of Kyrgyzstan 2021.

28 Francis Botchway and Nightingale Rukuba-Ngaiza, 'The Constitutional Regime for Resource Governance in Africa: The Difficult March toward Accountability' in Jasper Wouters et al. (eds.), *The World Bank Legal Review – Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability* Vol 6 (The World Bank 2015); Article 102 of the Political Constitution of the Republic of Nicaragua 1987 (as amended to 2014).

29 See Section C(7)(a) of COP 15 UN Biodiversity Conference, Kunming-Montreal Global Biodiversity Framework (22 December 2022) UN Doc CBD/COP/15/L25; the Constitution of the United States of Mexico 1917 (as amended to 2022) in Article 2A provides extensive rights to indigenous peoples, including the freedom to maintain and 'improve their environment' per their traditions and beliefs, along with the right to attain 'preferential use of the natural resources' located on their lands, except the ones declared 'strategic resources.'

30 For example, Article 5(5) of the Constitution of the State of Georgia 1995 (as amended to 2020); Article 44(4) of the Constitution of the Slovak Republic 1992 (as amended to 2017); Article 45 of the Constitution of the Federal Republic of Somalia 2012; Article P(1) of the Constitution of the Republic of Hungary 2011 (as amended to 2022); Article 120(2) of the Constitution of the Republic of South Korea 1987.

foundation to enforce the conservation of natural resources before competent courts, as their conservation is intricately linked to the fulfilment of human rights.<sup>31</sup> Although certain constitutions might not expressly offer any protection mechanisms for natural resources, the relevant country might have adopted and ratified international instruments, which offer broader conservation strategies. As with the influx of ‘green constitutionalism’,<sup>32</sup> which saw amendments to incorporate environmental rights<sup>33</sup> coupled with ‘sustainable development’<sup>34</sup> and similar conservation-focused provisions as regards natural resources,<sup>35</sup> ‘climate change consciousness’, is also on the rise in constitutions.<sup>36</sup> Thus, with time, these international obligations often become commonplace in national constitutions.

### 3 Analysed Constitutions

To provide a regionally balanced insight, which is cognisant of the liberal/authoritarian/religious-based character of the constitutions selected, the following countries have been analysed: for Africa, South Africa and Chad; for the Americas, Brazil, Cuba, and Bolivia; for Asia, India and Iran; for Europe, Germany; and for Oceania, Australia. With this selection, major legal systems in the world are represented. Furthermore, the constitutions discussed offer diverging tendencies in the context of natural resource regulation from the ‘Global North’ versus the ‘Global South’ perspective. As archaic or politically incorrect one might find the Brandt Line

31 UNEP and UN OHCHR, *Human Rights and the Environment Rio+20: Joint Report* (19 June 2012).

32 See Amber Polk, ‘The Unfulfilled Promise of Environmental Constitutionalism’ (2023) 74 *HLJ* 123; Roderic O’Gorman, ‘Environmental Constitutionalism: A Comparative Study’ (2017) 6 *TEL* 435.

33 This right, which has officially been recognised, has grown more rapidly over the past decades than any other human right. UNGA, Resolution the Human Right to a Clean, Healthy and Sustainable Environment A/76/L.75 (July 28, 2022); UNHRC, Resolution the Human Right to a Clean, Healthy and Sustainable Environment A/HRC/RES/48/13 (October 8, 2021); David Law and Mila Versteeg, ‘The Declining Influence of the United States Constitution’ (2012) 87 *NYU Law Review* 762.

34 For example, the Preamble and Article 12 of the Constitution of the Republic of Tunisia 2014; Section 73(1) of the Constitution of the Republic of Zimbabwe 2013 (as amended to 2017); Article 59(1)(d-dh) of the Constitution of the Republic of Albania 1998 (as amended to 2020); Article 39(1–2) of the Constitution of the Republic of Angola 2010; Article 12(1) of the Constitution of the Republic of Armenia 1995 (as amended to 2015).

35 This is considering the recommendations of the UN Conference on the Human Environment Action Plan for the Human Environment (16 June 1972) UN Doc A/CONF.48/14/Rev.1, to name a few.

36 For example, Chapter XVI Section 258(g)(1) of the Constitution of the Kingdom of Thailand 2017; Article 194 of the Constitution of the Dominican Republic 2015; Chapter IX Article 127 of the Constitution of the Bolivarian Republic of Venezuela 1999 (as amended to 2009); Article 257(g) of the Constitution of the Republic of Zambia 1991 (as amended to 2016); Preamble of the Constitution of the Republic of Côte d’Ivoire 2016.

in 2023, strictly speaking, this distinction, which is rooted in colonialism, exploitation, and unequal power dynamics, remains relevant.<sup>37</sup> The ‘Global North’ is represented by Germany and Australia, with Cuba, Chad, Bolivia, and Iran representing the ‘Global South.’ South Africa, Brazil, and India are the odd borderlands – due to their BRICS association.<sup>38</sup>

## 4 Comparative Discussion on the Role and Meaning of ‘Natural Resources’ in the Context of Individual Constitutions

### 4.1 South Africa

Regarding natural resource governance and the challenges of the 21st century, South Africa is no doubt one of the important political actors on the African continent. As the only African nation with a G20 seat,<sup>39</sup> South Africa is not only a leading economy on the continent. South Africa has compared to other African countries a well-developed infrastructure, which, together with its unique location on three essential shipping routes from West to East, makes it an ideal ‘pathway to Africa’ for natural resources exploitation. After the end of Apartheid in 1994, South Africa has become a constitutional democracy with significant moral authority on the continent.<sup>40</sup>

The current Constitution of the Republic of South Africa (as amended to 2012) – the supreme law of the land (Article 1(c)) – was approved in December 1996 by the

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<sup>37</sup> Refer to Malgorzata Blicharska et al., ‘SDG Partnerships may Perpetuate the Global North–South Divide’ (2021) 11 SR 1; Kamal Uddin, ‘Covid-19 Response: The Global North-South Divide’ (2021) 25(3) World Affairs 142; Jason Hickel et al., ‘Imperialist Appropriation in the World Economy: Drain from the Global South through Unequal Exchange, 1990–2015’ (2022) 73 GEC 1.

<sup>38</sup> BRICS: Brazil; Russia; India; China; and South Africa – for now. See Wendell Roelf, ‘BRICS meet with “Friends” Seeking Closer Ties amid Push to Expand Bloc’ (*Reuters*, 2 June 2023) <<https://www.reuters.com/world/brics-meet-with-friends-seeking-closer-ties-amid-push-expand-bloc-2023-06-02/>> accessed 24 June 2023; Joseph W Sullivan, ‘A BRICS Currency could shake the Dollar’s Dominance’ (*FP*, 24 April 2023) <<https://foreignpolicy.com/2023/04/24/brics-currency-end-dollar-dominance-united-states-russia-china/>> accessed 24 June 2023.

<sup>39</sup> G20: Argentina; Australia; Brazil; Canada; China; France; Germany; India; Indonesia; Italy; Japan; Mexico; Republic of Korea; Russia; Saudi Arabia; South Africa; Türkiye; United Kingdom; United States of America; and the European Union.

<sup>40</sup> Oliver C. Ruppel and Tina Borgmeyer, ‘The BRICS Partnership from a South African Perspective: Sustainable Development Space in a New Global Governance’ in Muna Ndulo and Steve Kayizzi-Mugerwa (eds.), *Financing Innovation and Sustainable Development in Africa* (Cambridge Scholars Publishing 2018) 282.



Constitutional Court after two years of negotiations and drafting by the elected Constitutional Assembly. This Constitution has been lauded globally, especially for its Bill of Rights, which is assigned a model character by many for its visionary formulation of political and civil rights, as well as its wide range of enforceable social and economic rights.<sup>41</sup> One of the provisions in the Constitution, which deserves special attention is the central clause relevant to natural resources laid down in Section 24 of the Bill of Rights dealing with the environment. It states that:

Everyone has the right to (a) an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

However, unlike many constitutions, which provide that natural resources are owned by the State,<sup>42</sup> the South African Constitution contains no explicit provision assigning ownership of, nor the sharing of revenues from, natural resources. Section 24 merely recognises everyone's entitlement to its beneficial use. In the same spirit, the property clause in Section 25 provides that public interest incorporates 'reforms to bring about equitable access to all South Africa's natural resources.' In line therewith, the concept of public trusteeship emerged – the idea that the country's natural resources belong to all its people.<sup>43</sup> This is reflected in legislative texts, namely Section 3(1) of the National Water Act 36/1998, Section 2(4)(o) of the National Environmental Management Act 107/1998, Section 3 of the Mineral and Petroleum Resources Development Act 28/2002, Section 3 of the National Environmental Management: Biodiversity Act 10/2004, and Section 3 of the National Environmental Management: Integrated Coastal Management Act 24/2008. Therefore, private ownership has been replaced with the custodianship of the State, and if the people of South Africa seek to make use of 'their property' (i.e., natural resources), prior authorisation in terms of licenses and permits must be obtained following the relevant regulating legislation.<sup>44</sup>

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41 Refer to John Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 AJLS 1.

42 For example, Article 100 of the Constitution of the Republic of Namibia 1990; Oliver C. Ruppel and Katharina Ruppel-Schlichting (eds.), *Environmental Law and Policy in Namibia* 4th edn (Nomos 2022).

43 Germarie Viljoen, 'The Transformed Property Regime of the National Water Act 36 of 1998: Comparative Reflections on South Africa's Water in the "Public Space"' (2019) 52 VRÜ 172.

44 For a discussion see Elmarie Van Der Schyff, 'South African Natural Resources, Property Rights, And Public Trusteeship – Transformation in Progress' in David Grinlinton and Prue Taylor (eds.), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Brill 2011) 323.

Within the Constitution, natural resources are subject to environmental conservation in terms of Section 24, which is anthropocentric and can be asserted vertically against the State. Whether the environmental right also applies horizontally, i.e., whether it can be invoked in private disputes, is subject to debate.<sup>45</sup> Section 24 can be invoked by all people in South Africa, but it excludes animals and plants. The substantive environmental right entrenches, on the one hand, an enforceable defensive right and, on the other, a positive obligation directed at all branches of government. Section 38(d) of the Constitution also introduces public-interest action, whereby anyone can approach a court in the sole interest of the public when a right (e.g., Section 24) has been infringed upon. Thereby, one need not have a direct interest in the matter to take legal action.<sup>46</sup> This is further iterated in Section 32(1) of the National Environmental Management Act and the Promotion of Administrative Justice Act 3/2000.

In South Africa, there were two specialised environmental courts/tribunals, the first was established in Hermanus (Western Cape) in 2003, which was followed by the placement of an environmental prosecutor in the Port Elizabeth district court (Eastern Cape) — jointly these two courts had an incredible prosecution rate of 90 % by 2005, despite their limited jurisdiction.<sup>47</sup> Regardless of their successful impact in enforcing compliance with environmental laws, due to mainly political considerations (including a lack of funding), these specialist courts were closed, and environmental matters were referred back to the ordinary domestic courts. This has remained a contentious issue for academics who question the effectiveness of having deeply technical and scientific environmental matters/cases brought before judges, who, very few have actual theoretical knowledge of environmental law and its application (a small number of tertiary institutions in South Africa offer environmental law as a compulsory taught module).<sup>48</sup> As the UN Environment Programme (UNEP) has observed, a ‘well informed’ judiciary ‘of the rapidly expanding boundaries of environmental law’ plays a key role in ‘promoting compliance with, and the implementation and enforcement of, international and national environmental law.’<sup>49</sup> While South Africa’s courts are to be commended for the contribution they

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45 Jan Glazewski (ed.), *Environmental Law in South Africa* (LexisNexis 2021) 5–12.

46 Neels Swanepoel, ‘The Public-Interest Action in South Africa: The Transformative Injunction of the South African Constitution’ (2016) 41 JJS 29, 29.

47 Stop Illegal Fishing, *Case Study Series 02: Environmental Courts Prove to be Effective* (2011) 1–2.

48 Michael Kidd, ‘Greening the Judiciary’ (2006) 9(3) PELJ 1; Imraam Chohan, ‘Environmental Courts: An Analysis of their Viability in South Africa with Particular Reference to the Hermanus Environmental Court’ (Thesis at the University of Kwazulu-Natal 2013).

49 UNEP, *Report of the Global Judges Symposium on Sustainable Development and the Role of Law* (12 November 2002) UNEP/GC 22/INF/24 4–5.

have made to the development of environmental law in the country,<sup>50</sup> one cannot deny that enforcement of such laws would be increased (as they offer easier access and expeditious judgments) and our understanding of such laws enhanced, by dedicated environmental courts or ‘green tribunals’ (as can be inferred from the experience of the other countries analysed).<sup>51</sup>

The scope of application of Section 24 is overly broad, because the term ‘environment’, as used but not defined by the drafters, is itself broad. Thereby, it can be implied that this provision not only contains a fundamental right but also enshrines cultural and socioeconomic aspects in Section 24(b).<sup>52</sup> Section 1 of the National Environmental Management Act defines the environment as:

*the surroundings within which humans exist and that are made up of (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing.*

Of particular importance regarding natural resources is Section 24(b)(iii) of the Constitution, according to which measures need to be taken to prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development. As explicitly mentioned in Section 24, such measures include legislative measures in the form of statutory environmental law,

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50 Refer to Louis J Kotzé and Anél du Plessis, ‘Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa’ (2010) 3 J Ct Innovation 157; Joana Setzer and Lisa Benjamin, ‘Climate Litigation in the Global South: Constraints and Innovations’ (2020) 9(1) TEL 77, 81.

Also see *EarthLife Africa Johannesburg v. Minister of Environmental Affairs et al.* 2017 2 All SA 519 (GP) (8 March 2017) – even before the global rise of climate change litigation, South Africa’s High Court held that although the country’s environmental law framework does not expressly contemplate climate change as a relevant consideration when granting environmental authorisation for proposed development projects, given the commitments made under the Paris Agreement, it must be considered. Marjoné van der Bank and Jaco Karsten, ‘Climate Change and South Africa: A Critical Analysis of the Earthlife Africa Johannesburg and Another v. Minister of Energy and Others 65662/16 (2017) Case and the Drive for Concrete Climate Practices’ (2020) 13 Air, Soil, and Water Research 1.

Another High Court case to follow is *African Climate Alliance et al. v. Minister of Mineral Resources and Energy et al.* (56907/21) [2022] ZAGPPHC 946 (9 December 2022), which is the first youth-led climate litigation in South Africa. The litigants are challenging the constitutionality of the government’s decision to procure new coal-fired power (#CancelCoal case) as an unjustified limitation of the Section 24 environmental right and associated rights, including the rights of children.

51 For example, see Neethi V. Rao et al., ‘Can Green Tribunals Help to Resist Neo-liberalism in Environmental Governance – The Case of India’ (2023) 131 LUP 1.

52 This has been confirmed by the High Court in *BP Southern Africa (Pty) Ltd v. MEC for Agriculture, Conservation Environment and Land Affairs* (03/16337) 2004 ZAGPHC 38 (1 May 2004).

but also other measures implemented by the executive branch, such as policies and programs.<sup>53</sup> To that end, the judiciary plays a significant role in the realisation of this right, e.g., by imposing sentences on people who commit environmental crimes and ensuring that the government upholds its obligations created by Sections 24 and 27.<sup>54</sup> The latter of which grants everyone the right to have access to sufficient food and water, with the State mandated to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.’

Section 40(1) of the Constitution confirms that South Africa’s government is constituted of national, provincial, and local (municipal) spheres, which are distinctive, interdependent, and interrelated. Section 41(1) further provides that all spheres of government and all organs of State within each sphere must assist and support one another in the fulfilment of their respective mandates. Respectively, Sections 83-102, 103-150, and 151-164 describe the capacities and powers of the national, provincial, and local spheres. Accordingly, as required by both Sections 24 and 27, numerous statutes and policies have been adopted at national, provincial, and municipal levels to regulate the use and conservation of the country’s natural resources. Such regulatory functions are carried out by different bodies depending on the resource in question. For example, the overall governance of water-related matters is an exclusive national competence carried out by the Department of Water and Sanitation and their respective delegated entities at the provincial and municipal levels. Land management in South Africa is governed by the Department of Agriculture, Land Reform, and Rural Development, and the Department of Mineral Resources must regulate the exploration and exploitation of South Africa’s mineral resources. On the other hand, the Department of Forestry, Fisheries, and the Environment, along with its provincial counterparts, is responsible for the management, protection, and conservation of all natural resources in South Africa. Therefore, the latter Department shares responsibility with the others, which leads to conflicting mandates given that its focus is on the protection of natural resources while theirs are on development.<sup>55</sup>

According to reports by inter alia the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), the Food and Agriculture Organisation (FAO), and the Intergovernmental Panel on Climate Change (IPCC),

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<sup>53</sup> Confirmed by the Constitutional Court in *Government of the Republic of South Africa v. Grootboom* 2000 11 BCLR 1169 para 42.

<sup>54</sup> Ruth Krüger, ‘The Silent Right: Environmental Rights in the Constitutional Court of South Africa’ (2019) 9 CCR 473.

<sup>55</sup> Refer to Charlie Shackleton, ‘Will the Real Custodian of Natural Resource Management Please Stand Up’ (2009) 105 SAJS 91; Christopher Thornhill, ‘Spheres of Government Contributions to Sustainable Service Delivery’ (2011) 4(1) AJPA 45.

environmental degradation trends are ‘less severe or avoided’ in areas owned or managed by indigenous peoples.<sup>56</sup> This can be attributed to most indigenous peoples’ cultural and spiritual connection with nature, and with the steady decline of the world’s natural resources, traditional knowledge of conservation and sustainability is gaining recognition.<sup>57</sup> This leads to the foremost juxtaposition highlighted in this contribution between the North/South; that is, their different tendencies toward natural resource protection – i.e., their different perspectives adopted in that regard. Most of the ‘Southern’ countries possess a fast stock of natural resources but also have deep religious, cultural, and spiritual connections with the environments containing said resources, which have and do influence the constitutional value placed respectively on those natural resources.

