



MELBOURNE FORUM
ON CONSTITUTION BUILDING
IN ASIA & THE PACIFIC

Report

CLIMATE CHANGE

AND CONSTITUTIONS

Eighth Melbourne Forum on
Constitution-Building in Asia and the Pacific

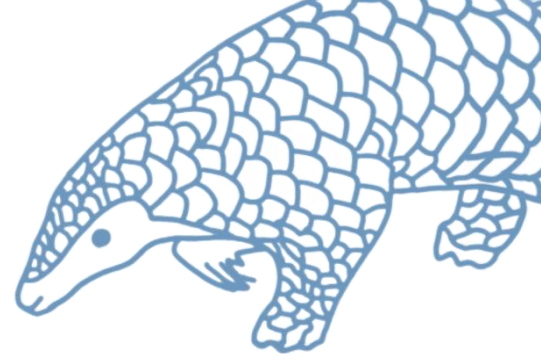
Publication Date: February 2025



**Constitution
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Executive Summary



Climate change is a diverse and complex phenomenon with multiple causes and consequences. Effective state action, individually and collectively at the local, national, regional and international levels, is indispensable for responding to climate change. As the framework for state action, constitutions can play a role in understanding and diminishing shortfalls and barriers to effective climate action. Constitutions are themselves impacted by climate change, attracting attention and potentially prompting change. And as enduring instruments of fundamental law, constitutions are useful vehicles to mandate actions in response to climate change.

This Report examines the linkages between climate change and constitutions through insights from Asia and the Pacific. This large and diverse region has much to contribute to global understanding, to both constitutional governance and the impacts of climate change. Climate change affects communities in the Asia Pacific in distinctive and in some cases existential ways, generating both constitutional insights and innovations. Experiences from the ASEAN and Pacific regions, and from Taiwan, Indonesia, India, Fiji, Sri Lanka, Malaysia, Bangladesh, Bhutan, Thailand, Tuvalu, South Korea, the Philippines, and Nepal inform greater understanding of four thematic areas in which the interactions between constitutions and climate change arise in particularly telling ways:

Representation and Democratic Decision Making: In democracies, state action to address climate change is primarily done through laws and policies made by elected representatives. While there is growing concern about climate change in communities across the region, there does not yet seem to be effective pressure on representatives to take urgent action. Reasons for this include the ‘short-termism’ of elected government; knowledge gaps that invite misinformation and political division, and the slow onset of climate change and the high costs of action which cause voters to prioritise other issues. Case studies from Taiwan, Indonesia, India and Fiji examine these challenges. They suggest potential solutions that centre transparency and public engagement, protect the civic space for advocacy and information sharing, and foster bipartisanship and cooperation in order to lessen the instrumentalisation of climate change for political gain.

Multi-level Government: Actions to address climate change inevitably involve international, regional, national and local levels of government. The causes and effects of climate change cross state borders and require states to collaborate at regional and international levels. Within states, powers and responsibilities can be distributed among different levels of government to provide more calibrated and effective responses to climate change. Multilevel government also presents challenges, however, which were explored in through case studies from Sri Lanka, Malaysia, Bangladesh, ASEAN, and the Pacific region. International commitments and assistance in the form of climate finance often come with conditions that can limit the range of actions that states and local communities can take to adapt to the effects of climate change. As a generalisation, international institutions deal only with agents of the central state, marginalising local government agency in responding to climate change. To address climate change, multilevel government therefore requires understanding the roles and limitations of each level

of government, effective coordination and a sense of shared responsibility so as to avoid uncertainty, duplication and blame shifting.

Constitutional Text: Constitutional provisions relevant to climate change take a variety of forms, including rights (including individual, collective and eco-centric), directive principles imposing obligations on the state for environmental protection, and provisions for the sustainable management of natural resources and environmental impact assessment. Constitutional texts in the region provide innovative new examples, including the mandated preservation of forest cover in Bhutan’s Constitution, and preservation of sovereignty in perpetuity in Tuvalu’s Constitution, which fixes the maritime borders of the state regardless of sea level rise. Constitutional provisions provide support for laws and policies to mitigate and adapt to climate change. They are no panacea, however, unless put into effect by all relevant actors. They can also lose effectiveness in the face of constitutional and political instability, as the case study of Thailand shows; or where older constitutional provisions are not updated and interpreted to meet current challenges.

Climate Litigation: Strategic litigation to enforce and enhance climate action is a worldwide trend. Such litigation has a long history at the domestic level in Asia, while the Pacific is currently leading climate litigation at the international level. Case studies from South Korea, the Philippines, Nepal, and the Pacific demonstrate how litigation can raise awareness, change public opinion, and act as an accountability mechanism when other forms of political accountability fall short. The success of litigation in enhancing climate action vary, depending on the nature of the constitutional provisions, the kinds of remedies available and prevalent conceptions of the role of courts when engaging in polycentric policy issues. However, even unsuccessful litigation can play an important role by identifying policy weaknesses and prompting a government response.

Jointly organised by

International IDEA Regional Programme for Asia and the Pacific
Constitutional Transformation Network at Melbourne Law School
Policy and Law Center for Environmental Sustainability of the
National Taiwan University College of Law





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About the Melbourne Forum

The Melbourne Forum on Constitution Building in Asia and the Pacific brings together practitioners and scholars from across Asia and the Pacific to share their experiences with the making, design and operation of constitutions. It provides an opportunity for understanding different experiences of constitutional government through in-depth discussion of shared issues and challenges and meaningful comparison across the region. The Melbourne Forum is jointly organised by the Constitution Transformation Network at Melbourne Law School and International IDEA's Regional Programme for Asia and the Pacific. The Forum is organised under the auspices of the Constitution Building Program of International IDEA in collaboration with the Constitutional Transformation Network at Melbourne Law School.

Melbourne Forums to Date

Each Forum takes a theme of current global importance in constitution building to explore from the perspectives of states in the Asia Pacific region:

- 2016 First Melbourne Forum, Melbourne, Australia:
[Constitution Building in Societies with Territorially Based Societal Conflict](#)
- 2017 Second Melbourne Forum, Manila, Philippines:
[From Big Bang to Incrementalism: Choices and Challenges in Constitution Building](#)
- 2018 Third Melbourne Forum, Colombo, Sri Lanka:
[Implications of Culture for Constitution Building](#)
- 2019 Fourth Melbourne Forum, Yangon, Myanmar:
[Inclusion and Participation in Constitution-Building Processes](#)
- 2020 Fifth Melbourne Forum, online:
[Representation in Democracies during Emergencies](#)
- 2021 Sixth Melbourne Forum, online:
[Democracy, Constitutions and Dealing with the World](#)
- 2022 Seventh Melbourne Forum, Melbourne, Australia:
[Representation: Views from the Ground Up](#)
- 2024 Eighth Melbourne Forum, Taipei, Taiwan:
[Climate Change and Constitutions.](#)

The Melbourne Forum Model

The format of the Melbourne Forum is designed to encourage the interchange of ideas, leading to shared insights on the key themes and questions.

Before the Forum

- Questions based on the theme of each session are circulated to presenters from each case study country.
- The presenters provide brief written responses, which are collated and circulated in advance of the Forum.

At the Forum

- Each presenter gives a short, five-minute oral presentation on the key insights offered by their case at the beginning of each session, with the majority of each session then devoted to questions and discussion.
- The experiences of all the countries represented at the Forum are often relevant across many, if not all, sessions. All participants are encouraged to join in the discussions in all sessions and share their knowledge and experiences in an open and collegial way.
- Active chairing aims to draw out insights from all participants, foster links, and summarise sessions.

After the Forum

- We publish a Forum Report and multiple policy briefs on themes arising from the discussions.



List of Abbreviations

ASEAN Association of Southeast Asian Nations

COP Conference of the Parties [under UNFCCC]

IPCC Intergovernmental Panel on Climate Change

NAP National Adaptation Plan

NDC Nationally Determined Contributions

REDD+ Reducing Emissions from Deforestation and Forest Degradation

UNFCCC United Nations Framework Convention on Climate Change

Acknowledgements

The Eighth Melbourne Forum on Constitution Building in Asia and the Pacific was held in person in Taipei on 23-24 May 2024. It was followed by the Taiwan Roundtable on Climate Change and Constitutions on 25 May 2024, which focussed on law and policy responses, litigation and advocacy to climate and environmental challenges facing Taiwan.

The Eighth Melbourne Forum was organised jointly by International IDEA, the Constitution Transformation Network at Melbourne Law School, and Policy and Law Center for Environmental Sustainability of the National Taiwan University College of Law.

The organising team consisted of Anna Dziejic and Leena Rikkilä Tamang from International IDEA; Cheryl Saunders and Tomás Daly from the Constitution Transformation Network; and Wen-Chen Chang, Jiunn-rong Yeh and Pei-Jung Li from the Policy and Law Center for Environmental Sustainability (PLES) at the National Taiwan University.

In 2024, the Melbourne Forum was jointly sponsored by the National Science and Technology Council of Taiwan and International IDEA's Regional Programme for Asia and the Pacific.

We are grateful to Ken Chen and the team of students at National Taiwan University College of Law for their invaluable assistance in organising and hosting the Eighth Melbourne Forum. We also acknowledge with thanks Rohan Nanthakumar of Melbourne Law School for his research contributions in preparing and editing this Report. We also thank Chia-En Hsieh who created the original images featuring endangered fauna of Taiwan that appear in this Report.

This report shares the papers and the findings from a productive three days' discussion in Taipei. We thank all participants for generously sharing their insights through presentations and discussions at the Melbourne Forum, and in written form in this report.

Image Attribution & Acknowledgements

The images in this report come from the following sources:

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1. Introduction

This Report draws together insights from the Eighth Melbourne Forum on Constitution Building in Asia and the Pacific, on the interaction between climate change and constitutions. Climate change is one of the defining challenges of our time, with political, economic, social, and cultural dimensions. Constitutions are not the only lens through which to examine its implications and to seek solutions. But given the critical roles of states, acting individually and collectively, in mitigating climate change and adapting to its effects, the constitutions that frame state action offer an important window into both problems and potential solutions.

Climate change is a diverse and complex phenomenon with multiple causes and consequences, prompting the need for a variety of strategies to mitigate and adapt to it. The report focusses on those aspects of climate change that most directly implicate constitutions in structuring the domestic activities of states and their international and transnational dealings.

The report therefore is concerned with changes in the climate system that are attributable to human activity and, in particular, to greenhouse gas emissions, although it should be noted that the two other aspects of the triple planetary crisis, biodiversity loss and pollution, are attributable to human activity as well.

Effective state action is indispensable for responding to climate change. The causes of climate change are often driven by local considerations and its effects manifest themselves locally, although responsibility for the causes and the burdens of its effects is not shared equally amongst all states. Mitigation of causes and adaptation to effects therefore demands local actions such as policy making, regulation, investment and advocacy at the state and, often, the sub-state levels.

Of course, effective global action also is indispensable for responding to climate change. Many features of climate change are beyond the reach of individual states and require collective, co-ordinated action. In one way or another the immediate, secondary, and other flow-on effects of climate change have impacts in all parts of the world and on all aspects of the environment, including on the oceans and other global commons. Neither the causes nor the consequences of climate change are confined by state boundaries. Contributors to emissions include powerful transnational corporations and high-polluting industries. Climate change has intergenerational causes and effects. Equitable responses to climate change, therefore, require interstate burden sharing on a basis that is common, but differentiated, so as to be ultimately 'fair'. Effective responses to climate change require shifts in priorities and attitudes at the local, national, and global scale.

For this too, however, state action is critical. States negotiate and enter into the international agreements on which global climate change action depends. State institutions, and other levels of government within states, must implement commitments, once made. State co-operation and co-ordination is needed to manage transnational activity that impacts on the mitigation of climate change and the adaptation to its effects.

A range of international agreements are expressly directed to mitigating and adapting to climate change; averting, minimising and addressing loss and damage associated with climate change; and the provision of technical and financial support to developing states. The primary example is the Paris Agreement, which sets a temperature goal of keeping warming below 1.5°C and the Nationally Determined Contributions (NDCs) and the National Adaptation Plans (NAPs) associated with it. Again, however, it should be noted that other international agreements, which may have relevance to constitutions, play a role in relation to climate change by targeting specific pollutants (e.g. the Montreal Protocol on Substances That Deplete the Ozone Layer) or by regulating greenhouse gas emissions through more generalised regimes such as the law of the sea or human rights law.

In taking either national or collective action, states are guided by what they perceive to be their own interests, both as a discrete state and as a state in a global community. This complicates effective action in many states. Even in relation to climate change, state interests differ in significant degree. States, and communities within states, are affected differently and disproportionately by climate change in ways that vary over time and affect policies and priorities. Some face existential threats from sea level rise, even to the point of requiring relocation of the population, inviting risks of severe economic, social and cultural loss. Others are acutely affected by rising temperatures; drought and its consequences; melting glaciers; cyclones; more fierce and frequent fires; and/or repeated and extreme natural disasters.

To add to the complexity, climate change is a multifaceted phenomenon requiring actions that affect economies, development, energy mix, land and sea uses and governance, which play out in different states in different ways. States also bear different levels of responsibility for the causes of climate change, historically and now, and have benefitted economically from such activities to different degrees. Further, reliance on fossil fuels varies widely across different states. These realities affect the stance taken by states in international negotiations and their readiness to implement international commitments once made. The problems are compounded where state institutions are captured by powerful economic interests and by stark inequalities in the influence that states can exert in international dealings.

As noted in International IDEA's 2023 publication *Climate Change and Democracy: Insights from Asia and the Pacific*, democratic governance shapes climate action and the responses to the threats that arise from the climate crisis. While it is not the sole factor shaping such action or responses, declines in democracy also have an impact on effective climate responses.

In 2024, it is clear that both commitments under the Paris Agreement and action to implement commitments within states fall short of what is required either to hold emissions to levels that constrain catastrophic global warming or to adapt to the warming that occurs. It is clear that the 'climate emergency' requires a paradigm shift in global, national and local priorities and practices.

Given the dependence of effective responses to climate change on state action, constitutions should assist in diagnosing problems and moving towards solutions, even if much more is required. To these ends, this report draws attention to three dimensions of the linkages between constitutions and climate change. *First*, and most obviously, constitutions provide the framework for state action and can help to explain how states have reacted to climate change to date and to chart directions for the future. *Secondly*, the operation of constitutions is affected by climate change in myriad ways, including its impacts on security, equality, culture and other rights; the capacity of governments to cope; the mass movement of people irrespective of state boundaries; the impact on democratic governance, processes and institutions; and the potential for militarisation in the face of emergency conditions. *Thirdly*, constitutions offer a potentially useful vehicle

through which to respond to the specific challenges of climate change. In relation to all three, the Report necessarily is concerned with the operation of constitutions in practice and not merely in form.

There are four thematic issues in which these dimensions play out in particularly telling ways. The first is representation and democratic decision making, which deals with the challenge of converting the necessity for change into legislative and executive action to mitigate and adapt to climate change. The second is multilevel government and the intersection of governance across international, regional, national and local levels. The third and fourth thematic issues reflect two trends in constitutional law in response to climate change: the inclusion or interpretation of written constitutional provisions and litigation on issues of climate and environmental protection and justice.

Asia Pacific focus

The focus of the Melbourne Forum and this Report is on the experiences of constitution building in the Asia-Pacific region. The Report canvasses experiences in 13 polities from across the region: Taiwan, Indonesia, India, Fiji, Sri Lanka, Malaysia, Bangladesh, Tuvalu, Bhutan, Thailand, South Korea, the Philippines and Nepal; and three regional perspectives: one from ASEAN and two from the Pacific. The diversity of the region, in ways that range from size to culture to socio-economic conditions and to constitutional arrangements makes it a particularly rewarding study, with much to contribute to global understanding. Unlike much of the rest of the world, regional organisation also is more limited and less integrated in the Asia-Pacific.

Two other points should be made about the significance of a focus on Asia and the Pacific for examining the links between constitutions and climate change.

One is that the issues raised by climate change affect communities in Asia and the Pacific in ways that are distinctive and often severe. The region offers stark examples of both coastal and non-coastal climate change, some of which is existential. Most states in the region have contributed less to climate change historically and, in many cases, now. It follows that many Asia-Pacific states are affected differently by global commitments. Particular states in the region already have taken innovative constitutional steps towards responding to climate change, with Tuvalu a dramatic example. The pressures of climate change also tend to have encouraged other developments in the region including public interest litigation and litigation in international and domestic courts.

Secondly, in this context, there is often a reason to distinguish Asia and the Pacific from each other more sharply than has been necessary in dealing with other issues. The small island developing states (SIDS) in the Pacific are especially vulnerable to climate change, in distinctive ways that threaten their very existence. Pacific states are responsible for only minimal historical or current contributions to climate change, while some countries in Asia make significant current contributions. Expectations of burden sharing and the extent of current impacts of climate change thus differ between the regions, at least as a generalisation. The pressures of climate change have encouraged enhanced regional co-ordination in the Pacific, for example through the Pacific Islands Forum, to maximise the Pacific influence in international negotiations. There have also been numerous global initiatives that have been spearheaded by states or international organisations in the Pacific, such as the advisory opinion proceedings in the International Tribunal for the Law of the Sea and in the International Court of Justice. States in this part of the world also are taking a leading role in other initiatives including, for example, the call for a Fossil-Fuel Non-Proliferation Treaty. While different, there are still some shared experiences and much to learn across the diverse countries of

the Asia-Pacific region, especially pertaining the four thematic issues of representation, multi-level government, constitutional text and litigation.

Structure of the Report

The Report is structured around four thematic issues. In each part, an introductory section outlines the issue, and a series of case studies explores it by reference to the experience of selected jurisdictions in the region. The case studies comprise the written answers to questions initially prepared for discussions in the Forum by a scholar or practitioner with deep knowledge of the jurisdiction in question, some of which have been revised in the light of discussions at the Forum.

A final section draws together insights from across the report by asking what role is there for constitutions in responding to the challenges of climate change. Constitutions are no panacea, but they are a potentially useful tool for overcoming entrenched barriers to effective climate action.

The themes, case studies and authors are as follows:

1. Representation and democratic decision-making

Case studies and authors:

- Taiwan: Chun-Yuan Lin
- Indonesia: Belgis Laela Noor Habiba
- India: Shibani Ghosh
- Fiji: Romitesh Kant

2. Multi-level government and climate change

Case studies and authors:

- Sri Lanka: Kumaravadivel Guruparan
- Malaysia: Maizatun Mustafa
- Bangladesh: Shawkat Alam
- ASEAN: Linda Yanti-Sulistiawati
- Pacific: George Carter

3. The relevance of constitutional text to climate change

Case studies and authors:

- Bhutan: Om Katel
- Thailand: Thitinant Tengaumnuy
- Tuvalu: Anna Dziedzic (as an editorial briefing)

4. Litigation and climate change

Case studies and authors:

- South Korea: Sejong Youn
- Philippines: Raymond Marvic C Baguilat
- Nepal: Rupa Basnet
- Pacific: Fleur Ramsay

We are grateful for the contributions of all participants in Melbourne Forum 2024, who comprised a range of respected scholars and practitioners, with expertise in constitutional law and practice, climate and environmental justice, and related issues and knowledge of their own jurisdictions. They bring a wealth of experience and insights. Between them, they offer insights into the experience of 13 jurisdictions across Asia and the Pacific as well as regional perspectives, bringing diverse perspectives on the interaction between constitutions and climate change.



2. Representation & Democratic Decisionmaking

2. Representation & Democratic Decisionmaking

In democracies, climate change law and policy is made primarily through legislative and executive action by representatives of the people of the state who are elected at regular intervals, usually in a political contest. Such laws and policies are needed to reduce greenhouse gas emissions and mitigate climate change through, for example, carbon taxes, carbon trading schemes, clean energy standards, and the promotion of green renewable energy. As climate change accelerates there are calls for additional measures including phasing out of fossil fuel production and use, withdrawing subsidies, and halting new fossil fuel projects. In all countries, law and policy also is required to adapt to climate change in order to, for example, protect the environment, manage risks relating to natural disasters and potentially relocate communities at risk. Government action sometimes also is needed to facilitate compensation and restitution for loss and damage associated with adverse effects of climate change.

The design and implementation of effective policies and legislation to address climate change depend on many factors. These include the constitutional organisation of public power, including its interpretation by courts, the practical capacities of state institutions, and political will. The focus of this section of the report is on the possibilities and challenges presented by democratic representation.

In principle, if representative government is working well, state institutions should be active in tackling issues that affect the public interest of which climate change might be considered an obvious and pressing example. In practice, however, state action remains desultory, for reasons that include both the attitudes of voters and the operations of representative government.

While there is growing concern about climate change in communities across the world, it is more marked in some communities than others. As a generalisation, the point has not yet been reached at which a majority of voters places effective pressure on representatives to respond to climate change as a matter of urgency, particularly through specific measures designed to mitigate its causes. Explanations lie partly in the 'slow-onset' nature of climate change itself, causing voters to prioritise other more apparently immediate issues, and in the complexity of the policy responses that climate change demands, at least some of which threaten to significantly disrupt familiar patterns of daily life. The problem is compounded by ongoing debate about the realities and reversibility of climate change, fuelled by misinformation and disinformation. Where climate change policy emanates from the international level, the attention of voters is more attenuated still. Commitments are made by the executive in circumstances that typically lack transparency; global agreements seem remote and may attract local skepticism and suspicion; and the gulf between generalised international commitments and targeted local implementation makes it harder still for voters to understand how global decisions align with local needs and challenges and to hold their representatives accountable for implementing effective and equitable climate solutions.

Representatives are not solely dependent on public opinion, although they are responsive and ultimately accountable to it. On a matter as significant as climate change, they can provide leadership, inform and educate voters, explain options to them, and assuage their concerns. In practice however, in the case of climate change, the requirement for regular, competitive elections that underpins representative democracy has inhibited long-term and potentially unpopular actions that need to be taken. The contestation around climate change, its impact across multiple areas of government and the economic significance of some of the measures that need to be taken, including transition from fossil fuels, makes climate change policy a divisive political issue that is opposed in some quarters and tackled gingerly in others. In such circumstances, a change of government necessarily disturbs policy continuity and interrupts long range planning in an area that already is one of the most difficult that any government is likely to face. These difficulties are exacerbated by the often-malign influence of powerful domestic and transnational economic forces seeking to avoid the impact of climate change policies on their profitability by exerting financial and other pressures on elected representatives to modify or delay climate action. Here, too, the inadequacy of action is partially obscured by the disjunctions between international action and domestic implementation.

This section explores how four countries – Taiwan, Indonesia, India and Fiji – have experienced and dealt with challenges of representation and democratic decision-making in the field of climate change law and policy.

Each of the case studies that follow broadly responds to the following questions:

1. What are the most pressing issues arising from climate change in your country and what impact do they have on the constitutional system?
2. What do people want their representatives to do to address climate change? Are there conflicting pressures?
3. Are there different expectations of representatives at the national level and at the subnational or local levels?
4. What legislative and policy measures have been taken to respond to climate change at the national and/or subnational level?
5. Were there any constitutional barriers to taking measures to address climate change? If so, how were they dealt with?
6. What other constraints (political, social, national, and international) limit people and governments achieving the measures needed to address climate change?
7. Have there been any innovations in inclusive representation (eg citizens' assemblies, specialist commissions, representation of nature) to improve representation on issues of climate change?

Taiwan

Chun-Yuan Lin

1. What are the most pressing issues arising from climate change and what impact do they have on the constitutional system?

The most noticeable climate impact in Taiwan is the change in rainfall, which destabilises the water supply and invites a wide range of impacts, including the loss of biodiversity and unstable industrial production and agricultural activities. Taiwan needs effective policy and legislation on climate change. However, it faces less pressure from and possesses fewer resources than the international society. Progressing climate policy in Taiwan depends on Taiwan's domestic political dynamics, either through its representative democratic process or through referendums.

Although some progress has been made through the representative democratic process, the economic-driven policy environment and political polarisation in Taiwan hinders effective law-making and implementation. For instance, the *Climate Change Response Act 2023* can be partly attributed to the introduction of the European Union's Carbon Border Adjustment Mechanism Regulation in 2023 because Taiwanese companies felt the need for climate law to enhance their competitiveness in the decarbonizing global market. This economic-driven legislation perpetuates the pervasive narrative of economic development and the influence of enterprises, resulting in a narrow focus on clean energy and green growth. The dominant economic concern may divert attention from human rights and environmental protection in climate policy formulation and implementation. Critical issues such as decarbonisation, social equality, and adaptation remain largely under-addressed. The Constitution does not provide for any right to the environment nor any environmental protection mandate to balance the prevalence of economic concerns. Political polarisation further deters rational discussion on climate policy. Taiwan's constitutional framework of semi-presidentialism may extend political confrontation to the conflicts between the legislative and executive branches, which may discourage progressive climate policy and implementation.

According to the Constitution, citizens may engage in shaping climate policy through referendums. Notably, three out of ten referendums in 2018 and two out of four in 2021 pertained to energy policy. Key issues addressed in these referendums included the reduction of coal-fired electricity generation, the expansion of new coal-fired power plants, the decommission of nuclear power facilities by 2025, the potential revival of the fourth nuclear power plant, and the construction of a third natural gas-receiving station within an ecologically sensitive algal reef area. These energy-related referendums, however, revealed deep political divisions, largely along party lines, and highlighted the significant role of misinformation. Opposition parties often initiated or joined referendum campaigns to challenge government policies. Even in citizen-initiated referendums, such as the one concerning the natural gas-receiving station, political party cooperation was sought to secure majority support. In a seriously divided society, political tendency significantly shapes the voting behavior in any referendum. The extent to which referendums contribute to effective climate policy outcomes remains a matter of ongoing debate.

Two legal actions have been brought against the Government to challenge inadequate climate action. The first was brought in the Taipei Administrative Court, where Greenpeace challenged the Ministry of Economic Affairs for failing to impose an effective scheme requiring major electricity consumers to use renewable energy. The Court refused to review the case on the basis that the executive branch enjoyed discretions in making the ordinance and the plaintiff had no right to demand a particular ordinance. In a second case, some fishermen and indigenous people, with the help of an NGO, brought an action in the Constitutional Court. The main arguments of relevance were: 1) the Constitutional Litigation Act is unconstitutional for not providing effective remedies for climate victims; 2) the Climate Change Response Act is unconstitutional for not providing short and mid-term greenhouse gas emission reduction goals; and 3) the Ministry of Environment failed to establish periodic regulatory goals according to the law. This ongoing climate litigation may impact the power balance between the court and political branches, as well as the availability of judicial remedy.