Given the notion of public trusteeship adopted, no mention is made in the South African Constitution regarding indigenous people’s usage and ownership of natural resources located in their traditional territories. However, as South Africa’s legal system consists of a hybrid of Roman-Dutch Civil Law, English Common Law, and Customary Law, the Constitution does acknowledge the validity of customary laws applied by indigenous peoples, which concern natural resources (Sections 39(3) and 211–212). Also, through the cases of *Alexkor Ltd et al. v. the Richtersveld Community et al.*<sup>58</sup> and *Gongqose et al. v. Minister of Agriculture, Forestry et al.*,<sup>59</sup> clarity was given as follows: provisions in environmental legislation, as regards natural resources, do not extinguish the rights and traditions of indigenous peoples regarding said resources and their use and exploitation. These rights continue to exist subject to the limitations and requirements laid out in the relevant legislation, particularly regarding conservation and sustainable development.<sup>60</sup>

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56 IPBES, ‘Global Assessment Report on Biodiversity and Ecosystem Services’ (IPBES, 2019) <<https://www.ipbes.net/global-assessment/>> accessed 13 March 2023; FAO, ‘Forest Governance by Indigenous and Tribal Peoples: An Opportunity for Climate Action in Latin America and the Caribbean’ (FAO, 2021) <<http://www.fao.org/>> accessed 13 March 2023; IPCC Working Group II, ‘Sixth Assessment Report: Climate Change 2022: – Impacts, Adaptation and Vulnerability’ (IPCC, 2022) <<https://www.ipcc.ch/report/ar6/wg2/>> accessed 13 March 2023.

57 Giorgia Magni, ‘Indigenous Knowledge and Implications for the Sustainable Development Agenda’ (2017) 52 EJED 438.

58 [2003] ZACC 18 (CC).

59 [2018] ZASCA 87 (SCA).

60 Refer to Tracy Humby et al., *Review of National Laws and Policies that Support or Undermine Indigenous People and Local Communities: South Africa* (Natural Justice 2014); Charles Maimela, ‘The Role and Importance of African Customary Law in the 21st Century South Africa’ (Research Paper Series at University of Milano-Bicocca School of Law 2019) 1; Zipho Xego and Emeka Obioha, ‘Knowledge of Current Conservation Methods and Infusion of Indigenous Knowledge Systems among Local Communities in Dwesa Cwebe Protected Area, South Africa’ (2021) 20 IAJKS 263.

Although South Africa's indigenous peoples have predominantly been 'Westernized' and no longer (as strongly) harbour the cultural value of nature (apart from in a few select rural communities), the principle of *Ubuntu* ('humanness') features prominently.<sup>61</sup> The Constitution of the Republic of South Africa Act 200/1993 (interim Constitution enacted until the 1996 version was finalised) in its Post-amble mentioned the 'need for *Ubuntu*' as part of creating national unity – solidarity; while not contained in the final Constitution, it has been confirmed as an implicit integral part of the 1996 Constitution's essence (part of human dignity).<sup>62</sup> Akin to *Buen Vivir/Sumak Kawsay* (discussed later on) in Peru, Bolivia, Ecuador, Chile, Colombia, etc., *Ubuntu* in South Africa, Kenya, Nigeria, Zimbabwe, etc.,<sup>63</sup> can be understood as 'living well' – a way of being, the relationship between people and nature (interdependence and harmony) – a concept connected more broadly to an ethical/moral duty or public policy of sustainable living.<sup>64</sup>

South Africa's Constitution is regarded as one of the most 'international law-friendly' constitutions in the world (see Sections 39(1)(b) and 233).<sup>65</sup> Consequently, international environmental law instruments do influence policymaking on matters concerning natural resources. For example, South Africa has ratified the Revised

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**61** Refer to Michelle L Cocks et al., "'God is my Forest" – Xhosa Cultural Values provide Untapped Opportunities for Conservation' (2012) 108(5–6) S Afr J Sci 1; Penny Bernard and Sibongiseni Kumalo, 'Community-based Natural Resource Management, Traditional Governance and Spiritual Ecology in Southern Africa: The Case of Chiefs, Diviners and Spirit Mediums' in Christo Fabricius et al. (eds.), *Rights, Resources and Rural Development Community-based Natural Resource Management in Southern Africa* (Earthscan 2004) 115.

**62** See Tom Bennett, *Ubuntu: An African Jurisprudence* (Juta 2018); Sivhaga Netshitomboni, 'Ubuntu: Fundamental Constitutional Value and Interpretive Aid' (Dissertation at the University of South Africa 1998).

**63** Note, that although the principle of *Buen Vivir* might only be expressed in two constitutions (Ecuador and Bolivia), different concepts with similar notions can be found among diverse indigenous people around the world. Similarly, synonyms of the *Ubuntu* philosophy are acknowledged by various indigenous peoples in African countries. See Alberto Acosta and Mateo M Abarca, 'Buen Vivir: An Alternative Perspective from the Peoples of the Global South to the Crisis of Capitalist Modernity' in Vishwas Satgar (ed.), *The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives* (Cambridge University Press 2019) 131; ASWNet, 'Ubuntu' (ASWNet, 2022) <<https://africasocialwork.net/ubuntu/>> accessed 24 June 2023.

**64** Refer to Dorine van Norren, 'Development as Service: A Happiness, Ubuntu and Buen Vivir Interdisciplinary view of the Sustainable Development Goals' (Doctoral Thesis at Tilburg University 2017); Kyriaki Topidi, 'Ubuntu as Normative Value in the New Environmental World Order' in Domenico Amirante and Silvia Bagni (eds.), *Environmental Constitutionalism in the Anthropocene: Values, Principles and Actions* (Taylor & Francis 2022) 49.

**65** Dire Tladi, 'Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga' (2016) 16 AHRLJ 310, 311.

African Convention on the Conservation of Nature and Natural Resources,<sup>66</sup> which in Articles 2 and 4 requires States to adopt measures to achieve the objective of conserving and sustainably using natural resources ‘in the interest of present and future generations.’<sup>67</sup> The country has also endorsed the Millennium Development Goals (MDGs),<sup>68</sup> the 2030 Agenda, and Sustainable Development Goals (SDGs).<sup>69</sup> However, despite its impressive participatory record and ratification of numerous relevant international instruments, South Africa often stumbles with its realisation.<sup>70</sup> Several factors have been ascribed thereto, including governance inadequacies in the form of financial mismanagement, corruption, and failure to place environmental issues above short-term financial gain.<sup>71</sup>

Consequently, as a country faced with internal governance issues and increased climate change impacts, several academics are urging policymakers to recall *Ubuntu* – the principle, which is embedded with ‘Africanness’ that enthuses communitarianism, respect for nature, and future generations – denouncing seemingly individualistic values and economics but focuses on sufficiency, caring for one’s local ecosystems to enable one’s descendants to also survive therefrom (not be enriched thereby).<sup>72</sup>

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66 African Convention on the Conservation of Nature and Natural Resources (Revised Version) (adopted 11 July 2003, entered into force 23 July 2016).

67 Oliver C. Ruppel, ‘Part II: The Regional Dimension’ in Glazewski (n 45) 52.

68 UN, *The Millennium Development Goals Report* (2015); UNGA Res 55/2 UN Millennium Declaration (2000) A/RES/55/2.

69 UNGA Res A/Res/70/1 Transforming our World: the 2023 Agenda for Sustainable Development (25 September 2015); UNGA Res 66/288 The Future We Want (2012) A/RES/66/288.

70 South African Government, *MDG Country Report* (2015) 105; South African Government, *MDG 7 Report* (2015) 70; Statistics South Africa, *SDGs: Country Report* (2022) 32.

71 For example, refer to the Karpowership debacle, Patrick Bond, ‘Climate-Financing Carrots and Sticks in South Africa’ (*CADTM*, 29 March 2023) <<https://www.cadtm.org/Climate-Financing-Carrots-and-Sticks-in-South-Africa>> accessed 4 June 2023; Wendell Roelf, ‘South Africa Grants Turkey’s Karpowership Deal to Ease Power Crisis’ (*Reuters*, 18 May 2023) <<https://www.reuters.com/world/africa/south-africa-grants-turkeys-karpowership-deal-ease-power-crisis-2023-05-18/>> accessed 4 June 2023; the Shell offshore oil and gas exploration controversy, *Sustaining the Wild Coast NPC et al. v. The Minister of Mineral Resources and Energy et al.* 2022 6 SA 589 (ECMk); and the Mabola Protected Environment incident, The Mining and Environmental Justice Community Network of South Africa, ‘Statement on Environmental MEC’s Decision to Exclude Properties from the Mabola Protected Environment to Enable a New Coal Mine’ (*MEJCON-SA*, 15 February 2021) <<https://mejcon.org.za/media/news/statement-on-environmental-mecs-decision-to-exclude-properties-from-the-mabola-protected-environment-to-enable-a-new-coal-mine>> accessed 4 June 2023.

72 With further references see Oliver C Ruppel, ‘South Africa: Climate Change, Responsibility and Liability – the Legal System, Public and Private Law Considerations’ in Schulev-Steindl et al. (eds.), *Climate Change, Responsibility and Liability* (Nomos 2022) 201, 215–216.

## 4.2 Chad

Dissimilar to the Republic of Chile's ongoing peaceful democratic constitutional reform (2020–now),<sup>73</sup> the Republic of Chad has been ruled by a military government following the death of former President Idriss Déby (1990–2021).<sup>74</sup> Just five years after the adoption of its Constitution of 2018 (last amended to 2020), the political unrest in the country is palpable with the Constitution indefinitely suspended.<sup>75</sup> Directly following the death of the former Chadian president, a group of military officers established the *Conseil Militaire de Transition*, or Transitional Military Council (CMT), dissolved the government and the national assembly, installed the former president's son as 'interim leader', suspended the Constitution, but committed to overseeing an eighteen-month transition period that would end with civilian rule. In the interim, a Transition Charter (2022) has been drafted and adopted by the CMT, with democratic elections (tentatively) set to take place in October 2024.<sup>76</sup> Compared to South Africa's relatively smooth transition toward a liberal social democratic Constitution in the late 1990s,<sup>77</sup> Chad's transition is delimited by violence and delays. Accordingly, in contrast with the other countries discussed, Chad's undetermined constitutional trajectory offers a glimpse into the uncertain and unstable realities faced in the aftermath of military coups, which are an all-too-common occurrence on the continent in recent years.<sup>78</sup> Structural

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73 Refer to Detlef Nolte, 'Chile's Constitutional Reform Process Rebooted' (2022) 4 GIGA Focus Lateinamerika 1; Hugo Rojas, 'Chile at the Crossroads: From the 2019 Social Explosion to a New Constitution' (2022) 20 SJSJ 981; Maite Berasaluce et al., 'Social-Environmental Conflicts in Chile: Is There Any Potential for an Ecological Constitution?' (2021) 13 Sustainability 1.

74 Abdelkerim Marcelin, 'La Charte de Transition et al. Mort des Démocraties en Afrique: Cas du Tchad' (2022) 1 Collection Recherches and Regards D'Afrique 11.

75 Bernard Lanne, 'Chad: Regime Change, Increased Insecurity, and Blockage of Further Reforms' in John Clark and David Gardinier (eds.), *Political Reform in Francophone Africa* (Routledge 2018) 267; Sebastian Elischer and Benjamin Lawrance, 'Reassessing Africa's New Post-Coup Landscape' (2022) 65 ASR 1.

76 Elizabeth Dejanikus, 'Déby After Déby: Violent Protests in Chad Expose Corruption in Military-Led Government' (*The Yale Review of International Studies*, April 2023) <<http://yris.yira.org/comments/5895>> accessed 6 June 2023; Freedom House, 'Chad' (*Freedom House*, 2022) <<https://freedomhouse.org/country/chad/freedom-world/2022>> accessed 6 June 2023; Tom Ginsburg, 'Democracies and International Law: An Update' (2022) 23 CJIL 9.

77 Refer to Heinz Klug, *Constituting Democracy: Law, Globalism, and South Africa's Political Reconstruction* (Cambridge University Press 2000).

78 For example, Mali (August 2020 and May 2021), Guinea (September 2021), Sudan (April 2019 and October 2021), and Burkina Faso (January and September 2022).



challenges such as socio-economic underdevelopment and climate change are additional layers of fragility.<sup>79</sup>

Chad is Africa's fifth largest nation by geographical area, a Sahelian country located in the heart of Central Africa, is one of the world's least developed countries, and is landlocked – but rich in natural resources. Oil and agriculture drive Chad's economy.<sup>80</sup> Thus, it comes as no surprise that Article 63 of the (repealed) Constitution grants the State complete and 'permanent sovereignty over all the national natural riches and resources' of the country. However, the State must ensure their exploitation 'for the well-being of the whole national community.'<sup>81</sup> Accordingly, the State 'may concede the exploration and the exploitation of these natural resources to private initiatives' (i.e., foreign investors). Although Article 45 stipulates that private property 'is inviolable and sacred' and that no one may be dispossessed, it is permissible 'on the grounds of duly declared public utility and with a just and prior indemnification.' This complements the sovereignty of the State over natural resources, espoused specifically in the Mining Code 004/PR/2018 (Article 4), which confirms that mineral substances 'contained in the soil and subsoil' of Chad's national territory 'are the exclusive, inalienable, and imprescriptible property of the State.' However, per Article 5, holders of mining titles or mining authorisations acquire ownership of the mining and quarrying substances they extract.

No definition of natural resources is stipulated in the Constitution nor the Law Defining the General Principles of Environmental Protection 014/PR/98, however, the latter does define the environment in Article 2(1) as:

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<sup>79</sup> Lake Chad has lost approximately 90 % of its volume since 1960, depriving the 50 million people residing in its basin of their livelihoods. The changing environment has triggered competition over resources, irregular migration, food insecurity, and organised crime. Chad ranks 190/191 countries on the Human Development Index and roughly 84 % of the population is living in multi-dimensional poverty. Ekperusi Abraham and Ekperusi Omesiri, 'Natural Resources Depletion, Pollution and Restoration of Lake Chad' (2021) 2 IJMIR 1; Katherine Riebe and Anne Dressel, 'The Impact on Food Security of a Shrinking Lake Chad' (2021) 189 J Arid Environments 1; American University, IOM Chad, and Food Security Cluster, *Climate Change, Food Security and Migration in Chad: A Complex Nexus* (2021); Oliver C. Ruppel and Mark Funteh, 'Climate Change, Human Security and the Humanitarian Crisis in the Lake Chad Basin Region: Selected Legal and Developmental Aspects with a Special Focus on Water Governance' in Patricia Kameri-Mbote et al. (eds.), *Law|Environment|Africa* (Nomos 2018) 105.

<sup>80</sup> Regarding Chad and the resource curse, refer to Mahamat S Abakar, 'The Effects of Oil on Economic Development of Chad' (2018) 4 JITAL 23.

<sup>81</sup> This obligation is a contentious issue, which the government failed to adhere to even before the 2021 regime change. Gadom D. Gadom et al., *Oil Exploitation and Inequality in Chad* (2015); Gadom D Gadom and Armand M Kountchou, 'Oil Exploitation and Regional Disparities of Poverty in Chad: An Analysis of the Oil Revenues Redistribution Policy' (AERC Research Paper 400 2020).

all the natural and artificial elements that promote the existence, evolution, and development of the environment, living organisms, and human activities, with due respect for the ecological balance.

From the statute, it can be inferred that natural resources denote those categories mentioned previously: mineral and energy resources, soil resources, water resources, and biological resources.

Article 51 of the Constitution further provides everyone with the ‘right to a healthy environment’, which per Article 52 (read with Article 57), the State and the Autonomous Collectivities<sup>82</sup> must ensure, along with the protection of the environment. Any damage thereto ‘must be made the object of a just reparation.’<sup>83</sup> Article 57 does declare that the ‘protection of the environment is a duty for all’ – this is gradually becoming a standard obligation in constitutions.<sup>84</sup> While a substantive environmental right is included in the Constitution, no procedural rights are conferred.<sup>85</sup> Instead, parties rely on legislative remedies when their environmental rights are infringed upon.<sup>86</sup>

Regarding its indigenous peoples, Articles 161–163 of the Constitution provide that their customary and traditional rules are only applicable in the communities where they are recognised, and may not, once codified, be contrary to the Constitution’s provisions. Thus, apart from their right to self-governance, Chad’s indigenous peoples (the self-identified Toubou and Mbororo) are not officially recognised by the law.<sup>87</sup> Note, that Chad was absent for the vote on the UN

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**82** Per Article 201 of the Constitution, they comprise of the provinces and the communes.

**83** No case law is mentioned in this section due to a lack of cases relating to the environment in Chad. This can be attributed to the lack of knowledge of the law by the country’s citizens (certain legislation are also unavailable in local languages) and the location of the courts. Tchoca Fanikoua, ‘La contribution du droit penal de l’environnement a la repression des atteintes a l’environnement au Benin’ (Doctoral Thesis at Maastricht University 2012).

**84** For example, Section 50(8) of the Constitution of the Kingdom of Thailand 2017; Article 25(3) of the Constitution of the Republic of Senegal 2001; Article 38 of the Constitution of the Republic of Kazakhstan 1995.

**85** David Boyd, ‘The Status of Constitutional Protection for the Environment in Other Nations’ (David Suzuki Foundation Paper 4 2013) 26.

**86** Although it has been opined that one can ‘fairly presume’ that Article 51 of the Chadian Constitution presents a self-executing right, this has not been the case in practice. Refer to James May and Erin Daly, ‘Vindicating Fundamental Environmental Rights: Judicial Acceptance of Constitutionally Entrenched Environmental Rights’ (2009) 11 ORIL 365, 383–384; Didegomi Dar, ‘Oil Exploitation and Constitutional Protection of the Environment in Chad’ (2019) 7 AJHSS 192, 199–200.

**87** Dwayne Mamo (ed.), *The Indigenous World* 37th ed (2023); IWGIA, ‘Indigenous Peoples in Chad’ (IWGIA, 24 April 2019) <<https://www.iwgia.org/en/chad.html>> accessed 7 June 2023; Michelle Denton, *Chad* (Cavendish Square Publishing 2021).

Declaration on the Rights of Indigenous Peoples.<sup>88</sup> Consequently, coupled with their nomadic lifestyle, indigenous peoples' access to natural resources is further deterred by the obstacles of privatisation of water resources and land grabbing.<sup>89</sup>

On the topic of international law, Article 223 of the Constitution states that 'peace treaties, the defence treaties, the treaties of commerce, the treaties relative to the use of the national territory or the exploitation of the natural resources' only take 'effect after having been approved and ratified' by the president (Article 222). Once ratified and published, they enjoy superiority 'to that of the national laws' (Article 225). Chad has ratified the UN Framework Convention on Climate Change,<sup>90</sup> and the Paris Agreement,<sup>91</sup> and is committed to achieving the SDGs,<sup>92</sup> however, as of 2023, ranks 164/166 in realising said goals.<sup>93</sup> As can be observed from this paper, several nations with comparable levels of natural resource abundance attain diverse development outcomes, which are (mostly) attributable to political institutions.<sup>94</sup>

While the Constitution does leave room for critique,<sup>95</sup> it was still in its fledgling stage. Unfortunately, any room for reform has been halted by political siege. The Transition Charter is the 'fundamental law' of Chad (Article 119) as of 2022 and will remain in force until a new constitution has been adopted 'by way of a referendum' (Article 115). According to Article 117, unless 'expressly repealed, all the legislation

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88 UNGA Res 61/178 UN Declaration on the Rights of Indigenous Peoples (13 September 2007) GAOR 61st Session Supp 49 Vol 3, 15.

89 Domitille Roux, 'Hindu Oumarou Ibrahim: Speaking up for the Rights of the Mbororo' (UNESCO, 26 April 2023) <<https://courier.unesco.org/en/articles/hindu-oumarou-ibrahim-speaking-rights-mbororo>> accessed 6 June 2023; Mariam W Aboubakrine and Zoé Boirin-Fargues (eds.), *Africa Regional Report about Indigenous Women and the Sustainable Development Goals* (2021).

90 UN Framework Convention on Climate Change (9 May 1992) S Treaty Doc No 102-38, 1771 UNTS 107.

91 UN Paris Agreement (12 December 2015) TIAS No 16-1104.

92 Republic of Chad, *First National Climate Change Adaption Plan* (2021–2026).

93 WFP, *Chad Country Strategic Plan* (2019–2023) WFP/EB.2/2018/8-A/2 (2018); Agrica Project, *Climate Risk Profile: Chad* (2021); Abdelkerim Marcelin and Ndingangar T Emmanuel, 'The Problem of the Application of International Environmental Law in Chad' (2019) 8 SS 52.

94 The World Bank, *Rents to Riches: The Political Economy of Natural Resource-Led Development* (2012); Ryan Abman and Gabriel Longbrake, 'Resource Development and Governance Declines: The Case of the Chad–Cameroon Petroleum Pipeline' (2023) 117 *Energy Economics* 1.

95 It has been argued that the Constitution's environmental provisions were vague and incomplete. Specifically, the concerns were that although phrased as fundamental rights, it would have been preferable to include a Bill of Rights and place the environmental provisions thereunder to give them a special rank. It was also contended that the requirement for an ecologically balanced environment should have been included along with the notion of sustainable development. Although these objectives were iterated in Law 014/PR/98, it is not without merit to argue that their inclusion in the Constitution would have given more weight thereto. Also, the environmental provisions were said to be too derisory in number – although one could counter that it is not the number that matters but the content and comprehensiveness of the provision. Refer to Dar (n 86) 192.

and regulations in force until the adoption of this Charter remain fully applicable.' Furthermore, the Charter's provisions are 'supplemented by legislative texts' where 'necessary' (Article 118).

The Transition Charter is silent regarding environmental rights, indigenous peoples, and natural resources, which is both surprising and disappointing, given that other rights contained in the (repealed) Constitution remain – such as freedom of movement; information; opinion; intellectual property; equality; life; dignity; presumed innocent until proven guilty; etc. Article 17 only stipulates that customary and traditional rules 'relating to collective responsibility are prohibited.' Article 29 guarantees the right of ownership with expropriation permissible 'within the framework of the law.' Article 33 sets out that respect 'for the law is the duty of every citizen.' The organs of the state, as set out in Article 38, are the president, the transition government, and the National Council of Transition. An 'interim parliament' has also since been established.

As expected, most of the Charter's provisions concern the 'khaki government.' However, Article 9 does provide that 'fundamental rights and freedoms are recognised, and their exercise guaranteed to citizens under the conditions and forms provided by law.' The Chadian Charter repeals the 'Constitution and all other contrary previous provisions' (Article 116). However, given that Law 014/PR/98 and Code 004/PR/2018 remain in force (for now), one can postulate that the repealed Constitution's provisions relating to the environment and natural resources are tacitly intact. Perhaps it was a mere negligent omission on the part of the Charter's hasty drafters, which could be rectified in due course, or the intention might be for Article 9 to serve as an all-rights-inclusive provision (i.e., encompassing those non-contradictory rights contained in the repealed Constitution). Or their exclusion might have been intentional. Until further clarity is provided, the position under the Charter as regards ownership, regulation, exploitation, and conservation of Chad's natural resources seemingly continues as they were under the now-repealed Constitution.

Regarding international law, Article 111 of the Charter confirms that those conventions and agreements duly ratified or approved and incorporated into law, enjoy superiority to national laws after their publication. As to the treaties previously concluded and ratified, Article 112 sets out that they 'shall remain in force, subject to their reciprocity.'

Although the Charter offers several liberal rights, one cannot overlook the very first sentence contained in the Preamble: 'We, the Members of the Transitional Military Council ...' Therewith, the liberticidal nature of the Charter is revealed, and the possibility of a democratic constitutional reform process rendered

stagnant (at least for now).<sup>96</sup> While the effectiveness of public participation in constitution-making is debatable,<sup>97</sup> a constitution-type document cannot proclaim to have been drafted in ‘the higher interest of the Nation’ as a ‘prerequisite for the consolidation of democracy’, when its opening passage enshrines authoritarianism. Consequently, it will be interesting to monitor Chad’s ‘transition’ from strongman rule toward a (hopefully) democratic constitutional reform with greater emphasis on natural resource protection.

### 4.3 Brazil

The Constitution of the Federative Republic of Brazil 1988 (as amended to 2020) contains various provisions relevant to natural resources. Such provisions have been included not only to foster environmental protection but also for economic reasons.<sup>98</sup> Given that Brazil is a country rich in natural resources – a majority of the Amazonian rainforest is located in Brazil – especially mineral resources,<sup>99</sup> it is not surprising that the Constitution provides detailed provisions on the ownership of natural resources. This is one of the foundations for the growth of mining production in the country. The central provision is Article 20, which declares distinct items as property of the Union, including natural resources of the continental shelf and the exclusive economic zone; mineral resources; and certain lands and waters, such as interstate waters and lakes, rivers, and any watercourses on lands that it owns. Article 26 assigns the property on the following to the State:

- I. surface or underground waters, whether flowing, emerging or in reservoirs, with the exception, in the latter case, as provided by law, of those resulting from works carried out by the Union;
- II. ocean and coastal island areas that are under their dominion, excluding those under the dominion of the Union, counties or third parties;
- III. river and lake islands that do not belong to the Union; and
- IV. vacant government lands not included among those belonging to the Union.

<sup>96</sup> The Preamble of South Africa’s Constitution opens with ‘We, the people ...’; also reiterated in the Constitution of the Islamic Emirate of Afghanistan 2004; and over 100 others. Refer to Adeno Addis, ‘Constitutional Preambles as Narratives of Peoplehood’ (2018) 12(2) ICL Journal 125.

<sup>97</sup> Refer to Gabriel Negretto, ‘Constitution-making and Liberal Democracy: The Role of Citizens and Representative Elites’ (2020) 18 ICON 206; Alexander Hudson, ‘Political Parties and Public Participation in Constitution Making’ (2021) 53 Comparative Politics 501; Dinesha Samararatne, ‘Direct Public Participation in Constitution-Making’ (2018) Policy Brief No 001 Constitution Transformation Network 1.

<sup>98</sup> Erasmo M Ramos, *Direito Ambiental Comparado* (Midiograf II 2009) 6.

<sup>99</sup> Malayna Raftopoulos and Joanna Morley, ‘Ecocide in the Amazon: The Contested Politics of Environmental Rights in Brazil’ (2020) 24 IJHR 1616, 1620.

Although Article 5 XXII of the Constitution guarantees the right to property, mineral deposits and other mineral resources and hydraulic energy sites belong to the Union and constitute property distinct from the soil for the effects of exploitation or use (Article 176). However, the 'soil owner' is entitled to a share in the results of the mining, in the form and amount established by law. Prospecting and mining of mineral resources and use of hydraulic sites may only be performed subject to authorisation or concession by the Union, which must be temporary and may not be transferred without the prior consent of the granting authority. Prospecting and mining activities subject to authorisation must be in the national interest, and only Brazilians and companies organised under Brazilian law, which has their headquarters and management in the country, are eligible to perform these mining activities. The Union has a monopoly on various prospecting and exploitation activities, according to Article 177 of the Constitution, which is the case for deposits of petroleum, natural gas and other fluid hydrocarbons, ores, and nuclear minerals. The Union may, however, contract with private firms to perform the activities which fall under the monopoly of the Union.

Article 23 of the Constitution stipulates that the Union, states, federal districts, and counties have joint powers regarding certain activities, including in the fields of environmental protection and liability for damages to the environment; combating pollution; and the preservation of forests, flora, and fauna (Article 23 VI-VII). The concurrent legislative power of the Union, states and federal districts apply to the fields of 'forests, hunting, fishing, fauna, preservation of nature, defence of the soil and natural resources, protection of the environment and pollution control' and to liabilities for damages to the environment (Article 24 VI-VIII). Another important provision relevant to natural resources is contained in the Constitution's Chapter on public administration, which provides in Article 43 that the Union may coordinate its actions in the same social and geo-economic complex, to foster development and reduce regional inequalities. To this end, regional incentives include, among others, 'priority in the economic and social use of rivers, reservoirs, or waters that can be dammed in low-income regions subject to periodic droughts.'

Natural resources also play a vital role in the field of national security. The National Defence Council has the authority to 'propose the criteria and conditions for utilisation of areas indispensable to the security of national territory and to opine on their effective use, especially for the frontier strip and those related to preservation and exploitation of natural resources of any kind.' Title VII of the Constitution recognises the principle of environmental protection as one of the principles, which must be observed within the economic order (see Articles 170 VI and 174).

The Constitution has put great emphasis on environmental protection in various contexts, for example, regarding agrarian reform, rural property that is not fulfilling its social function may be subject to expropriation, provided that prior and just

compensation is paid (Article 5 XXIII-XXIV). The social function is met if several requirements are fulfilled simultaneously, one of them being the adequate use of available natural resources and the preservation of the environment (Article 186 II). Per Article 225, everyone has the right to an ecologically balanced environment, which is an asset for common use by the people and essential to the quality of life. Both the government and the ‘community’ are charged with the ‘duty to defend and preserve’ the environment ‘for present and future generations.’ The provision goes on to describe at length what achieving said duty entails, including preserving and restoring essential ecological processes; conducting environmental impact assessments before engaging in activities with the potential to cause significant environmental degradation; promoting environmental education; enforcing the polluter pays principle; to name a few.

Article 225(4) also provides that the natural resources located in the Brazilian Amazon may be utilised by the State, bearing in mind the need to preserve its precious environment. On fundamental rights and guarantees, Article 5 provides that any citizen has the standing to bring a popular action to annul an act injurious to the environment and historic and cultural patrimony.<sup>100</sup> To institute civil investigations and public civil actions to protect the environment lies within the institutional function of the Public Ministry (Article 129 III), which consists of the Public Ministry of the Union and the Public Ministries of the States.<sup>101</sup>

The Brazilian ‘Citizens’ Constitution’ certainly presented a welcomed transition in 1988 to democracy from the previous authoritarian rule.<sup>102</sup> As a credit thereto, Article 5 of the Constitution offers an almost never-ending list of fundamental rights far exceeding those contained in South Africa’s formidable Bill of Rights – although the necessity of iterating so many in a constitutional text is debatable – rights from equality, belief, religious assistance, privacy, home, profession, movement, protest, petitioning, association, physical and moral integrity, consumer protection, succession planning, etc. are dealt with under this provision. The 1988 Constitution was also the first for the country wherein the ‘environment’ was included as a separate concept in and of itself, removed from the previous provisions concerned therewith

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**100** José Drummond and Ana F Barros-Platiau, ‘Brazilian Environmental Laws and Policies, 1934–2002: A Critical Overview’ (2006) 28 *Law and Policy* 83, 94–95; Ricardo Perlingeiro and Luísa S Schmidt, ‘An Overview of Environmental Justice in Brazil’ (2023) 12 *BJALS* 1.

**101** For a full discussion refer to Eduardo S Lersch, ‘Environmental Courts and Tribunals in Brazil and Bolivia: A Comparative Analysis between Institutional Systems of Environmental Protection’ (2023) 58(SP2) *DPCE Online* 575, 580–586.

**102** Arturo Alvarado, ‘A Constituição Brasileira de 1988: uma avaliação comparativa’ (2018) 5 *Revista de Investigações Constitucionais* 137.

solely for the protection of human health.<sup>103</sup> Accordingly, a myriad of environmental laws and policies have been enacted and natural resources do play a significant role in Brazilian Constitutional Law. However, the rights of indigenous peoples to natural resources and territories in Brazil is an ongoing contentious issue.<sup>104</sup>

Notably, the Guarani in Brazil share the concept of *Tekó Porã* (a good way to be in/a good state of life/good living and living well).<sup>105</sup> As an ethical norm and cultural value, *Tekó Porã* is not only linked with religious practices and beliefs but forms the basis for certain behaviours (one's personal attitudes/moral code): to have a good life one must be respectful of not only the other members of the community but of nature (be in harmony with Mother Earth) as a member of that community itself (as a living being).<sup>106</sup> Directly linked therewith is the sense and the practice of reciprocity – requiring a balance between all the living beings on the planet (both human and nature), which must be maintained through sustainable practices.<sup>107</sup> To the Guarani nature cannot be an object of ownership and exchange, because it 'has its own life', and to ensure your (good life), it must be cared for and respected.<sup>108</sup> Similarly, the Apurinã believe that natural objects embed owner spirits (chief/master spirits) from whom permission must be sought to extract natural resources.<sup>109</sup> This must be done

**103** Antonio de Aguiar Patriota, 'An Introduction to Brazilian Environmental Law' (2008/2009) 40 *GW International Law Review* 611.

**104** Refer to Luciene C Risso et al., 'Bolsonaro's Anti-Indigenous and Anti-Environmental Policies in Brazil' (2022) 21 *JLAG* 183; Veronica K Gonçalves and Marcelo E Cafrune, 'A política anti-indígena brasileira: mudanças nos direitos dos povos indígenas durante o governo' (2023) 14 *Revista Direito e Práxis* 1; Extraordinary Appeal (RE) No 1.017.365 [2021]; Sara Villén-Pérez et al., 'Brazilian Amazon Gold: Indigenous Land Rights Under Risk' (2020) 8 *Elementa* 1; Bill PL 191/2020 on the conditions for carrying out research and mining of mineral and hydrocarbon resources and for the use of water resources to generate electricity in indigenous lands; Sara Villén-Pérez et al., 'Mining Threatens Isolated Indigenous Peoples in the Brazilian Amazon' (2022) 72 *GEC* 1.

**105** Antonio AR Ioris, 'Indigeneity and Indigenous Politics: Groundbreaking Resources' (2023) 85 *Revista de Estudios Sociales* 1, 13–14.

**106** Roberto E Zwetsch, 'Intercultural Theology and the Challenge of the Indigenous Peoples in Latin America' (2015) 43(3) *Missionalia* 526, 539–540; Rafaela W Achatz et al., 'Impacts of the Goldmining and Chronic Methylmercury Exposure on the Good-Living and Mental Health of Mundurucu Native Communities in the Amazon Basin' (2021) 18(17) *Int J Environ Res Public Health* 1, 3.

**107** Genna Naccache, 'Genocide and Settler Colonialism' in Jeffrey S. Bachman (ed.), *Cultural Genocide: Law, Politics, and Global Manifestations* (Taylor & Francis 2019) 118, 125–126.

**108** Reinaldo M Fleuri and Lilian J Fleuri, 'Learning from Brazilian Indigenous Peoples: Towards a Decolonial Education' (2017) 47(1) *AJIE* 8, 13.

**109** Pirjo K Virtanen and Laura P Gil, 'Health as Living in Tranquility: Dialogues with the Apurinã and Yaminawa in Indigenous Brazilian Amazonia' in Esa Ruuskanen and Heini Hakosalo (eds.), *In Pursuit of Healthy Environments: Historical Cases on the Environment-Health Nexus* (Routledge 2020) 137, 141–142; Pirjo K Virtanen, 'The Death of the Chief of Peccaries: The Apurinã and the Scarcity of Forest Resources in Brazilian Amazonia' in Victoria Reyes-García and Aili Pyhälä (eds.), *Hunter-gatherers in a Changing World* (Springer 2017) 91; Álvaro Fernández-Llamazares and Pirjo K



to avoid illnesses and obtain sufficient subsistence, which again fosters the idea of reciprocity and protective actions.<sup>110</sup>

Concerning legislative powers, Article 49 XVI (read with Article 176) of the Constitution provides that National Congress has the exclusive power to authorise the exploitation and use of water resources, prospecting, and mining of mineral wealth on indigenous lands. Similarly, Article 231(3) permits the National Congress to authorise the utilisation of water resources and the mining of mineral wealth on land owned by Indians, albeit after ‘hearing from the communities involved’, who are ‘assured of participation in the results of the mining.’