2. What do people want their representatives to do to address climate change? Are there conflicting pressures?

People have conflicting expectations about climate policy. Most citizens expect the government to address the climate crisis yet tend to prioritise immediate needs over the exigencies of the distant climate crisis. For example, people support renewable energy but oppose the increase of electricity prices and the decommissioning of nuclear power plants.

As previously noted, there exists a vocal constituency advocating for policies aimed at safeguarding export-oriented enterprises from the adverse effects of global competition. These advocates call for legislative measures facilitating access to a reliable supply of clean energy, the establishment of more accommodating frameworks for Environmental, Social, and Governance disclosure, and the facilitation of participation in the global emissions trading market. However, there is a notable dearth of voices clamouring for ambitious decarbonisation initiatives or addressing social inequalities. Several Environmental NGOs ardently advocate for the implementation of ambitious decarbonisation policies and legislation, while some others express concerns regarding issues such as land exploitation and environmental degradation resulting from the energy transition.

3. Are there different expectations of representatives at the national level and at the subnational or local levels?

Owing to the narrow framing of the climate issue, most individuals perceive climate change primarily as a matter of national policy, consequently downplaying the significance of local governments in climate response efforts. Local climate issues and corresponding policies receive scant coverage in the public media.

At the subnational level, climate change issues sometimes manifest without reference to the climate, such as concerns related to land-use conflicts, disaster response mechanisms, and pollution control measures. For instance, a national policy to establish solar power plants may be reframed within the context of land-use controversies and the welfare of fishermen, farmers, or indigenous communities at the subnational level. The asymmetrical emphasis on the national level is further perpetuated by constitutional provisions and the Local Government Act, which grants the Executive Yuan the power to review and potentially veto self-governing ordinances proposed by local governments. Several attempts by local authorities to regulate climate change-related issues have been disapproved by the central government.

4. What legislative and policy measures have been taken to respond to climate change at the national and/or subnational level?

The enactment of the *Climate Change Response Act* in 2023 marked a significant milestone, prescribing the 2050 net-zero emission target, carbon pricing mechanisms, adaptation measures, and strategies for international cooperation. However, the compulsory carbon fee and the emission trading system are not implemented yet. Comparatively, companies actively put efforts into complying with the Environmental, Social, and Governance reporting policy promoted by the Financial Supervisory Commission and the Stock Exchange.

The implementation of the *Climate Change Response Act* also provided the catalyst for a wave of localised initiatives. Article 14 mandates the establishment of climate change response steering groups by local governments, while Articles 15 and 20 require the formulation of Reduction Implementation Programs and Adaptation Implementation Programs at the local level. These programs are required to align with the National Action Guidelines, Action Programs, and Adaptation Plan. Several local governments, including Taipei City, New Taipei City, Taichung City, Tainan City, Kaohsiung City, and Chia-Yi City, have either enacted or drafted local ordinances aimed at achieving net-zero emissions.

Interactions between the central and local governments occasionally give rise to conflicts. For instance, in June 2021, the Ministry of Economic Affairs sanctioned the construction of two gas-fired units at the Taichung Power Plant as part of an initiative to replace coal-fired units. This action encountered opposition from the Mayor of Taichung City, who argued that the central government's decision jeopardised the health of Taichung's residents.

5. Were there any constitutional barriers to taking measures to address climate change? If so, how were they dealt with?

The constitutional barriers for climate change response arise from the interaction of an ill-designed constitution and political reality.

Several constitutional features may constrain Taiwan's climate action. First, the Constitution of 1945 was crafted to limit government power and safeguard individual freedoms. It ignores environmental concerns and was not designed to facilitate a climate transition. Consequently, executive branches are unable to undertake aggressive climate actions without legislative support. The legislative process, characterised by political lobbying and diverse voices, at times, hinders the swift enactment of effective climate policies.

Second, the 1945 Constitution was made in and for mainland China, and this has complicated the possible climate efforts. On the one hand, the Made-in-China Constitution has fostered a divided national identity, which exaggerates political division and complicates Taiwan's participation in international regimes. Serious political division deters collaboration on climate policy and the opportunity for international participation and cooperation. In addition, the central-local system of the 1945 Constitution was designed for a large and populous China and offers limited guidance for resolving contemporary central-local climate controversies in Taiwan. Subsequent constitutional amendments delegate power to the legislature to define the central-local relationship, yet in doing so the central legislature may tend to suppress local autonomy in pursuing climate actions. For instance, Article 28 of the *Local Government Act* grants the Executive Yuan the power to veto local ordinances, while Article 7 of the *Fiscal Discipline Act* restricts local

governments' utilisation of fixed budgets or funds. The lack of a clear constitutional framework for central-local relationships leaves more space for political manipulation and turbulence.

Constitutional amendment has created more problems. Taiwan's semi-presidential system, which combines a parliamentary-based power structure with direct presidential elections, amplifies the risk of political polarisation and conflicts between the legislative and executive branches. This deep-seated political division impedes rational dialogue and genuine cooperation in addressing climate change. When both the legislative and executive branches align politically, progress on climate policy and legislation may be achieved. However, in cases of a divided government, the executive branch tends to adopt softer climate strategies, such as subsidies and tax incentives, to circumvent political discord.

The ill-fitted Constitution exaggerates political confrontation and populism, creating barriers to effective climate policy. Unfortunately, the high threshold to revise the Constitution, as prescribed in Article 12 of the R.O.C Constitutional Amendment, has made constitutional amendment extremely difficult.

6. What other constraints (political, social, national, and international) limit people and governments achieving the measures needed to address climate change?

Two key impediments to proactive climate action in Taiwan are the absence of international participation and domestic political polarisation. Without meaningful engagement in international forums, Taiwan is precluded from accessing valuable knowledge and resources from the global climate regime. Moreover, this international isolation denies Taiwan the opportunity to participate in transnational emission trading schemes and other mechanisms of global climate governance. Additionally, entrenched political divisions within Taiwan hinder rational discourse and collaborative efforts toward addressing climate change.

7. Have there been any innovations to improve representation on issues of climate change?

Despite some efforts, the progress on inclusive representation remains little. The *Climate Change Response Act* incorporates certain participatory mechanisms. Competent authorities are required to engage experts and NGOs and conduct public hearings during the development of mitigation and adaptation policies and objectives (Articles 10, 11, 19, 20). Local governments are also mandated to consult citizens when formulating local action plans (Article 15). While the *Climate Change Response Act* ostensibly values expert input, the extent to which these hearing and opinion-gathering procedures enhance citizen participation remains unclear.

Efforts to promote a “*just transition*” have placed greater emphasis on inclusive mechanisms. The National Development Council established the Just Transition Commission in 2023 to offer policy recommendations and conducted a series of social dialogues on the matter. However, the function of the Commission may be undermined due to the lack of independence and resources. In addition, the ongoing social dialogue on a just transition has put no comprehensive plan on the agenda, issue, and scope of “*affected people*” To what extent this “*dialogue*” may contribute to meaningful participation and better policy remains an open question.

Indonesia

Belgis Laela Noor Habiba

The Relationship of Business and Decision Making on Climate Change

Indonesia at the Crossroads of Oligarchy and Democracy

The United Nations Conference on Environment and Development in 1992 and the Aarhus Convention in 1998 shared the underlying principle that effective environmental governance involves ensuring community participation by governments. These events marked a pivotal moment in recognising the interplay between environmental conditions and governmental administration patterns. Consequently, contemporary global environmental policies and laws emphasise governance models that promote effective environmental management, necessitating democratic forms of government. Research suggests that democratic practices in environmental management positively impact environmental quality.¹ Moreover, the democratisation of natural resource management underscores the importance of state-society interactions in managing natural resources in a manner that benefits impoverished communities.²

After almost two decades, reflection on the condition of democracy in Indonesia has begun to be widely carried out. One of the important findings in this reflection is the presence of clientelism. Clientelism is a socio-political phenomenon which in Indonesia is especially closely related to the General Election period. The cause of electoral clientelism is poverty. The close relationship between clientelism and the diversity of economic types in society means that the more diverse the types of economy, the level of clientelism decreases.

So, electoral reform is needed to reduce political costs. High political costs can lead to political corruption and strengthen oligarchic dominance in a democratic system. In the principles of citizenship, power should be accessible to all people from various social and economic layers, not only by citizens with great wealth or who are linked to powerful groups.³

Climate change and climate change policy in Indonesia

As an archipelago country, Indonesia is vulnerable to the impact of climate change. Frequent extreme weather, intense rainfall that causes floods, and longer droughts that cause longer fire seasons are a few examples of what has already happened in Indonesia. Early in 2024, a big flood occurred in Demak,⁴ posing a threat to Indonesia's biodiversity. This, in turn, jeopardises agriculture, fisheries, and forestry, potentially undermining food security and livelihoods. In Indonesia, the rights of healthy living and a healthy

¹ Ivalerina, Feby. *Demokrasi dan Lingkungan*. Jurnal Hukum Lingkungan Vol 1 Issue 1 Januari 2014 <http://repo.driyarkara.ac.id/502/1/JurHUKUM.pdf>.

² Borras, S. M., & Franco, J. C. (2008). *Democratic Land Governance and Some Policy Recommendations*. United Nations Development Program.

³ Aspinall, E., & Berenschot, W. 2019. *Democracy for Sale: Pemilu, Klientelisme, dan Negara di Indonesia*. Cornell University Press.

⁴ 'Demak Flood 2024: An Expedited Review' (*rdi.or.id*, 2024), <https://rdi.or.id/article-blog/demak-flood-2024-an-expedited-review/> (accessed on 20 October 2024).

environment are regulated by the Indonesian Constitution of 1945, in article 28H(1): “Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care”.

Even though the Constitution states this right, much remains open to interpretation by the government. Who will take the responsibility? Who should provide for the people? The government responsibility to provide for the matters protected in article 28H is not clear or concrete, as has been demonstrated by the number of litigation cases brought against the state as the defendant.⁵ When there is an environmental case, how and when should the state's responsibility be carried out? How should it be run? For example, in the case of the Lapindo mudflow tragedy — where, in possibly the largest methane emission in ever recorded, a mud volcano in Lapindo eliminated residents’ houses, school, mosques, and land fields across 12 villages — the government sought to take the case first and resolve it and then recoup costs from the corporations where appropriate. In the end, however, the state said that it did not have enough money to resolve the case, which was taken over by the corporations.

Many responsibilities arising from public rights are taken up by corporations and business actors, rather than by the government, so that the performance of many public functions also may be delayed or late. The government typically sees environmental cases as disaster cases, and so does not apply a risk lens to decision-making and response. When the government does use a risk lens, then the *in dubio pro natura* principle applies [this principle requires that where there is uncertainty in legal interpretation, the decision maker should choose the interpretation that favour nature and environmental protection], as does the precautionary principle [which supports taking protective action against irreparable harm, even if the scientific evidence is incomplete. Meanwhile, when using a disaster lens, there will be certain parameters within which an event can be classified as a disaster and response measures will be costly and late. Changing the mindset is also a problem.

Climate change needs a different approach. We cannot rely on current politics; it needs systemic change. Climate change has not featured in Indonesia’s economic policy or in politics, except as a discrete matter at the project-level. Institutionally, the issue of climate change cannot be managed by just one institution. So how should the government apply the constitutional mandate in article 28H to the economic politics surrounding Indonesia’s Nationally Determined Contribution (NDC)? If it becomes law, it will directly mandate all ministries. Climate change is considered an open legal policy, so it is not easy to hold government accountable to a clear standard or to pursue legal action. By way of illustration, article 28H should be able to be used to challenge the Mining and Coal law on climate change grounds, but it cannot be used in this way because of the “open legal policy” on climate change, meaning that there is no benchmark or standard to apply.

Climate change policy in Indonesia is also directly impacted by the investment sector. The Indonesian government wants to increase the amount of investment in various ways,⁶ and this poses challenges for

⁵ ‘Gugatan Warga Negara Dalam Menuntut Keadilan Iklim’ (*leip.or.id*, 22 September 2022), <https://leip.or.id/wp-content/uploads/2022/09/4.-Raynaldo-Sembiring-Gugatan-Warga-Negara-dalam-Menuntut-Keadilan-Iklim.pdf> (accessed on 20 October 2024).

⁶ ‘Indonesia Attracts \$90B Investment in 2023’ (*Jakartaglobe.id*, 24 January 2024) <https://jakartaglobe.id/business/indonesia-attracts-90b-investment-in-2023#:~:text=Indonesia%20has%20attracted%20a%20total,in%20combined%20investment%20last%20year> (accessed on 20 October 2024).

responding effectively to climate change. As the Minister of Environment and Forestry said: “*FoLU [Forestry and other Land Use] Net Carbon Sink 2030 should not be interpreted as zero deforestation. This needs to be understood by all parties for national interests. The massive development of President Jokowi's era must not stop in the name of carbon emissions or in the name of deforestation*”.

Increasing the investment, the government should increase the potential of domestic manufacturing, but the manufacturing sector in Indonesia is facing many challenges: labour issues, wages and infrastructure. This causes the Indonesian government to resort to increasing investment through natural resource incentives, which, of course, has a significant impact on climate change. For this natural resource incentive, the regulator (the House of Representatives and the government) created new regulations and policies that increased the natural resource demand and relied on false solutions that directly affect the climate.

At the end of 2019, the government started to create the *Job Creation Omnibus Law*. This law met with a lot of criticism from civil society. It was declared conditionally unconstitutional by the Constitutional Court in November 2021, and the Court required the government to revise the law over the course of the two-year grace period,⁷ otherwise the law would become invalid. In early 2023, the government issued *The Regulation in Lieu of Law on Job Creation (Perppu Cipta Kerja)*, relying on the principle of urgency and using the climate crisis as the basis of urgency, but copying the old *Job Creation Omnibus Law* that was declared unconstitutional.⁸

In Indonesia, political power is closely related to economic power; political elites are often also economic elites or have close personal or familial relationships with business actors.⁹ The interconnection between the worlds of politics and business is a recurring topic in analyses of Indonesia. The fusion of the political and the economic, especially in how policies have been created, is frequently discussed in assessments of present-day Indonesia. Despite their varied focuses, these examinations of Indonesia's democratic political economy all hint at a significant change in the balance of power between the government and business interests. In the past, under the New Order regime, businesses relied heavily on the support of government officials to secure and retain economic advantages. However, in recent times, business entities have frequently managed to leverage democratic electoral processes to wield influence within state bodies.

The National Cabinet operates under Law 39/2008 on State Ministries, which prohibits ministers from simultaneously serving as directors or commissioners of state-owned or private companies, or as leaders of organisations funded by the state budget. As a result, politicians heavily involved in business typically resign from their positions as CEOs or directors before assuming cabinet roles, a process often carried out with formal announcements.

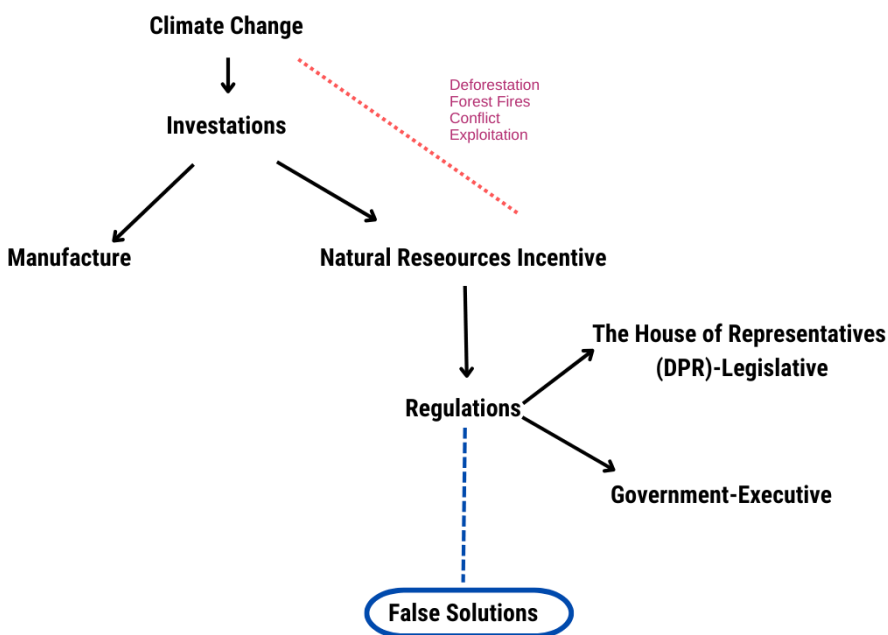
⁷ 'BREAKING: Constitutional Court orders government to amend job creation law' (*TheJakartaPost.com*, 25 November 2021), <http://www.thejakartapost.com/indonesia/2021/11/25/breaking-constitutional-court-orders-government-to-amend-job-creation-law.html> (accessed on 20 October 2024).

⁸ 'Perppu Cipta Kerja Ready for Approval' (*Kompas.id*, 16 February 2024), <https://www.kompas.id/baca/english/2023/02/16/perppu-cipta-kerja-ready-for-approval> (accessed on 20 October 2024).

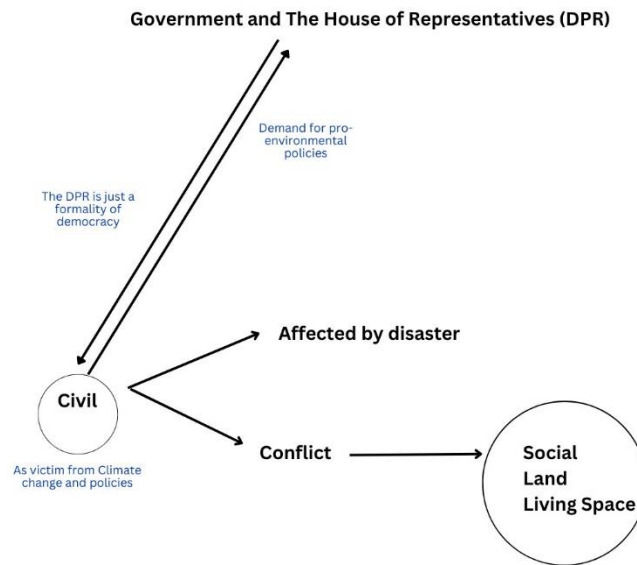
⁹ 'Central Actors in Natural Resource Oligarchy Networks: Based on the Context of Omnibus Law' 2023, https://www.greenpeace.org/static/planet4-indonesia-stateless/2024/02/3637d2fb-sna_report_english_oct23.pdf (accessed on 20 October 2024).

The law is less precise regarding restrictions on parliamentarians' conflicts of interest concerning private enterprise involvement. Specifically, there is no explicit prohibition against parliamentarians holding positions in or owning shares in companies, whilst serving in parliament. Law 17/2014 on Indonesian legislative bodies specifies that parliamentarians are prohibited from concurrently holding various other positions, such as being a public servant, a judge, a lawyer, an active member of the armed forces, or being employed by a state-owned enterprise or a state-funded organisation. However, there is no specific mention of holding interests in private enterprises. Nonetheless, the law does establish a general principle that parliamentarians should not engage in other employment that conflicts with or is related to their role as a member of parliament.

The result of this predominance of parliamentarians with business interests is that parliamentarians face massive conflicts of interests when devising, and voting on, various laws affecting business interests.



Since Indonesia has had the *Job Creation Omnibus Law*, most decisions on permits, regulations, policies and climate mitigation have occurred on a national level. The local government has small and limited authorities because of fiscal limitations (almost 90% of provinces depend on national funds). The people therefore tend to not put their expectation on local governments, including the Regional People's Representative Assembly. If the local government rejects or limits a permit related to investment (i.e because it can degrade the land) then it will be considered as “investment-obstructive” and its authority can be withdrawn based on the *Job Creation Omnibus Law* or *UU Minerba*.



In addressing climate change at the national level, the government only has one formal policy to decrease emissions. This is the NDC policy, which is Indonesia’s target for decreasing greenhouse gasses by 2030. This policy is sectoral regulated (energy sector controlled by Ministry of Energy and Mineral Resources; investment by Ministry of Investment; Forestry and other Land Use and Pollution by Ministry of Environment and Forestry etc) even though the NDC applies at a whole-of-government level and the Ministries are interconnected. There are no coercive authorities to enforce compliance with the NDC policy, including to enforce the local government’s compliance. The NDC target will not be achieved if the government adopts a “*business as usual*” approach, without more ambitious measures and comprehensive changes, including on regulations and policies.¹⁰

Another limitation to addressing climate change is political will. The government and legislature are not focused on climate change or how to mitigate it. Instead, they look at the resulting disaster (i.e in the example of forest fires, they do not see the root causes but focus on creating the responsive taskforce, etc). Solutions are therefore partial and inefficient. Since the amendment of the *Job Creation Omnibus Law*, across the whole regulatory sphere but especially in the environment space, there is a lack of public participation because the law reduced public space to participate in decision making relating to climate change. For example, at the environmental impact analysis stage under the *Job Creation Omnibus Law*, only the people who are *directly* impacted by the environmental degradation can participate. Indonesia also does not have any formal institution, authority (e.g. a special envoy) or forum that brings together the whole of civil society and government at the same time to address climate change. Outside of this, the draft bill on the Conservation of Living Natural Resources and Ecosystems is still not agreed by the parliament even though this is one of the regulations that could offer greater protection to the environment.

¹⁰ ‘Main Api dengan Deforestasi: Analisis Risiko Kehilangan Hutan Indonesia Akibat Kebijakan FOLU Net Sink 20230’ 2023 <https://www.greenpeace.org/static/planet4-indonesia-stateless/2023/12/b5beb192-main-api-dengan-deforestasi.pdf> (accessed on 20 October 2024).

Civil society is trying to push the government to make a specific law relating to climate change. The initiative is already there, but we are still waiting for the political will from the government. A Bill concerning climate change has been proposed by the climate justice coalition, drawing on the impacts of the climate crises as stated by the Intergovernmental Panel on Climate Change in its reports.

Local communities and Indigenous peoples also face difficulties. On the one side, they have land conflicts with corporations; and on the other side, they are asked to protect their living spaces. In 2012, the Constitutional Court determined that the indigenous forest is not the state's forest, but this verdict has not been effectively implemented, so Indigenous peoples are still fighting for their rights to be recognised and implemented by the government. Yet, every celebration of Independence Day, the president always wears traditional clothes that represent the Indigenous people.

India

Shibani Ghosh

1. What are the most pressing issues arising from climate change and what impact do they have on the constitutional system?

India is one of the most vulnerable countries to the impacts of climate change. It has a long and densely populated coastline which is at risk from sea level rise. The Himalayan glaciers are retreating rapidly and are likely to witness significant loss in volume, resulting in erratic water flow in several major river systems in North India. This will directly affect agricultural productivity, and cause water scarcity in many parts of the country. Climate change is also likely to increase the frequency of extreme weather events like heatwaves, droughts and floods, exposing millions across the country to harsher living conditions. Changing weather patterns are also likely to impact forest vegetation and wildlife in the country, destabilise energy systems, and impact the labour force in multiple ways. Ranked 134th in the Human Development Index, with a significant chunk of the 1.4 billion population facing acute financial distress and unable to reliably access basic facilities such as food, water and electricity, India's existing vulnerabilities will only be exacerbated by climate change impacts. This is, of course, a telegraphic way of describing India's climate change induced distress, which is immense, and most likely not entirely understood or accounted for yet.

Although historically India's emissions are insignificant, India is currently the third largest emitter of greenhouse gas emissions. Its per capita emissions remain far below the world average. India is heavily reliant on coal. More than 57% of the country's primary energy supply is being sourced from coal, and India has not committed to phasing it out. In its nationally determined contribution (NDC) submitted to the UNFCCC in August 2022, India committed to reducing its emissions intensity by 45% below 2005 levels by 2030 (excluding land use, land-use change, and forestry) and to increasing the share of non-fossil power capacity to 50% by 2030. In its first NDC (submitted in 2015), India also committed to an additional carbon sink of 2.5 to 3 billion tonnes of CO₂ equivalent through additional forest and tree cover by 2030. This commitment continued in its 2022 NDC. The Prime Minister has also pledged a net zero target by 2070 at COP26 in 2021.

India's vulnerability to climate impacts, and its contribution as one of the largest emitters in the world (with emissions continuing to rise), raise several complex challenges for governance and policy making. The Constitution of India does not explicitly acknowledge climate change, its drivers or impacts. But at least three core aspects of India's constitutional set-up will be affected by climate change, and also define the ways in which climate change is addressed in the country:

1. Federalism – The Constitution of India divides legislative and executive powers and functions between the Union (Government of India) and the States (28 states). Schedule VII to the Constitution provides two lists of subject matters on which the Union and the States have competence to legislate and a third list on which both the Union and the States can legislate (called the concurrent list). Matters relevant to climate change (mitigation and adaptation) are spread across the three lists. For instance, the Union can legislate on development of oil fields and mineral oil resources, petroleum, and interstate waters; States

have competence to legislate on agriculture, water, public health, and sanitation; and forests and wildlife are on the concurrent list. On some matters the division of legislative competence may not be entirely clear. Importantly, the Union has the residual powers to legislate on subject matters that are not expressly included in Schedule VII. Who has the power to legislate on a climate relevant issue, who would take the lead in legislating, which issues will be prioritised, how would regional diversity be reflected in the law making – are all salient questions.

2. **Fiscal flows** – Even though legislative competence is distributed across the Union and the States, the Union dominates in terms of fiscal power. The Government of India holds the purse strings for several programs and schemes – some with direct climate relevance such as those on renewables and electric vehicles, and others with indirect climate benefits such as state development plans, housing, rural employment, cooking fuel etc. The devolution of tax revenue from the Union to the States has become an increasingly contested arena. Presently, the Union exercises disproportionate power in planning and implementation climate relevant policies/ measures as it controls most of the fiscal flows. How can fiscal flows be restructured in a manner which incentivises greater climate action, allows for innovative and region-specific planning, while ensuring that there is cohesion across the country’s various policies and actions, and equitably balances regional disparities?
3. **Rights, directive principles and duties** – The Constitution of India recognises several fundamental rights. Over the decades, through judicial pronouncements, many other (unenumerated) rights have been read into these fundamental rights. These include socio-economic and environmental rights such as the rights to livelihood, food, housing, and water, as well as a right to clean and healthy environment. These rights will undoubtedly be impacted by climate change. Recently in a landmark judgment, the Supreme Court of India also recognised that a right not to be affected by the adverse effects of climate change emanated from two fundamental rights, the right to life (Article 21) and right to equality (Article 14).