Moreover, where the country once showed commitment to achieving sustainable use of natural resources (e.g., National Review on the SDGs 2017 and it is the first G20 country to track the sustainable development of all its cities),<sup>111</sup> it has since reversed its progress.<sup>112</sup> One notable example is the country’s aggressive development projects in the Brazilian Amazon.<sup>113</sup>

Nevertheless, the judiciary has proven instrumental in ensuring that the government gives effect to their international obligations – in the *Partido Socialista Brasileiro et al. v. Federal Union of Brazil* (on Climate Fund) case,<sup>114</sup> the Supreme Court ruled that the Paris Agreement is a ‘supranational’ human rights treaty, which takes precedence over national laws (para 17).<sup>115</sup> Article 5(3) of the Constitution confirms that treaties and conventions on human rights that are approved in each House of the National Congress, will have the same status as constitutional

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Virtanen, ‘Game Masters and Amazonian Indigenous Views on Sustainability’ (2020) 43 Current Opinion in Environmental Sustainability 21.

110 Pirjo K. Virtanen, ‘Ancestors’ Times and Protection of Amazonian Indigenous Biocultural Heritage’ (2019) 15(4) *AlterNative* 330, 333.

111 IDSC – BR Index of Sustainable Development of Cities, *Brazil* (2022).

112 UN Special Rapporteur on Human Rights and the Environment, *The Right to a Healthy Environment in Brazil: Amicus curiae brief from the UN Special Rapporteur on Human Rights and the Environment* (Amicus Brief filed in the *Fundo Clima Case* ADPF 708) (2021); OECD, *Evaluating Brazil’s Progress in Implementing Environmental Performance Review Recommendations* (2021).

113 *Case of the Isiboro Sécure National Park and Indigenous Territory: Final Judgment* (15 May 2019) (International Rights of Nature Tribunal); *Structural Violation of the Right to a Clean, Healthy and Sustainable Environment perpetrated by the Brazilian Government* (Complaint filed with several UN Special Rapporteurs) (filed 15 November 2022); Celso Silva-Junior et al., ‘Brazilian Amazon Indigenous Territories under Deforestation Pressure’ (2023) 13 *Scientific Reports* 1.

114 [2022] Federal Supreme Court ADPF 708; the Federal Supreme Court is set to rule on two further matters concerning the Amazon (*Partido Socialista Brasileiro v. Federal Union of Brazil* ADPF 760 Federal Supreme Court [2022]; and *Partido Socialista Brasileiro v. Federal Union of Brazil* ADPF 59/DF Federal Supreme Court [2022]).

115 Isabella Kaminski, ‘Brazilian Court World’s First to Recognise Paris Agreement as Human Rights Treaty’ (*Climate Change News*, 2022) <<https://www.climatechangenews.com/2022/07/07/brazilian-court-worlds-first-to-recognise-paris-agreement-as-human-rights-treaty/>> accessed 16 March 2023.

amendments. Yet, with this case a shift was introduced – the constitutional value of the environment is no longer only recognised but the necessity of taking adequate climate action in fulfilment of human rights has been affirmed.<sup>116</sup>

Brazil also has an impressive number of self-standing environmental courts and environmental tribunals.<sup>117</sup> The Court of Environment and Agrarian Issues in the State of Amazonas is particularly known for its innovative remedies ranging from community service, environmental night school, and working for a wildlife organisation.<sup>118</sup>

With President Lula da Silva (2023-) vowing to reverse Jair Bolsonaro's (2019–2022) environmental policies,<sup>119</sup> as a matter of global concern, we can only observe and hope that his return will secure a significant decrease in deforestation in the Amazon (as was the case during his last two terms in the early 2000s).

#### 4.4 Cuba

In 2019, following extensive public engagement, voters overwhelmingly approved the new Constitution of the Republic of Cuba (as amended to 2022), replacing the 1976

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**116** Refer to Angelica Rutherford and Flavianne FB Nóbrega, 'The Paris Agreement as a Human Rights Treaty: The Ruling in *PSB et al. v. Brazil* (on Climate Fund)' (2022) 3 *Jus Corpus* 456; UNDP, *At the Nexus of Human Rights and Climate Change: A Rights-Based Approach to Environmental Impacts and Policy Responses* (2023); Joana Setzer and Délton W de Carvalho, 'Climate Litigation to Protect the Brazilian Amazon: Establishing a Constitutional Right to a Stable Climate' (2021) 30 *RECIEL* 197.

Note, also Colombia's Supreme Court of Justice's decision in *Future Generations v. Ministry of the Environment et al.* (2018) 11001-22-03-000-2018-00319-01, which concerned the deforestation of the Amazon as a threat to future generations through accelerating the climate crisis. It was held that the Colombian Amazon, as the 'lung of the world', is itself a subject of rights, entitled to protection, conservation, maintenance, and restoration.

**117** See UNEP, *Report: Environmental Courts & Tribunals – A Guide for Policy Makers* (2021); Nicholas A Robinson, 'Ensuring Access to Justice Through Environmental Courts' (2012) 29(2) *Pace Env't L Rev* 363; Nicholas S Bryner, 'Brazil's Green Court: Environmental Law in the Superior Tribunal de Justiça (High Court of Brazil)' (2012) 29(2) *Pace Env't L Rev* 470.

**118** *Ibid* UNEP (2016).

**119** Refer to Meghie Rodrigues, 'Will Brazil's President Lula keep his Climate Promises?' (*Nature*, 6 January 2023) <<https://www.nature.com/articles/d41586-023-00011-6>> accessed 24 June 2023; Constance Malleret, 'Record Deforestation in Brazil's Amazon Rainforest shows Challenge facing Lula' (*The Guardian*, 10 March 2023) <<https://www.theguardian.com/world/2023/mar/10/brazil-record-deforestation-amazon-rainforest-lula-bolsonaro>> accessed 24 June 2023; Anonymous, 'Brazil's Lula Lays out Plan to Halt Amazon Deforestation' (*Politico*, 6 June 2023) <<https://www.politico.com/news/2023/06/06/brazils-lula-lays-out-plan-to-halt-amazon-deforestation-00100342>> accessed 24 June 2023; Luke Taylor, 'Amazon Deforestation has begun to slow since Lula took over in Brazil' (*New Scientist*, 20 June 2023) <<https://www.newscientist.com/article/2378958-amazon-deforestation-has-begun-to-slow-since-lula-took-over-in-brazil/>> accessed 24 June 2023.

Constitution (as amended to 2002).<sup>120</sup> While retaining socialism as the ‘irrevocable’ ideology of the revolution (e.g., Articles 1 and 4),<sup>121</sup> the Constitution in Title V Chapter II contains a catalogue of various modern human rights ranging from equality, dignity, freedom of the press, religion, privacy, life, movement, information, freedom of expression, personal property, intellectual property, succession planning, to work and remuneration, rest and leisure, safe work environments, social assistance, adequate housing, a healthy and adequate diet, education, physical education, and the list goes on (e.g., Title V Chapter III family planning).<sup>122</sup> However, although Article 79 provides that everyone has ‘the right to participate in the artistic and cultural life of the nation’, apart from a brief reference in the Preamble, no mention is made to indigenous peoples or their rights to natural resources in the Constitution. This can be ascribed to the island’s colonisation, following which basically no distinct indigenous communities are remaining in Cuba.<sup>123</sup>

Per Article 18, Cuba’s socialist economic system is ‘based on ownership by all people’ and sovereignty lies with ‘the people, from which all the State’s power emanates’ (Article 3). Article 22 describes the forms of property that are recognised as a. socialist property of the entire population for which the State acts as a representative and beneficiary of the people as a property owner; b. cooperative property; c. property of political, social, and mass organisations; d. private ownership; e. mixed property (combination of two or more forms of ownership); f. institutional and associative property; and g. personal property.<sup>124</sup> The State regulates and monitors how all forms of ownership over means of production contribute to economic and social development. Article 23 classifies the following as the ‘socialist property of the people’, which

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120 Larry C Backer and Flora Sapio, ‘Popular Consultation and Referendum in the Making of Contemporary Cuban Socialist Democracy Practice and Constitutional Theory’ (2020) 27(1) University of Miami ICLR 37.

121 Son N Bui, ‘You, the People: Cuba’s International Constitution’ (2020) 52(3) NYU JILP 829; José Chofre-Sirvent, ‘Cuba’s 2019; Constitution and Socialist Constitutionalism: Realities and Challenges’ in Bert Hoffmann (ed.), *Social Policies and Institutional Reform in Post-COVID Cuba* (Verlag Barbara Budrich 2021) 247.

122 However, refer to US State Department, *Country Reports on Human Rights Practices: Cuba* (2022); HRW, ‘World Report: Cuba’ (HRW, 2022) <<https://www.hrw.org/world-report/2022/country-chapters/cuba>> accessed 18 June 2023.

123 Note, that there are ongoing debates regarding whether the historic indigenous people (Ciboney-Taino-Arawak) were truly extirpated, as there are small pockets of Taíno descendant communities living in rural areas in Cuba. Refer to Robert Poole, ‘What Became of the Taíno?’ (*Smithsonian Magazine*, October 2011) <<https://www.smithsonianmag.com/travel/what-became-of-the-taino-73824867/>> accessed 19 June 2023; Christopher Baker, ‘Cuba’s Taíno People: A Flourishing Culture, Believed Extinct’ (*BBC*, 6 February 2019) <<https://www.bbc.com/travel/article/20190205-cubas-tano-people-a-flourishing-culture-believed-extinct>> accessed 19 June 2023.

124 See Renee Monzon, ‘Introducing Private-Property Rights to Cuba: How Cuba’s New Constitution Paves the Way for Economic Growth’ (2020) 52(1) Case Western Reserve JIL 629.

are ‘unalienable, imprescriptible, and unseizable’: the lands that do not belong to individuals or their cooperatives; the subterranean areas; mineral deposits (including the mines); the forests; waters; beaches; and the natural resources both living and non-living within the exclusive economic zone of the Republic. Article 24 further extends the list to include other goods, such as general interest infrastructure, key industries, and economic and social facilities, as well as other goods that are strategic for the country’s economic and social development. These ‘socialist properties’ may be seized and transferred in exceptional cases with prior approval of the Council of Ministers if it is ‘for the country’s economic and social development and does not affect the political, economic, and social foundations of the State.’

The economy and related activities are regulated and monitored by the State, ‘according to the interests of the society’ (Article 19), which requires strategic development and ‘planning for relevant balances between resources and needs.’ Article 13(e) sets out that one of the State’s ‘essential objectives’ includes the promotion of sustainable development, which ‘secures individual and collective prosperity.’ Accordingly, the State may exercise its sovereignty and jurisdiction over the following (Article 11): a. the entire national territory (including the Island of Cuba, the Isla de la Juventud, other adjacent islands and cays, the interior waters, the established extended maritime territories, the aerospace that extends over these territories, and the radio spectrum); b. the environment and the natural resources of the country; c. the natural resources, both living and non-living, of the waters, the seabed, the waters above it, and the subsoil of the sea within the Republic’s exclusive economic zones; and d. the continental shelf.

Amid a dire economic crisis,<sup>125</sup> Article 28 of the Constitution has opened a window for foreign investment by stipulating that it is ‘an important element for the economic development of the country, which is based upon the protection and the rational use of the natural and human resources as well as respect for national sovereignty and independence.’

Regarding environmental rights, Article 75 provides every person with the ‘right to enjoy a natural environment that is healthy and stable’, and Article 76 provides ‘the right to water.’ The State is obliged to protect the environment and Cuba’s natural resources, bearing in mind the principle of sustainable development ‘to ensure the security of current and future generations.’ Not only the State, however, as Article 90(j) makes it the duty of all Cubans to ‘protect the natural resources, flora,

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125 HRW, ‘World Report: Cuba’ (HRW, 2023) <<https://www.hrw.org/world-report/2023/country-chapters/cuba>> accessed 18 June 2023; Will Freeman, ‘Why the Situation in Cuba is Deteriorating’ (Council on Foreign Relations, 25 April 2023) <<https://www.cfr.org/in-brief/why-situation-cuba-deteriorating>> accessed 18 June 2023.

and fauna, and to safeguard the preservation of a clean environment.<sup>126</sup> On a local level, the Municipal Assembly of People's Power (Title VIII Chapter II) is also mandated to oversee the protection of the environment (Article 191(i)).

Should these rights be infringed upon, access to judicial bodies or alternate dispute resolution institutions is guaranteed to everyone 'to obtain effective protection of their rights and legitimate interests' (Articles 92–94).<sup>127</sup> Akin to South Africa's Constitution, Article 99 of the Cuban Constitution provides for just administrative action. However, given that the Communist Party of Cuba 'is the superior driving force of the society and the State' (Article 5), there is no institutionalised system of checks and balances in a liberal, multiparty democratic sense – courts cannot interpret nor declare laws or rules unconstitutional (only the National Assembly of People's Power can).<sup>128</sup> Thus, there is uncertainty as to whether the judiciary can review the legality of government actions affecting the environment.<sup>129</sup> Consequently, courts are restricted to merely applying the law as in a traditional, civil law system, and parties can only access courts if there is a violation of a legislative regulation dealing with environmental harm.<sup>130</sup>

Therefore, the constitutional regulation of natural resources is rather limited in Cuba (especially compared to Bolivia and Brazil). Instead, similar to South Africa, governance thereover is found in key legislative texts and State policies.<sup>131</sup>

Regarding international agreements and treaties, Article 8 provides that once ratified, they 'form part of national legislative regulations', but the Constitution takes precedence (constitutional supremacy – Article 7).<sup>132</sup> Article 16(f) affirms that Cuba's international relations are focused on the promotion, protection, and conservation of the environment and climate change action through the 'recognition of common,

**126** See Dagniselys T Cordero, 'Instruments of Environmental Governance: A Guarantee of Sustainability in Cuba' (2017) 29(1) FJIL 35.

**127** For a discussion on the judiciary, refer to Karen Bell, 'Environmental Justice in Cuba' (2011) 31(2) *Critical Social Policy* 241; Batuhan Ç Aygar and Sayed AAM Chowdhury, 'Republic of Cuba' in Murat Önder et al. (eds.), *The Palgrave Handbook of Comparative Public Administration: Concepts and Cases* (Palgrave Macmillan 2022) 281.

**128** See Jorge Farinacci-Fernós, 'Constitutional Courts as Majoritarian Instruments' (2020) 14(4) *ICL Journal* 379.

**129** There is also a general lack of knowledge among Cubans of their rights and environmental legislation, thus, there is no relevant case law to discuss. Refer to Karen Bell, *Achieving Environmental Justice: A Cross-National Analysis* (Policy Press 2014) 195–196.

**130** Refer to Cordero (n 126) 44–45.

**131** Such as Ley de Minas [Mining Law] 76/1994; Law 81/1997 on the Environment; and the new environmental law statute: Law on the System of Natural Resources and the Environment/La Ley del Sistema de los Recursos Naturales y el Medio Ambiente (2022).

**132** Refer to Carmen A Guardiola, 'The Reception of International Treaties in Cuba in the Light of the 2019 Constitution' in Hoffmann (n 121) 263.

yet differential, responsibilities; the establishment of a more just and equitable international economic order as well as the eradication of irrational patterns of production and consumption.<sup>133</sup> While policies regarding environmental preservation and rational use of natural resources are not new to Cuba,<sup>134</sup> the government's State Plan to Confront Climate Change, i.e., *Tarea Vida* ('Life Task'), which launched in 2017 and is implemented and controlled by the Ministry of Science, Technology, and Environment, presents a more progressive environmental agenda.<sup>135</sup> Cuba, known as the 'ecological crown jewel of the Caribbean', is blessed with spectacular coral reefs, massive mangrove wetlands, tropical wet forests, coastal mountains, caves, rich biodiversity, and an abundance of natural resources.<sup>136</sup> However, climate change disproportionately affects the island through extreme weather events.<sup>137</sup> Accordingly, the State Plan, supported on a multidisciplinary scientific basis, sets out five strategic actions and 11 tasks aimed at adapting to and mitigating the effects of climate change on vulnerable areas in the region, which are to be achieved within short (the year 2020), medium (2030), long (2050), and very long (2100) terms.<sup>138</sup> The State Plan also emphasises the importance of community involvement in resilience efforts (Task 9). However, as the implementation of *Tarea Vida* is underway, akin to South Africa, Cuba continues to face an energy crisis with hours-long blackouts being an everyday occurrence, which results in prolonged fossil fuel dependency and the additional mooring of floating power plants.<sup>139</sup>

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**133** Refer to Navraj S Ghaleigh et al., 'The Complexities of Comparative Climate Constitutionalism' (2022) 34 JEL 517.

**134** Refer to Juan J Cabello et al., 'An Approach to Sustainable Development: The Case of Cuba' (2012) 14 EDS 573; Daimar C González, 'Environmental Legislation and Institutional Framework in Cuba' (2017) 29(1) FJIL 47.

**135** Refer to Helen Yaffe, 'People First: Cuba's Plan to Confront Climate Change' (RCG, 15 June 2023) <<https://www.revolutionarycommunist.org/americas/cuba/6798-people-first-cuba-s-plan>> accessed 19 June 2023.

**136** José A Suárez et al., 'Energy, Environment and Development in Cuba' (2012) 16 Renewable and Sustainable Energy Reviews 2724; Daniel Whittle and Orlando R Santos, 'Protecting Cuba's Environment: Efforts to Design and Implement Effective Environmental Laws and Policies in Cuba' (2006) 37 U Pitt Press 73.

**137** Care, 'Cuba' (Care, 2023) <<https://careclimatechange.org/where-we-work/cuba/>> accessed 19 June 2023.

**138** Available (in Spanish) at: [https://www.climate-laws.org/documents/confronting-climate-change-in-the-republic-of-cuba-a-task-for-life\\_2348](https://www.climate-laws.org/documents/confronting-climate-change-in-the-republic-of-cuba-a-task-for-life_2348); UNDP, *Cuba: Tarea Vida* (2019); Helen Yaffe, 'Cuba's Tarea Vida: Sustainable Development and Combating Climate Change' in Anna Clayfield et al. (eds.), *Disaster Preparedness and Climate Change in Cuba: Management and Adaptation* (Lexington Books 2021) 127.

**139** Ernesto M Sardiñas, 'Cuban Energy Law and Green Energy Transition' (Graz Law Working Paper Series No 04–2023) 1; Lyse Comins, 'Floating Ships Generate a Quarter of Cuba's Electricity' (*Freight News*, 28 February 2023) <<https://www.freightnews.co.za/article/floating-ships-generate-quarter>>

## 4.5 Bolivia

The road to the Constitution of the Pluri-national State of Bolivia 2009, was not an easy one, wrought with violent political and social tensions, which caused unrest in the country from 2003 to 2009, with demands for the reconstruction of the State and the reformation of the country's laws and politics.<sup>140</sup> Remarkably, amid all the tumultuous upheaval, on 25 January 2009, after being drafted by a Constitutional Assembly, the Constitution was approved by the National Congress, and following a free and fair public voting process entered into force. Given the prior turmoil, the comprehensiveness of Bolivia's Constitution is to be commended. It has received much praise for its provisions relating to the environment and recognition of indigenous people's rights – features seldom lacking compared to more developed counterparts. Respect for the environment and acknowledgement of indigenous people's rights were advocated for by the country's first elected indigenous president, Evo Morales (2006–2019).

Accordingly, bearing in mind the importance of recognising indigenous peoples' beliefs and cultures,<sup>141</sup> the Preamble of Bolivia's Constitution contains the indigenous philosophy of *Buen Vivir* (Ecuador) or *Vivir Bien* (Bolivia) – the 'good life', stating that the search therefor 'predominates' the essence of living in Bolivia.<sup>142</sup> Similar to *Ubuntu* and *Tekó Porã*, the concept of '*Vivir Bien*' is untranslatable, but can be understood as a condition of living in social solidarity and harmony with nature (post-development).<sup>143</sup> Therefore, Article 8(I) provides that the State 'adopts and promotes' the principles of living harmoniously (*Nandereko* –

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cubas-electricity> accessed 24 June 2023; Jorge Piñon and Ricardo Torres, 'The National Electric Grid and the Future of the Cuban Economy' (*Colombia Law School*, 17 May 2023) <<https://horizontecubano.law.columbia.edu/news/national-electric-grid-and-future-cuban-economy>> accessed 24 June 2023; Donald V. Kingsbury, 'Combined and Uneven Energy Transitions: Reactive Decarbonization in Cuba and Venezuela' (2020) 27(1) JPE 558.

140 Paola V. Calzadilla and Louis J Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7 TEL 397.

141 See also the Constitution of the Republic of Ecuador 2008 (as amended to 2021), of which the Preamble acknowledges humanity's interconnectedness with nature and envisions the 'good way of living' for all Ecuadorians (also iterated in Article 74).

142 Cletus G Barié, 'Nuevas narrativas constitucionales en Bolivia y Ecuador: el buen vivir y los derechos de la naturaleza' (2014) 59 *Latinoamérica* 9; Karen GA Bedriñana et al., "'Living Well" in the Constitution of Bolivia and the American Declaration on the Rights of Indigenous Peoples: Reflections on Well-Being and the Right to Development' (2020) 17 *IJERPH* 2870.

143 Kepa Artaraz and Melania Calestani, 'Suma qamaña in Bolivia: Indigenous Understandings of Well-being and their Contribution to a Post-Neoliberal Paradigm' (2014) 42(5) *LAP* 1; Pablo Andrade, 'The Government of Nature: Post-Neoliberal Environmental Governance in Bolivia and Ecuador' in Fábio de Castro et al. (eds.), *Environmental Governance in Latin America* (Palgrave Macmillan 2016)

with nature or the *Pachamama/Madre Tierra*, living well (*Suma Qamaña*), and living the good life (*Teko Kavi*). Articles 9(6), 346, and 354 (read together), accordingly, compel the State to conserve the country's 'natural assets', ensure their sustainable use 'for the welfare of present and future generations', and 'develop and promote research related to the management, conservation and use of natural resources.'<sup>144</sup> Again, tied to indigenous philosophy, Articles 108(15)–(16) and 342–343 make it the duty of all Bolivians (along with the State) to protect and defend the nation's natural resources to 'contribute to their sustainable use to preserve the rights of future generations', 'protect and defend an environment suitable for the development of living beings', and to participate in environmental management and decision making. The environmental principles governing the Constitution include participation, quality maintenance of the environment, taking responsibility and imposing liability for environmental harm caused, the promotion, and mitigation of harmful effects on the environment, and remedying any harm caused to the environment resulting from activities, which were conducted that adversely affected the environment (Article 345). Apart from the right of everyone 'to a healthy, protected, and balanced environment' (Article 33), the Constitution also guarantees all citizens the right to water (Articles 16(I) and 373(I)). To give effect thereto, the privatisation of water is prohibited (Articles 20(III) and 373(II)). Article 34 of the Constitution provides that any person may, in their own right or on behalf of a collective, take legal action in defence of environmental rights, without prejudice to the obligation of public institutions to act on their own in the face of attacks on the environment.' In accordance therewith, Article 135 introduces the 'popular action' remedy, which can be instituted 'against any act or omission by the authorities or individuals or collectives that violates or threatens to violate rights and collective interests related to', among others, the environment. The judiciary has confirmed that this remedy can be filed by any individual(s) or group(s) without having to exhaust other judicial remedies or administrative processes first (Article 136).<sup>145</sup> Note, that the Constitution also introduces the Agro-environmental Tribunal (*Tribunal Agroambiental*) in Articles 158(I)(5) and

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113; Henry Veltmeyer et al. (eds.), *Buen Vivir and the Challenges to Capitalism in Latin America* (Routledge 2023).

144 Bolivia does also have two statutes, which extensively sets out nature's rights and sustainable development framework – the Law of the Rights of Mother Earth No 71/2010 and the Framework Law of Mother Earth and Integral Development for Living Well No 300/2012. See Caroline C de Colombières, 'Towards the Recognition and Implementation of Rights of Nature in the European Union? Lessons Learnt from the Legislative Experiences of Ecuador, Bolivia and New-Zealand' (Thesis at the University of Eastern Finland 2020).

145 *Paniagua et al. v. Gobernador del Dpto de Santa Cruz et al.* Plurinational Constitutional Court Judgment No 1082/2013-L (2013).



179(I), with Articles 186–189 setting out its attributes and jurisdiction. This tribunal is ‘the highest court specialised in agro-environmental jurisdiction’ in Bolivia and is ‘governed specifically by the principles of social benefit, comprehensiveness, immediacy, sustainability, and being inter-cultural.’<sup>146</sup>

Pt IV Title II of the Constitution distinguishes between the nation’s renewable (forestry, water, animals, biodiversity, and, specifically, coca) and non-renewable resources (e.g., minerals ‘in all of their states’ and hydrocarbons). All of Bolivia’s natural resources are regarded as being of a ‘strategic character and public importance for the development of the country’ (Article 348(II)). The Constitution further underscores in several provisions that ownership and sovereignty of the country’s natural resources lie with the people ‘without limitation.’ (Articles 7, 309(1), and 349(1)). To that end, individual and collective property rights in the land ‘shall be respected and guaranteed’, and the State ‘shall recognise, respect and grant individual and collective ownership rights’ for the ‘use and enjoyment of natural resources’ (Articles 349(II) and 311(II)(2)). Yet, the central level of the State does have ‘exclusive authority’ over strategic natural resources, which include ‘minerals, the electromagnetic spectrum, genetic and biogenetic resources, and water sources’ (Article 298(II)(4)). The Constitution also authorises the State to manage, control, and take responsibility for the country’s mining industry (Article 369) and the exploration and exploitation of the country’s natural resources (Article 351). Per Articles 313(5), 316(3), (6), 319(I), and 370(II), the country’s mining industry must contribute to socio-economic development. Thus, Articles 355(I) and 356 provide, respectively, that the ‘industrialisation and sale of natural resources shall be a priority of the State, and that any activities concerning the ‘exploration, exploitation refining, industrialisation, transport and sale of non-renewable natural resources’ shall be regarded as being ‘of State necessity and public utility.’ Mining activities are regulated by the Mining and Metallurgy Law 535/2014.

According to the Constitution, the State is the competent body to ‘grant mining rights in the entire chain of production’ (Article 370(I)). Article 357 stipulates that neither foreign persons nor enterprises nor private Bolivian persons may register the property title to natural resources in stock markets or ‘use them as means for financial operations that grant title to or use them as security.’ Only the State has the ‘exclusive authority’ to annotate and register such reserves. Moreover, any rights conferred on the ‘use and exploitation of natural resources’ are subject to ‘periodic review for compliance with the technical, economic and environmental regulations’, and should there be any non-compliance resulting in a violation of the Constitution and the law, such rights conferred will be reversed and declared null and void (Article 358).

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146 See Lersch (n 101) 586-590.

Turning to hydrocarbons, Article 298(I)(18) provides that they form part of the ‘prerogative authority’ of the central level of the State, and in all its forms are ‘the inalienable and unlimited property of the Bolivian people’ (Article 359(I)), but the State, in its representative capacity, is the owner of the entire hydrocarbon production of the country and is the only one authorised to sell them. To that end, the State must promote the ‘comprehensive, sustainable and equitable development’ of Bolivia’s hydrocarbon resources through policy directives (Article 360).

Articles 306(V) and 307 of the Constitution provide that the State ‘places the highest value on human beings and assures development through the equitable redistribution of economic surplus in the social policies.’ Great prominence is placed on economic development through extractive projects of Bolivia’s non-renewable natural resources – a source of friction with indigenous Bolivians. Given that, Articles 386–389 permit the exploitation of natural forests and woodlands by the State, if such activities contribute to the strategic ‘development of the Bolivian people’, and restore and rehabilitate affected environments, ensuring that such activities are carried out sustainably. Article 385 stipulates that protected areas ‘constitute a common good’ and perform vital environmental functions but does not ban extractive and exploration activities in these sensitive areas. The Constitution classifies Bolivia’s Amazonia as a highly environmentally sensitive biodiversity ecoregion, which is a ‘strategic area of special protection for the comprehensive development of the country’ (Article 390(I)) but requires the State to ‘prioritise’ its ‘sustainable, integral development’ and encourage financial endeavours in this strategic area (Article 391). The State passed Supreme Decree 2366/2015, which permits hydrocarbon exploration activities in protected areas and national parks (Article 2),<sup>147</sup> with Supreme Decree 2549/2015, extending such activities to certain parts of the Brazilian Amazonia.<sup>148</sup>

Articles 2–3 of the Constitution formally recognise the existence and rights of the country’s indigenous peoples and Article 30(II)(10) further grants them the right to ‘live in a healthy environment, with appropriate management and exploitation of the ecosystems.’ Additionally, they have the right to prior consultation from the State regarding ‘the exploitation of non-renewable natural resources in the territory they inhabit’, and to reap a share of the benefits obtained from the ‘exploitation of natural resources in their territory’ (Articles 30(II)(15–16) and 352–353). Article 13(IV) of the Constitution further asserts that international

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<sup>147</sup> Alexandra Tomaselli and Rainer Hofmann, *The Indigenous Territory and Natural Park TIPNIS in Bolivia* (case study prepared for the ILA Committee on the Implementation of the Rights of Indigenous Peoples 2019) 14.

<sup>148</sup> Calzadilla and Kotzé (n 140) 420.

treaties and conventions ratified by the Pluri-National Legislative Assembly, which recognise human rights, ‘prevail over internal law.’<sup>149</sup> Moreover, Article 13(II-III) rather uniquely declares that the Constitution does not ‘deny’ nor take precedence over other rights, which are not expressly ‘enumerated’, nor is there a ‘hierarchy or superiority of rights. Yet, per Article 30(II)(17) of the Constitution, the exclusive use and exploitation of natural resources in indigenous territories are subject ‘to the legitimate rights acquired by third parties.’ As several scholars have observed, the prior-consultation requirement is seldom meaningfully complied with.<sup>150</sup> This is evidenced by the promulgation of Law 969/2017, on Protection, Integral and Sustainable Development of the Isiboro Secure National Park and Indigenous Territory, following a contested consultation process, which allows for construction projects in this indigenous protected area.<sup>151</sup> Thereby, Bolivia follows a neo-socialist approach to the ownership and exploitation of national resources, tempered by a dose of pragmatism stemming from their economic standing (Bolivia is one of the poorest countries in Latin America).<sup>152</sup>

Despite the above, in 2022, the Vice President of Bolivia, David Choquehuanca Céspedes, presented *Geopolítica del Vivir Bien* (‘The Geopolitics of Living Well’).<sup>153</sup> The book focuses on expanding *Vivir Bien* by promoting a profound transformation towards a new world order, rejecting Western thinking, placing Mother Earth at the centre and seeking to protect humanity from capitalism, ‘imminent catastrophe’, and advocating the existence of plurinational, decolonised, and intercultural States. The theory seeks the well-being of people, the care and protection of the environment, and the fight for human rights, equality and social justice by focusing on ancestral

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**149** Bolivia has ratified the ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383.

**150** Kyla Staley, ‘The Extraction Industry in Latin America and the Protection of Indigenous Land and Natural Resource Rights: From Consultation Toward Free, Prior, and Informed Consent’ (2022) 73 *HLJ* 1145; Almut Schilling-Vacaflor and Jessika Eichler, ‘The Shady Side of Consultation and Compensation: “Divide-and-Rule” Tactics in Bolivia’s Extraction Sector’ (2017) 48 *Development and Change* 1245.

**151** Refer to Gillian Diebold, ‘Evaluating Evo Morales: The Conflicts and Convergences of Populism, Resource Nationalism, and Ethno-Environmentalism in Bolivia’ (Thesis at the University of Pennsylvania 2021).

**152** Rickard Lalander, ‘Rights of Nature and the Indigenous Peoples in Bolivia and Ecuador: A Straitjacket for Progressive Development Politics?’ (2014) 3 *Iberoamerican Journal of Development Studies* 148, 150; Jessica Hope, ‘The Anti-politics of Sustainable Development: Environmental Critique from Assemblage Thinking in Bolivia’ (2021) 46 *TIBG* 208; Jessica Hope, ‘Globalising Sustainable Development: Decolonial Disruptions and Environmental Justice in Bolivia’ (2022) 54 *Area* 176.

**153** Available (in Spanish) at: <[https://www.vicepresidencia.gob.bo/IMG/pdf/geopolitica\\_del\\_vivir\\_bien\\_dch-2.pdf](https://www.vicepresidencia.gob.bo/IMG/pdf/geopolitica_del_vivir_bien_dch-2.pdf)>.

knowledge (specifically of the Abya Yala).<sup>154</sup> Whether the ideologies espoused in the book have any effect on the government's natural resource exploration and exploitation agenda, remains to be seen, especially considering President Luis Arce's aspirations for a lithium-powered economy.<sup>155</sup>

## 4.6 India

The supreme law of the Republic of India (Article 13), namely the Constitution of 1950 replaced the Indian Independence Act of 1947 and has since then been subject to 105 amendments, the latest being the Constitution (One Hundredth and Fifth Amendment) Act of 2022, making it the longest constitution in the world. Great care was taken by the Constituent Assembly (comprised of 299 members) to draft the Constitution, as several rounds of thorough discussion took place over three years with over 2000 amendments made.<sup>156</sup>

In contrast to the South African Constitution, India's Constitution contains an explicit provision regarding the ownership of natural resources in Article 297:

(1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for ... the Union (2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for ... the Union.

However, Article 39(b) of the Constitution provides that State policy should be directed towards securing 'that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.' Whether, and if so, under which conditions the government has the right to alienate, transfer, and distribute natural resources other 'than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution', has been subject to a judgment – *Centre for Public Interest Litigation et al. v. Union of India et al.*<sup>157</sup> The Supreme Court of India elaborated on the definition of the term natural resources and states that they are:

<sup>154</sup> Lic RS Díaz, 'Presentación del libro: "La Geopolítica del Vivir Bien" del Vicepresidente de Bolivia David Choquehuanca' (2023) 5(2) Revista Política Internacional 200.

<sup>155</sup> Refer to Julian Danneffjord, 'Extraction for the Green Transition' (Thesis at Lund University 2021).

<sup>156</sup> Holden Furber, 'Constitution-Making in India' (1949) 18(8) IPR 86; Vijayashri Sripati, 'Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950–2000)' (1998) 14(2) AUILR 413.

<sup>157</sup> [2010] Writ (C) No 423/2010 (SC).

generally understood as elements having intrinsic utility to mankind. They may be renewable or non-renewable. They are thought of as the individual elements of the natural environment that provide economic and social services to human society and are considered valuable in their relatively unmodified, natural form. A natural resource's value rests on the amount of material available and the demand for it. The latter is determined by its usefulness to production [para 63].

The Court further noted that no comprehensive legislation has been enacted that governs the use of natural resources. Nevertheless, referring to an earlier judgment, concludes that the State 'is the legal owner of the natural resources as a trustee of the people' and must distribute them equally for the 'larger public good'.<sup>158</sup>

In terms of environmental conservation, which also protects natural resources, Article 48A of the Constitution stipulates that the State 'shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.' Additionally, Article 51A(g) imposes a fundamental duty on every citizen 'to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.' This can be linked to religious beliefs in India, many follow Hinduism, which makes it part of one's *Dharma* (duty/aim of life) to respect nature as the *Bhumi Devi* (Earth Goddess).<sup>159</sup>

Several other provisions incorporate the conservation and sustainable use of natural resources into planning law.<sup>160</sup> Article 243ZD(3), for example, provides that the District Planning Committee, when preparing draft development plans, must have regard for matters 'including spatial planning, sharing of water and other physical and natural resources, the integrated development of infrastructure and environmental conservation.' A similar provision is laid down in Article 243ZE for draft development plans by the Metropolitan Planning Committee. As per Article 243W(a) of the Constitution, municipalities are endowed with certain powers, authorities, and responsibilities by the legislature of a State. This includes, *inter alia*, the performance of functions and the implementation of schemes concerning the matters listed in Schedule 12 to the Constitution, of which a relevant clause for the

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<sup>158</sup> *Reliance Natural Resources Limited v. Reliance Industries Limited* [2010] 7 SCC 1 para 72.