Apart from fundamental rights, the Constitution also recognizes certain Directive Principles that are to guide state policy, such as the directive principle that the State will endeavour to protect and improve the environment and to safeguard the forests and wild life of the country (Article 48A), the State shall raise the level of nutrition and the standard of living and to improve public health (Article 47), and the State shall foster respect for international law and treaty obligations (Article 51(c)). And finally, completing the triumvirate, the fundamental duties of citizens which include the duty to protect and improve the natural environment (Article 51A(g)).

There are also constitutional and statutory rights to approach the judiciary, an extensive jurisprudence around legal principles such as public trust doctrine, inter-generational equity, and the precautionary principle, and a history of courts being procedurally flexible and innovative in public interest cases. This rich legal landscape provides a solid bedrock for raising climate or climate-related claims.

2. What do people want their representatives to do to address climate change? Are there conflicting pressures? Are there different expectations of representatives at the national level and at the subnational or local levels?

Addressing climate change is yet to become a politically salient issue in India. India is in the midst of its five yearly national elections, and there is barely a whisper about climate issues. There are, of course, issues which will be affected by climate change, or are relevant to India's mitigation policies and adaptive capacity like access to electricity, water scarcity, employment, and environmental regulation that have found mention, but the climate angle remains missing.

India has witnessed several major environmental disasters in the recent past – floods, landslides, cyclones, droughts etc – and these will only be exacerbated as the frequency of extreme weather events increases. Yet, apart from sporadic demands for better planning and reducing environmental stress, and compensation related claims, there have been no significant demands being made of the political class. Occasionally, the courts step in directing governments to diagnose the causes leading to the environmental damage and loss of life, and to take necessary actions. But these are fairly *ad hoc*, and do not lead to strategic interventions or systemic reforms.

3. What legislative and policy measures have been taken to respond to climate change, at the national level and/or subnational level?

India is yet to legislate a national law on climate change. However, there have been a few Private Member Bills on the issue, including one on the net-zero target, which have been tabled in Parliament. Private Member Bills are rarely ever passed by Parliament. However, they are indicative of a growing interest in legislating on aspects of climate change.

There are several laws passed by Parliament in different sectors which provide hooks – either explicitly or implicitly – for policy measures that respond to climate change. Most recently, the law on forest conservation – *Forest (Conservation) Act 1980* – was amended purportedly to enable achievement of the national target of net-zero by 2070 and to maintain or enhance the forest carbon stocks. This aim finds mention in the preambular text, but it is not clear how the provisions of the amended law would support this objective.

The *Electricity Act 2003* is the principal law governing the electricity sector in the country. Renewable energy sources are being encouraged under this law by, for instance, allowing promotion of renewable energy to be a factor in tariff fixation, and mandating minimum amount of electricity to be purchased by distribution licensees from renewable energy sources. Several measures for increasing energy efficiency including energy labels, energy audits and conservation codes for buildings have been issued under the *Energy Conservation Act 2001*. There is also a scheme facilitating trade in energy savings certificates between designated consumers in sectors like power, iron and steel, cement and aluminium. In 2023, a carbon credit trading scheme was also introduced under this law, although the exact mechanics of the trading are unclear.

The *Disaster Management Act 2005* has the most direct bearing on adaptive measures. Although previously the focus had been on providing relief in the aftermath of disasters (man-made and natural), there is a mandate in this law to build capacity to prevent or reduce the risk and severity of a disaster and to rebuild in the aftermath of a disaster.

Environmental laws also provide several avenues for climate-relevant legislative and policy actions. Under the *Environment (Protection) Act 1986*, there are processes for granting regulatory approvals which could consider factors such as greenhouse gas emissions from a proposed industry or activity, its impact on the forest cover, or effects on adaptive capacity of the area, while assessing the impact. Although climate change can be considered – because there is ample room for discretion – as an explicit consideration, it is yet to be included expressly in the statutory processes. A climate-specific institution – the Apex Committee for Implementation of Paris Agreement – was set up under the *Environment (Protection) Act* in 2020. Other environmental laws such as those on pollution control and compensatory afforestation provide statutory hooks for future climate regulation. There is also a move towards encouraging corporate disclosures on greenhouse gas emissions, climate risks etc.

In terms of policy, the Union Government released its National Action Plan on Climate Change (NAPCC) in 2008. The Plan endorses a “co-benefits approach” – identifying measures which promote India’s development objectives while simultaneously yielding benefits by addressing climate change effectively. Several “missions” were set up under the Plan focusing on different aspects of India’s development agenda – including a solar mission, energy efficiency, water and sustainable habitat. These missions have met with varying degrees of success over the years.

The NAPCC also set in motion the preparation of State-level Action Plans on Climate Change (SAPCCs). These plans, though prepared at the state-level by the states were based on a template prepared by the Union government, and in most cases were not much more than a wish-list of policy measures, with tenuous links to climate change. These Action Plans are now being reviewed in several states. (The NAPCC and the SAPCCs are executive policy measures and do not have the weight of law.)

Apart from the NAPCC and the SAPCCs, there are several other policies that have been rolled out covering sectors like energy, agriculture, forestry and transport. The policies are mostly designed to achieve other developmental outcomes such as energy security and energy efficiency but also have complementary climate benefits. Climate finance to support this diverse and growing portfolio of climate policies is increasing. Apart from government subsidies and state-funded schemes, cleaner technologies are being supported by private capital, foreign capital and/or state backed funds.

At the sub-national level, there has been an uneven spread of actions. Certain states have set up climate-specific institutions to spur climate action. Some states have focused on increasing their renewable energy capacity. Cities in several parts of country have designed heat action plans to enable themselves to deal with extreme temperatures. However, these measures are often dependent on the interest and leadership of the bureaucrat or politician at the helm of affairs, and as the person moves to a different post or is voted out, the priorities could well shift.

4. Were there any constitutional barriers to taking measures to address climate change? If so, how were they dealt with?

The main constitutional barrier to taking measures to address climate change is that the law-making power on relevant subject matters is spread across the Union and the states. For a complex problem like climate change, it requires extensive cooperation, knowledge sharing, as well as strategic partnerships across levels of governance and outside the government. Conventionally, the Indian federal set-up is not conducive to such engagements. Fiscal flows from the Union to the states also affect the sub-national level innovation, although states are finding ways around it now.

5. What other constraints (political, social, national and international) limit people and governments achieving the measures needed to address climate change?

As a developing country with a 1.4 billion population, India has several pressing developmental imperatives which require urgent political and policy attention. As a result, while there are gains to be made in pursuing measures that address climate change – many of these measures are likely to produce results only in the medium to long term. Political leadership would much rather risk its political capital on measures that are likely to yield more tangible benefits in the short-term, even if it comes at the cost of postponing strategic and systemic reforms.

The other major constraint is lack of institutional heft. Addressing climate change and taking appropriate mitigative and adaptive measures requires a very high level of inter-agency coordination and planning, inter-disciplinary and deep expertise, strategic thinking, evidence gathering and knowledge sharing. The present institutional capacity, capability and design across the Union and the states is thin and uneven.

6. Have there been any innovations to improve representation on issues of climate change?

There is increasing interest in civil society on issues of climate change, particularly in the youth. At the same time, the state has taken several steps to narrow down avenues of protest, public consultation and representation. There have been several instances wherein individuals and institutions who have critiqued or challenged the government's stance have been faced with coercive actions. This stifling of civil society voices, including that of certain sections of the media, has been across the board on several issues of public concern, and not specific to climate.

The Supreme Court through a few decisions has signalled the need to move away from an anthropocentric approach towards conservation and to adopt a more eco-centric approach. There is also a conversation – albeit a nascent one – around the rights of nature, and the courts in some cases have acknowledged the rights of certain natural entities to be represented in decision making affecting such entities. However, there is no law recognising rights of nature and there is no widespread acceptance of the rights of nature, with the Supreme Court in one case describing its earlier decision recognising certain fundamental rights of animals as only a 'judicial suggestion'.

1. What are the most pressing issues arising from climate change and what impact do they have on the constitutional system?

Like many Pacific Island countries, Fiji confronts severe challenges due to the dynamic shifts in its climate and oceanic environments, as detailed in the Sixth Assessment Report by the Intergovernmental Panel on Climate Change. The islands are especially vulnerable to rising sea levels, escalated coastal flooding, and increasingly severe tropical cyclones that disrupt ecological and human systems. Such environmental adversities are compounded by the nation's geography, consisting of 332 islands, including low-lying atolls, making it highly susceptible to these changes. These pressing climatic challenges have a profound economic impact, as evidenced by the estimated loss of assets due to tropical cyclones, which account for up to 1.6 per cent of Fiji's GDP annually and up to 11 per cent in severe cyclone events. Adaptation costs for coastal defences alone could consume as much as 3 per cent of Fiji's GDP under worst-case scenarios. Approximately 75 per cent of the Fijian population resides in coastal zones on Viti Levu Island; the direct threat to their livelihoods, culture, and identity from climate-induced changes is significant.¹¹

The constitutional implications of these environmental challenges are substantial, requiring a re-evaluation and potential overhaul of Fiji's legal frameworks to ensure they are equipped to handle these evolving threats effectively. The intensifying adverse impacts of climate change have prompted Fiji to take a proactive stance in regional and international climate policy arenas, exemplified by its role in the Suva Declaration on Climate Change and its active participation in setting ambitious targets under the Paris Agreement. Domestically, the passage of the *Climate Change Act* in 2021 marked a significant step in formalising Fiji's response to climate change. This Act facilitates the integration of climate change mitigation, adaptation, and relocation strategies into national decision-making processes. It ensures that the strategy for enhancing ocean resilience is well-coordinated and adequately funded. The Act aims to foster a comprehensive approach to managing the marine and coastal ecosystems vital to the nation's economic and social well-being.

However, addressing these challenges within Fiji's constitutional framework also highlights broader governance issues, such as improved data collection and climate risk assessments essential for informed policymaking. The need for more reliable environmental data and robust climate models hampers effective planning and implementation of adaptation strategies. This is critical for a nation where much of the infrastructure and population are in vulnerable coastal areas. To this end, Fiji's National Development Plan and its National Adaptation Plan emphasise the importance of developing resilient communities and infrastructure that can withstand the impacts of climate change. By embedding these strategies within its legal and constitutional structures, Fiji aims to safeguard its population and ensure sustainable

¹¹ Nagisa Shiiba et al, 'Climate change and coastal resiliency of Suva, Fiji: a holistic approach for measuring climate risk using the climate and ocean risk vulnerability index (CORVI)' (2023) 28 *Mitigation and adaptation strategies for global change* 9.

development amidst the growing threats posed by climate change. These comprehensive measures reflect Fiji's commitment to addressing the constitutional implications of environmental challenges and underscore the integral role of robust governance in climate resilience.

The constitutional mandate outlined in Section 40 of Fiji's Constitution is a critical framework for understanding the country's legal and moral obligations to combat climate change. This provision affirms the right of every Fijian to a clean and healthy environment. It emphasises the protection of the natural world not only for current residents but also for future generations.¹² This directive compels the government to take proactive steps, both legislatively and otherwise, to ensure environmental preservation and sustainability. Here's how this constitutional right influences Fiji's response to the pressing issues of climate change:

- (a) **Legislative Response and Policy Development:** The explicit constitutional right to a clean and healthy environment has directly influenced Fiji's legislative landscape, leading to the development and enactment of comprehensive environmental laws. The *Climate Change Act* of 2021 is a prime example of such legislation, which has established a robust legal framework for addressing the multifaceted challenges of climate change. This Act aligns with Fiji's constitutional obligations and integrates climate adaptation and mitigation into national planning and development processes. Doing so ensures that the protection of the natural environment is not peripheral but a central component of governance and policymaking.
- (b) **Enhancement of Environmental and Oceanic Resilience:** Section 40's requirement for environmental protection has also led to specific initiatives to enhance the resilience of Fiji's marine and coastal ecosystems. Given the nation's dependence on its marine resources for economic and cultural sustenance, the government has initiated measures to strengthen these ecosystems' resilience against climate change's impacts. This includes reducing pollution, managing waste effectively, and improving the health of mangroves, seagrasses, and coral reefs. These efforts are crucial for maintaining biodiversity and the ecological balance necessary to support a healthy environment as stipulated by the Constitution.
- (c) **International Leadership and Advocacy:** Fiji's constitutional commitment has propelled it into a leadership role internationally, particularly in global climate negotiations. By advocating for stringent international measures to combat climate change, Fiji upholds its constitutional duties and seeks to ensure that similar protections are adopted and implemented globally. This is evident in Fiji's presidency of the 23rd session of the Conference of Parties (COP 23) to the United Nations Framework Convention on Climate Change (UNFCCC), where it championed the interests of small island developing states disproportionately affected by climate-related issues.
- (d) **Community Involvement and Future Orientations:** The constitutional right to a healthy environment has encouraged greater community involvement in environmental governance. Through initiatives like community-based adaptation programs, the government fosters a participatory approach to environmental management, ensuring that the local communities are directly involved in crafting solutions that affect their environment. Moreover, the focus on

¹² Joo-Cheong Tham et al, *Climate Change and Democracy: Insights from Asia and the Pacific* (International Institute for Democracy and Electoral Assistance, 2023), pp. 93-94.

protecting the environment for future generations has led to the development of long-term strategies that consider the enduring impacts of today's environmental decisions.

Fiji fulfils its legal obligations by grounding its response to climate change in the constitutional right to a clean and healthy environment. This sets a precedent for integrating environmental sustainability into national policy and governance. This approach addresses immediate environmental challenges and ensures the resilience and sustainability of the Fijian way of life for future generations, maintaining a balance between development and ecological preservation.

2. What do people want their representatives to do to address climate change? Are there conflicting pressures?

In Fiji, public expectations for governmental action on climate change are urgent and specific, reflecting the population's acute awareness of their vulnerability to environmental changes. People demand proactive and comprehensive measures to mitigate climate impacts and adapt to new realities. These expectations can be broadly categorised into several key areas:

- (a) **Robust Policy and Legislative Action:** Fijians expect their representatives to enact and enforce policies that robustly address climate change. This includes the development of sustainable environmental practices, the promotion of renewable energy sources, and the strict regulation of activities that contribute to environmental degradation. The passage of the *Climate Change Act* in 2021, which created a structured approach to climate adaptation and mitigation, is a direct response to these demands.¹³ However, people continue to seek policy enhancements that address current impacts and proactively prepare for future challenges.
- (b) **Enhancement of Infrastructure and Community Resilience:** Given Fiji's geographical makeup, with many living in coastal areas, there is a significant push for developing resilient infrastructures, such as seawalls, elevated buildings, and storm-resistant shelters.¹⁴ Communities expect improvements to protect against increasingly frequent and severe weather events like cyclones and floods. This extends to the demand for better emergency response systems and disaster readiness programs to ensure swift and effective responses when disasters strike.
- (c) **International Advocacy for Climate Action:** As a small island developing state, Fiji has taken a prominent role in international climate forums, advocating for more decisive global climate action and financial support for mitigation and adaptation efforts. The populace supports these efforts, recognising that global warming is a worldwide issue that requires international cooperation. They expect their leaders to continue to be vocal and influential globally, securing commitments that benefit Fiji and similar nations.

¹³ Priyatma Singh et al, 'Climate change adaptation in Fiji: Local adaptation strategies to enhance national policy' in Victoria Reyes-García (ed), *Routledge Handbook of Climate Change Impacts on Indigenous Peoples and Local Communities* (Routledge, 2023), 391-409.

¹⁴ Stefano Moncada and Hilary Bambrick, 'Extreme weather events in Small Island Developing States: Barriers to climate change adaptation among coastal communities in a remote island of Fiji' in Carola Klöck and Michael Fink (eds), *Dealing with Climate Change on Small Islands: Towards Effective and Sustainable Adaptation* (Göttingen University Press 2019), 217-247.

- (d) **Gendering climate change action:** Women’s organisations seek to have their representatives actively involve women and consider gender-responsive measures in the decision-making processes related to climate change and disaster risk management. It's important to note that women in Fiji begin with less access to secure and well-paid employment, occupy fewer senior and decision-making roles, and face significant levels of sexual harassment and domestic violence. These disparities suggest a broader issue of gender inequality, which, when combined with the effects of climate change and disasters, creates additional layers of vulnerability for women. As such, there are calls for a transformation of gender equality in national sustainable development, with a specific focus on gender-responsive climate change and disaster risk reduction measures.¹⁵

The lack of sex- and age-disaggregated data on the diverse impacts of climate change-induced disasters at the domestic level hampers policy and budget decisions that could address the specific needs of different groups of women. Women are recommended to have equal participation in all levels of governance, particularly in national disaster management and climate crisis response. The CEDAW Committee's Concluding Observations on Fiji emphasised the importance of including women in drafting and implementing policies and action plans on climate change and disaster risk reduction, pointing out that while they are disproportionately affected by climate change, they also represent a significant force for change within their communities.¹⁶

Addressing climate change is an inclusive process that requires the integration of various groups into decision-making and policy development. In Fiji, while comprehensive legislations and policies exist for climate change adaptation and disaster risk reduction, they lack an intersectional approach that addresses the needs of people with diverse sexual orientations, gender identity and expression, and sex characteristics (SOGIESC).¹⁷ This exclusion results in the invisibility of specific experiences, leading to inadequate responses in policies and programs. It is recommended that SOGIESC groups assist policymakers in ensuring that their experiences are accounted for to enable appropriate program design and services sensitive to the specific needs of different population groups.

While there is strong consensus on the need for action, Fijian representatives also face conflicting pressures that complicate the implementation of climate policies:

- (a) **Economic vs. Environmental Priorities:** Fiji's economy relies significantly on industries like tourism and agriculture, both of which are sensitive to climate change's impacts and the measures taken to combat it.¹⁸ For instance, policies restricting development in vulnerable zones can conflict with

¹⁵ Priyatma Singh et al, 'The role of women in community resilience to climate change: A case study of an Indigenous Fijian community' (2022) 90 *Women's Studies International Forum* 102550.

¹⁶ Nalini Singh, 'The Climate Crisis in Fiji: The Grim Realities and Available Opportunities for Gender and Climate Justice' in Elisa Fornalé and Federica Cristani (eds), *Women's Empowerment and Its Limits: Interdisciplinary and Transnational Perspectives Toward Sustainable Progress* (Springer International Publishing, 2023) pp 97-107.

¹⁷ Rainbow Pride Foundation, *SOGIESC inclusion in climate change: A policy brief on gaps in the inclusion of Fijians of diverse SOGIESC in climate change laws and policies in Fiji* (2023) .

¹⁸ Moleen Monita Nand et al, 'Climate change loss and damage governance. Where are we now? A case study from Fiji's sugar industry' (2023) 28 *Local Environment* 768-783.

tourism and real estate interests that contribute substantially to the national economy. There is an ongoing tension between pursuing economic growth and protecting the environment, often making it challenging to implement restrictive environmental regulations.

- (b) **Short-term Costs vs. Long-term Benefits:** Investments in climate resilience and adaptation often require substantial upfront costs, which can be a tough sell in the short term, especially in a developing economy. Representatives face resistance when redirecting funds from immediate, tangible benefits to long-term resilience projects that might not show immediate returns.
- (c) **Local vs. National Interests:** Local communities prioritise issues that directly and immediately impact their lives, such as local job creation or infrastructure improvements, over broader national or global problems like climate change mitigation strategies. This mismatch in policy focus and resource allocation complicates the effective implementation of comprehensive climate strategies.

In addressing these challenges, Fiji's representatives must navigate a complex landscape of urgent needs, strategic interests, and diverse stakeholder expectations. Balancing these effectively while making informed decisions that benefit current and future generations remains critical for Fijian policymakers.

3. Are there different expectations of representatives at the national level and the subnational or local levels?

At the national level, Fijians generally expect broader, more strategic actions aimed at addressing climate change:

- (a) **International Advocacy and Agreements:** National representatives are expected to actively participate in international forums and negotiations on climate change, such as the UNFCCC and other global or regional summits. They aim to secure favourable terms for climate finance, technology transfer, and support for mitigation and adaptation strategies that can be implemented at home.
- (b) **Comprehensive Legislation and Policy Frameworks:** There is an expectation for developing robust policies integrating climate change mitigation and adaptation into all facets of national planning. This includes creating frameworks that encourage sustainable development, enforce environmental protections, and promote renewable energy sources.
- (c) **National Security and Economy:** At the national level, there is also a significant expectation that leaders will address the broader economic implications of climate change, including securing the livelihoods of those employed in vulnerable sectors like agriculture and tourism and protecting national infrastructure.

At the local level, expectations tend to be more focused on immediate, tangible outcomes that directly impact daily life:

- (a) **Infrastructure and Community Resilience:** Local government officials are often expected to implement and oversee the construction of climate-resilient infrastructure such as flood defences, water management systems, and disaster-ready public buildings. Residents look for proactive

measures that safeguard their homes and communities from the immediate effects of climate phenomena.

- (b) **Public Education and Preparedness:** Local officials are expected to provide education on climate risks and preparedness strategies, organise community drills, and distribute resources that help individuals understand and respond to potential disasters.
- (c) **Local Environmental Management:** Local representatives are expected to manage natural resources sustainably, oversee waste management, and enforce local environmental regulations. This includes the management of coastal zones, parks, and community spaces to ensure they are maintained for public benefit and ecological balance.

The differentiation in expectations between national and local levels can sometimes lead to conflicts or challenges:

- (a) **Resource Allocation:** There may be disputes over how national funds are allocated to local governments for climate-related projects. Local officials often advocate for more funding and resources to meet the specific needs of their constituencies.
- (b) **Policy Implementation:** While national policies may set specific standards or goals, local realities or capacities can impede their effective implementation. Local governments may need more human resources, lack expertise, or logistical constraints, which can hinder the progress of climate initiatives.
- (c) **Priority Differences:** National agendas may sometimes need to pay more attention to local needs and conditions, leading to policies that are not fully applicable or effective at the local level. Conversely, local governments might focus on short-term solutions at odds with national long-term climate strategies.

Effective communication and coordination between national and local governments are crucial for managing these expectations and challenges. Building strong partnerships and ensuring that policies are adaptable and relevant to local conditions can help align the efforts across different levels of governance, ensuring a cohesive and comprehensive approach to tackling climate change in Fiji.

4. What legislative and policy measures have been taken to respond to climate change at the national and/or subnational levels?

At the national level, Fiji has established a suite of policies and legislation to guide its climate change governance, reflecting a clear vision for a resilient and sustainable future:

- i) **Republic of Fiji National Climate Change Policy 2012–2017:** This policy set the stage for Fiji's initial formal approach to climate change, positioning the nation as a responsible leader in the Pacific. It focused on building resilience and attaining sustainable development while actively combating climate change.
- ii) **Fiji's National Climate Change Policy 2018–2030:** Building on the previous policy, the 2018–2030 framework promotes a vision of a prosperous Fiji that supports the well-being of current and future generations. It envisions a socially inclusive, equitable, environmentally conscious, and net-zero emission economy.

- iii) **National Disaster Risk Reduction Policy 2018–2030:** This policy aligns Fiji's disaster risk reduction efforts with regional and global frameworks. It sets the objective to prevent new disaster risks and reduce existing ones through strategic planning and implementing risk reduction measures.
- iv) **Republic of Fiji National Adaptation Plan A Pathway to Resilience:** This plan serves as a comprehensive climate-resilient development pathway, allowing Fiji to manage environmental and climate risks caused by climate variability. It aims to support a vibrant society and economy by proactively addressing and adapting to climate risks.
- v) **Planned Relocation Guidelines 2018:** These guidelines provide a structured approach to relocating communities affected by climate change, particularly those impacted by slow-onset events like sea-level rise. They integrate relocation strategies into broader adaptation efforts, ensuring that displaced communities are supported through planned, dignified, and rights-based processes.
- vi) **Climate Change Act 2021:** The Act provides a legal foundation for Fiji's response to climate change. It establishes mechanisms for regulating and governing the national response to climate change, introduces systems for measuring and reporting greenhouse gas emissions, and ensures compliance with climate-related legal requirements.

While much of Fiji's climate change legislation is enacted at the national level, several measures are implemented at the subnational level to ensure local relevance and effectiveness:

- i) **Localised Implementation of National Policies:** Local governments are tasked with the operational aspects of national climate policies. This includes local disaster risk reduction initiatives, community-based adaptation projects, and the management of local natural resources.
- ii) **Coastal Management Plans:** Given Fiji's extensive coastline and the impacts of rising sea levels and storm surges, subnational authorities often develop and implement coastal management plans. These plans focus on preserving mangrove forests, coral reef rehabilitation, and enforcing building codes in coastal areas to reduce vulnerability to sea-level rise.
- iii) **Urban Development Policies:** Cities and towns in Fiji implement specific urban development policies incorporating climate resilience into planning and construction. These policies aim to address the challenges of metropolitan areas, such as flooding and infrastructure degradation due to extreme weather events.
- iv) **Community Engagement and Education Programs:** Local governments frequently organise climate change awareness and education programs to increase community knowledge and participation in climate adaptation and mitigation activities. These programs are crucial for building local capacity to respond to climate-related challenges effectively.
- v) **Integration of Traditional Knowledge:** Subnational entities often emphasise integrating traditional knowledge and practices into modern climate responses, recognising the value of indigenous strategies in natural resource management and environmental protection.

These legislative and policy measures at both national and subnational levels showcase Fiji's holistic and multi-tiered approach to tackling climate change. The national policies provide the framework and directives. At the same time, local implementation ensures that actions are tailored to individual communities' specific needs and conditions, enhancing the overall effectiveness of Fiji's climate response strategies.

5. Were there any constitutional barriers to taking measures to address climate change? If so, how were they dealt with?

None.

6. What other constraints (political, social, national and international) limit people and governments from achieving the measures needed to address climate change?