<sup>159</sup> Refer to Kelly D Alley, 'River Goddesses, Personhood and Rights of Nature: Implications for Spiritual Ecology' (2019) 10 Religions 1; Alison A Ormsby and Shonil A Bhagwat, 'Sacred Forests of India: a Strong Tradition of Community-based Natural Resource Management' (2010) 37(3) EC 320; Erin L O'Donnell, 'At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India' (2018) 30 JEL 135; Catrien Notermans et al., 'The Changing Landscape of Sacred Groves in Kerala (India): A Critical View on the Role of Religion in Nature Conservation' (2016) 7(4) Religions 38.

<sup>160</sup> Refer to Ministry of Environment, Forest, and Climate Change Government of India, *Draft National Resource Efficiency Policy* (2019); The Energy and Resources Institute, *Resource Efficiency Reference Report* (2019).

conservation of natural resources is number eight, listing urban forestry, protection of the environment, and promotion of ecological aspects. An analogous provision endows the committees with the powers and authority necessary to enable them to carry out the responsibilities conferred upon them, including urban forestry, protection of the environment and promotion of ecological aspects (Article 243W(b), read together with Schedule 12 to the Constitution).

The judiciary plays a key role in shaping environmental laws and policies, and, thus, in the management of natural resources.<sup>161</sup> This is particularly true since the instrument of Public Interest Litigation, as provided in Article 32 of the Constitution, has the potential to contribute toward more efficient environmental protection and management of natural resources. The underlying reason for this is that in many legal systems, environmental litigation faces the challenge that access to the courts may be limited because of conservative standing rules that require the plaintiff to establish that they have a personal interest in the action at hand. This may hinder environmental organisations from bringing cases before the courts in the interest of protecting the environment and natural resources. Instead, India's judiciary has taken 'a more activist approach towards redressal of issues placed before it.'<sup>162</sup> Notably, the Court in *Intellectuals Forum, Tirupathi v. State of AP et al.* confirmed that 'all human beings have a ... duty of ensuring that resources are conserved and preserved' for present and future generations.<sup>163</sup> Moreover, several cases illustrate the judiciary's willingness to accept and recognise nature and natural elements as legal subjects and rights holders.<sup>164</sup>

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**161** Ritu Verma, *Management of Natural Resources and Laws in India* (Laxmi Book Publication 2016) 10.

**162** See Sourya Bandyopadhyay, "A Noble Tree that Bore Bitter Fruits?": The Supreme Court of India, Judicial Activism and Judicialization of Politics' (2020) 11(1) IJLJ 120.

However, climate change litigation in India is still in the nascent phases, see Eeshan Chaturvedi, 'Climate Change Litigation: Indian Perspective' (2021) 22 GLJ 1459, 1461; Lavanya Rajamani, 'Rights Based Climate Litigation in the Indian Courts: Potential, Prospects & Potential Problems' (Centre for Policy Research, Climate Initiative, Working Paper 2013). Also, refer to *Ridhima Pandey v. Union of India* Application before the National Green Tribunal at Principal Bench, New Delhi No 187/2017, which was brought by a nine-year-old (on behalf of all children and unborn generations) relying on the principles of intergenerational equity and the public trust doctrine to contend that India had failed to enact effective measures to combat climate change and failed to implement environmental laws. The case was dismissed because there was 'no reason to presume that the Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances.' Pau de Vilchez and Annalisa Savaresi, 'The Right to a Healthy Environment and Climate Litigation: A Game Changer?' (2021) 32(1) YIEL 3. **163** [2006] 3 SCC 549.

**164** For example, in *A Periyakaruppan v Principal Secretary to Government* (Writ Petition (Mandamus) Case No 18636 of 2013) and connected petitions (Writ Petition (Mandamus) Case No 3070 of 2020 & Writ Miscellaneous Petition (Mandamus) No 2614 of 2020), the High Court declared Mother

Also, while a right to a healthy environment has not been expressly articulated, the judiciary has read an environmental right into Article 21 of the Constitution, which provides that no person may 'be deprived of his life or personal liberty except according to procedure established by law.'<sup>165</sup> Thus, dissimilar to the dearth of justiciability provisions in Chad's 2018 (repealed) Constitution, the Indian Constitution places great emphasis on equal opportunity and access to justice, as evidenced by Article 39A, which requires the State to ensure that justice is not denied to any citizen by providing free legal aid to those in need, and legislation may be written and court proceedings held in any language most used in a particular region (Articles 345, 347–348, and 350). Furthermore, the National Green Tribunal Act 19/2010 was promulgated for the 'effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources' (Preamble). Chapter III of the Act sets out the jurisdiction, powers, and proceedings of the Tribunal, which has both original and appellate jurisdiction over all civil cases where the substantial legal question relates to the environment.<sup>166</sup>

Article 51(c) of the Indian Constitution stipulates that the State 'shall endeavour to foster respect for international law and treaty obligations.' Article 253 confirms that such obligations become law in India once ratified by an act of Parliament.<sup>167</sup> The Preamble of the Indian Constitution also proudly proclaims that 'We the people of India', having established a democratic Republic, 'secure to all its citizens' justice, liberty, equality, and fraternity. However, despite also having voted in favour of the UN Declaration on the Rights of Indigenous Peoples (on the condition that

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Earth as a legal person 'with all corresponding rights, duties and liabilities of a living person' to preserve and conserve it and promote its 'health and wellbeing' [para 23].

**165** For example, in *T Damodhar Rao et al. v. The Special Officer, Municipal Corporation of Hyderabad et al.* AIR 1987 Andhra Pradesh 171, the High Court held that Article 21 mandates the 'protection and preservation of nature's gifts' (i.e., natural resources) [para 24]; in *Vellore Citizens Welfare Forum v. Union of India et al.* (1996) 5 SCC 647, the Supreme Court confirmed 'the constitutional mandate to protect and improve the environment', which includes 'a person's right to fresh air, clean water and pollution free environment'; Lovleen Bhullar, 'Environmental Constitutionalism and Duties of Individuals in India' (2022) 34 JEL 399; Jayanta Boruah, 'Environmental Rights as Fundamental Rights in India: A Journey of the Supreme Court Towards a New Destination' (2021) SSRN 1.

**166** Refer to Gitanjali N Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge 2017); Ravikiran Shukre, 'Establishment of Green Tribunal in India: Ideology and Nexus with the Constitution of India' (2022) 28 *Supremo Amicus* 403; Usha Tandon, 'Green Justice and the Application of Polluter- Pays Principle: A Study of India's National Green Tribunal' (2020) 13(1) *Tandon* 35.

**167** Note, however, that although India follows a dualist approach to international law, the judiciary does tend to digress toward monism in matters concerning customary international law. Ninth Report of the Committee on External Affairs (2020–2021) on the subject 'India and International Law including Extradition Treaties with Foreign Countries, Asylum Issues, International Cyber-Security and Issues of Financial Crimes.'

after independence all Indians are indigenous) and having signed the International Labour Organisation (ILO) Indigenous and Tribal Peoples Convention, until its Constitution provides otherwise, no official recognition is afforded to the countries' indigenous peoples. Instead, listed groups are referred to as 'Scheduled Tribes' (Article 342), who are given certain rights set out in the Constitution (Fifth Schedule for central India and the Sixth Schedule).<sup>168</sup>

## 4.7 Iran

Similar to Chad (Transition Charter), Australia (no Bill of Rights), and Bolivia (emphasis on indigenous philosophies), Iran was selected given its distinctive Constitution – a theocratic one (*Velayat-e faqih*/Guardianship of the Islamic Jurist), which establishes an unapologetic authoritarian government.<sup>169</sup> Following the Iranian Revolution (*Persian Enqelāb-e Eslāmī*) in 1978–1979, which culminated in the overthrowing of the monarchy (Pahlavi dynasty – Shah Mohammad Reza Pahlavi) and the establishment of an Islamic Republic (governed by the first supreme leader, Ayatollah Ruhollah Khomeini), the Constitution of the Islamic Republic of Iran 1979 (as amended to 1989) emerged.<sup>170</sup> Despite ongoing protests, sparking revolution rumours and questions of the legitimacy of the government,<sup>171</sup> the current Constitution remains in force.

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**168** UNHCR, *Universal Periodic Review: Observations on the State of Indigenous Human Rights in India* (2016) 27th Session, Third Cycle (Cultural Survival).

**169** Larry C Backer, 'Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering' (2006) 16(1) *IJGLS* 85; Wilfried Buchta, *Who Rules Iran? The Structure of Power in the Islamic Republic* (The Washington Institute for Near East Policy and the Konrad Adenauer Stiftung 2000); Neil Shevlin, 'Velayat-E Faqih in the Constitution of Iran: The Implementation of Theocracy' (1998–1999) 1 *U Pa J Const L* 358; Houchang Chehabi, 'Religion and Politics in Iran: How Theocratic Is the Islamic Republic?' (1991) 120(3) *Religion and Politics* 69.

**170** For a discussion on the circumstances surrounding the drafting of the Constitution, refer to Siavush Randjbar-Daemi, 'Building the Islamic State: The Draft Constitution of 1979 Reconsidered' (2013) 46(4) *Iranian Studies* 641; Ahmad Ashraf and Ali Banuazizi, 'Iran's Tortuous Path Toward "Islamic Liberalism"' (2001) 15(2) *IJPCS* 237; Herman Pelani and Hasaruddin Hasaruddin, 'The Political History of Iran: From Monarchy to Islamic Republic' (2023) 6(1) *JRM* 702.

**171** Sanam Vakil, 'Iran's Crisis of Legitimacy' (*Foreign Affairs*, 28 September 2022) <<https://www.foreignaffairs.com/middle-east/iran-crisis-legitimacy-mass-protests-ailing-leader>> accessed 10 June 2023; Asef Bayat, 'Is Iran on the Verge of Another Revolution?' (*Journal of Democracy*, March 2023) <<https://www.journalofdemocracy.org/is-iran-on-the-verge-of-another-revolution/>> accessed 10 June 2023; Sina Azodi, 'Iran is Having Nationwide Protests. Is it a "Revolution"?' (*Atlantic Council*, 30 September 2022) <<https://www.atlanticcouncil.org/blogs/iransource/iran-is-having-nationwide-protests-is-it-a-revolution/>> accessed 10 June 2023.



Iran is the world's fifth most resource-rich country, with the second-largest natural gas reserves, and the fourth-largest crude oil reserves.<sup>172</sup> Similar to the public trust doctrine in South Africa, Article 45 of the Iranian Constitution confirms that the country's natural resources belong to the people, with the government mandated to treat them per the public interest. Article 40 further clarifies that no one may claim the exercise of their rights as a justification for violating the public interest. Iran has 31 provinces, further divided into counties, which include districts with municipalities and village councils – each with its own appointed managing executive – but, akin to South Africa, has national ministerial departments to regulate specific natural resources.<sup>173</sup>

Specifically, Article 45 lists the following as falling under the government's 'control': wastelands and public wealth, abandoned or unclaimed land of deceased owners, mines, seas, lakes, rivers, and other public bodies of water, mountains, valleys, forests, marshlands, natural prairies, unrestricted pastures, inheritance without any heir, wealth without any identified owner, and public wealth that is confiscated from the usurpers. Their management and utilisation are to be determined by legislation and 'must' contribute to the development and growth of the country's economy (Articles 44 and 43(9)). However, the Preamble of the Constitution declares that contrary to Western economic systems, which 'focus on the concentration and accumulation of wealth and on seeking profit', Iran's economic development merely aims 'to satisfy the needs of human beings in the process of their development and growth.' Thus, along with private ownership, foreign ownership of natural resources is strictly prohibited (Article 153 read with 43(8)). Article 48 further precludes discrimination among the provinces and regions when it comes to the allocation of revenues from the extraction of the country's natural resources; rather, each area should have access to the required resources, considering their unique needs and potential for development.

Regarding environmental protection, Article 50 provides that 'any activity, economic or other, that leads to the pollution of the environment, or its irreparable

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172 World Bank, 'Iran' (*World Bank*, 20 October 2022) <<https://www.worldbank.org/en/country/iran/overview>> accessed 10 June 2023.

173 For example, the Ministry of Jihad Agriculture (Ministry of Natural Resources merged with the Ministry of Agriculture) is nationally responsible for forests, rangelands, soil conservation, and watershed management (the latter responsibility is shared with the Ministry of Energy). The Ministry of Petroleum manages the oil industry, in charge of all issues pertaining to exploration, extraction, exploitation, distribution, and exportation of crude oil with the Ministry of Industry, Mine, and Trade regulating industrial and mining developments. The Department of Environment is responsible for matters related to safeguarding the environment.

damage will be forbidden.<sup>174</sup> Furthermore, in line with Islamic teachings, it is ‘a public duty to preserve the environment where the present and the future generations may have an improved social life.’<sup>175</sup> Should these rights be violated, Article 34 rather broadly provides everyone with the right to access justice.

Article 19 of the Iranian Constitution affirms that the people ‘enjoy equal rights, regardless of the tribe or ethnic group to which they belong.’ Article 13 lists Zoroastrian, Jewish, and Christian Iranians as the ‘only recognised religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their canon in matters of personal affairs and religious education.’ There are numerous ethnic groups in Iran (including the Ahwazi Arabs, South Azerbaijani, Baloch, and Kurds), each with their own culture, language, traditions, and customary systems of nature conservation.<sup>176</sup> However, no formal legal recognition is afforded to them as indigenous peoples of Iran, and they rarely enjoy legal title to the lands they occupy, let alone the natural resources found in those areas.<sup>177</sup>

The Iranian Constitution has been acutely described as being ‘minute in detail’ and ‘full of contradictions.’<sup>178</sup> For each human right conferred, and for each economic and administrative decision made, there is an ‘in compliance with the Islamic criteria’ caveat attached (reiterated in Article 4). Thus, while vital fundamental human rights are recognised (Chapter III – equality, dignity, life, privacy, assembly, etc.), they are only given effect, to the extent that they conform to Islamic Laws

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174 For a brief overview of environmental laws see, Abbas Taghvaei et al., ‘Environmental Problems in Iran’s Law’ (2015) 7(1) *Biological Forum – An International Journal* 111; Hossein Rabani et al., ‘Typology of Environmental Crimes in Iran (Case Study: Crimes Related to Environmental Pollution)’ (2020) 4(2) *APJ* 78.

175 Accordingly, although an environmental right is not expressly stated, it can be inferred. Refer to Mohammad J Hosseini, ‘The Sustainable Development in Article Fifty of Constitution of Islamic Republic of Iran’ (2020) 2 *GHR* 1; Ali Talebi and Seyed M Hosseini, ‘The Status of Environmental Law in Islam (An Investigation of Iran)’ (2016) 2(2) *JLR* 28.

For a discussion on the environment and Islam, see Labeeb Bsoul et al., ‘Islam’s Perspective on Environmental Sustainability: A Conceptual Analysis’ (2022) 11(6) *Soc Sci* 228; Omprakash Ashtankar, ‘Islamic Perspectives on Environmental Protection’ (2016) 2(1) *IJAR* 438; Shazia Chaudhry, ‘Environmental Stewardship: Perspectives from the Islamic Teachings’ (2022) 1(1) *AJOSAPS* 121.

176 Unrepresented Nations and Peoples Organization, *Alternative Report submitted to the UN Committee on Economic, Social and Cultural Rights for the consideration of the Second Report of the Islamic Republic of Iran* during the 49th Pre-Sessional Working Group (2012) *Alternative Report to CESCR – Iran E/C.12/IRN/2*.

177 Naimeh Masumy, ‘The Need for the Enforcement of Environmental Standards in the Iranian Oil and Gas Industry: Narrowing the Accountability Gap’ (University College London Research Paper No 24 2021); Nazila Ghanea and Binesh Hass, ‘Seeking Justice and an End to Neglect: Iran’s Minorities Today’ (Minority Rights Group International Briefing 2011).

178 Waqar Hasib, ‘The Iranian Constitution: An Exercise in Contradictions’ (2004) *Al Nakhlah* 1.

(Articles 1–2, 4 and 11). Therefore, no case law is mentioned here, given that despite the Iranian judiciary being ‘composed of just judges’ who ‘shun any unhealthy relations and connections’ (Preamble of the Constitution), they play no vital role in furthering the development of Iranian Law except to further ‘Islamicise’ its application, regardless of whether their rulings are contrary to international human rights norms.<sup>179</sup>

On the topic of international law, Article 77 of the Constitution sets out that ‘all international agreements must be ratified by the Islamic Consultative Assembly.’ Iran is the world’s sixth-highest greenhouse gas emitter and, along with Yemen and Libya, is one of the only countries that has not ratified the Paris Agreement.<sup>180</sup> While steps have been taken by the Iranian government toward climate action, they are ‘critically insufficient.’<sup>181</sup> Moreover, although environmental law statutes have been

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**179** Iran ranks 119/140 on the World Justice Project Rule of Law Index (2022); for a full discussion refer to Moosa A Ghazi, ‘Iranian Judiciary Facing Human Rights Norms or Islamic Criteria’ (2011) 5(3) *AJMEIS* 37; Justice for Iran, *Submission to the Working Group on Business and Human Rights on Connecting the Business and Human Rights and Anti-Corruption Agendas* (2020); Nadereh Chamlou, ‘Iran: Access to Justice’ in Karim Mezran and Annalisa Perteghella (eds.), *The Politics of Pandemics: Evolving Regime-Opposition Dynamics in the MENA Region* (Ledizioni 2021) 76.

**180** Sanam Mahoozi, ‘Iran’s Failure to Tackle Climate Change – a Question of Priority’ (*Aljazeera*, 9 November 2021) <<https://www.aljazeera.com/news/2021/11/9/irans-failure-to-tackle-climate-change-a-question-of-priority>> accessed 10 June 2023; Joseph Kaminski, ‘The OIC and the Paris 2015 Climate Change Agreement: Islam and the Environment’ in Leslie Pal and Evren Tok (eds.), *Global Governance and Muslim Organizations* (Springer International Publishing 2018) 171.

Note, that there is an Islamic Declaration on Global Climate Change, which was formally adopted at a Symposium held in August 2015 in Istanbul. The Declaration invites people of all nations to join forces to fight climate change, which is linked to the moral obligations of man to protect the planet (citing passages from the Qur’an), assuring its strong religious legitimisation. Samira Idllalène, *Rediscovery and Revival in Islamic Environmental Law: Back to the Future of Nature’s Trust* (2021); Antar S Abdellah, ‘The Islamic Declaration on Global Climate Change: An Ideological Discourse Analysis’ (2020) 1(2) *MEJRESS* 77.