Addressing climate change in Fiji involves navigating myriad constraints that span the political, social, national, and international arenas. These constraints often interlink, creating complex challenges for both people and the government in executing effective climate change measures:

Political Constraints:

- (a) **Political Will and Continuity:** The prioritisation of climate policies can fluctuate with changes in political leadership. Long-term climate strategies may stall or shift direction with new administrations, leading to consistency in policy implementation.
- (b) **Interdepartmental Coordination:** Effective climate action requires coordinated efforts across various governmental departments and agencies. A lack of synchrony can lead to fragmented approaches and inefficient resource utilisation.
- (c) **Policy Implementation:** Translating national climate policies into action at the local level can be hindered by bureaucratic delays and the complexities of government processes.
- (d) **Top-down Approach to Climate Change Action:** While government actions on climate change in Fiji have been comprehensive and aligned with global sustainability and resilience discourses, the prevalent 'economic rationalist' narrative has led to a top-down approach in environmental governance. This has sparked a need for greater public participation, addressing criticisms of traditional top-down administration. However, efforts to increase participatory approaches have often been criticised as ineffectual or symbolic. An illustrative case is the Vunidogoloa relocation, where the government's handling of the relocation process gradually diminished the villagers' autonomy, leading to an adaptation project that compromised local aspirations while favouring governmental agendas. Such practices highlight the importance of incorporating local voices in climate change adaptation strategies to ensure the initiatives align with community values and needs.¹⁹

Social Constraints:

- (a) **Socioeconomic Priorities:** Immediate socioeconomic challenges, such as poverty alleviation and healthcare, may take precedence over climate actions, especially if the benefits of climate measures are not immediately tangible.

¹⁹ Elodie Fache and Hannah Fair, 'Turning away from wicked ways: Christian climate change politics in the Pacific Island region' (2020) 30 *Anthropological Forum* 233.

- (b) Cultural Practices:** Traditional ways of life and land use practices may sometimes be at odds with climate mitigation or adaptation strategies, necessitating sensitive integration of new practices with respect for cultural heritage.
- (c) Public Awareness and Engagement:** Achieving widespread public understanding and engagement in climate initiatives is often challenging. With strong community buy-in, policy measures may avoid resistance or apathy.
- (d) Religious and Spiritual Beliefs:** Faith-based organisations in Fiji incorporate a Christian vision of environmental stewardship into climate action. However, local beliefs sometimes see climate change as divine will, leading to apathy or rejection of scientific approaches to climate change. This spiritual perspective can complicate efforts to implement scientifically informed climate strategies. Furthermore, national approaches to climate policy tend to frame the issue within dominant economic and developmental discourses that often overlook or suppress local and indigenous worldviews. Critics argue that many climate initiatives in Fiji and other Pacific Islands have failed due to a lack of acknowledgement of these cultural and spiritual attributes. This leads to a reliance on technocratic and science-driven strategies, disregarding local knowledge and perspectives.²⁰

National Constraints:

- (a) Economic Resources:** As a developing nation, Fiji needs more financial resources to invest in comprehensive climate strategies, which often require significant funding.
- (b) Infrastructure Development:** Existing infrastructure needs to be improved to support the necessary changes for climate resilience, and upgrading these systems can be a substantial financial burden.
- (c) Data and Technical Expertise:** More accurate data and local technical expertise are required for detailed climate modelling and risk assessment, which is crucial for informed decision-making.

International Constraints:

- (a) Global Climate Finance:** Access to international climate finance is critical for countries like Fiji. However, the complexity and competitiveness of the application processes can be a barrier to obtaining the necessary funds.
- (b) International Policy:** Small island nations often need more influence in global negotiations and may find their needs and voices overshadowed by larger, more economically powerful countries.
- (c) Dependence on International Markets:** Fiji's reliance on international markets for trade, particularly for tourism and export of goods, can be affected by global economic conditions and policies that may not align with climate action priorities.

These constraints require a multifaceted approach to overcome, involving strategic planning, robust international partnerships, and fostering a national culture prioritising resilience and sustainability. Effective communication, education, and community engagement are crucial to transforming these challenges into collaborative action for climate resilience.

²⁰ Francisco Gelves-Gómez and Shannon Brincat 'Leveraging Vanua: metaphysics, nature, and climate change adaptation in Fiji' in Johannes M. Luetz and Patrick D. Nunn (eds) *Beyond Belief: Opportunities for Faith-Engaged Approaches to Climate-Change Adaptation in the Pacific Islands* (Springer, 2021) pp 59-79.



3. Multi-Level Government & Climate Change

3. Multi-Level Government & Climate Change

Multi-level government is inevitable in responding to the challenges of climate change. States collaborate at the regional and/or international levels in seeking to mitigate the causes of climate change, to adapt to its effects and to distribute the burden more equitably. Supranational agreements, whether legally binding or non-binding (soft law), require implementation at both national and subnational levels to be effective. Within states, the causes and effects of climate change are likely to be experienced differently in different geographical regions, requiring calibrated responses that operate within each state's framework for decentralisation. In states with a vertical constitutional division of power, of which federations are the most obvious example, climate change may require cross-jurisdictional collaboration as well.

Multi-level government thus presents opportunities for responding to climate change that would not otherwise exist. At its best, it can also facilitate greater participation of groups who may not have pathways to contribute their voice to the decision-making process at a single level of government. Through this means it may be possible, for example, to bring different perspectives on priorities in relation to the environment into multi-lateral forums, including the traditional knowledge and modes of decision making of Indigenous communities in different parts of the world.

But multi-level government also presents distinctive challenges that need to be recognised and tackled in the context of climate change. At a national level it tends to concentrate power in the executive branch, reducing transparency and accountability, unless corrective measures are taken to require transparency, reporting and review. It facilitates blame shifting, unless lines of responsibility are clear. It adds further complexity in dealing with issues that already involve a highly complex policy response. It requires a more subtle approach to government than many state institutions generally take, based on mutual understanding and respect, shared responsibility for joint projects, and acceptance of the values of both uniformity and diversity.

Other features of multi-level government vary with the levels of government involved and the purposes of transnational relations. International decision-making on issues affecting all states, of which climate change is a classic case, involves a very large number of players, a few of whom are much more influential than others, with very diverse and often conflicting interests. This makes it necessary to strike agreements that are both a compromise and pitched at a level of generality, jeopardising effectiveness and complicating monitoring and compliance. Mechanisms for this latter purpose include the Conferences of Parties under the UNFCCC regime (COP) but presently are falling short of the goal of net zero emissions by 2050. As a generalisation, international institutions deal only with agents of the central state, leaving intrastate compliance with international obligations to be handled within the national constitutional framework and national processes for co-operation and collaboration, whatever they may be. Within states the hierarchy of legal norms assists to ensure compliance whereas difficulties of enforcement above the level of states place a premium on mutuality and co-operation.

In a different form of transnational dealing, states dependent on external donors, multilateral development banks or climate finance providers are often presented with conditions that limit the scope of actions available to pursue effective climate action or are predicated on the expansion of extractive development projects.

In many parts of the world, states participate in regional arrangements lying between the national and the international levels. Where this occurs, it provides an additional set of principles and practices that may be engaged in some way in responding to climate change. There is no pan-regional organisation in the broad Asia-Pacific region, but sub-regional arrangements are in place and are growing in ambition, fuelled in part by the challenges of climate change. In South-East Asia, ASEAN has an 'action plan' on a joint response to climate change. And in the Pacific, the Pacific Islands Forum and other shared bodies are playing a role in monitoring and managing responses to climate change, giving member states a collective and potentially more powerful voice in broader international decision-making forums.

This section explores how constitutional norms, institutions and processes in Asia and the Pacific have interacted with the problem of climate change and invite reflection on the role of multi-level government approaches in this context.

To explore these issues, three case study countries—Sri Lanka, Malaysia and Bangladesh—address the following questions.

1. What are the most pressing issues arising from climate change in your country and what impact do they have on the constitutional system?
2. What international or regional forums, mechanisms and commitments to address climate change have been adopted by your country?
3. How are international commitments to address climate change entered into in your constitutional system? Who is responsible for negotiating and ratifying international commitments?
4. How well are international commitments to address climate change implemented in domestic law in your country? What barriers or challenges arise?
5. What impact has international involvement in climate change action and policy making had on domestic processes for law and policy making, including accountability, at different levels of government?

A similar set of questions was posed in relation to two regional case studies, ASEAN and the Pacific:

1. What are the most pressing issues arising from climate change in your region and what impacts do they have on domestic constitutional systems?
2. What were the motivations for regional or international action on climate change in the Pacific?
3. What international or regional forums, mechanisms and commitments to address climate change have been adopted in the region?
4. What impact has involvement in regional or international forums had on domestic processes for law and policy making, including accountability?
5. What impact have regional or international arrangements had on addressing climate change, within the region and internationally?

Sri Lanka

Kumaravadivel Guruparan

1. What are the most pressing issues arising from climate change and what impact do they have on the constitutional system?

Decreasing rainfall and its impact on the dry zone is a key issue arising from climate change in Sri Lanka. Threats facing the coastal communities with ocean temperatures and sea levels rising is another concern. A third concern is rising ocean temperatures affecting the biodiversity of marine ecosystems and hence on the livelihood of the fisher community which forms a significant part of the population in the island state of Sri Lanka.²¹

The above matters have a direct bearing on the right to equality, right to life and right to employment (all justiciable under Sri Lanka's Constitution). A less explored topic is the issue of accountability and responsiveness of the Government to the impact of climate change and environmental issues in the North and Eastern provinces, which in turn directly relates to the debate on devolution and federalism in Sri Lanka. Numerically smaller communities feel that climate change and environmental issues that affect them seem not to be of concern to the central government.²² Centre-Province relations, the principle of subsidiarity and law-making authority in relation to climate change (and related issues) must be treated as important when considering constitutions and climate change.

2. What international or regional forums, mechanisms and commitments to address climate change have been adopted by your country?

Sri Lanka ratified the UNFCCC in 1992 and was one of the first 50 states to do so. The Paris Agreement was ratified by Sri Lanka in September 2016.

Despite its low carbon footprint and highly vulnerable status, Sri Lanka committed to reduce greenhouse gas emissions by 14.5% for the decade leading to 2030, including an unconditional reduction of 4%. Sri Lanka has also committed to increase its forest cover by 32% by 2030. The island state also established 2030 targets to achieve 70% renewable energy in electricity generation. Sri Lanka expects to achieve Carbon Neutrality by 2050 and has committed to not increase the capacity of its coal power plants.

²¹ See further Third National Communication of Sri Lanka to the UNFCCC (Oct 2022) <https://unfccc.int/sites/default/files/resource/Third%20National%20Communication%20of%20Sri%20Lanka.pdf> (accessed on 20 October 2024).

²² See further: 'Locals and experts raise environmental concerns over proposed Mannar wind project' (Tamil Guardian, 11 March 2024) <https://www.tamilguardian.com/content/locals-and-experts-raise-environmental-concerns-over-proposed-mannar-wind-project> (accessed on 20 October 2024); Visvajit Sriramrajan, 'Sri Lanka's Tamils Trapped Between War and Waste' (*Jamhooor*, Issue 4, Essay, 18 March 2020), <https://www.jamhooor.org/read/2020/5/18/sri-lankas-tamils-trapped-between-war-and-waste> (accessed on 20 October 2024).

3. How are international commitments to address climate change entered into? Who is responsible for negotiating and ratifying international commitments?

Sri Lanka is a dualist country. The Supreme Court in *Singarasa v Attorney General*²³ interpreted dualism in very narrow terms. In that case it was held that Sri Lanka's accession to the optional protocol of the ICCPR 'binds the Republic qua state but, no legislative or other measures were taken to give effect to the rights recognized in the Convention as envisaged in Article 2. Hence the Covenant does not have internal effect and the rights under the Covenant are not rights under the law of Sri Lanka'. Given this decision in the absence of enabling legislation any 'new rights' created by international agreements are unlikely to be enforced by courts.

No laws have been enacted giving effect to any of the climate change agreements that Sri Lanka has entered into.

The Ministry of Foreign Affairs is responsible for negotiating and ratifying international commitments.

4. How well are international commitments to address climate change implemented in domestic law? What barriers or challenges arise?

As mentioned in response to the previous question no laws have been enacted incorporating the commitments into domestic law. There is a National Policy and a National Adaptation Plan which are the main policy instruments adopted by the Government to give effect to its international commitments.

It may be additionally observed that the Sri Lankan Government in the last couple of years been overzealously engaged in international activism on climate change,²⁴ probably in an attempt to build its image which has suffered heavily owing to its egregious rights violations during its civil war being under international observation and action for the past 15 years.

5. What impact has international involvement in climate change action and policy making had on domestic processes for law and policy making, including accountability, at different levels of government?

It is plainly obvious that international discourse around climate change has been an impetus for state-initiated action on climate change, particularly in terms of setting goals. However, it is very early stages still to comment on whether it has had an impact on law making and accountability.

²³ *Singarasa (Nallaratnam) v Attorney General*, Application for judicial review, SC Spl (LA) No 182/99, ILDC 518 (LK 2006), 15th September 2006, Sri Lanka; Supreme Court: <https://opil.ouplaw.com/display/10.1093/law:ildc/518lk06.case.1/law-ildc-518lk06> (accessed on 20 October 2024).

²⁴ Consider for example the announcement of this initiative in the midst of a very severe economic crisis: <https://news.lk/news/political-current-affairs/item/35952-president-wickremesinghe-launches-international-climate-change-university-to-address-gaps-in-global-climate-action> (accessed on 20 October 2024).

Malaysia

Maizatun Mustafa

Background on Malaysia's Federal System of Government and the Constitution

Malaysia has a federal system of government with a constitutional monarchy. The Federal Constitution is the supreme law that distributes the law-making authority between the federal and state governments through the Federal List, State List and Concurrent List. In exercising this legislative power: (a) the Federal government/Parliament may make laws for the whole or any part of the federation and laws having effect outside as well as within the federation; and (b) the legislature of a state may make laws for the whole or any part of that state. Being a country with strong parliamentary traditions, Malaysia's environmental and climate change issues are governed predominantly by federal law. However, political instability, marked by the turnover of four governments since 2018, has necessitated frequent adjustments in executive and legislative set-up, thereby impacting the legal and policy frameworks concerning the environment and climate change. For instance, there have been several revamps in Malaysia's environmental and climate change ministry and portfolio since 2018, disrupting policy continuity, impeding legal reform efforts, and challenging strategic alignment. These federalism and constitutional issues, as well as other factors, have implications on Malaysia's international, regional and domestic intersections relating to climate action.

1. What are the most pressing issues arising from climate change and what impact do they have on the constitutional system?

Over the last few decades, Malaysia has been exposed to adverse climate change impacts including the significant rise of surface air temperature, increase in rainfall intensity, alteration of rainfall patterns, unpredictable weather system, and life-threatening weather conditions. Further challenges associated with rapid expansion of the Malaysian economy and population have led to unaddressed negative externalities on the environment, which include higher greenhouse gas emissions. The climate change challenges faced by Malaysia include:

- (a) **Extreme Weather Events:** Climate change contributes to the intensification of extreme weather events such as storms, floods, and droughts as well as landslides, mudslides, tropical storms, and other weather-related events causing significant damage to infrastructure, agriculture, and livelihoods. The increased frequency and severity of such events strain the government's resources leading to challenges in disaster management.
- (b) **Loss of Biodiversity:** Malaysia is one of the world's most biodiverse countries, hosting rich ecosystems such as rainforests. Climate change threatens this biodiversity through habitat destruction, species extinction, and ecosystem degradation.
- (c) **Health Impacts:** Climate change contributes to the spread of vector-borne diseases and respiratory problems. The health impacts of climate change impose a burden on Malaysia's healthcare system. Vulnerable populations, such as the elderly and children could be at risk.

These climate change impacts interact with Malaysia's constitutional system in several ways necessitating adjustments to existing laws and policies within the framework of federalism:

- (a) **Legal Framework:** Malaysia's Constitution provides the legal framework for governance and environmental protection. Climate change necessitates the enhancement of existing laws and policies to address emerging challenges.
- (b) **Resource Management:** Climate change affects the availability and distribution of resources such as water, land, and forests, requiring coordination and cooperation between different levels of government to ensure sustainable management.
- (c) **Social Justice:** Climate change exacerbates social inequalities. Malaysia's Constitution guarantees fundamental rights, necessitating efforts to address climate justice issues, including ensuring the rights of the marginalised groups.
- (d) **Judicial Review:** The judiciary plays a crucial role in interpreting constitutional provisions related to environmental protection and human rights. However, Malaysia's judiciary has been criticised for its perceived limited role and effectiveness in addressing environmental and climate change issues, including challenges in adjudicating environmental disputes effectively.

2. What international or regional forums, mechanisms and commitments to address climate change have been adopted?

Malaysia has been actively engaged in international and regional efforts to address climate change. Some of the key mechanisms and initiatives adopted by Malaysia include:

- (a) **United Nations Framework Convention on Climate Change (UNFCCC):** As a party, Malaysia participates in UNFCCC conferences (COPs), where negotiations take place to strengthen global efforts to mitigate greenhouse gas emissions, adapt to climate impacts, and provide support to developing countries.
- (b) **Paris Agreement:** Malaysia ratified the Paris Agreement in 2016. As part of its Nationally Determined Contributions (NDCs), Malaysia pledged to reduce its emissions intensity of GDP by 45% by 2030 compared to 2005 levels. This agreement underscores Malaysia's role in the global effort to limit global temperature rise and mitigate climate impacts.
- (c) **REDD+ (Reducing Emissions from Deforestation and Forest Degradation):** Malaysia has engaged in REDD+ initiatives, which aim to reduce emissions from deforestation and forest degradation in developing countries. Through REDD+ projects and partnerships, Malaysia works to conserve its forests and enhance carbon sequestration.
- (d) **ASEAN Agreement on Transboundary Haze Pollution (AATHP):** Malaysia is a signatory to the AATHP, which aims to address transboundary haze pollution caused by land and forest fires, primarily in Indonesia. The agreement facilitates cooperation among ASEAN member states in preventing and mitigating haze pollution, promoting sustainable land management practices, and enhancing regional environmental governance.
- (e) **ASEAN Working Group on Climate Change (AWGCC):** Malaysia participates in regional cooperation through the AWGCC, which facilitates collaboration among ASEAN member states on climate change issues. The AWGCC coordinates initiatives, exchanges information, and promotes capacity-building activities to enhance climate resilience and mitigate emissions in the ASEAN region.
- (f) **ASEAN Air Quality Monitoring System (AQM):** Malaysia collaborates with other ASEAN member states to share air quality data collected through the AQM system. This system aims to monitor and manage air quality in the ASEAN region, including tracking pollutants that contribute to climate change and transboundary haze pollution. By sharing data on air pollutants such as particulate matter (PM2.5 and PM10), sulfur dioxide, nitrogen dioxide, carbon monoxide, and ozone, Malaysia contributes to a better understanding of regional air quality trends and patterns.

- (g) **Regional Initiatives:** Malaysia engages in regional initiatives such as the Heart of Borneo conservation which is an initiative of Malaysia, Brunei Darussalam and Indonesia to preserve one of Borneo's best remaining rainforests and water catchments in the interior of the island to promote sustainable resource management and enhance climate resilience in the Southeast Asian region.

3. How are international commitments to address climate change entered into? Who is responsible for negotiating and ratifying international commitments?

In Malaysia, international commitments to address climate change are entered into and ratified through a process that involves both the executive and legislative branches of government through the following steps:

- (a) **Executive action:** Malaysia, as a sovereign state, participates in international negotiations and agreements related to climate change through its government representatives, usually under the auspices of bodies like the UNFCCC. The responsibility for negotiating international commitments, including agreements related to climate change, rests with the executive branch of government, such as the Ministry of Natural Resources and Environmental Sustainability which oversees Malaysia's climate change policies and represents the country in international forums. Before ratification, the agreement may also be reviewed by relevant government agencies and legal experts to ensure compatibility with Malaysia's laws and policies.
- (b) **Legislative Processes:** International commitments related to climate change may require legislative amendments or the enactment of new laws to align domestic regulations with international standards. The Malaysian Parliament is responsible for passing or amending laws necessary to implement international agreements. For instance, the *Environmental Quality Act 1974* was amended in 2023 to strengthen environmental regulations and enforcement mechanisms in line with Malaysia's obligations under international law such as the Paris Agreement.
- (c) **Constitutional Considerations:** The placement of international treaties under the Federal List underscores the federal government's authority to manage Malaysia's international relations and fulfill its obligations under international law. It reflects a centralised approach to treaty-making and implementation through Parliament, shaping Malaysia's engagement with the global community through international agreements. Malaysia's Constitution does not explicitly address the process for entering into international agreements. However, the government's authority to negotiate and ratify international agreements is derived from constitutional principles of executive power and parliamentary sovereignty.
- (d) **Stakeholder Engagement:** Malaysia often engages various stakeholders, including NGOs, industry representatives and academia, in the process of formulating and implementing policies related to climate change. This engagement ensures broader participation and buy-in from relevant stakeholders, enhancing the effectiveness of international commitments at the domestic level.

4. How well are international commitments to address climate change implemented in domestic law? What barriers or challenges arise?

The implementation of international commitments to address climate change in domestic law in Malaysia varies depending on the specific agreement. While Malaysia has taken steps to integrate its international obligations into domestic law, there are still challenges and barriers to effective implementation.

- (a) **Policy Coherence:** Despite legislative efforts, ensuring policy coherence across different sectors remains a challenge. Fragmentation and overlapping mandates among government agencies can hinder effective implementation of climate-related policies such as the conflicting priorities between economic development and environmental conservation.
- (b) **Policy Integration:** Integrating climate considerations into sectoral policies and development plans is essential for mainstreaming climate action across various sectors of the economy. However, Malaysia may face challenges in integrating climate change considerations into existing policies and planning processes, particularly in sectors such as energy, transportation, agriculture, and land use, where competing interests and priorities may exist.
- (c) **Capacity Building and Resources:** Enhancing institutional capacity at both the federal and state levels is essential for effective implementation. Malaysia faces challenges in terms of limited resources, technical expertise, institutional coordination and funding. For example, the lack of enforcement capacity and technical expertise in monitoring and regulating emissions from industries can undermine efforts to achieve emission reduction targets. The lack of financial resources may affect effective implementation of mitigation and adaptation measures, and conducting research on climate-related issues.
- (d) **Stakeholder Engagement:** Engaging stakeholders, including civil society organisations, the private sector, and local communities, is crucial for successful implementation. However, limited public awareness and participation in climate-related decision-making processes pose challenges.
- (e) **Legislative Alignment:** Malaysia may need to enact or amend domestic legislation to align with its international commitments on climate change. This process involves drafting and passing laws that reflect the obligations outlined in the international agreements. While Malaysia has made efforts to incorporate climate-related provisions into various laws and policies, such as the *Environmental Quality Act* and the National Climate Change Policy, further legislative action may be required to fully implement all aspects of its international commitments.

5. What impact has international involvement in climate change action and policy making had on domestic processes for law and policy making, including accountability, at different levels of government?

International involvement in climate change has driven Malaysia to implement laws and accountability measures at both federal and state levels, aiming to align with global standards and best practices. These are as follows:

- (a) **Federal level:** international agreements such as the Paris Agreement have prompted Malaysia to develop new laws or revise existing legislation and policies to align with global climate objectives. These include the Environmental Quality (Amendment) Bill 2023 which is the amendment from the

Environment Quality Act 1974. Malaysia introduced the *Renewable Energy Act* in 2011 aiming at promoting the use of renewable energy sources in electricity generation and established the Feed-in Tariff system to incentivise the adoption of renewable energy technologies. International best practices in environmental protection have also influenced Malaysia's Environmental Impact Assessment regulations. These regulations require thorough assessments of potential environmental impacts before major projects can proceed, ensuring accountability and adherence to international standards.

- (b) **State level:** While climate change is typically a federal issue, state governments in Malaysia may have jurisdiction over certain environmental regulations and natural resources. International agreements can influence state-level policies and regulations related to forestry, land use, and environmental protection. For example, in 2023 the state of Sarawak passed the *Environment (Reduction of Greenhouse Gases Emission) Act*, making it the first state in Malaysia to have legislation to address climate change (although this law is applicable only within the state of Sarawak). Several other Malaysian states have developed state-specific policies and plans in response to international climate initiatives such as the state of Selangor's Green Technology Policy which promotes sustainable practices, including green building and low-carbon mobility at the state level.
- (c) **Both levels:** At both the federal and state levels, participation in international agreements may entail reporting requirements and accountability mechanisms. However, the state governments may need to coordinate their climate change policies with federal initiatives to ensure consistency and effectiveness. This can involve aligning state-level targets and actions with national goals established under international agreements.
- (d) **Private sector:** International involvement has encouraged greater engagement of the private sector in climate action either voluntarily or through legal or procedural requirements. For example, Malaysia has implemented laws and guidelines to promote environmental auditing such as through the ISO 14001 certification, especially for SMEs, aiming to ensure businesses and industries operate sustainably and minimize their environmental impact. Another initiative is the ESG which refers to the integration of environmental, social, and governance factors into business operations and investment decisions. Malaysia has recognised the importance of ESG practices in companies, businesses and investors, and has also taken significant steps to promote environmentally responsible banking practices. For example, Malaysian banks have developed green financing frameworks to support environmentally friendly projects and initiatives that outline criteria for identifying eligible projects, such as renewable energy, energy efficiency, and sustainable infrastructure, and provide guidelines for financing arrangements.

Bangladesh

Shawkat Alam

1. What are the most pressing issues arising from climate change and what impact do they have on the constitutional system?

Bangladesh, with a large population of over 160 million and a predominantly low-lying geography, is highly vulnerable to climate change despite its minimal global emissions. Ranked seventh in the Global Climate Risk Index 2021, Bangladesh has experienced substantial economic and human costs from climate-related disasters. From 2000 to 2019, it faced economic losses of \$3.72 billion and endured 185 extreme weather events. These events directly affect human rights by jeopardising lives, livelihoods, and fundamental necessities such as clean air and water.

The nation's coastal areas, where two-thirds of the territory is less than 15 feet above sea level, are particularly at risk from sea-level rise. Projections suggest that by 2050, sea-level rise could displace one in seven Bangladeshis. This sea level rise exacerbates floods, threatens the biodiversity-rich Sundarbans mangrove forest, and leads to salinisation that harms agriculture and drinking water. Additionally, Bangladesh's coastal regions are prone to severe tropical cyclones, which have claimed approximately 718,000 lives over the past 50 years.

Inland, drought is a significant concern in the west and northwest of the country, while salinity ingress poses challenges in the southwest. Vulnerability is acute along the shores of the three main rivers and in the coastal, south-eastern (Chittagong), and north-eastern (Sylhet) regions. The impoverished communities on riverine sandbars or “chars” are particularly susceptible to seasonal floods that destroy homes and fields, escalating food insecurity and poverty. Erratic weather patterns disrupt agriculture, farming cycles and decrease crop yields, and waterborne diseases like malaria and diarrhea strain healthcare systems, especially in rural areas.

These climate change challenges have profound implications for Bangladesh's constitutional system. Fundamental rights, including the right to life, enshrined in the Constitution, are threatened by climate-induced disasters. Additionally, access to clean air, water, and food—the cornerstones of a dignified life—is compromised by climate-related challenges like salinity intrusion and water scarcity. Governance structures are strained as they deal with the multifaceted impacts of climate change, stretching the capacity of the government to provide essential services and challenging the effectiveness of regulatory bodies. Bangladesh has been compelled to rethink its policy priorities, focusing on climate resilience and sustainability. The constitutional system of Bangladesh is both challenged and potentially transformed by climate change, requiring both reactive and proactive legal measures to safeguard the environment and ensure the rights and well-being of its citizens in the face of climate adversity.

2. What international or regional forums, mechanisms and commitments to address climate change have been adopted by Bangladesh?

Bangladesh is actively involved in numerous international and regional forums, mechanisms, and commitments to combat the challenges posed by climate change. Given its high vulnerability to climate

impacts, Bangladesh recognises the importance of international collaboration to enhance resilience and pursue sustainable development.

At the international level, Bangladesh is committed to key frameworks like the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. Through its active participation in annual Conference of Parties (COP) meetings, Bangladesh advocates for ambitious global climate action and fair outcomes, emphasising the needs and priorities of vulnerable countries. Since June 2020, Bangladesh has been leading the Climate Vulnerable Forum, a coalition of 48 countries that are particularly susceptible to climate impacts. As chair, Bangladesh has urged member countries to work towards limiting global temperature increases to 1.5°C above pre-industrial levels, aligning with the Paris Agreement targets.

Regionally, Bangladesh is a member of the South Asian Association for Regional Cooperation and the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation. These platforms facilitate collaboration on climate adaptation and mitigation projects across the region. Bangladesh also participates in the Bangladesh-China-India-Myanmar Economic Corridor, which supports climate-resilient development initiatives and enhances cross-border cooperation on environmental issues.

Bangladesh leverages international climate finance mechanisms to fund its climate resilience efforts. This includes the Bangladesh Climate Change Resilience Fund and the Climate Finance Access Hub, which help the country access funds from sources like the Green Climate Fund and the Adaptation Fund. These resources support projects that build resilience in vulnerable communities and key sectors. Moreover, Bangladesh places a strong emphasis on technology transfer and capacity building in its climate change strategy. The country collaborates with international research institutions and development partners to promote innovations in renewable energy, climate-smart agriculture, and resilient infrastructure. It also engages in Regional Climate Outlook Forums, which enhance its capabilities in climate monitoring, early warning systems, and adaptation planning.

In terms of regional water management, Bangladesh participates in the Bangladesh, Bhutan, India, Nepal subregional cooperation, which includes a Joint Working Group on water resources management and hydro-power. This group addresses climate-induced water challenges like floods, droughts, and water scarcity, underscoring Bangladesh's commitment to integrated and cooperative approaches to climate change and water management.

3. How are international commitments to address climate change entered into?? Who is responsible for negotiating and ratifying international commitments?

In Bangladesh, the process of integrating international climate change commitments into the national legal and constitutional framework involves several distinct steps: negotiation, ratification, and implementation, all overseen by different branches of the government.

The negotiation of international commitments primarily falls to the executive branch, particularly the Ministry of Foreign Affairs. This ministry, along with other relevant government agencies, represents Bangladesh in international negotiations, discussing issues such as technology transfer, funding, and specific adaptation or mitigation measures. Given Bangladesh's significant vulnerability to climate change, its representatives play an active and often pivotal role in global climate discussions.

Following the negotiations, the next step is ratification, which is also managed by the executive branch, led by the Prime Minister and the Cabinet. Ratification is a critical stage where the executive assesses whether

the international agreements align with national interests, comply with existing laws, and support policy objectives. Although not all agreements require parliamentary approval, those that necessitate changes to domestic law or involve substantial financial commitments are typically brought before Parliament. This involvement ensures democratic legitimacy and adherence to the constitutional framework by facilitating transparency, accountability, and public engagement.

Once an international treaty is ratified, it does not automatically become law in Bangladesh due to its dualist system. Instead, the treaty must be incorporated into national law through legislation. This requires the creation of new laws or amendments to existing ones, which are drafted by the relevant ministries and passed by Parliament. The executive branch, especially the ministries concerned with environmental and foreign affairs, plays a crucial role in coordinating the implementation of these commitments. This includes developing strategies, allocating resources, and establishing the necessary institutions to manage and monitor the implementation.

Through this structured approach, Bangladesh ensures that its international commitments are carefully integrated into its constitutional system, maintaining a balance between global cooperation on climate change and safeguarding national sovereignty and development priorities.

4. How well are international commitments to address climate change implemented in domestic law? What barriers or challenges arise?

To ensure consistency between international obligations and domestic laws, Bangladesh has effectively integrated climate change adaptation into its legal framework. This proactive approach aligns with the Constitution's 15th amendment, particularly Article 18A, which focuses on environmental protection and enhancement. With 187 statutory laws governing environmental management, Bangladesh possesses a robust legal foundation, despite many being established prior to widespread global concern about climate change. Nonetheless, these laws offer a framework to support adaptation and mitigation efforts. For instance, the Factories Act of 1965 regulates industrial emissions, while the *Forest Act* of 1927 influences land use policies like the 2002 National Land Use Policy and initiatives such as REDD+. Similarly, the *Water Act* of 2013 aids in adaptive water resource management, and the *Hill District Local Government Parishad Act* of 1989 delegates forest management responsibilities to the Hill District Council, potentially impacting REDD+ efforts. Additionally, Bangladesh has enacted specific legislation targeting climate change, including the *Climate Change Trust Fund Act 2010*, the *Bangladesh Energy Regulatory Commission Act 2010*, the *Sustainable and Renewable Energy Development Authority Act 2012*, and the *Disaster Management Act 2012*.

Since the early 2000s, Bangladesh has been formulating structured adaptation policies, plans, and strategies. Notably, it has developed the National Adaptation Plan of Action in 2005 (updated in 2009), the Bangladesh Climate Change Strategy and Action Plan in 2009, and the National Plan for Disaster Management in 2010. These initiatives delineate the government's focal areas in the and delineate specific action plans. Additionally, Bangladesh has established a domestically funded Climate Change Trust Fund, allocating over US\$36 million until 2015, alongside a Climate Change Resilience Fund with support from development partners, which has allocated around US\$187 million until 2014 to implement these plans. The government has recently approved strategic plans such as the Mujib Climate Prosperity Plan 2022-2041, the National Adaptation Plan 2023-2050, and the Bangladesh Delta Plan 2100, demonstrating its ongoing commitment to addressing climate change impacts.

Implementing international commitments to address climate change in Bangladesh indeed involves a complex interplay of legal, institutional, and socio-political factors. While strides have been made, numerous barriers and challenges persist, impacting the effective integration of these commitments into domestic law. Improving legislative and institutional capacity for the efficient implementation of existing policies and programs is a pressing concern for Bangladesh, as highlighted by the World Bank. Differing legal frameworks, priorities, and interpretations pose significant hurdles, necessitating comprehensive legal reforms for consistency and effectiveness in policy implementation. Limited expertise and resources hinder the enforcement of climate-related laws, constraining monitoring, compliance, and enforcement efforts. Limited institutional capacity and expertise hinder the implementation and enforcement of climate-related laws and regulations. Insufficient resources, both human and financial, exacerbate these challenges, constraining monitoring, compliance, and enforcement efforts.

Effective policy implementation requires coordination and collaboration among various stakeholders. However, bureaucratic silos and coordination challenges often impede the coherent execution of climate-related initiatives. Overcoming these barriers, fostering inter-agency cooperation, and involving stakeholders in decision-making processes are essential to enhance coordination mechanisms and maximise synergies across sectors. Additionally, policy prioritisation presents challenges, as competing development priorities and resource constraints may divert political attention and resources away from climate change mitigation and adaptation efforts.

Weak legal enforcement mechanisms undermine the effectiveness of climate-related laws, fostering a culture of non-compliance and undermining international commitments. Strengthening enforcement mechanisms, enhancing monitoring capabilities, and promoting accountability are vital to uphold legal obligations and ensure adherence to international commitments. Addressing institutional fragmentation and enhancing political will are also crucial for overcoming implementation challenges. Persistent leadership and institutional reforms are necessary to streamline governance structures, upgrade coordination mechanisms, and establish a conducive environment for effective climate action.

5. What impact has international involvement in climate change action and policy making had on domestic processes for law and policy making, including accountability, at different levels of government?

International involvement in climate change action and policy making has significantly influenced domestic law and policy processes in Bangladesh, especially regarding accountability at various government levels. Here are some of the ways this influence manifests.

Firstly, Bangladesh's participation in international agreements like the Paris Agreement and the UNFCCC has shaped its climate governance. This involvement has compelled the country to develop policies that address climate change impacts and fulfill its international obligations.

Secondly, engagement with international organisations has bolstered institutional capacities within Bangladesh's governance systems. Many capacity-building programs delivered by international partners have improved the skills, knowledge, and institutional capabilities of government bodies, thereby enhancing their ability to devise effective climate policies.

Thirdly, this international cooperation has fostered better coordination among various government agencies. It has established mechanisms for more efficient decision-making, improved information sharing, and strengthened policy integration across different sectors and stages of governance.

Moreover, international involvement has enhanced accountability for climate action by introducing transparency, reporting, and review mechanisms. For instance, Bangladesh is required to submit periodic reports to international bodies, which helps track progress and ensures compliance with international commitments, thereby reinforcing domestic accountability.

At a national level, Bangladesh's judiciary has also played a pivotal role. A landmark decision by the Supreme Court in 2019, granting legal recognition to the Turag River and all other rivers in the country exemplifies the potential of public interest litigation and judicial interventions in environmental protection. This ruling not only acknowledges the rights of rivers but also issues directives to government agencies to take measures for safeguarding rivers, reflecting a significant step in legal and environmental accountability.

Furthermore, international involvement has facilitated greater civil society engagement, enabling NGOs and other non-state actors to participate more actively in climate policymaking and to hold the government accountable. These organisations are instrumental in monitoring government actions, pushing for policy reforms, and ensuring that international climate commitments are met.

Finally, community engagement has been promoted through international initiatives, empowering local communities to better understand climate risks, prioritise adaptation measures, and hold local authorities accountable for effective climate response. This enhances community participation and empowers citizens at the grassroots level to contribute to and benefit from climate action strategies.

ASEAN

Linda Yanti Sulistiawati

1. What are the most pressing issues arising from climate change and what impacts do they have on domestic constitutional systems?

All countries in the Association of Southeast Asian Nations (ASEAN) are undergoing extreme pressures because of climate change, natural disasters (typhoons, landslides, climate borne diseases) and also resources pressures including financial, human resources and technology to adapt and mitigate climate impacts. There are still many challenges to be overcome in the ASEAN region, such as persistent hunger, inequality, particulate pollution in cities, and deforestation.

However, ASEAN is optimistic because the world economy and population have grown significantly in recent decades, with Asia leading the way. In keeping with this, the ASEAN region has been on track to achieve a number of development objectives. Indicators for ASEAN Member States' sustainable development goals on poverty reduction, excellent health and well-being, quality education, industry, and affordable and clean energy showed continuous improvement by 2015 compared to 2000.²⁵

ASEAN's population is expected to reach 770 million by 2040, with its economy poised to become the world's fourth largest by 2030. The India-ASEAN-China corridor is intended to be the world's "golden arc," boosting global economy and trade. Digital transformation and the fourth industrial revolution are set to provide the region with major opportunities such as empowering micro, small, and medium-sized enterprises and individuals with enhanced access to markets, finance, and technology, accelerating agricultural modernization, improving national resource management, and moving forward on smart cities through projects such as ASEAN's Smart Cities Network.²⁶

2. What international or regional forums, mechanisms and commitments to address climate change have been adopted?

The answer to this question is quoted from the ASEAN State of Climate Change Report, Jakarta, ASEAN Secretariat, October 2021, pages 2-3.

"ASEAN joins the rest of the world in standing at a historical turning point in combatting climate change. Greenhouse gas (GHG) emissions in the region have been increasing in line with industrialisation based on fossil-fuel energy and associated land-use change resulting in the loss of tropical forest and peatland rich in biodiversity. Given the current policy and the Nationally Determined Contribution (NDC) targets, GHG emissions will continue to rise in the years up to 2030 globally [...] leading to a temperature rise of 2.1-3.9°C by 2100 relative to preindustrial levels [...]. The ASEAN Center for Energy (ACE) predicts that the region's energy-related GHG emissions will increase by 34-147% between 2017 and 2040 [...]. Climate

²⁵ ASEAN State of Climate Change Report, Jakarta, ASEAN Secretariat, October 2021, p. 2.

²⁶ Ibid.

change impacts will intensify unavoidably due to accumulated global emissions in the atmosphere over time. The costs incurred from damage wrought by climate change will be many times larger than investments needed to mitigate such damage. Moreover, the COVID-19 pandemic has proved to be a huge challenge to the overall ASEAN community on many levels in terms of development, with positive and negative implications for climate change interventions. In the same way that the first industrial revolution used fossil fuel energy to transform society, the ASEAN region must turn global trends towards a “decarbonising revolution” [...] to pursue net-zero emissions as soon as possible in the latter half of the 21st century.

[...]

To date, AMS have proactively taken measures to address climate change at the national and regional level as Parties to the UNFCCC and the Paris Agreement ([...], under the ASEAN Community Vision 2025 [...]). The ASEAN Joint Statement on Climate Change to the 25th Session of the Conference of the Parties (COP) to the UNFCCC [...] reaffirmed AMS’s commitment to the UNFCCC and the [Paris Agreement] by:

- Implementing measures to address climate change under the ASEAN Socio-Cultural Community (ASCC) Blueprint 2025;
- Promoting sustainable management of forests through the Reducing Emissions from Deforestation and Forest Degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries (REDD+);
- Reducing energy intensity in line with the ASEAN Plan of Action for Energy Cooperation (APAEC) 2016-2025;
- Launching the ASEAN Regional Strategy on Sustainable Land Transport, the ASEAN Fuel Economy Roadmap for the Transport Sector 2018-2025 with a focus on light-duty vehicles, and the Guidelines for Sustainable Land Transport Indicators on Energy Efficiency and Greenhouse Gas Emissions in ASEAN;
- Strengthening ASEAN's capacity in managing climate-related disasters through existing mechanisms under the ASEAN Agreement on Disaster Management and Emergency Response (AADMER);
- Implementing Phase 2 of the Plan of Action of the ASEAN Disaster Risk Financing and Insurance (ADRFI) and establishing the Southeast Asia Disaster Risk Insurance Facility (SEADRIF) with a focus on strengthening AMS’s financial resilience by improving disaster risk assessment, financing and insurance solutions; and
- Promoting collaboration with ASEAN dialogue, sectoral dialogue, development partners and other external parties to enhance climate action in the ASEAN region.”

3. What were the motivations for regional or international action on climate change in South East Asia?

The motivation for the ASEAN region is the fact that it enjoys the fastest regional economic growth in the world. Population-wise, ASEAN region is also fast growing. With these two main comparative advantages, ASEAN needs to protect its citizens from the impacts of climate change which increasingly places pressure on and presents risks to the region.

Climate ambition in the ASEAN region must be consistent with each ASEAN Member State's long-term development ambitions. Member states must also account for the sociocultural changes and repercussions of the COVID-19 pandemic, emphasising the importance of green recovery.²⁷

4. What impact have regional or international forums had on domestic processes for law and policy making, including accountability? For example, have countries changed how they make law and policy as a result of regional or international engagement on climate change?

I have engaged with this question in the following paper: Linda Yanti Sulistiawati and Irene Amadea Rembeth, "NDCs in ASEAN Countries: Dreams or Reality? Assessing Case Studies from Indonesia and the Philippines" (August 2023) *NUS Law Working Paper No 2023/022*, available at: https://law.nus.edu.sg/wp-content/uploads/2023/08/APCEL_WPS-2304.pdf.

That study focused on Indonesia and the Philippines. The study concludes that based on the NDCs submitted to the UNFCCC, the roles of subnational governments have been well recognized by ASEAN Member States. However, examining the case studies of Indonesia and The Philippines, subnational level climate and NDCs policies and regulations are not representing the level of ambition of NDCs present on a national level. This study further identifies the root causes of the problem in relation to NDCs and climate change policies and regulation at the local level.

The study discovers that the underlying problems here are not NDCs and Climate Change per se. Instead, the problem lies with how these issues are being represented at the subnational level. In both countries, NDCs and climate change are: (i) introduced superficially; (ii) slowly trickle down from national to subnational level; (iii) project oriented; (iv) do not hold climate as a priority issue (except when paired with disaster risk reduction); and (v) show a lack of understanding and awareness of climate change impact at the local level.

Accordingly, as the climate change issue is not being prioritised, they are unable to formulate comprehensive arrangements at the subnational level.

5. What impact have regional or international arrangements had on addressing climate change, within the region and internationally? What barriers or challenges to effective action arise?

The answer to this question is paraphrased from the ASEAN State of Climate Change Report, Jakarta, ASEAN Secretariat, October 2021, page 4.

²⁷ See, e.g., *ASEAN State of Climate Change Report*, Jakarta, ASEAN Secretariat, October 2021, pp. xiv, xvii, 118, 125, 130.

Even under the current transparency framework, some ASEAN Member States lack sufficient reporting capacity, implying that more opportunities for improving transparency should be created (for example, strengthening the capacity of national experts on greenhouse gas Inventory and technical expert review). All ASEAN Member States face new reporting challenges under the Enhanced Transparency Framework, including indicators to track progress toward the implementation and achievement of its NDC, projections of future greenhouse gas emissions with methodology and assumptions, and estimates of greenhouse gas emission reductions by policies and measures. As a result, all ASEAN Member States must be prepared to meet the statutory mitigation reporting requirements.

Although some flexibility is granted, every ASEAN Member State should strive to satisfy all of these objectives as they face long-term problems in combating climate change. Furthermore, it is critical to realise that there are still significant gaps in implementation and ambition when compared to the Paris Agreement's global goals for both adaptation and mitigation, as demonstrated by, but not limited to, NDC greenhouse gas emission reduction targets in 2030 and current emission trends. To make progress toward the medium- to long-term climate targets, transformative changes must occur at the regional and national levels in a variety of domains, including society, economy, politics, governance, technology, finance, and human development. Transparency must be ensured through appropriate human capability and expertise, as well as information based on consequences, susceptibility, and climate change adaptation and mitigation strategies.

Pacific

George Carter

1. What are the most pressing issues arising from climate change and what impacts do they have on domestic constitutional systems? What were the motivations for regional or international action on climate change in the Pacific?

Climate change is the greatest threat to the livelihoods, security and wellbeing of Pacific peoples.²⁸ Contributing to 1% of global greenhouse gas emission, the Pacific region — from the ocean, states and to societies — are the frontline of current climatic impacts. All global climate indicators from increasing temperature, ocean heat and acidification, and sea level rise continue to increase.²⁹ The science (IPCC) and lived reality of peoples tell of a region that is suffering from environmental impacts such as sea-level rise, coastal erosion, water security and environmental integrity, and also from economic development setbacks brought on by the increasing frequency and intensity of disasters.³⁰ Responding to climate change impacts is not only a priority for governments and societies, but a necessity. This message is not only amplified in the international advocacy by Pacific states and the Pacific region in global climate forums, but also in other legal frameworks and mechanisms at the ground level. While building resilience, these mechanisms are diverse and unique. They are strengthened by local and traditional knowledge in their geo-cultural contexts.

Pacific states are inherently and uniquely vulnerable to exogenous shocks owing to, *inter alia*, their small size, geographical remoteness, highly dispersed populations, limited scale and undiversified nature of economies, high dependence on external markets, and extreme exposure to disasters, natural hazards and the effects of climate change. Recognising this vulnerability does not mean that the Pacific exhibits any weakness or lack of potential for development. Rather, it means that the Pacific is disproportionately impacted in terms of physical destruction and other economic and non-economic losses, to a far greater scale than elsewhere.

As Pacific states are vulnerable to adverse impacts of climate change, including, *inter alia*, erratic precipitation, increasingly frequent and extreme weather phenomena, more frequent and severe tropical cyclones, floods and drought, diminishing freshwater resources, desertification, coastal erosion, land degradation and sea-level rise, which represent the gravest of threats to the survival and viability of their people, natural ecosystems, and overall sustainable development. The impacts of climate change have possible implications on the Pacific and other island states, including humanitarian, economic, social, cultural, ecological and, as exacerbated by other factors, security consequences (as set out in the Antigua and Barbuda Agenda for SIDS (ABAS) – a Renewed Declaration for Resilient Prosperity).

²⁸ Pacific Islands Forum Leaders, *Boe Declaration on Regional Security* 2018, art 1.

²⁹ Pacific Islands Forum Secretariat and Pacific Fusion Centre, *The Pacific Security Outlook Report 2023-2024* (2024).

³⁰ *Ibid.*

2. What international or regional forums, mechanisms and commitments to address climate change have been adopted in the region?

International

All 18 states and territories under the Pacific Islands Forum have ratified the Paris Agreement. The 14 Pacific Island Countries — Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu; as well as Australia and New Zealand — have ratified the Paris Agreement. Together with New Caledonia and French Polynesia (territories of France), these countries make up the current membership configuration of the Pacific Islands Forum.

Under the UNFCCC negotiations, Australia and New Zealand negotiation under the Annex 1- Umbrella Group. However, the 14 Pacific Island Countries have shaped UNFCCC negotiations strategically mainly under the Alliance of Small Island States coalition. This group is made up of 43 small island developing states from the Pacific, Caribbean, Africa, Indian Ocean, Mediterranean and the South China Sea and was instrumental in the formation of the UNFCCC in the early 1990s. The Alliance of Small Island States is one of the key coalitions in the global south conglomerate of the G-77 and China group. Samoa is currently the chair of AOSIS. However, in the last decade since the negotiations in Paris, a new Pacific coalition under the banner of Pacific Small Islands Developing States has gained momentum as the vehicle for advocating regional Pacific-led initiatives and concerns in the negotiations – especially where they may not find consensus in the G-77 or Alliance of Small Island States grouping. The work of Pacific negotiators and Pacific Champions is led under the Pacific Small Islands Developing States with technical support from One CROP (Council of Regional Organisations). The PSIDS Chair is Vanuatu, and One CROP in Climate Negotiations is the Secretariat of the Pacific Regional Environment Programme.

At the fourth International Conference on Small Island Developing States, world leaders adopted the “Antigua and Barbuda Agenda for Small Island Developing States: A Renewed Declaration for Resilient Prosperity” (ABAS).³¹ This global plan of action sets out an agenda for responding to climate impact, and having access to climate finance and debt recovery, for resilient economies — a key concern for SIDS. ABAS calls on greater support from partners and global community to work with SIDS meet the challenges of the next 10 years.

Regional

Pacific Islands Forum Leaders Declarations on Climate Change: The Pacific Islands Forum Leaders meeting is the main preeminent political gathering of Pacific Heads of Government and concludes on recommendations made by ministerial forums (Foreign Affairs, Economic, Environment, Education, Health, Culture, Transport and ICT), the Forum Officials Committee, civil society and the private sector. Over the years there have been multiple Pacific Islands Forum Declarations on climate action, most notably: the Suva Climate Change Declaration (2015), the Boe Declaration on Regional Security (2018), the Kainaki II Declaration on Climate Action (2019) and the 2050 Blue Pacific Strategy (2022). Key priorities underscored in these declarations are commitments to meeting the obligations in the Paris Agreement, stronger action

³¹ Report of the fourth International Conference on Small Island Developing States (Antigua and Barbuda, 27-30 May 2024), A/CONF.223/2024/6, res 1. See, Antigua and Barbuda Agenda for SIDS (ABAS) A Renewed Declaration for Resilient Prosperity <https://sdgs.un.org/sites/default/files/2024-04/SIDS4%20-%20Co-Chairs%20FINAL_0.pdf>.

from the global community on mitigation, greater attention to adaptation and the needs in the Pacific, greater and simplified access to climate finance, commitments to loss and damage and financing, and action on the ocean and climate change nexus. The annual Pacific Islands Forum Communique lays out the annual agenda of regional organisations on climate change action as agreed to by leaders.

2050 Strategy for the Blue Pacific: Under the renewed Pacific Way regional narrative of Blue Pacific — that sees collective action and a vision of the Pacific Ocean as a continent — the 2050 Strategy for the Blue Pacific was endorsed by leaders in 2022. It is development framework that outlines the commitment to ensuring health and wellbeing of Pacific peoples, and to human rights and equity for all. The 2050 Strategy places emphasis on the ocean and land and celebrates Pacific communities, the natural environment, climate change resources, livelihoods, faiths, cultural values and traditional knowledge.

Underpinning the region’s commitment to international agreements and the work in the region supporting states and local communities, the Strategy implements other climate related initiatives that have been priorities and led by Pacific states. Pacific Island countries have developed and supported multi-faceted strategies to prepare and respond to climate change, including: global advocacy; innovative legal declarations on preserving maritime zones, and the continuity of statehood, in the face of climate change; the request for an advisory opinion from the International Court of Justice; frameworks for climate mobility and displacement; the Pacific Resilience Facility to support community resilience, amongst other measures.

Implementing Climate Action: The Framework for Resilient Development is a voluntary non-political framework that supports coordination and action on a number of key issues related to climate change and disaster risk management in the region. The Framework for Resilient Development recognises the clear overlap between Climate Change Adaptation and Disaster Risk Reduction and is the world’s first integrated regional framework to build resilience to climate change and disasters. The Framework for Resilient Development advocates for an integrated approach to addressing climate change and disaster risk management in two ways:

- First, integrated actions to address climate change and disasters, whenever possible (i.e., where there are similar tools and resources required to monitor, analyse and address climate and disaster risks). An integrated approach can reduce duplication and optimise the use of limited resources and sharing of technical expertise.
- More effective mainstreaming of action to address climate change and disaster risks into development planning including policy making, planning, financing, programming, and implementation, which includes building resilience into governance structures and processes, partnerships, communications, and financing.