**181** Claudio Providas, ‘Iran Tackles its Cities’ Carbon Emissions’ (*UNDP*, 21 October 2021) <<https://www.undp.org/blog/iran-tackles-its-cities-carbon-emissions>> accessed 17 June 2023; Iran, *Third National Communication to United Nations Framework Convention on Climate Change* (December 2017); WHO and UN Framework Convention on Climate Change, *Iran: Health and Climate Change, Country Profile* (2022); Climate Action Tracker, ‘Iran’ (*Climate Action Tracker*, 15 September 2021) <<https://climateactiontracker.org/countries/iran/policies-action/>> accessed 17 June 2023; Farshad Amiraslani and Arnaud Caiserman, ‘Multi-Stakeholder and Multi-Level Interventions to Tackle Climate Change and Land Degradation: The Case of Iran’ (2018) 10(6) *Sustainability* 1; UNSDCF, *Report: Islamic Republic of Iran (2023–2027)*; Hamidreza S Osbooei, ‘The Challenges Ahead of Iranian Natural Resources/Heritages Alongside the International Conventions in Upcoming Years’ in Olimpia Niglio and Eric YJ Lee (eds.), *Transcultural Diplomacy and International Law in Heritage Conservation* (Springer 2021) 427.

enacted in Iran, they are inadequate and rarely enforced.<sup>182</sup> Consequently, climate change is an aggravating factor to pre-existing environmental issues plaguing the country.<sup>183</sup>

## 4.8 Germany

Historically, the Federal Republic of Germany's *Grundgesetz* – the Basic Law of 1949 (as amended to 2022), contained hardly any content related to environmental protection and natural resources. However, with the rapid progress of technical and industrial development after World War II, environmental problems such as pollution of air, soil, and water bodies became increasingly apparent. Parliamentary debates on the introduction of environmental concerns into the German Basic Law started in the early 1970s; however, it was only in 1993 that a compromise proposal of a constitutional commission, which proposed the introduction of a state objective of environmental protection, was approved and effected by the Federal Parliament and the Federal Assembly.

Provisions relevant to natural resources, in general, relate to concurrent legislation (Articles 72 and 74 Basic Law). Legislative power is assigned to the federal States of Germany (*Länder*), except in cases where it is explicitly assigned to the Federation (*Bund*). The protection of nature and landscape management (excluding general principles of nature conservation, the law on the protection of plant and animal species and the law on the protection of marine life) are subject to concurrent legislation just as in the case of the management of water resources (Article 72 Basic Law). Within the scope of Article 72, the federal States can enact laws in variance to legislation enacted by the Federation.

Further provisions pertinent to natural resources are Article 91a Basic Law on the joint responsibility of the Federation and the federal States – these include the improvement of the agrarian structure and coastal preservation, but primarily,

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**182** Such as the Environmental Protection Law 1974-06-02, Water Law and the manner of water nationalization 1968, Act of Conservation and Protection of Natural Resources and Forest Reserves 1992; Clean Air Law 2017; refer to Masoud Faryadi, 'Soil Protection Governance in Iran' in Oliver C Ruppel et al. (eds.), *International Yearbook of Soil Law and Policy* (Springer 2020/2021) 351; Financial Tribune, 'Legal Vacuum Harming Environment' (*Financial Tribune*, 28 February 2017) <<https://financialtribune.com/articles/people-environment/60489/legal-vacuum-harming-environment>> accessed 10 June 2023.

**183** Morad Tahbaz, 'Environmental Challenges in Today's Iran' (2016) 49(6) *Iranian Studies* 943; Mahdi Kolahi et al., 'Legal Conflicts Among Natural Resources Stakeholders in Iran' (2021) 50(1) *BJMES* 160; Honeye Hojabrosadati et al., 'Restorative Nodes of Governance in the Anthropocene: Iran's Kashaf River' (2021) 43(3) *Law & Policy* 205. See also, Kaveh Madani, 'Have International Sanctions Impacted Iran's Environment?' (2021) 2 *World* 231.

Article 20a Basic Law deals with the protection of the environment. This provision has given rise to a vast spectrum of statutory law and policy and has been subject to various court decisions.<sup>184</sup> Article 20a Basic Law (as translated by the language service of the German *Bundestag*) reads as follows:

Mindful also of its responsibility towards future generations, the State shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by the executive and judicial action, all within the framework of the constitutional order.

The term ‘natural foundations of life’ is most relevant in the context of natural resources. The Basic Law itself, however, does not provide a definition, which leaves the term open for interpretation so that it can be applied dynamically, depending on the current needs and developments.

As to the nature of constitutional environmental protection, it should be noted that the provision concerning the protection of the natural foundations of life and animals, as stipulated in Article 20a Basic Law is not allocated in the catalogue of basic rights (Articles 1–19) but has rather been formulated as a *Staatsziel* (BVerfGE 102, 1 (18); 102, 347 (365)), a directive principle of State policy. In contrast to the basic rights, Article 20a Basic Law does not constitute a subjective enforceable right.<sup>185</sup> Rather, it is objective: it binds the legislature, executive, judiciary, and all bodies of government. Article 20a Basic Law, thus, only applies vertically. However, in *Neubauer et al. v. Germany*, the German Federal Constitutional Court (*Bundesverfassungsgericht*) was tasked with the issue of climate change and inter-generational equity when a group of German youth argued that certain provisions of the Federal Climate Change Act of 2019, were incompatible with their fundamental rights, as it fails to provide sufficient specifications for emission reductions from 2031 onwards.<sup>186</sup> The Court agreed [para 192], stating that:

the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. As inter-temporal guarantees of freedom, fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed by Article 20a Basic Law being unilaterally offloaded onto the future [para 183].

**184** Dietrich Murswiek, ‘Art. 20a’ in Michael Sachs (ed.), *Grundgesetz, Kommentar* 9th ed (Beck 2021).

**185** Stefan Theil, ‘Cautious Scrutiny: The Federal Climate Change Act case in the German Constitutional Court’ (2023) 86(1) *Mod L Rev* 263, 270–271; Lando Kirchmair, ‘Enforcing Constitutional Sustainability Clauses in the Age of the Climate Crisis: Insights from Social Contract Theory on How to Take Account of Future Generations’ (2023) 17(1) *ICL Journal* 1 8–10.

**186** 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, *Neubauer et al. v. Germany* [2021] BVerfGE 157 30.

See also Esmeralda Colombo, ‘The Politics of Silence: Hannah Arendt and Future Generations’ *Fight for the Climate*’ (2023) 17(1) *ICL Journal* 43.

Furthermore, Article 20a Basic Law ‘encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence’ [para 193]. Although the Court reaffirmed that Article 20a Basic Law does not contain subjective rights but is a ‘fundamental national objective’ and, thus, ‘cannot be directly relied upon to establish standing to lodge a constitutional complaint’ [para 112], through its judgment, the Court has confirmed that Article 20a Basic Law encompasses a constitutional duty of the State to take climate action and achieve climate neutrality [paras 197–198].<sup>187</sup>

As to the ownership of natural resources, three provisions of the Basic Law can be mentioned. Firstly, Article 15 on socialisation provides that land, natural resources, and means of production may ‘be transferred to public ownership.’ Secondly, Article 74 extends concurrent legislative powers to ‘the transfer of land, natural resources, and means of production to public ownership or other forms of public enterprise’, as well as to the promotion of agricultural production and forestry (except for the law on land consolidation), ensuring the adequacy of food supply, the importation and exportation of agricultural and forestry products, deep-sea and coastal fishing, and preservation of the coasts.

Thirdly, Article 89 provides that ‘[t]he Federation shall be the owner of the former *Reich* waterways.’ Other than this, no provision is enshrined in the Constitution regulating the ownership of natural resources. The right to property guaranteed by Article 14 Basic Law is relevant as natural resources *de facto* follow the rules of property rights. The property right can be subject to certain limitations for the benefit of public goods and owning property is linked to certain obligations. A multitude of laws govern the use of natural resources and limit the rights linked to private property. The German Civil Code 1900 (*Bürgerliches Gesetzbuch*, BGB) provides that:

*the right of the owner of a plot of land extends to the space above the surface and the subsoil under the surface. However, the owner may not prohibit influences that are exercised at such a height or depth that he has no interest in excluding them (§ 905 BGB).*

Furthermore, a multitude of provisions in German Public Law governs the use of natural resources. The right to make use of mineral resources, for example, as well as

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<sup>187</sup> Refer to Petra Minnerop, ‘The “Advance Interference-Like Effect” of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court’ (2022) 34 JEL 135; Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation Policy Report* (The Centre for Climate Change Economics and Policy and the Grantham Research Institute on Climate Change and the Environment 2022); Anna-Julia Saiger, ‘The Constitution Speaks in the Future Tense’ (*Verfassungsblog*, 29 April 2021) <<https://verfassungsblog.de/the-constitution-speaks-in-the-future-tense/>> accessed 24 June 2023.

the associated rights and obligations, are governed by the Federal Mining Act 1980 (*Bundesberggesetz*), which distinguishes between mountain-free mineral deposits, on the one hand, and mineral deposits belonging to the owner of the property on which they are located, on the other. The latter are conclusively listed in the Federal Mining Act and include, *inter alia*, clay, quartz, and quartzite. Mountain-free mineral deposits such as ores, solid metals, and fossil fuels, as well as geothermal energy, are resources which are not covered by property ownership. Whoever wants to make use of these resources needs the appropriate permit from the State. Similarly, many provisions exist regarding inland waters and the use of water as a natural resource. Article 89 Basic Law provides that '[t]he Federation shall be the owner of the former Reich waterways.' The administration of waterways of the Federation (governed by the Federal Waterway Law 1968 (*Bundeswasserstrassengesetz*), is performed through its authorities. The ownership of inland waters is regulated by the Federal Water Act 1957 (*Wasserhaushaltsgesetz*). Federal waterways are in general owned by the Federation. It is, furthermore, provided that flowing surface waters and groundwater cannot be subject to property rights. Subject to the principle of proportionality, various conditions of toleration or allowance to conduct measures designed to protect the waters may be imposed on owners and beneficiaries of land on which flowing surface waters occur. In the case of unreasonable impairments of the property, the persons concerned are entitled to compensation.

Of the Constitutions discussed thus far, the German Basic Law is certainly the most accepting of the influence of international law (*Völkerrechtsfreundlichkeit*), stipulating in Article 25 that the 'general rules of international law shall be an integral part of federal law' – taking 'precedence over the laws' and directly creating 'rights and duties for the inhabitants of the federal territory.'<sup>188</sup> Although Germany is to be commended for the support it renders internationally to protect, respect, and implement the rights of indigenous peoples – having also ratified the Indigenous and Tribal Peoples Convention in 2021<sup>189</sup> – no rights are conferred by the Basic Law to

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**188** As clarified by the Federal Constitutional Court, these 'general rules' refer to 'the universally applicable rules of customary international law as well as the general principles of law.' *Bundesverfassungsgericht* (Federal Constitutional Court), *Decision of the Second Chamber of the Second Senate of 4 September 2008*, 2 BvR 1475/07 [para 20]; Daniel Lovric, 'A Constitution Friendly to International Law: Germany and its *Völkerrechtsfreundlichkeit*' (2006) 25 AYBIL 75.

**189** IKI, 'Germany Supports Nature Conservation Efforts of Indigenous Peoples and Local Communities' (IKI, 15 December 2022) <<https://www.international-climate-initiative.com/en/iki-media/news/germany-supports-nature-conservation-efforts-of-indigenous-peoples-and-local-communities/>> accessed 10 June 2023; Tabata Viapiana, 'Germany Resumes Payments to Brazil's Amazon Fund to Protect Environment, Indigenous Peoples' (*Brazil Reports*, 2 February 2023) <<https://brazilreports.com/germany-resumes-payments-to-brazils-amazon-fund-to-protect-environment-indigenous-peoples/3809/>> accessed 10 June 2023.

indigenous peoples living in Germany. However, there are four officially recognised national minorities: the Frisians, German Sinti and Roma, Sorbs, and Danes, who are given such protection in legislation and *Landesverfassungen*.<sup>190</sup>

## 4.9 Australia

The Commonwealth of Australia Constitution Act of 1900 (consolidated in 2013) is to some extent uncommon as, although it contains certain fundamental rights, there is no catalogue of fundamental rights comparable to a bill of rights as known in most Western democracies and other Anglo-Saxon countries.<sup>191</sup> The rights derived from the wording of the Constitution include only a few, such as the right to vote, freedom of conscience and religion or belief, and the right to trial by a jury. Other than this, the Constitution is silent, which, however, does not mean that no protection of fundamental rights and freedoms in Australia exists. The ratification of international treaties (often lacking effective enforcement mechanisms), court decisions, and national and federal legislation concretise several fundamental rights and freedoms. Environmental protection and the conservation of natural resources are primarily governed by court decisions and statutory law and policy. A landmark decision relevant to the conservation of natural resources, namely the *Commonwealth v. Tasmania*,<sup>192</sup> has, for instance, influenced much of Australia's national environmental legislation.<sup>193</sup> This decision confirmed that the Commonwealth had power under Section 51(xxix) to make laws to protect the environment.

Legislation plays a significant role in the context of natural resources. An explicit environmental right or other provisions relevant to ownership or protection of natural resources, does, however, not exist in the country,<sup>194</sup> nor at the Commonwealth level,

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**190** Refer to Sonja Wolf, *Functional Minority Autonomy in Germany* (Autonomy Arrangements in the World 2020); Daniel Häfner and Lutz Laschewski, *Die Rechte indigener Völker an natürlichen Ressourcen und die Sorben/Wenden* (Sozialwissenschaftliche Umweltfragen Berichte & Arbeitspapiere 1 2013).

**191** Cheryl Saunders and Adrienne Stone (eds.), *The Oxford Handbook of the Australian Constitution* (OUP 2018) 906.

**192** [1983] 158 CLR 1.

**193** Cameron Holley, 'International Environmental Law and Australia and New Zealand' in Shawkat Alam et al. (eds.), *Routledge Handbook of International Environmental Law* (Routledge 2013); Ann Genovese, 'Critical Decision 1983: Remembering Commonwealth v. Tasmania' (2015) 24 Griffith Law Review 1.

**194** Australia is one of only 15 countries without the right to a healthy environment enshrined in its federal laws or Constitution. For a discussion see Revel Pointon and Justine Bell-James, 'The Right to a Healthy Environment in Australia' (2019) 7 Griffith Journal of Law and Human Dignity 75; Rebecca Bratspies, 'Do We Need a Human Right to a Healthy Environment?' (2015) 13 Santa Clara JIL 31.



nor the level of state and territory law; although some state and territory laws provide for the protection of civil and political rights, such as the Human Rights Act of 2004 (Australian Capital Territory) or the Charter of Human Rights and Responsibilities Act of 2006 (Victoria).

On the level of Commonwealth Law (federal law), various pieces of legislation have been enacted that are pertinent to environmental protection and the conservation of natural resources.<sup>195</sup> The central piece of legislation in this regard is the Environment Protection and Biodiversity Conservation Act of 1999 on matters of national environmental significance, which provides a legal framework to protect and manage, nationally and internationally, important flora, fauna, ecological communities, and heritage places. Furthermore, a plethora of environmental legislation, aiming to protect the environment and manage natural resources sustainably, exists in Australia's states and territories, such as the Environmental Protection Acts of the Australian Capital Territory (1997), Queensland (1994), South Australia (1993), and Western Australia (1986), to name but a few. Refer also to the Great Ocean Road and Environs Protection Act of 2020 and the Yarra River Protection Act 49/2017 (Victoria).<sup>196</sup>

The main environmental courts and tribunals in Australia are the Planning and Environment Court (Queensland); Land and Environment Court (New South Wales); Victorian Civil and Administrative Tribunal (Victoria); Resource Management and Planning Appeal Tribunal (Tasmania); Environment, Resources, and Development Court (South Australia); and State Administrative Tribunal (Western Australia). The Land and Environment Court of New South Wales is the most notable, given its broad jurisdiction, its establishment as a superior court of record, and its 'multi-door' system (i.e., multiple dispute resolution mechanisms offered).<sup>197</sup>

The Constitution is silent regarding the rights of Australia's indigenous peoples.<sup>198</sup> However, following the historic case of *Mabo v. Queensland (No 2)*,<sup>199</sup> in which

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<sup>195</sup> Gerry Bates, *Environmental Law in Australia* 10th ed (LexisNexis 2019).

<sup>196</sup> The Yarra River Protection (*Wilip-gin Birrarung murron*) Act proclaims the river and its corridor, which transverses many boundaries, as a single living and integrated natural entity for protection. The Act prescribes how a long-term Community Vision and a Yarra Strategic Plan, which gives effect to the vision, are developed. The Act also prescribes the establishment of a new statutory body, the Birrarung Council, to be the first independent voice of the Yarra River, as part of recognising it as a living entity. Refer to Katie O'Bryan, 'Giving a Voice to the River and the Role of Indigenous People: The Whanganui River Settlement and River Management in Victoria' (2017) 20 AILR 48.

<sup>197</sup> Refer to Brian J Preston, 'Judicial Specialization Through Environment Courts: A Case Study of the Land and Environment Court of New South Wales' (2012) 29 Pace Envtl L Rev 602, 603; Brian Preston and Elizabeth Fisher (eds.), *An Environmental Court in Action: Function, Doctrine and Process* (Bloomsbury Publishing 2022).

<sup>198</sup> Saunders and Stone (n 191) 41.

<sup>199</sup> [1992] 23 175 CLR 1.

the legal doctrine of native title was asserted, the federal Native Title Act 110/1993 was enacted.<sup>200</sup> The native title denotes that if indigenous peoples can prove that they have an ongoing connection with certain land areas, according to their traditional laws, and their interest has not been extinguished, such interest can be legally recognised.<sup>201</sup> Persons and companies seeking to undertake mining and exploration projects in claimed native title holders' territories can conclude voluntary indigenous land use agreements with the concerned parties.