The Framework for Resilient Development is implemented through the Pacific Resilience Partnership Taskforce, whose membership includes member states, civil society and private sector representatives, regional organisations and development partners.

Pacific Climate Change Roundtable: There have been talks to revitalise the Pacific Climate Change Roundtable. This is the meeting of Climate Change Ministers and Officials, with civil society and the private sector. The Climate Change Roundtable was in existence before the Framework for Resilient Development, however in its current configuration there is limited time to discuss the climate agenda and initiatives. This shows the broadening, deeper and stronger views of states in the region for more attention on climate change.

The diagram below sets out the key frameworks and partners for the Strategy for the Blue Pacific Continent 2050. The diagram is extracted from: Center for Excellence in Disaster Management & Humanitarian Assistance, *Blue Pacific Continent Volume 1: Primer on Pacific Regional Climate Change Action* (January 2024), p. 69 (Figure 12).³²

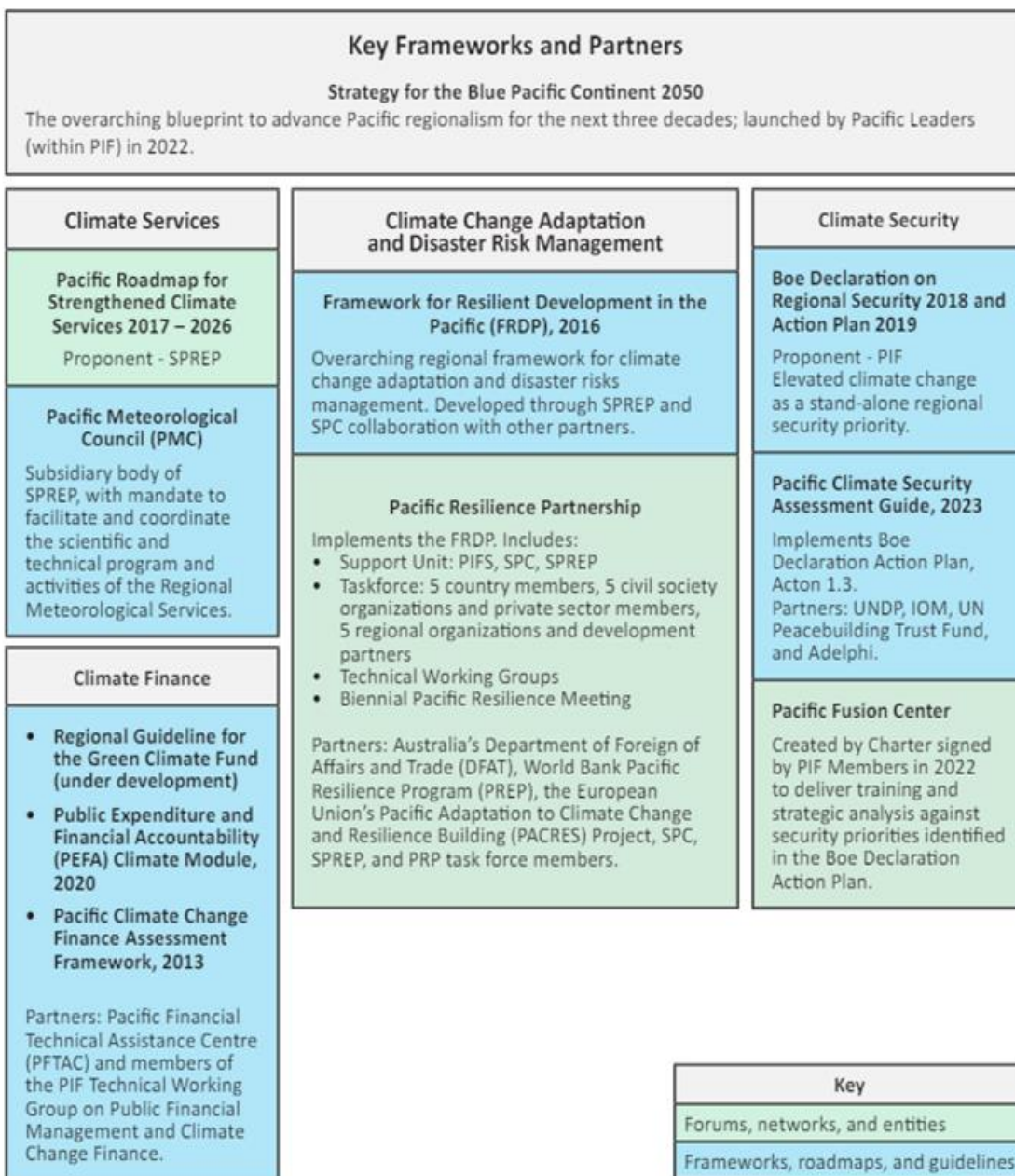


Figure 12: Key Frameworks and Partners

³² Available at <https://reliefweb.int/report/micronesia-federated-states/blue-pacific-continent-volume-1-primer-pacific-regional-climate-change-action-january-2024>.

3. What impact has involvement in regional or international forums had on domestic processes for law and policy making, including accountability? For example, have countries changed how they make law and policy as a result of regional or international engagement on climate change?

The UNFCCC is the overarching global framework to which regional strategies and policies are directed. The close association with Sendai Framework on Disaster, and advocacy by the Pacific Islands Forum and Pacific Small Islands Developing States at the UN Security Council on Climate Security debates are other avenues where there is a regional focus. Nevertheless, the region can influence and work with domestic law and policies by meeting the Paris Agreement targets and improving upon those targets through ambitious NDC and National Adaptation Plan (NAP) processes.

The Pacific regional work on Climate Change is carried out by key regional organisations: the Pacific Islands Forum (political leadership and finance), the Secretariat of the Pacific Regional Environment Programme (technical – science and policy implement, lead on UNFCCC negotiations); the Pacific Community (mainstreaming into other sectors); the University of the South Pacific (tertiary and higher education); the Pacific Tourism Organisation (tourism and climate change); and the Pacific Power Association (energy transition).

This key regional work is guided under the overarching Strategy for the Blue Pacific Continent 2050, which was launched by the Pacific Islands Forum in 2022, sets the goals for overall sustainable development and was presaged by the Boe Declaration on Regional Security (2018), which elaborated an understanding of climate change as the region’s top security threat. The Framework for Resilient Development advocates for integrated approach climate change action and is the most comprehensive framework for addressing challenges posed by climate change. As a means to define, integrate, and plan for climate security, the various organisations and fora have elaborated strategies, frameworks, and guides for action. Sustainable development has become the strategy to which many other regional, sub-regional, and national plans and policies refer and serves as a reference point for extra-regional partners to understand how and where to integrate with the Pacific Islands on development issues, especially climate change.

Moreover, the regional ecosystem on climate change includes the work programs of inter-governmental organisations, including the UN system through various entities like the UN Development Programme, the World Health Organization, the UN Educational, Scientific and Cultural Organization, the International Maritime Organization, UN Economic and Social Commission for Asia and the Pacific , and UN Women, to name a few; as well as multilateral banks, including the World Bank, the International Monetary Fund, and the Asian Development Bank.

These regional and intergovernmental organisations work with national governments through relevant Ministries and sectors to meet their climate change targets. At best, these organisations or climate actors have shaped climate governance by providing supporting (including technical) with climate polices and legislation. Around 70% of work on climate change in the region can be characterised as capacity building; most of this is provided through programs and projects on climate delivered by regional and intergovernmental organisations.

4. What impact have regional or international arrangements had on addressing climate change, within the region and internationally?

Parties to the Paris Agreement under the UNFCCC are required to prepare and submit an NDC to the UNFCCC Secretariat and to update it every five years. The NDC is a non-binding climate action plan to cut emissions and to adapt to climate impacts. The UNFCCC also provides for a NAP process for least developed countries and other developing countries.

- The NAP process helps states to reduce their vulnerability to the impacts of climate change by building adaptive capacity and resilience and to facilitate the integration of climate change adaptation into relevant new and existing policies, programs, and activities, in all relevant sectors. Fiji, PNG, and Tonga have finalised and published their NAPs. Other Pacific Island countries are developing their NAPs or have provided for adaptation in other climate or disaster-related planning.
- All Pacific Island countries have submitted their NDC to the UNFCCC Secretariat. Samoa, Solomon Islands, Tuvalu, and Vanuatu have National Adaptation Programmes of Action (NAPAs) as designated least developed countries (although Samoa graduated from this status in 2014 and Vanuatu in 2020).

The table overleaf sets out the status of NDCs and NAPs in the region. The table is extracted from: Center for Excellence in Disaster Management & Humanitarian Assistance, *Blue Pacific Continent Volume 1: Primer on Pacific Regional Climate Change Action* (January 2024), p. 67 (Table 26).³³

³³ Available at <https://reliefweb.int/report/micronesia-federated-states/blue-pacific-continent-volume-1-primer-pacific-regional-climate-change-action-january-2024>.

Country/Territory	NDC Submitted	NAP Published	NIIP	Other Climate Policies/Plans	SIDS and LDCs designation
American Samoa (U.S. territory)	N/A	N/A	N/A	N/A	N/A
Cook Islands	First NDC submitted 2016	None	2015; updated 2021	Climate Change Policy 2018-28 and the Cook Islands Climate Change Country Programme 2018-2030, Joint National Action Plan (JNAP) for Disaster Risk Management and Climate Change Adaptation 2012	SIDS
Federated State of Micronesia	Updated NDC submitted in 2022	Readiness Proposal for NAP Development submitted to GCF 2022, re-submitted 2023	N/A	Climate Change Act 2013	SIDS
Fiji	Updated NDC submitted in 2020	December 2018	2023-2034	National Climate Change Policy (NCCP) 2018	SIDS
French Polynesia (French territory)	N/A	N/A	N/A	N/A	SIDS
Guam (U.S. territory)	N/A	N/A	N/A	N/A	N/A
Kiribati	Enhanced NDC submitted in 2023	January 2020	2022-2032	National Framework for Climate Change and Climate Change Adaptation (NFCCCCA) 2013; National Disaster Risk Management Plan (NDRMP) 2012	SIDS, LDC
Northern Mariana Islands (U.S. territory)	N/A	N/A	N/A	N/A	N/A
Marshall Islands (Republic of)	Updated Second NDC submitted in 2020	NAP process commenced in 2019	N/A	2050 Climate Strategy of 2018	SIDS
Nauru	Updated First NDC submitted 2021	RONAdapt to be updated to become NAP through Readiness Proposal submitted to GCF in 2022	2011; updated by Nauru Economic Infrastructure Strategy and Investment Plan 2019	Climate Change Adaptation and Disaster Risk Management Framework (RONAdapt) 2015	SIDS
New Caledonia (French territory)	N/A	N/A	N/A	N/A	N/A
Niue	First NDC submitted in 2016	None	Transport Strategy and Short-term Action Plan 2017-2026	Climate Change Policy 2009; Joint National Action Plan (JNAP) for Climate Change Adaptation and Disaster Risk Management 2012	SIDS
Palau	First NDC submitted in 2016	Readiness Proposal to prepare NAP submitted to GCF in 2022	2021-2030	Palau Climate Change Policy (PCCP) 2015	SIDS
Papua New Guinea	Second NDC submitted in 2020	May 2023	N/A	Climate Change Management Act 2015, Amendment 2022	SIDS
Pitcairn (United Kingdom territory)	N/A	N/A	N/A	N/A	SIDS
Samoa	Second NDC submitted in 2021	NAPA 2005	N/A	Samoa Climate Change Policy 2020; NAPA 2005; National Policy on Combating Climate Change (NPCCC) 2007	SIDS
Solomon Islands	Updated First NDC submitted in 2021	NAPA 2008	2013; Priority Infrastructure Investment Pipeline 2021	Solomon Islands National Climate Change Policy (NCCP) 2023-2032 (2023); Long Term Low Emission Development Strategy (LT-LED5)(2023)	SIDS, LDC
Tokelau (New Zealand territory)	N/A	N/A	N/A	N/A	N/A
Tonga	Second NDC submitted in 2020	Published 2021	2010; 2013-2023; 2021-2030; and post-volcano/tsunami update	Tonga Climate Change Policy - A Resilient Tonga by 2035 (2016)	SIDS
Tuvalu	Updated First NDC submitted in 2022	NAPA 2007	Priority Infrastructure Investment Plan 2020-2025	National Climate Change Policy 2021-2030 (2021)	SIDS, LDC
Vanuatu	Revised and enhanced NDC submitted in 2022	NAPA 2007	Infrastructure Strategic Investment Plan 2015-2024	Climate Change and Disaster Risk Reduction Policy 2016-2030 (2015)	SIDS
Wallis and Futuna (French territory)	N/A	N/A	N/A	N/A	N/A

Table 26: Pacific Islands' NDC Submissions, NIIPs, NAP Preparation, and Climate Plans



4. The Relevance of Constitutional Text to Climate Change

4. The Relevance of Constitutional Text to Climate Change

Constitutional text offers obvious promise for grappling with the challenges of climate change. Provisions may deal more generally with the environment or more explicitly with climate change. Ancillary provisions may be relevant as well; for example, by mandating approaches to interpretation that prioritise protection of the environment or recognise responsibility to (or even rights of) future generations.

Constitutional provisions relevant to climate change may take a variety of different forms. Examples include:

- Rights provisions (including individual rights, collective rights, eco-centric rights (e.g. rights of nature));
- Directive principles imposing political obligations on the state to protect the environment;
- Duties imposing binding legal obligations on the state in relation to the environment, which may also have vertical application;
- Mandated preservation of aspects of the physical environment; for example, a proportion of nature reserves or forest cover;
- Provision for the protection and sustainable management of natural resources;
- The establishment of institutions with responsibility to protect the environment and monitor efforts to address climate change; and
- Provisions requiring environmental impact assessment.

Such provisions can play a significant role in shaping a state's responses to climate change. They offer support for law and policy designed to mitigate the causes of climate change. They may assist in striking the balance needed for sustainable development. The challenge for each state is to choose a form of constitutional protection that is most likely to be effective in its context. On paper, some of the formulations currently in use seem weaker than others, but in practice, much depends on justiciability and implementation. By way of example, statements of duties, values and principles may appear to be only aspirational, but they can be robust in practice, influencing how state authorities make decisions and exercise powers.

The inclusion of specific constitutional provisions may be motivated by a range of concerns and directed to a range of purposes: they may be designed to implement international obligations; to promote domestic action on climate change that may exceed the internationally agreed threshold; to provide levers to improve legislative engagement with climate change or to encourage institutional design that delivers more effective climate action; to recognise and prioritise the problem of climate change; to signal to the outside world the expectations of the State and its people on matters affected by climate change, including the preservation

of statehood and maritime boundaries; and simply to take environmental matters beyond the reach of day-to-day politics.

There are risks, however, in placing too much reliance on constitutional text. Constitutional protection is effective only if the provisions are observed, notwithstanding the policy challenges that climate change presents and the divisions that it can cause. With this in mind, constitutional overreach can be counterproductive, as can transplanting provisions in use elsewhere, without considering their operation in context. Experience suggests that Constitutions may entrench provisions that become outdated over time but prove difficult to amend or to adapt to new conditions. Most constitutional provisions depend on interpretation by courts, which may result in a meaning that is narrower than intended or needed. Overreliance on judicial interpretation also risks distracting attention from the actions of elected representatives on whom, in the end, responses to climate change depend.

This section explores the use of written constitutions in responding to climate change and as an aid to effective climate action, using three case studies: Bhutan, Thailand and Tuvalu.

Each of the case studies that follows broadly responds to the following questions.

1. What are the most pressing issues arising from climate change in your country and what impact do they have on the constitutional system?
2. What provisions relating to climate change or environmental protection are included in your constitution (or are being considered)?
3. What was the motivation for including those provisions? Was there debate or disagreement about the provisions at the time of constitution making or constitutional amendment?
4. What, if any, institutional arrangements were put in place to ensure new provisions were implemented?
5. How have these provisions been interpreted and implemented by governments, courts and other public actors? Have there been unforeseen challenges to putting the provisions into effect?
6. Have constitutional provisions made a difference in how the state responds to climate change? Why or why not?

Bhutan

Om Katel

With Anooja Nair and Yogeeta Daha

Introduction

Global warming — the dominant cause of which is to be attributed to human activities — has been intensifying extreme weather events and brought on slow onset events (e.g. sea level rise, increasing temperatures, ocean acidification, amongst others). This is in turn affecting food production, human health, loss of ecosystems and biodiversity, etc. It appears that without major climate action, with a drastic reduction of net carbon emissions by the end of the century, it would be difficult to assume a healthy environment into the future. The strategies or approaches should pursue a significant technological revolution and a radical change in all greenhouse gas emissions. Scholars argue that to achieve the broad policy outcomes, countries around the world need to look into the instruments meant to answer environmental problems right at the country level. One such approach would be to consider any constitutional provisions that could be relied on in relation to whether environmental policies can be sustained or can support the decarbonisation or low carbon development. The objective of these contributions is to reflect on whether or not there are any such constitutional provisions in Bhutan and whether or not the country's aim to remain carbon neutral is in congruence with the country's Constitution.

1. What provisions relating to climate change or environmental protection are included in the constitution (or are being considered)?

Article 5 of the Constitution of the Kingdom of Bhutan specifically spells out the “Environment” as the theme of the article. The clause states that: *“Every Bhutanese is a trustee of the Kingdom’s natural resources and environment for the benefit of the present and future generations and it is the fundamental duty of every citizen to contribute to the protection of the natural environment, conservation of the rich biodiversity of Bhutan and prevention of all forms of ecological degradation including noise, visual and physical pollution through the adoption and support of environment friendly practices and policies”*.

The subsequent clauses specifically mention protection, conservation and improvement of the environment; and also safeguarding the rich biodiversity resources and cultural heritage associated with the biodiversity and the environment. The protection of the environment is a broad, thematic area, under which preventing pollution and ecological degradation is contemplated. The securing of ecologically sensitive areas through balanced socio-economic development is also mentioned. One of the strategies adopted by Bhutan, to conserve the country's natural resources and to prevent degradation of the ecosystem is contained in article 5 of the Constitution, which provides that a *“minimum of sixty percent of Bhutan’s total land shall be maintained under forest cover for all time”*. In addition, a significant power is granted to the parliament to, *“by law, declare any part of the country to be a National Park, Wildlife Reserve, Nature Reserve, Protected Forest, Biosphere Reserve, Critical Watershed and such other categories meriting protection”*. Currently more than 50% of the country's land areas are protected areas.

2. What was the motivation for including those provisions? Was there debate or disagreement about the provisions at the time of constitution making or constitutional amendment?

The Constitution of the Kingdom of Bhutan mandates to maintain a minimum of 60% of the country's land areas under forest cover for all times to come. This is set basically to conserve the natural resources in the country and to prevent degradation of the ecosystem. The commitment to set aside more than 50% of the land under forest cover is rooted in Bhutan's national forest policy of 1974. This policy recognises the importance of soil and forest for protecting water sources, which as a result can maintain equilibrium among forest, soil and climate. One of the experiences that Bhutan had in the past was that significant forested areas suffered severe degradation. As a country with major areas of mountainous environment, Bhutan underwent significant degradation of land due to soil erosion and landslides. Therefore, to protect fragile lands that are vulnerable to soil erosions and other ecological disturbances, with command from His Majesty, the fourth King of Bhutan, the policy was introduced to ensure ecological balance and environmental stability in 1974.

The Constitution was amended in the year 2008 and there were no disagreements on whether or not to include a minimum of 60% of the country's land areas under the forest cover. Today, all the citizens of the country recognise that forest plays a critical role in protecting soil from degradation and also protecting water sources, as water catchment and watershed areas, and vital components of its natural heritage. The country's efforts have been significant; as a result, there has been a significant increase in forest cover over the years, and Bhutan is one of the few countries in the world that is "carbon negative". While doing so, Bhutan has contributed significantly to the mitigation of climate change impacts.

3. What, if any, institutional arrangements were put in place to ensure new provisions were implemented?

Although provisions concerning environmental protection in Bhutan were based on the protection of the natural resources, they were increasingly relied upon to protect local livelihoods, particularly as climate change impacts became more and more pronounced. Natural resources such as water, agriculture and forests feel the brunt of the climate change impacts. Bhutan has contributed nothing to causing these impacts; to the contrary, it has only helped alleviate the causes of climate change by absorbing more greenhouse gasses than it emits. Bhutan's response to climate change impact has been characterised by a strong commitment to environmental conservation, which includes a constitutional mandate to maintain a minimum of 60% forest cover. Further, together with the enactment of national policy of 1974, a development philosophy known as Gross National Happiness was introduced to Bhutan in the same year. Bhutan's approach to addressing climate change impact has involved holistically integrating Gross National Happiness into the country's environmental policies.

While considering how to address the climate change impact, Bhutan initially started with the development of adaptation projects such as a disaster management strategy, a weather forecasting system, landslide management, flood prevention, and others. These projects were crucial in addressing the climate change impacts, particularly for the significant portion of the population relying on subsistence farming. Also, it must be mentioned that one of the country's major sources of revenue is hydropower, and that it is predicted that there would be significant water associated disasters in the future. Accordingly, such projects appear crucial for now and the future to secure ecological stability in the country.

In 2019, Bhutan embarked on the project of formulating the National Adaptation Plan, to prepare the broad framework, address the climatic impacts, and protect both people and natural resources. This was done by mainstreaming the mitigation and adaptation efforts both at national and local level across key sectors of the economy. In 2020, Bhutan formulated the Climate Change Policy of the Kingdom of Bhutan to further streamline the country's stance on climate action. In the climate policy, there are specific mentions of the policy's goals that include: (a) pursuing carbon-neutral development, (b) building resilience to climate change, (c) ensuring means of implementation, specifically linking how to secure financial resources, access technology, build technical and human resource capacity etc., and (d) enhancing effective and coordinated actions across different sectors and among different stakeholders. In order to make sure that the policy goals are met, the government has set up specific objectives or pledges such as maintaining carbon neutrality, inventorying and managing greenhouse gas emissions, low carbon development, and integrating adaptation actions into development planning. In addition, to protect public health, Bhutan has identified interventions in the health sector adaptation plan, in the areas with public health risks. Additionally, Bhutan has made advances in climate change research, with a roadmap and strategy for strengthening research from 2021 to 2025.

4. How have these provisions been interpreted and implemented by governments, courts and other public actors? Have there been unforeseen challenges to putting the provisions into effect?

The Paris Agreement has been crucial because Bhutan's journey to adapt to climate change has been closely tied with its Nationally Determined Contributions (NDCs). Bhutan followed Five Year plans to implement development in the country, starting in 1960s. Currently, Bhutan is in its 13th Five Year Plan phase. Bhutan has included significant Key Performance Indicators focusing on climate and disaster resilience in its Five Year Plans since the 11th Five Year plan. This is one of Bhutan's major achievements concerning the country's integrated approach to climate change impact through a combination of policy, integrating strategies, and practical provisions. On the international stage, such an approach has gained attention together with Bhutan's position as a leader in climate resilience and carbon negative status. However, there have been hiccups in several areas while implementing the important provisions of the Constitution. These include lack of financial resources at the local level, whereby local governments are not mandated to pursue climate resilient development and also lack any strong database on natural resources such as whether climate played any role in drying up of the spring water in many watershed and water catchment areas. It can be noted that the lack of financial resources made it difficult for the national government to direct local level planning towards climate friendly development. It appears that local elected leaders are more interested to pursuing economic development rather than addressing climate change impacts. Similarly, sectoral isolation and lack of collaboration and coordination has been the reason for duplication of resources which otherwise could have paved the way for significant development in addressing climate change impacts. However, there have been several pilot projects to showcase how economic development and climate change mitigation or adaptation can be combined and upscaled to promote climate resilient development. There is a hope that Bhutan will make significant progress in the 13th Five Year plan.

5. Have constitutional provisions made a difference in how the state responds to climate change? Why or why not?

The constitutional provisions played pivotal role in shaping the country's response to climate change.

First, in addition to article 5 (forest cover), there is Gross National Happiness in clause 2 of article 9 and under the four pillars of the Constitution, including, environmental conservation, cultural preservation, balanced socio-economic development and good governance. Since the environment and economic development are related, specific terms such as environmental conservation and balanced socio-economic development, as enshrined in the Constitution, provide a strong legal backbone for enacting and implementing environmental laws and policies. There is thus a strong argument in favour of ensuring that environmental conservation is not just a policy choice but a constitutional commitment.

Secondly, the provisions of balanced socio-economic development served as the guiding framework for sustainable development whereby every sector of the economic development is mandated to integrate environmental considerations into their plans and developments.

Thirdly, Bhutan's commitment to environmental conservation and sustainable development through its constitutional provision provides credible standing, and Bhutan has gained international support to address climate change related resilient development initiatives.

Fourth, the constitutional provisions guide national to local developmental actions which reflect and reinforce cultural values of respect of Bhutanese citizens for nature, which also is integral to the country's developmental philosophy of Gross National Happiness. Such cultural integration appears to facilitate public acceptance of initiatives to address climate change impacts.

Lastly, the country's commitment to environmental conservation has reinforced the system of accountability and transparency of environmental governance that include monitoring and evaluation. This, in summary, may mean that the country's constitutional provisions have not only influenced state's policies and actions but also generated the environmental stewardship which is crucial in response to climate change. The constitutional provisions have been instrumental in putting environmental conservation as the core component of Bhutan's developmental pathways and national identity.

Thailand

Thitinant Tengaumnuy

1. The pressing issues arising from climate change in Thailand and the impact they have on the constitutional system

Thailand is an agricultural nation where a large number of Thai people earn their living through agriculture. Climate change affects the amount of rain; extremely heavy storms cause floods and damage crops, and on the other side of the spectrum, drought and higher temperatures than usual damage crops and affect fisheries. Thailand is identified as a medium-risk country which will face significant problems with floods, according to the INFORM risk index 2024. However, addressing environmental problems, especially preparing for the mitigation and adaptation to climate change, is not a high priority in the constitutional system. With consistent political instability and the failure to establish democracy in Thailand, national policies and the public have paid more attention to the restructure of government and focus more on policies to support business development and boost economic growth. It is international obligations which drive the government to take some action to make Thailand follow the global trends and move toward sustainability. International obligations motivated the governmental agency to prepare the draft of the *Climate Change Act*. This Act introduces a carbon tax and emission trading scheme to incentivise the business sector to take a proactive role in reducing carbon and shifting to green energy.

2. What provisions relating to climate change or environmental protection are included in the Constitution of Thailand?

The first Constitution of Thailand (or precisely, the ‘Constitution of the Kingdom of Siam’³⁴) of 1932 did not mention or recognise environmental issues. Indeed, it was not until the 10th Constitution of Thailand in 1974 that environmental development was explicitly recognised as an important issue of government policy. However, the early provision relating to environmental protection is anthropocentric, as it recognises the necessity of environmental protection to prevent harms possibly caused to humans. Due to political instability and several coups following one another, constitutions were repeatedly abrogated and new constitutions promulgated. The environmental dimension was not mentioned in later Constitutions until the 16th Constitution in 1997.

The 1997 Constitution has been regarded as the most democratic Constitution of Thailand, for it was enacted when the Thai government was democratically elected and the drafting of this Constitution included processes for public involvement. A vast array of rights were officially recognised in the 1997 Constitution and this manifested a ‘bold’ effort to confer ‘greater power to the Thai people than had ever been granted before.’³⁵ It was the first time that the Constitution of Thailand guaranteed environmental rights. Section 56 of the 1997 Constitution established the right of a person to participate in the preservation

³⁴ The ‘Kingdom of Thailand’ was previously called the ‘Kingdom of Siam’ until being renamed in 1939. Therefore, the official titles of the constitutions before the 1939 was the ‘Constitution of the Kingdom of Siam.’

³⁵ Paul Chambers, ‘Good Governance, Political Stability and Constitutionalism in Thailand 2002’ (King Prajadhipok’s Institute, 2006) 16.

and exploitation of natural resources, biodiversity, and environmental quality to allow for his or her usual and safe life. The requirement for Environmental Impact Assessment of any projects or activities which might cause adverse impacts on the environment is explicitly stated in paragraph 2 of section 56, rather than simply included in an Act as usual, implying an awareness of environmental concerns and a determination to prevent environmental degradation that could come with industrialisation.

The inclusion of the Environmental Impact Assessment requirement at the constitutional level is interesting, since, in other countries such as European Member States, for example, Environmental Impact Assessments are required only under national legislation. The European Union environmental governance regime is generally known to be a world leader in environmental development, but its Environmental Impact Assessment requirements do not have to be set at the constitutional level as they were Thailand. The political background along with abrogation of several constitutions in Thailand does not make the inclusion of Environmental Impact Assessment requirements in the constitution a guarantee that the Assessments will be securely reserved. However, the introduction of Environmental Impact Assessments in the constitution might to some extent raise public awareness and remind the government of the significance of environmental management.

Section 56 also provided legal standing for a person to bring a case against government agencies or governmental authorities in order to protect a person's rights as guaranteed by the Constitution. Although there have not been any cases brought to the court to exercise such rights, section 56 has initiated the constitutional recognition of a person's right to environmental protection.

The 1997 Constitution was abolished after the military coup in 2006, but some ideas of rights and governance under the 1997 Constitution still influenced later constitutions, despite some additional restrictions due to the military's tendency towards autocratic governance.³⁶ The 2007 Constitution recognised environmental rights as had its predecessor in section 67, recognising the right to participate in environmental protection and the right of a community to take legal action against the state to ensure their constitutional rights. Moreover, section 67 of the 2007 Constitution also introduced the requirement for public hearings while encouraging the engagement of stakeholders and interested parties in the Environmental Impact Assessment process. It is a further step for environmental development in Thailand that the 2007 Constitution has developed from its predecessor by facilitating the protection of a person's rights and encouraging public participation in the Environmental Impact Assessment process.

The Administrative Court, which was established by the 1997 Constitution to carry out judicial review of the exercise of public authorities as well as to ensure accountability in public services, still survives despite the abrogation of the 1997 Constitution. The Administrative Court has a prominent role in enforcing environmental rights under the Constitution. The landmark case which indicates the success of the environmental rights under the 2007 Constitution and the role of the Administrative Court in enforcing such rights is the Map Ta Phut case in 2009. In this case, the local people in the Map Ta Phut industrial area won a case wherein the government was accused of non-compliance with the Environmental Impact Assessment requirements under the constitution and successfully prevented hazardous activities in the area.³⁷ It was the first time that the local community together with non-governmental organisations brought a case against the National Environment Committee (the composition and the duties of this Committee will be

³⁶ Andrew M. Marshall, *A Kingdom in Crisis: Thailand's Struggle for Democracy in the Twenty First Century* (Zed Books, 2015) xi.

³⁷ Supreme Administrative Court Order No. 592/2552 (2 December 2009).

further explored below), and the ministers and government agencies associated with approval of the Map Ta Phut project. They were accused of non-compliance with the 2007 Constitution, as they approved the project despite the Environmental Impact Assessment process not properly including public hearing and consultation as required. The Administrative Court revoked the Impact Assessment approved by the government and issued a temporary injunction to suspend the project until the Assessment was re-conducted and included public consultation as well as the opinions of the 'Independent Environment Body' as required by the Constitution.³⁸

The current Constitution which was enacted in 2017 after the 2014 military coup shares a similar requirement for an Environmental Impact Assessment in section 58 as its predecessors. However, the right to participate in environmental protection is missing. Rather than the explicit recognition of the people's right, the 2017 Constitution imposes a duty on the state under section 57(2) in terms that the state has the duty to preserve and protect the environment and must allow the public and the local communities to participate in the state's undertakings as provided by the law. This change has been criticised as diminishing the people's right to environmental protection. The drafting committee argued that the imposition of the state duty signified the importance of environmental protection more than simply recognising the right as before.

With regards to Climate Change, the current Constitution does not explicitly recognise the emergency of this issue. However, the state's responsibility for addressing climate change and its impact falls within the scope of the duty of the state under section 57(2) of the Constitution. At the time of writing, the drafting process for the Climate Change Act is at the stage of public hearing. The Department of Climate Change and Environment was established on 18 August 2023 under the Ministry of Natural Resources and Environment and has become responsible for preparing suggestions for the national Climate Change policy as well as drafting the Climate Change Act. However, the draft has been criticised for the insufficiency of public participation and overcentralised governance. The committee appointed under this new act has a higher proportion of government members than experts and representatives of the public sector.

Now, with the pressing issue of climate change and the missing right to a good environment in the current Constitution, it is still questionable whether people affected by climate change, or more specifically, affected by the fact that the government does not take action to mitigate climate change impacts as well as to prepare any tangible measures to move towards carbon neutrality, can have legal standing to file a case for the state violation of their rights to live in a good environment.

3. What Institutional Arrangements were put in place to ensure the implementation of constitutional provisions?

The governance structure poses considerable challenges for designing and implementing environmental regulation in Thailand. There are several committees and agencies involved in enforcing environmental laws. While the Department of Climate Change and Environment has been recently established to focus on climate change action, it is not the governmental agency which implements climate change laws. While the Climate Change Act has not yet been passed, the problems relating to climate change are generally considered environmental problems. The *Promotion and Conservation of National Environmental Quality Act*, as amended in 1992, restructured environmental agencies. The National Environment Committee was

³⁸ Supreme Administrative Court Order No. 592/2552 (2 December 2009) and No. 1352/2553 (2 September 2010).

established under this Act to set the environmental standards to prevent water, air and noise pollution. This committee includes members from both political and bureaucratic authorities and experts. Expert members are required in this forum to provide specialist information and knowledge and contribute their insights into environmental management planning.

The qualifications of the Committee seem reasonable as this encourages collaboration among authorities and experts in what appears to be a well-balanced composition. However, in reality, there is a strong likelihood that political authorities will dominate the decisions of the Committee without affording sufficient weight to opinions based on expertise. As the law does not specify the exact number of experts in the Committee but merely indicates that the Cabinet must select not more than eight experts to sit on the Committee, the number of experts could be a small proportion in the Committee, which potentially weakens their voices. Moreover, the selection of experts is at the total discretion of the Cabinet, allowing the government to choose persons that share the same views or standpoints as the government.

The Office of Natural Resources and Environmental Policy and Planning is assigned as a responsible agency to check submitted Environmental Impact Assessments. However, the Office itself does not have any monitoring officers under its own authority. The Office of Natural Resources and Environmental Policy and Planning is an agency under the Ministry of Natural Resources and Environment, while the monitoring officers ('the pollution control officers') work under other agencies, mainly the Pollution Control Department and other Departments for particular environmental issues, such as the Department of Fisheries in cases of pollution from fisheries, and the Department of Marine and Coastal Resources in cases of marine pollution.³⁹ The dispersal of government authority to officers under various departments indicates a high degree of fragmentation in the environmental governance framework in Thailand. The monitoring process will be more complex if the project is an industry, because the pollution control officers, in cases where they want to monitor a project, have to collaborate with the factory officers who are the officers under another agency, namely the Department of Industrial Works. This makes things more complicated than it should be as there are three agencies associated with the Environmental Impact Assessment.

The Regulation for the Official Prime Minister for Collaboration in Enforcing Environmental Laws 2007 did not set up a single overarching regulatory body to address this problem. Instead, it established a new committee for facilitating collaboration. The fragmentation of governance requires one regulatory body with overarching authority to reduce bureaucratic processes, not the establishment of another set of committees. The chaotic structure of governance is therefore a significant problem of environmental regulation in Thailand. While the Climate Change Act is still in the drafting stage, it is doubtful how these structural problems can be solved to ensure the effective implementation of the law.

4. How have constitutional provisions been interpreted and implemented? Have there been any challenges?

The fact that the Constitution contains provisions which establish a state duty towards environmental protection and set requirements for Environmental Impact Assessments does not ensure effective environmental management. Political instability, especially frequent coups, impedes the continuous

³⁹ Pollution Control Department, 'News on Pollution Control' (22 April 2021) <www.pcd.go.th/pcd_news/12894/> accessed 10 February 2022.

development of environmental regulation. The situation can also get worse when the military government uses excessive powers to grant total exemptions from the application of environmental regulations, allowing some environmentally degrading actions by private actors, namely business corporations and industries, or even by state projects.

Interim constitutions announced after the abrogation of a pre-existing constitution often confer special powers on the military regime to restore peace and order to the country. In 2014, section 44 of the Interim Constitution of Thailand enabled Prime Minister Prayut Chan-o-cha to issue any orders considered necessary for national reform. This provision granted the military Prime Minister an extensive power to impose or amend any laws and regulations, with recognition from the 2017 Constitution that the orders issued under section 44 are constitutional and lawful.⁴⁰ Economic problems have been the focus of government policies, as investment and developmental projects are needed for creating jobs and spurring economic growth. Environmental standards and requirements have been regarded as an obstruction discouraging investment, and such regulations are seen to increase costs for investors or delay the construction of projects.⁴¹

With this viewpoint, Prime Minister General Prayuth Chan-o-cha used the special power conferred by section 44 to issue the National Council for Peace and Order (NCPO) Order to exempt certain areas of economic development projects from the application of the *Town Planning Act*, and to amend the law to allow certain necessary projects to proceed for approval before completion of the Environmental Impact Assessment previously required by the law.⁴² A number of projects were allowed during that time and their adverse impacts to environment remain, despite the termination of the NCPO's Orders.

The NCPO's orders obviously exemplify a situation where the national government ignores the importance of environmental regulation and even lowers the level of existing environmental standards. Although the environmental standards are incorporated in an Act or even recognised in the Constitution, political instability in countries such as Thailand can allow government interference to abolish all such requirements and to lower environmental standards with no predictability.

Conclusion

Thailand is now in the process of drafting the Climate Change Act, but it is still doubtful that the public can raise its voice if they do not have sufficient engagement in climate change action. Will the law restructure the bureaucratic governance and ensure effective implementation? Can people have the actual rights to ensure effective environmental regulation when the current Constitution does not explicitly recognise their rights as before? Will the Environmental Impact Assessment process efficiently take climate change issues into consideration? These are still the questions to discuss and find out.

⁴⁰ Constitution of the Kingdom of Thailand 2017, s 279.

⁴¹ 'Thai Junta Scraps Regulations on Industries, Power Plants' (*Prachathai*, 22 January 2016) <prachatai.org/english/node/5789>;

'Thai Junta Slashes EIA Procedures on State Projects' (*Prachathai*, 9 March 2016) <prachatai.org/english/node/5919>.

⁴² The NCPO's Orders 3/2559, 4/2559, and 9/2559.

Tuvalu

Anna Dziedzic

[*Editors' note:* The methodology of the Melbourne Forum is to invite an expert from the country concerned to present each country case study. In planning this Melbourne Forum on Constitutions and Climate Change, it was important to include Tuvalu as a country that had recently engaged in the process of making a new constitution which directly responded to the climate crisis. Unfortunately, the invited expert was unable to participate. To try to cover the gap, the following overview by Anna Dziedzic explains the provisions included in the text of Tuvalu's new Constitution in response to climate change.]

The new Constitution was passed unanimously by the Parliament of Tuvalu on 5 September 2023 and came into effect on 1 October 2023. It was the culmination of a constitution review process that began in 2016. After the first round of reforms failed to receive the support of the required majority in the parliament, the newly elected government revived the constitutional review process in 2021. Both processes sought to respond to a range of issues relating to government stability, the judiciary and human rights and custom.⁴³

A significant component of the new Constitution is its response to the climate crisis. Tuvalu is at extreme risk of the consequences of climate change. It is a small coral atoll nation and its lands are less than 2 metres above sea level. It is highly vulnerable to sea level rise, natural disasters, salination of water and soil, and climate-change induced weather events.⁴⁴ While it is one of the most vulnerable nations to climate change, Tuvalu is also one of the least responsible, with negligible greenhouse gas emissions.

In Tuvalu, climate change is approached as an existential threat. The new Constitution makes this very clear. A new section of the Preamble expresses deep concern at the 'imminent existential threat of Climate Change and sea-level rise to the security and survival of Tuvalu'.

One significant innovation in Tuvalu's Constitution is the preservation of statehood provision. Tuvalu's Constitution, like many others, has a territory clause, which defines the land, water and airspace of Tuvalu. Section 2 of the Constitution extends the definition of territory in two ways. First, section 2 states that these boundaries shall remain unchanged, notwithstanding any change in the low water mark or changes in geographical features due to sea level rise or other causes, unless prescribed by an Act of Parliament. Second, the constitutional text provides that the State of Tuvalu 'within its historical, cultural and legal framework shall remain in perpetuity in the future, notwithstanding the impacts of climate change or other causes resulting in loss to the physical territory of Tuvalu'. As these words make clear, this provision is not simply about recognition of territory, but of the nation of Tuvalu. These provisions complement actions undertaken by Tuvalu in international law to set the borders of the state in perpetuity.⁴⁵

⁴³ Simon Kofe and Jess Marinaccio, 'Tuvalu Constitution Updated: Culture, Climate Change and Decolonisation' (*Devpolicy Blog*, 20 September 2023).

⁴⁴ Apisai Ielemia, 'A Threat to Our Human Rights: Tuvalu's Perspective On Climate Change' (*United Nations UN Chronicle*) <<https://www.un.org/en/chronicle/article/threat-our-human-rights-tuvalu-perspective-climate-change>>; Eesealofa Apinelu, 'Tuvalu', in Joo-Cheong Tham et al, *Climate Change and Democracy: Insights from Asia and the Pacific* (International IDEA, 2023).

⁴⁵ Government of Tuvalu, 'Te Sikulagi: Tuvalu Foreign Policy 2020 - Future Now Te Ataeao Nei' (2020). Paragraph 9.2.3 provides that in bilateral relations, Tuvalu will insist that other states recognise Tuvalu's existing boundaries in perpetuity.

The new paragraph dealing with climate change in the preamble also recognises the ‘urgent need for meaningful work with the rest of the world to protect and save Tuvalu’. A new provision in the Constitution, section 5, commits Tuvalu to address climate change by recognising all relevant regional and international law relating to mitigation and adaptation, and the ‘common but differentiated responsibilities of all States, sectors, organisations and individuals and the need for international co-operation to address climate change and to protect those that are most affected.’ Under the Constitution, this kind of ‘commitment provision’ can be interpreted and applied by the Tuvaluan courts like any other constitutional provision. But it remains to be seen how courts and other entities in Tuvalu and outside it will approach the interpretation of this provision, including the extent to which it recognises responsibilities of those outside Tuvalu.

Given that this new Constitution was made at a time and under the leadership of a government that was acutely focused on climate change, it is interesting to also note what kinds of provisions were *not* included.

Tuvalu did not go down the path of enshrining a right to a healthy environment or similar kind of rights provision. The only mention of the environment in the Bill of Rights is a limitation clause in section 26 that permits laws that limit the freedom of movement where reasonably required in the interests of conservation. This provision is not new, it was carried over from the previous Constitution. The reluctance to enshrine environmental rights in the Constitution perhaps reflects Tuvaluan understandings of rights as custom and a deep concern over the past enforcement of individual constitutional rights in ways that were seen to contradict custom.⁴⁶

The Constitution also does not address all of what might be needed should loss of territory actually occur. Tuvalu’s ‘Future Now Project’ seeks to prepare for the worst-case scenario under climate change, namely the disappearance of Tuvalu’s territory as lands are submerged by rising sea levels. Part of this initiative is to prepare for Tuvalu to become a digital nation, functioning as a sovereign state while its people reside elsewhere.⁴⁷ While it provides for statehood in perpetuity, the new Constitution does not go into the details of how this might work in relation to issues such as citizenship, voting rights and representation.

We see in these provisions a new Constitution that seeks to protect the state in perpetuity but also hold on to hope that climate change will not destroy the land of Tuvalu, in part to send a message to the rest of the world. In this, it is a constitutional text that speaks as much to the world outside as to those within Tuvalu.

⁴⁶ Eselealofa Apinelu, ‘Standing under Fenua: Customary Rights and Human Rights in Postcolonial Tuvalu’ (PhD thesis, Swinburne University of Technology 2022).

⁴⁷ Simon Kofe, ‘Tuvalu’s Future Now Project: preparing for climate change in the worst-case scenario’ (*Devpolicy Blog*, 10 November 2021).

A blue-tinted photograph of a street scene. In the foreground, a utility pole has a mural of a dark bird with a white breast. The background shows a street with buildings, including a wooden structure with a sailboat mural and a building with a corrugated metal roof. A security camera is mounted on the utility pole.

5. Litigation & Climate Change

5. Litigation & Climate Change

The urgency of climate change, in an era of increasing frustration at the level of action and ambition displayed by legislatures and executives and greater appreciation of how standards of governance may be shaped by judicial review, has given rise to a new genre of strategic litigation, in the form of climate litigation. Under this rubric, both domestic and international courts increasingly are called upon to review and monitor policies and actions (including inaction) by legislatures, executives and other actors on climate change. The landscape of climate litigation is broad; cases are brought all around the world, at the domestic, regional and international levels, invoking many legal regimes. In this Report, the focus is on public (especially constitutional) forms of climate litigation.

Climate change litigation has many uses. It can be used strategically to raise awareness and change public opinion. It can function as an accountability mechanism where other forms of political accountability have fallen short. In terms of enforcement, its effect sometimes may be limited to *triggering* momentum for improvement rather than *implementing* a normative standard for climate action. An illustration of the point is presented by a decision of the Korean Constitutional Court discussed below in the contribution from Sejong Youn. In this case, the Korean Court held legislation providing for net zero targets up to 2030 to be constitutionally invalid, not on the grounds of failing the meet prescribed standards but because no targets were prescribed for the years after 2030, passing the burden to future generations.

The success of judicial review as a means of enhancing responses to climate change varies between states across the region and the world. In some states, courts have found general constitutional provisions (such as the right to life or human dignity) to encompass other environmental human rights or environmental protection in some form. Some courts take an active role in monitoring implementation of and compliance with their judgments, whereas others have not. Courts in some states are more willing than others to develop and apply novel remedies that meet the particular demands of climate change. Courts in some states are reluctant to engage with climate challenges at all, for reasons that may range from deference to legislatures and executives engaged with frameworks of cooperation on climate change, to the novelty of the reasoning that such litigation requires, to a lack of awareness of the seriousness of the issues that climate change presents.

The effectiveness of judicial decisions depends on compliance by the other branches of government and respect for the rule of law. Any court is likely to be cautious in engaging with the kind of polycentric questions that arise in climate litigation. Courts are attuned to the legitimacy risks associated with being, or perceived as, 'activist'. Courts understand that if they are perceived to overstep their judicial role, the independence of the court as well as implementation of the contested decision may be at risk. How these factors play out in practice varies between states. Points to note include how climate change litigation arises in different constitutional systems, how courts approach the polycentric issues that arise, the effectiveness of the enforcement of judgments, and the impact that climate litigation has on the wider constitutional system. In practice, there also may be limitations on what litigation can achieve for doctrinal or procedural reasons that include the organisation of jurisdiction and the impact of extraterritoriality.

This section deals with experience with climate change litigation to mitigate the causes of climate change and to balance competing interests in implementing climate change measures.

To examine these issues, this section draws on three country case studies of South Korea, the Philippines and Nepal and one regional case of the Pacific. Each of the case studies broadly responds to the following questions.

1. What are the most pressing issues arising from climate change in your country or region and what impact do they have on the constitutional system?
2. On what constitutional bases have courts asserted jurisdiction to review action/inaction on climate change?
3. What have been the results of such litigation, and what kinds of remedies have the courts ordered? How effectively are the court's orders enforced?
4. Has climate change litigation had an impact on the wider constitutional system, for example in terms of the separation of powers (and judicial power in particular), the allocation of powers between national and subnational governments, or other constitutional principles?
5. Has climate change litigation had wider public effects (e.g. advocacy, raising awareness, representation and participation)?

South Korea

Sejong Youn

1. What are the most pressing issues arising from climate change and what impact do they have on the constitutional system?

The direct impact of climate change is increasing in South Korea including flashfloods, wildfires, coastal inundation, longer droughts and monsoons, stronger and more frequent typhoons, and heatwaves. However, the policy discussion on climate change is focused on mitigation strategies, particularly around the economic impact of climate mitigation including carbon pricing for the energy and industry sectors and the global trade impact of carbon regulations.

In the South Korean context, the national climate target, or the NDC, has been the key issue for the climate movement. The Government set the first climate target for 2020 (543MtCO₂e) but completely failed to meet the target as greenhouse gas emissions continuously increased. In 2016, the Government submitted the first NDC under the Paris Agreement effectively pushing the same target to 2030 (536MtCO₂e). This invited strong criticism around the world putting the nation among the four “climate villains”. The first constitutional claim was brought to the Korean Constitutional Court in 2020 by Youth4Climate, a teenage climate activist group, arguing that the laws and enforcement decree that define the NDC violates their fundamental rights under the Constitution including the right to healthy environment, right to life, right to health, and right to pursue happiness.

The National Assembly legislated the *Carbon Neutrality Act* in 2021, setting the long-term goal for net zero 2050, and the Government enhanced the NDC from 536MtCO₂e to 437MtCO₂e by 2030. The youth plaintiffs revised their claim to argue that the updated NDC still violates their fundamental rights as the target (i) exhausts South Korea’s carbon budget for 1.5 degrees before 2030, (ii) does not reflect South Korea’s fair share under the Paris Agreement principles, (iii) warrants up to 3 degree temperature increase according to modelled pathway analysis, and (iv) even falls below the IPCC global reduction pathway for 1.5. Follow-up constitutional cases were filed by citizen group plaintiffs in 2021, and by infant plaintiffs in 2022. In 2023, another constitutional complaint was filed by citizen groups arguing that the Government’s Carbon Neutrality Plan, which sets out the sectoral and annual reduction pathway up to 2030, is unconstitutional as it excessively relies on overseas credits and immature mitigation technologies such as carbon capture utilisation and storage.

In sum, the key constitutional question on climate change in South Korea is the adequacy of 2030 climate target and how it affects the fundamental rights of the people. The issue reflects a fundamental concern over the effectiveness of political processes in dealing with climate change in two regards. First, it raises a question on whether the level of deference traditionally given by the Judiciary to the Legislature and the Executive would be sound on the climate change issue. In the Korean case, the Legislature and the Government have enhanced their target during the course of the pending constitutional litigation but it still falls short of the scientifically required level. In the plaintiffs’ viewpoint, it evidences that the political processes are not salient in properly balancing long-term risk with short term interests. Secondly, the political processes fail to properly consider the interest of the *younger* generation, who will be impacted

the most by climate change with least contribution to the problem, because they are a political minority. In this regard, the failure around climate change can be characterised as a *political failure*, which justifies expanded judicial intervention.

2. On what constitutional bases have courts asserted jurisdiction to review action/inaction on climate change?

The question of jurisdiction and standing has not been definitely answered by the Korean Constitutional Court yet. The Government has argued the claim fails to meet the legal requirements for constitutional complaint because (i) the plaintiffs have failed to demonstrate individual and concrete harm caused by impacts of climate change (ii) the argued harm is not present and is merely a theoretical possibility and (iii) the laws and the regulation do not directly impact the plaintiffs as they only prescribe obligations on the Government to implement mitigation measures. However, it is meaningful to note that many courts around the world including the Dutch Supreme Court and the German Constitutional Court have asserted jurisdiction over the states' climate action.

Another constitutional question on jurisdiction is related to the right to a healthy environment under Article 35 of the Korean Constitution. Although the Korean Constitution has a separate provision on the right to environment, this provision has not been widely utilised because the Courts have applied narrow interpretation of the right. This has limited the use of constitutional claims outside the Constitutional Court. For example, civil courts do not recognise the right to environment as a basis for civil injunction. Injunction against an environmental harm is only recognised for property rights.

For example, in 2019, Indonesian nationals filed an application for a preliminary injunction against Korea Export-Import Bank seeking an order refraining the Bank from providing financial support for a coal power plant construction project by Korean companies in Indonesia. The civil court ruled that the right to environment is not recognised as a legal basis for such an injunction, apart from the question whether constitutional rights can be invoked by foreign nationals. Narrow interpretation and application of the right to healthy environment is one of the reasons why civil climate litigation has not been widely used in the Korean context and also why climate litigation has mainly focused on state action rather than private actors.