Australia voted against the adoption of the Indigenous and Tribal Peoples Convention, and although the country has since announced its support, it has not yet been formally recognised or implemented. This is expected, given Australia's strict arms-length relationship with international law – save for one reference to treaties (Section 75(i)), no mention is made of international law in the Australian Constitution.<sup>202</sup> Notably, the UN Human Rights Council (UNHRC) recently found that the Australian government is violating its human rights obligations to the Indigenous Torres Strait Islanders through climate change inaction.<sup>203</sup> Where Australian courts previously held that State organs do not owe a duty of care for failing to regulate environmental harm,<sup>204</sup> it has now been confirmed that State organs do have such a duty (especially in light of the principle of intergenerational equity), under the International Covenant on Civil and Political Rights.<sup>205</sup> It will be interesting to see whether this finding will be mirrored in a pending case – in 2021, Environmental

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**200** Ros Vickers, 'The Regulation of Natural Resources Law in Australia for Indigenous People' (2019) 2 *JLJ* 99, 107–108.

**201** Katie O'Bryan, *Indigenous Peoples and the Law. Indigenous Rights and Water Resource Management: Not Just Another Stakeholder* (Routledge 2019) 69–70.

**202** Refer to Emily Crawford, 'Monism and Dualism – An Australian Perspective' (Sydney Law School Research Paper No 12/87 2013).

**203** *Daniel Billy et al. v. Australia* (Torres Strait Islanders Petition) (United Nations Human Rights Committee Case CCPR/C/135/D/3624/2019, 2022); Maria A Tigre, 'Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation' (2022) 9(3) *e-Publica* 214; Riccardo Luporini and Annalisa Savaresi, 'International Human Rights Bodies and Climate Litigation: Don't Look Up?' (2023) *RECIEL* (Early View) 1.

**204** *Graham Barclay Oysters v. Ryan* [2002] 211 CLR 540, the question was whether the local and State authorities responsible for the upkeep of lakes in which oysters were grown were liable when contaminated oysters caused the plaintiffs harm (the court held that they were not); in *Sharma et al. v. Minister for the Environment* [2021] FCA 560, the Federal Court of Australia found that the Minister for the Environment did have a duty of care to young people to mitigate climate harm, but was overturned on appeal in *Minister for the Environment v. Sharma* VID389/2021. Jacqueline Peel and Rebekkah Markey-Towler, 'A Duty to Care: The Case of *Sharma v. Minister for the Environment* [2021] FCA 560' (2021) 33(3) *JEL* 727.

**205** See also Max Lesch and Nina Reiners, 'Informal Human Rights Law-making: How Treaty Bodies use "General Comments" to Develop International Law' (2023) 12(2) *Global Constitutionalism* 378; Matthew Rimmer, 'The Torres Strait Eight: Climate Litigation, Biodiversity, Human Rights, and

Justice Australia submitted a complaint to three Special Rapporteurs of the Office of the UN High Commissioner for Human Rights (OHCHR) on behalf of five young people living in Australia regarding the government's inaction to set more ambitious emission targets.<sup>206</sup>

Although there are voices that call for better protection and promotion of civil, political, socioeconomic, and cultural rights on the constitutional level, the recommendation by Australia's federal government's Human Rights Consultation Committee 2009 to adopt a national Human Rights Act was rejected by the government and considerations for a constitutional change to include an instrument such as a bill of rights into the Australian Constitution are not on the table.<sup>207</sup> Thus, issues pertinent to natural resources remain of limited relevance in the field of Constitutional Law in Australia.

## 5 Conclusion and Comparative Assessment

Germany and Australia are the only two countries analysed whose constitutional texts offer limited guidance as to the regulation of their respective natural resources. While it is not a concern for the countries in question, given that case law, international instruments, and national legislation compensate harmoniously for the omission, without some kind of constitutional foundation, the intention to protect natural resources can easily ring hollow in countries, which have an inferior track record of environmental law enforcement. In countries such as South Africa, Brazil, and India where the governments often compromise environmental protection for economic activities, relying on legislative texts (which can easily be amended) is not enough, but relying on a constitution (with sovereignty) raises the odds of successfully opposing such action – i.e., it provides a stronger additional layer of protection. For example, in Bolivia, the Constitution does not enjoy sovereignty, thus, the

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Indigenous Intellectual Property' in Charles Lawson et al. (eds.), *Access and Benefit Sharing of Genetic Resources, Information and Traditional Knowledge* (Routledge 2022) 259.

**206** See Letter from Environmental Justice Australia to David R Boyd (Special Rapporteur on Human Rights and the Environment), Francisco C Tzay (Special Rapporteur on the rights of Indigenous peoples) and Gerard Quinn (Special Rapporteur on the rights of persons with disabilities), 25 October 2021; also follow *Pabai Pabai et al. v. Commonwealth of Australia* VID622/2021, which is a pending Federal Court case brought on behalf of all Torres Strait Islanders against the Australian government for failure to cut greenhouse gas emissions as part of its duty of care to protect them from climate harm.

**207** For a debate on the topic refer to Ricky Gordon, 'Bill of Rights for Australia: Is It Necessary?' (Research Paper at Edith Cowan University 2018) 1; Paul Babie, 'Australia's Bill of Rights' (2019) 97 U Detroit Mercy L Rev 187.

contradictory development laws (previously) enacted by the government are more difficult to contest. Also, while most citizens (at least) possess (some) knowledge of their country's constitution, they are seldom aware of the accompanying environmental laws (as in Chad and Cuba). Therefore, it benefits laypersons to have all the relevant principles (including natural resource regulation) in one constitutional text.

Although a few of the analysed systems share certain overarching elements, such as state ownership of natural resources (Chad, Brazil, and India) or the recognition of the principle of sustainable use, the constitutional regulatory approach of each country affects the implementation and details of these shared elements differently. While the Australian Constitution does not contain provisions on natural resources,<sup>208</sup> the Indian, Brazilian, and Bolivian Constitutions contain elaborate provisions relating to the conservation and sustainable use of natural resources. Brazil and Bolivia's Constitutions contain extensive provisions relating to mining activities and Bolivia's Constitution contains provisions regulating exploration and exploitation activities in its protected areas and Amazonian region.

Dissimilar to the broad environmental provision found in the Constitution of Germany, the Constitutions of India, Brazil, South Africa, and Bolivia contain more precise provisions on how natural resources are to be protected. Thereby, positive obligations to protect natural resources are imposed on the State, with an increasing trend to impose such an obligation on citizens (Brazil, Cuba, Bolivia, India, and Iran).

The South African Constitution rather implicitly recognises everyone's entitlement to good use of natural resources and incorporates the notion of public trusteeship in its environmental legislation, with the German legal system containing some relevant provisions in the Basic Law, which are complemented by statutory provisions. Undoubtedly, statutory law and, thus, legislative powers assigned by the different constitutions, but also the implementation, enforcement, and compliance mechanisms of the executive, play a leading role in the context of conservation and sustainable use of natural resources. This is also notable in the regions with dedicated environmental courts or tribunals (Brazil, India, Australia, and Bolivia). Regardless of the critique raised against them,<sup>209</sup> 'green courts' have been proven

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**208** As is the case in the Republic of Italy's Constitution 1947 (as amended to 2022) as well. Article 117(s) merely mentions the State's exclusive legislative powers concerning the protection of the environment and ecosystems. Only in 2022, was Article 9 amended to place a duty on the State to 'safeguard the environment, biodiversity and ecosystems, also in the interest of future generations.' Article 41 was also amended to require that business activity must not be harmful to people's health and the environment.

**209** Including the costs of setting up a dedicated environmental judiciary and the potential for judicial bias (i.e., fear that the judges are predisposed to decide in favour of the environment and

effective for many countries (from both the Global North and South),<sup>210</sup> but their continued relevance in a world faced with ever-increasing nuanced concepts (e.g., climate justice and nature's rights) and environmental threats is wholly dependent on their independence from the government.<sup>211</sup>

When a country openly commits human rights violations (e.g., detaining environmentalists without cause) and unilaterally overthrows the existing constitutional regime, it is difficult to praise its natural resource governance. While the planet is heading toward a warmer climate and debates continue regarding whether we are in the Anthropocene,<sup>212</sup> significant international environmental law developments are underway (including the UN High Seas Treaty,<sup>213</sup> increased recognition of indigenous peoples' rights, and the ever-growing rights of nature movement).<sup>214</sup> However, in the background, considerable challenges remain in many countries with internal conflict significantly hindering the successful protection and constitutional regulation of their natural resources.<sup>215</sup> – Including the independence of the judiciary and their

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breed anti-developmental sentiments). See Eeshan Chaturvedi, 'Green Courts: The Way Forward?' (2017) CPR 1, 15–19.

**210** See George W Pring and Catherine G Pring, 'The "Greening" of Justice: Will it Help the Poor?' in Yves Le Bouthillier et al. (eds.), *Poverty Alleviation and Environmental Law* (Edward Elgar 2012) 223, 224.

**211** Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 JEL 365.

**212** Refer to Oliver C Ruppel, 'Intersections of Law and Cooperative Global Climate Governance – Challenges in the Anthropocene' in Oliver C Ruppel et al. (eds.), *Climate Change: International Law and Global Governance: Legal Responses and Global Responsibility* (Nomos 2013) 29–93; Frank Biermann, 'The Future of "Environmental" Policy in the Anthropocene: Time for a Paradigm Shift' (2021) 30(1–2) Environmental Politics 61.

**213** Greenpeace International, 'Historic UN Ocean Treaty Agreed' (*Greenpeace International*, 5 March 2023) <<https://www.greenpeace.org/international/press-release/58486/historic-un-ocean-treaty-agreed-greenpeace-statement/>> accessed 13 March 2023; UNGA A/CONF.232/2023/4 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (19 June 2023).

**214** Eva J Lohse and María V. Berros, 'You Cannot Have the Cake and Eat It – How to Reconcile Liberal Fundamental Rights with Answers to the Climate Crisis' (2023) 17(1) ICL Journal 17; refer to <<http://www.harmonywithnatureun.org/rightsOfNature/>>, which tracks the global adoption of rights of nature laws.

**215** For example, against the backdrop of the devastating effect Russia's military activities have on Ukraine's natural environment, the ILC's Principles are crucial to the advancement of the legal protection of the environment (and natural resources) during both international armed conflicts, as well as civil wars. ILC Reports of the Drafting Committee, Protection of the Environment in Relation to Armed Conflicts (20 May 2022) 73rd Session A/CN.4/L.968; Sergio Harari and Isabella Annesi-Maesano, 'The War in Ukraine is an Environmental Catastrophe' (*The Union*, 7 December 2022) <<https://theunion.org/news/the-war-in-ukraine-is-an-environmental-catastrophe>> accessed 16 March 2023.

ability to bring governments to book (including as regards climate inaction) without fear of reproach.

On that note, stark contrasts between the various constitutions relate to the notion of standing (*locus standi*). In Australia, no enforceable substantive right to the environment exists on the constitutional level, and, thus, no provision extends to the protection of natural resources. This the Australian Constitution has in common with the German Constitution. In contrast, the South African, Cuban, Iranian, Indian, Brazilian, and Bolivian Constitutions all contain enforceable rights concerning the environment. Thus, the protection of natural resources has been subject to judicial proceedings in most of these legal systems, be it in the form of individual claims or the claims of environmental organisations, or the review of state action. With climate litigation globally on the rise, courts are increasingly also confirming that governments do have a constitutionally mandated duty as regards climate action<sup>216</sup> – linking this obligation with existing human rights to broaden State responsibility. This development is not just occurring in the Global ‘North’ (Germany and Australia) but the ‘South’ (Brazil and South Africa), despite the significant constraints experienced in the latter countries.

In sum, the importance of natural resources, both economically and within the ecological sphere they form part of, cannot be overstated. Valuing natural resources is essential for sustainable development. It helps understand the economic, social, and environmental impacts of their use and guides in making informed decisions about their management. While in fact being priceless, natural resources are natural capital, which is often undervalued or neglected in decision-making, which can easily contribute to increased biodiversity, loss and damage impacting human well-being. While its economic character has been a core component in most constitutions for decades or even centuries, the ecological value of natural resources is in recent years also becoming commonplace as the mantra of only one planet is starting to seep in, and nations are taking heed of the warnings spelt out by increasing environmental disasters.<sup>217</sup> There is a notable shift being undertaken in countries (be it due to judicial orders or citizen advocacy), orchestrated by international environmental laws, towards more eco-centric environmental policies and development modes focusing on the protection of natural resources for the common good.<sup>218</sup>

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**216** See Oliver C Ruppel and Cleo Dobers, ‘The Paris Agreement: A Symbiosis for the Protection of Human Rights and Climate Change?’ (2022) 52 *Environmental Policy and Law* (399).

**217** UNEP, *Global Environment Outlook – GEO-6: Healthy Planet, Healthy People* (2019).

**218** Refer to ILA, *Guidelines on the Role of International Law in Sustainable Natural Resources Management for Development* (2020) Res No 4/2020; EU Directive 2009/147/EC on the Conservation of Wild Birds [2009] OJ L20/7; EU Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Flora and Fauna [1992] OJ L206/7; EU, *Biodiversity Strategy for 2030: Bringing Nature Back into*

This leads to the observation, which this contribution notes, the (perhaps) underestimated contrast, which persists between the Global North/South natural resource regulation paradigm: the former focuses on technological advancements and advocates less consumption to achieve sustainable development of its natural resources, where the latter promotes the role of communities, autarky, and harmony with nature (e.g., through *Ubuntu*, *Buen Vivir*, *Tarea Vida*, *Tekó Porã*, and *Geopolítica del Vivir Bien* or more specific religious philosophies).<sup>219</sup> It is an indisputable fact that the resources and labour from the Global South assisted in building the economies of the Global North,<sup>220</sup> but what is not often highlighted (until recently at least) is the perspective this has nurtured in the North – nature has a price, and it is affordable. The Northern economic model has separated humans from nature and promotes the domination of nature to satisfy human desires (call it anthropocentrism if you will).<sup>221</sup> This ‘perspective’ has seemingly made it acceptable to misuse and abuse natural resources in the name of capitalism, progress, growth, and development,<sup>222</sup> while (North-dominated) international trade has furthered this behaviour.<sup>223</sup> In contrast, we have the Global South, where *Pachamama* and related concepts are regarded as part of everyday survival.

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our Lives (20 May 2020) COM 380 final; EU, Proposal for a Regulation of the European Parliament and of the Council on Nature Restoration (22 June 2022) COM 304 final; EU, The European Green Deal (11 December 2019) COM 640 final; UN, Our Common Future: Report of the World Commission on Environment and Development Geneva A/42/427 (1987); WEF, *The Global Risks Report* 18th ed (2023).  
 219 For a full discussion refer to Jens Marquardt, ‘Worlds apart? The Global South and the Anthropocene’ in Thomas Hickmann et al. (eds.), *The Anthropocene Debate and Political Science* (Routledge 2018) 200; Bronwyn Hayward and Joyashree Roy, ‘Sustainable Living: Bridging the North-South Divide in Lifestyles and Consumption Debates’ (2019) 44 *Annual Reviews* 157; Topidi (n 64) 61–62; Joram Tarusarira, ‘Religious Environmental Sensemaking in Climate-Induced Conflicts’ (2022) 13 *Religions* 204.

220 See Jason Hicckel et al., ‘Plunder in the Post-Colonial Era: Quantifying Drain from the Global South through Unequal Exchange, 1960–2018’ (2021) 26(6) *NPE* 1030.

221 Refer to Carmen Gonzalez, ‘Bridging the North-South Divide: International Environmental Law in the Anthropocene’ (2015) 32 *Pace Envtl L Rev* 407 423; Carmen Gonzalez, ‘Environmental Justice, Human Rights, and the Global South’ (2015) 13 *Santa Clara J Int’l L* 151 169; Jasper Mührel, ‘Towards European Rights of Nature’ (*Verfassungsblog*, 28 February 2023) <<https://verfassungsblog.de/towards-european-rights-of-nature/>> accessed 28 June 2023.

222 See Aida C Terblanché-Greeff, ‘Ubuntu and Environmental Ethics: The West Can Learn from Africa When Faced with Climate Change’ in Munamoto Chemhuru (ed.), *African Environmental Ethics: A Critical Reader* (Springer International Publishing 2019) 93, 101, 104 and 107.

223 Refer to Kati Kulovesi, ‘International Trade: Natural Resources and the World Trade Organization’ in Elisa Morgera and Kati Kulovesi (eds.), *Research Handbook on International Law and Natural Resources* (Edward Elgar 2016) 46; Robert Falkner and Nico Jaspers, ‘Environmental Protection, International Trade and the WTO’ in Ken Heydon and Steven Woolcock (eds.), *The Ashgate Research Companion to International Trade Policy* (Ashgate 2012) 245; WTO, *Report: Trade in Natural*

Despite this dichotomy, natural resources are the foundation for all life on earth. The answer to their intergenerational endurance is not only deeply embedded in the existing economic order (monetising nature) but also in the principle of common but differentiated responsibility.<sup>224</sup> While the consequences of climate change are increasingly being felt in both the Global North and the Global South, a just transition for both will require unpacking a mutual understanding and the acceptance of the respective roles and responsibilities of all parties involved towards reaching the common goal.

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*Resources* (2010); Stephanie Switzer, 'The Principle of Sovereignty over Natural Resources and the WTO' in Panos Delimatsis and Leonie Reins (eds.), *Trade and Environmental Law* (Edward Elgar 2021) 136, 138; Julia Dehm, 'Natural Resources' in Koen de Feyter et al. (eds.), *Law and Development Encyclopaedia* (Edward Elgar 2021) 211; Oliver C Ruppel and Cleo Dobers, 'From Stockholm+50 to Bretton Woods+80: Greening Trade Law for Global Climate Governance?' *Environmental Policy and Law* (2022) 52(2) 145–160.

<sup>224</sup> Refer to Rike Krämer-Hoppe, 'The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide' (2021) 22 GLJ 1393, 1400–1408.