3. What have been the results of such litigation, and what kinds of remedies have the courts ordered? How effectively are the court's orders enforced?

The constitutional cases on climate change are still pending and have not reached a final decision. The remedy sought in the Korean climate litigation cases is a declaration of unconstitutionality. The Constitutional Court is asked to declare the provisions of the law and the enforcement decree that defines the NDC unconstitutional, on the grounds of failure to comply with State's obligation to protect constitutional rights, and/or on the grounds of State's infringement of constitutional rights.

If such a decision is reached, the law and the enforcement decree will lose effect and the National Assembly and Government will be required to rectify the unconstitutionality by coming up with new legislation and regulations that satisfy the standards set forth by the Constitutional Court's decision. The Court is likely to maintain the effect of the said law and the enforcement decree on a provisional basis and allow a certain time period for the National Assembly and the Government to prepare replacement rules because immediate quashing can lead to absence of climate targets.

The Constitutional Court has no authority to enforce such a remedy because declaratory relief is viewed as the boundary of Constitutional Court's role under the separation of powers doctrine. As a result, there is a possibility that the National Assembly and/or the Government will not comply with the Constitutional Court's decision. For example, in 2019 the Constitutional Court ruled that the criminalisation of abortion violates the fundamental rights of women and ordered that the National Assembly must amend the law by the end of 2020. However, the National Assembly failed to pass the amendment bill for the Criminal Code and the relevant provisions were rendered ineffective without any follow up legislation. As a result, abortion is no longer prosecuted but there is no legal framework to regulate and control the medical procedures around safe abortion either.

The Constitutional Court's declaration of unconstitutionality can have important implications for the substance of the alternative legislation. For example, if the Court finds the NDC unconstitutional based on intergenerational inequality resulting from exhaustion of the carbon budget for a certain temperature target, the alternative legislation must ensure that the interim 2030 greenhouse gas emission target must leave an equitable amount of carbon budget post-2030 up to 2050 carbon neutrality. While what constitutes "equitable" can be a matter of interpretation, this significantly narrows the discretion for the legislature and the executive branch to determine the appropriate reduction target because the cumulative emissions must not exceed the fixed carbon budget figure, which is considered quite stringent at this point.

This is a double-edged sword in the context of the effectiveness of constitutional review. Even if the Court decides that the actions of the Legislature and the Executive are unconstitutional, there is a good chance that the rectification will still fall short of the standards adopted by the Court. In the *Neubauer* case before the German Constitutional Court, the Court decided that the law is unconstitutional as it gives little regard to the remaining carbon budget post-2030 and the German legislature responded by enhancing the 2030 target from 55% to 65% from 1990 levels, and net zero by 2045 instead of 2050. However, it is unclear whether this incremental improvement actually allows for a sufficient carbon budget post-2030 based on the 1.75 degree per-capita carbon budget for Germany because the previous target was deemed to exhaust most of the carbon budget by 2030.

In this sense, one could argue the role of the constitutional review is limited to *triggering* a momentum for improvement, rather than *implementing* a normative standard for climate action.

4. Has climate change litigation had an impact on the wider constitutional system?

In the Korean climate change litigation cases, plaintiffs argue that climate change falls into the crack between the separation of powers. The political processes in the Legislative and Executive branch tend to prioritise short-term interests over long-term risks due to the election cycles. Further, it is not clear whether the existing constitutional principles adequately address the new challenges brought by climate change.

Climate change is indeed different from other environmental or social challenges we have encountered in the past in many aspects. For example, there is a significant time gap between the action and the consequence. The impacts of climate change we experience now is the result of greenhouse gas emissions made decades ago. Likewise, the mitigation choices we make now will materialise 10-20 years later. To make things more complicated, such impacts will be irreversible, possibly indefinitely. Also, climate change is a result of collective action problem with both intra-generational and inter-generational dimensions. The former explains why the global community has failed to properly mitigate climate change in the past three decades. The benefit of emissions is enjoyed by the emitter while the cost is distributed globally. The latter

is the reason why the “net zero 2050” target is widely accepted while 2030 interim target falls far off the scientifically required level.

The unique challenge posed by climate change makes it easier for the judiciary to overcome the counter-majoritarian conundrum because the repeated failure of the political branches to deal with climate change has weakened their position as the *salient* institutions. Despite the ever-increasing risk of climate change political decisions, both on the international and national levels, are failing to meet the scientifically required mitigation target. It is courts around the world that are pushing the ambition through judgments based on constitutional rights and science.

If the current political system fails to address the climate crisis, it may lead to serious questions on the democratic system itself. Historically, challenges against democracy were most effective in times of crisis because arguments can be made that the iterative democratic process is a luxury that society cannot afford when it is facing urgent danger. In this sense, wider judicial intervention on climate change is not an encroachment on the democratic legitimacy of the political branches, but rather a complementary balancing role by the judiciary.

5. Has climate change litigation had wider public effects?

The youth climate movement, led by Youth4Climate, played a pivotal role in raising awareness of the urgency of climate change in Korean society, just as the Fridays for Future movement did in European societies. Because the constitutional litigation was the central campaign project for Youth4Climate, the group has emphasised the intergenerational inequality aspect of climate change, both in relation to the climate impacts and underrepresentation of future generations in the decision-making process.

Characterising climate change as an issue of human rights or fundamental rights through litigation also helped expand the audience for climate discussions. Human rights groups and minority rights groups have become more active in engaging in climate change issues as they neatly fit into the ‘oppression of the minority by the majority’ framework. In 2023, the Korean National Human Rights Commission issued an opinion declaring that climate change poses a serious threat to the human rights of the people and that the current climate target is unconstitutional. The Commission’s opinion was also submitted to the Constitutional Court in support of the plaintiffs.

Postscript: In the time between the Melbourne Forum 2024 and the release of this report, the constitutional case discussed by Sejong Youn in his answers to questions above and oral contributions at the forum has been decided by the Constitutional Court of Korea. In short, the Constitutional Court declared the *Carbon Neutrality Act* unconstitutional on the grounds that the provision does not prescribe any targets post-2030 and as a result passes the burden to future generations, which constitutes violation of State’s obligation to protect fundamental rights. This is the first time climate change is acknowledged as a constitutional rights matter, the first time rights of future generations are acknowledged, and the first time the Court held the State in violation of its constitutional duty to protect its people from the threats of climate change. The Court did not rule the 2030 NDC unconstitutional, but rather focused on the absence of any targets beyond 2030 for its decision of unconstitutionality.

However, this is a ground-breaking change for any discussion on the national climate target because now the National Assembly must revise the law to set milestone targets all the way up to 2050, instead of simply following the 5-year update schedule, and the national climate target now must be based on science and

Korea's share of responsibility. This will fundamentally change the dynamics of the ongoing 2035 NDC discussions, and this also opens up opportunities to reassess and enhance 2030 NDC altogether.

The Philippines

Raymond Marvic C. Baguilat*

1. What are the most pressing issues arising from climate change, and what impact do they have on the constitutional system?

The Philippines is ranked at the top of the World Risk Report 2023.⁴⁸ The report is produced by Bündnis Entwicklung Hilft and the Institute for International Law of Peace and Armed Conflict at Ruhr University Bochum. The report presents a risk index of all 193 United Nations member states using 27 indicators highlighting the nexus between natural disasters and the capacity to respond. The rank is more troubling due to the increasing risk index from the previous year. On a scale of 0 to 100, the Philippines received a score of 46.86, higher than the prior year set at 46.82. Complicating the vulnerability of the Philippines is the seemingly feeble response from the government, as exemplified by the persistence of the country occupying the top rank since 2011. To highlight the country's vulnerability, the all-time hottest temperature in several localities was recorded in 2024. While still experiencing *El Niño*, the public has been informed that they should also prepare for the eventual *La Niña* that would bring more intense typhoons and floods. These issues have threatened the Philippines' biodiversity, food security, and social cohesion.

As an Indigenous person, the most pressing issue for our communities is the effect of climate change and its impacts on our lands and cultural integrity. While the Philippines Constitution provides that “[T]he State recognizes and promotes the rights of indigenous cultural communities,”⁴⁹ the effects of climate change have given rise to the passage of policies that directly conflict with our customs and traditions. For example, water scarcity is dealt with by destroying ancestral domains to create dams and power plants. This development aggression can be seen in the Kaliwa Dam project erected in the Sierra Madre mountains and Kabugao Hydroelectric Power Plant in the Apayao-Abulug River. The social cost of this project is the loss of the cultural identity of the Dumagat-Remontado and Isneg Indigenous Peoples, whose ancestral domains serve as the lynchpin of their culture. The State prescribes these destructive projects under the guise of climate change mitigation through renewable energy.

Other forms of social fragmentation can also be felt in different sectors. For example, owing to the World Health Organization report that the country has an annual mean of 24 micrograms per cubic meter for fine matter, which goes far beyond the maximum level recommended of 5 $\mu\text{g}/\text{m}^3$,⁵⁰ the government pushed for the Public Utility Vehicle Modernization Program launched in 2017. This Program aims to replace old

* The invaluable assistance of Research Assistants Mayumi Paras, Jessica Chica, and Veronica Te is recognised in the drafting of this work.

⁴⁸ United States Agency for International Development, *Philippines: Climate Change Country Profile* (2023), https://www.usaid.gov/sites/default/files/2023-11/USAID-%20Philippines-Climate-Change-Country-Profile_0.pdf (accessed on 20 October 2024).

⁴⁹ *Constitution of the Philippines*, art. II, § 22.

⁵⁰ World Health Organization, *Health and environment scorecard: Philippines*, <https://cdn.who.int/media/docs/default-source/country-profiles/environmental-health/environmental-health-phl-2022.pdf> (accessed on 20 October 2024).

jeepneys with “cleaner” vehicles to reduce harmful air pollution emissions.⁵¹ However, the shift will cost as much as 2.8 million pesos (over US\$49,000), an over 1,000 percent increase in cost compared to the traditional vehicles.⁵² This affects the over 150,000 jeepney drivers and operators in the country. The consequences of this shift would also affect the riding public, as most still use the old jeepneys as their means of transportation. This example highlights the tension between the constitutional right to property⁵³ of individuals and the government’s power to give life to the right to a “*balanced and healthful ecology in accord with the rhythm and harmony of nature.*”⁵⁴ Given the stress of climate change, the Constitution and its application to Philippine society would have to be harmonised by the Supreme Court to ensure that climate justice prevails.

2. On what constitutional bases have courts in your country asserted jurisdiction to review action/inaction on climate change?

Section 16, Article II of the 1987 Constitution mandates that one of the State’s policies is to protect and advance the people’s right to a balanced and healthful ecology in accord with the rhythm and harmony of nature. While this is a non-self-executing provision of the Constitution, parties have invoked Section 16 in establishing their claims or rights in environmental and climate change cases.

3. What have been the results of such litigation, and what kinds of remedies have the courts ordered?

In the case of *Oposa v Factoran*,⁵⁵ the Philippine Supreme Court provided the doctrine of intergenerational responsibility (concerning legal standing) and the right of future generations to a balanced and healthful ecology. Expanding this doctrine further, in the case of *Resident Marine Mammals of the Protected Seascape Tañon Strait v Reyes*,⁵⁶ the Supreme Court explained that while it does not give rights to nature, it has enabled every citizen to have the right to enforce environmental rights as citizen suits following the principle that humans are stewards of nature. More recently, in *Sangacala v National Power Corporation*,⁵⁷ the Court recognised that an environmental tort action based on negligence may be sustained. Thus, according to the Court, “[T]ort law can be used to address environmental harms to a well-defined area or specific person, or a class of persons, when readily supported by general and specific causation and closely fits the elements of a tort cause of action.”

On top of these cases, the Philippine Supreme Court has also issued the Rules of Procedure for Environmental Cases.⁵⁸ The rules provide essential environmental protection tools, including additional writs that either restrain or dictate the performance of acts consistent with environmental laws. It also

⁵¹ Climate Adaptation Platform, *Cleaner and Modern Public Transportation in the Philippines* (2024), <https://climateadaptationplatform.com/cleaner-and-modern-public-transportation-in-the-philippines/> (accessed on 20 October 2024).

⁵² Ralf Rivas, *In Numbers: Why jeepney phaseout is anti-poor, will do little for environment*, (Rappler, 6 March 2023), <https://www.rappler.com/business/numbers-why-government-phaseout-jeepneys-anti-poor-do-little-environment/> (accessed on 20 October 2024).

⁵³ *Constitution of the Philippines* art. III, § I.

⁵⁴ *Constitution of the Philippines* art. II, § 16.

⁵⁵ *Oposa v Factoran*, G.R. No. 101083, 224 SCRA 792, 30 July 1993.

⁵⁶ *Resident Marine Mammals of the Protected Seascape Tañon Strait v Reyes*, G.R. Nos. 180771 & 181527, 756 SCRA 513, 21 April 2015.

⁵⁷ *Sangacala v National Power Corporation*, G.R. No. 209538, 7 July 2021.

⁵⁸ Administrative Matter No. 09-6-8-SC, 13 April 2010.

adopted regulations to embrace the precautionary principle as an evidentiary rule and summary procedures to dispose of lawsuits meant to harass or pressure environmental defenders from enforcing environmental protection laws and rights.

The importance of environmental rules is heightened by the Commission on Human Rights' report on the world's first National Inquiry on Climate Change released in May 2022, which declared that "[any] neglect in climate change mitigation may be considered human rights violation."⁵⁹ The Commission on Human Rights had also reported, years prior, that major fossil fuel companies could be held morally and legally liable for climate change and its effects due to their precise role in the adverse impacts of climate change.⁶⁰ Though these reports do not set a judicial precedent, the Commission on Human Rights may influence the government to address environmental concerns in the country.⁶¹

4. How effectively are the court's orders enforced?

The Philippine Supreme Court has established various remedies that address environmental concerns in the country. As a result, it has been open to litigants to bring cases before the judiciary. On paper, existing rules ought to provide speedy and effective remedies and access to justice, with judges sensitised to the climate issues hounding the country.⁶² For example, the Supreme Court introduced the "*Writ of Kalikasan*," a landmark legal remedy that compels the government to act and halt environmental degradation that impacts more than one municipality.

While several petitions have already been approved, local governments have not consistently implemented the rulings.⁶³ In 2019, a considerable controversy arose involving the rights in the West Philippine Sea as fisherfolks deprived of access to a fishing site filed a petition for a Writ of Kalikasan. However, they backed out of the case, citing their lack of understanding of the legal complexities.⁶⁴

Another legal innovation is also the "*Writ of Continuing Mandamus*". This remedy allows the Supreme Court to compel the government to protect the environment, subject to existing laws, and mandate it to provide reports to the court for monitoring. The Court issued this writ to compel government bodies around Manila Bay to perform their duties in cleaning and preserving the polluted area. The agencies were also tasked to submit quarterly progress reports for monitoring. The Order will not be final until the Court is satisfied that Manila Bay is fully restored. While this is being enforced, there is a tendency for the agencies to merely provide for the basic requirements, that is, to show that it has plans and is committed to continuing the

⁵⁹ Iya Gozum, *In landmark case, CHR declares climate change as human rights issue*, (Rappler, 6 May 2022), <https://www.rappler.com/environment/chr-landmark-case-climate-change-human-rights-issue/> (accessed on 20 October 2024).

⁶⁰ Janella Paris, *CHR: Big oil, cement firms legally, morally liable for climate change effects*, (Rappler, 11 December 2019) <https://www.rappler.com/nation/246939-chr-big-oil-cement-firms-legally-morally-liable-climate-change-effects/> (accessed on 20 October 2024).

⁶¹ Gozum above n 12.

⁶² Gregorio Rafael P. Bueta, *Environmental Jurisprudence from the Philippines: Are Climate Litigation Cases Just Around the Corner?* (International Union for Conservation of Nature, 21 June 2019) <https://www.iucn.org/news/world-commission-environmental-law/201906/environmental-jurisprudence-philippines-are-climate-litigation-cases-just-around-corner> (accessed on 20 October 2024).

⁶³ Purple Romero, *Hits and misses for a legal tool to protect the environment in Philippines*, (Mongabay, 28 April 2021) <https://news.mongabay.com/2021/04/hits-and-misses-for-a-legal-tool-to-protect-the-environment-in-philippines/> (accessed on 20 October 2024).

⁶⁴ Ibid.

rehabilitation. It is already outside the Court’s jurisdiction to suggest how to implement the plans and how much financial provisions would be provided.

5. Has climate change litigation had an impact on the wider constitutional system?

Climate change litigation has altered the concept of judicial review, particularly the elements of legal standing. As mentioned previously, the cases of *Resident Marine Mammals* and *Oposa* have operated to effectively expand the Court’s concept of legal standing, holding that the rights of both animals in the Philippine waters (thru stewardship) and future generations, respectively, may be represented before the Court. Public interest litigation for the environment and nature was also boosted when the Supreme Court designated environmental courts around the country (117 in total) in 2008 and issued the Rules of Procedures for Environmental Cases in 2009. These rules provided simplified and streamlined measures to speed up environmental litigation and make it easier for the public to bring cases, as it is integral that the environment be represented in these disputes.⁶⁵

The Rules also include the remedy called the Writ of Kalikasan (or nature). It is a form of special civil action in environmental cases, a judicial remedy in case of “environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces.” Considered the first of its kind in the world, it is a unique tool by which petitioners can invoke the courts' extraordinary writ powers and jurisdiction.⁶⁶

In November 2023, the *Climate Accountability Act*, which proposes a “loss and damage-focused legal framework,” was introduced in the House of Representatives. Emily Bradeen, Tiffanie Chan, and Catherine Higham outline the bill’s innovative provisions and explain how it reflects broader climate change laws and litigation trends. The *Climate Accountability Act* seeks to hold corporate actors to account for their contributions to climate change. Given that the Philippines is a nation incredibly vulnerable to the harmful impacts of the climate crisis, Filipino legislators are proactively seeking to establish mechanisms to help alleviate loss and damage from climate change (forecast by the Philippines Department of Finance to reach close to \$10 billion over the next decade) while also pursuing calls for climate justice.⁶⁷

6. Has climate change litigation had wider public effects?

In a 2019 study, it was said that the Philippine jurisprudence on the environment has been at a steady pace of development since the 1970s and 1980s. It was only in 1993, when the famous case of *Oposa v Factoran* that the jurisprudence on the environment got a global boost. In this case, the Court gave standing to generations yet unborn. Since then, the *Oposa* case has been cited and replicated worldwide.⁶⁸

In the Philippines, activists across all sectors have established movements towards climate justice to forward urgent demands for climate transformation. The Philippine Movement for Climate Justice comprises 150 national networks, alliances, and local organisations that work towards building safe, sustainable, and reliant communities and providing quick responses to climate emergencies. Working on

⁶⁵ Bueta, above n 15.

⁶⁶ Ibid.

⁶⁷ Emily Bradeen, Tiffanie Chan and Catherine Higham, *Philippines Climate Accountability Bill: loss and damage in domestic legislation* (London School of Economics and Political Science, 18 December 2023) <https://www.lse.ac.uk/granthaminstitute/news/philippines-climate-accountability-bill-loss-and-damage-in-domestic-legislation/> (accessed on 20 October 2024).

⁶⁸ Bueta above n 15.

both the grassroots level and through institutional strengthening, the Philippine Movement for Climate Justice recognises the need to hold developed countries accountable for destroying the climate system while urging developing countries to address their contributions to greenhouse gas emissions.⁶⁹ Members of the academe, national government organisations, local government units, and various other organisations continue working with local communities to further climate change mitigation and adaptation.

⁶⁹ Climate Justice, *About*, <https://climatejustice.ph/about> (accessed on 20 October 2024).

Nepal

Rupa Basnet

1. What are the most pressing issues arising from climate change and what impact do they have on the constitutional system?

Nepal is a landlocked country with three geographical regions: the high Himalayas, the mountains, and the Terai. The mountains, or the low Himalayas, include the Chure and Mahabharat ranges, which are two fragile geological regions with significant population pressure. These populations, previously affected by devastating landslides and drought two decades ago, have been resettled by the government, with many migrating to the Chure region in search of abundant natural resources. Nepal has more than 6,000 rivers that are rain or snow-fed. Due to these perennial rivers, the country aims to develop hydropower and sell it to its neighbors, mainly India, and extend it to Bangladesh.⁷⁰ Although these hydro projects may contribute to Nepal's international pledges to develop green energy, they are compromised by climate,⁷¹ because there is less snow in the Himalayas and the water is receding. Government reports indicate that Nepal is losing snow in its Himalayas, which is a serious issue since snow is a source of livelihood for highlanders through tourism.

The Constitution secures several fundamental rights for the people, such as the right to dignified life,⁷² right to clean environment,⁷³ right to cultural practices,⁷⁴ right to property,⁷⁵ right to freedom of religion,⁷⁶ and right to employment.⁷⁷ However, these rights are at risk as Nepal, being a least developed country, may not be able to sustain its people with adequate services and benefits, and climate change will aggravate the problems for people due to resource constraints.

Climate change has serious effects on Nepal's natural resources. In 2021, devastating flash floods in the Melamchi River damaged many lives and properties, displacing hundreds of people. They also destroyed a drinking water project that had been under construction for 25 years.⁷⁸ Recent forest fires have led to high levels of air pollution, making Kathmandu one of the most polluted capital cities in Asia.⁷⁹

⁷⁰ Rezaul H Laskar, 'Nepal, India, Bangladesh power trade agreement in "final stage", says envoy' (*Hindustan Times*, 28 September 2023) <https://www.hindustantimes.com/india-news/nepal-india-bangladesh-power-trade-agreement-in-final-stage-says-envoy-101695910839318.html> (accessed on 20 October 2024).

⁷¹ *Ibid.*

⁷² Constitution of Nepal 2015, art 16.

⁷³ *Ibid* art 30.

⁷⁴ *Ibid* art 32.

⁷⁵ *Ibid* art 25.

⁷⁶ *Ibid* art 26.

⁷⁷ *Ibid* art 33.

⁷⁸ SB Maharjan et Al, 'The Melamchi flood disaster: cascading hazard and the need for multi-hazard risk management' (ICIMOD, 2021).

⁷⁹ Sweta Singh, 'Kathmandu tops the list of cities with unhealthy air in the world' (DD News online, 30 April 2024) <https://ddnews.gov.in/en/kathmandu-tops-the-list-of-cities-with-unhealthy-air-in-the-world/#:~:text=According%20to%20the%20'World%20Air,the%20world's%20unhealthy%20air%20list> (accessed on 20 October 2024).

Another pressing issue is the over-exploitation of sand and stone mining in the Chure region, a geologically sensitive area. This illegal activity has exacerbated water levels, causing water shortages for residents of the Terai. Similarly, in the high mountains, the government's keenness to develop hydropower projects by damming river water⁸⁰ is compromising cultural rights, livelihoods, and the mountain ecosystem. Incidents in the far western and western regions have shown that rising temperatures are drying up springs and affecting traditional farming methods.⁸¹ Most people in these areas are subsistence farmers, with many men going to India for labor work. Nepal's 2021 assessment of risk and vulnerability has identified climate-vulnerable and risky districts.⁸²

In addition to these pressing issues, interstate competition for the utilisation of natural resources is another challenge that is not well addressed, despite Nepal becoming a federal state. In 2009, an incident occurred between the districts of Gorkha and Manang, where *yarchagumba* pickers had a fight, causing seven deaths and two serious injuries.⁸³ This incident is just the tip of the iceberg. As the snow recedes and water scarcity increases, such incidents are likely to occur more frequently. Although Nepal promulgated a new Constitution in 2015, stipulating a committee for natural resources and its functions and roles, there are no proper rules for interstate distribution. The Constitution has ensured the right to a clean environment, explicitly mentioning compensation for pollution victims and sustainable development. However, despite the risk of climate change induced disasters, there is no mention of compensation for victims of the same in the existing laws.

Nepal is a negligible contributor of greenhouse gases, but climate change has substantial impact on Nepal's economy, environment, and development gains. These issues are pertinent because climate change has disproportionately affected infants, vulnerable and marginalised communities, women, people with disabilities, and the elderly – the populations that remain at the center of the constitutional goal of creating an egalitarian society.

The Constitution of Nepal has secured the right to a clean environment and the right to a dignified life. However, it has not incorporated the right to compensation for climate victims, which is imperative for adapting to climate change. Simply mentioning victims of pollution and environmental degradation does not adequately address the victims of climate-induced disasters.

2. On what constitutional bases have courts asserted jurisdiction to review action/inaction on climate change?

The Constitution of Nepal guarantees the right to a dignified life and the right to a clean environment as fundamental rights. Environmental cases in Nepal are often invoked using these constitutional rights, with the judiciary playing a critical role in defining and establishing the use and protection of natural resources.

⁸⁰ Bal Krishna Sah, 'They don't want hydropower; they want pristine nature' (*Himalayan Times*, 20 June 2024) <https://thehimalayantimes.com/nepal/they-dont-want-hydropower-they-want-pristine-nature> (accessed on 20 October 2024).

⁸¹ Shristi Kafle, 'Climate change exacerbates food crisis in Nepal's poorest region' (*Dialogue Earth*, 13 May 2022) <https://dialogue.earth/en/food/climate-change-exacerbates-food-crisis-in-nepals-poorest-region/> (accessed on 20 October 2024).

⁸² Government of Nepal, *Vulnerability and Risk Assessment and Identifying Adaptation Options: Summary for Policymakers* (2021) <https://www.mofe.gov.np/uploads/documents/vulnerability-repnew1630571413pdf-2940-766-1658827788.pdf> (accessed on 20 October 2024).

⁸³ Bhrikuti Rai, 'Fighting for yarsa' (*Nepali Times*, 12 June 2014) <https://archive.nepalitimes.com/article/nation/yarsagumba-dispute-dolpa,1424> (accessed on 20 June 2024).

Articles 133 and 144 of the Constitution grant ‘extraordinary power’ of judicial review to the Supreme Court and the High Courts to hear matters concerning fundamental rights and the public interest. Environmental issues have been considered as one of the most salient matters of public interest by the courts.

The first significant environmental case in Nepal was decided by Chief Justice Hari Prasad Pradhan in 1953, preventing people from residing inside forests to protect biodiversity and water resources,⁸⁴ even though the right to life and the right to a clean environment were not guaranteed by the Interim Constitution of Nepal (1950). This decision set a precedent for environmental protection. Another early case was *Dev Lal Upadhyaya v Buddhi Lal Gubhaju (1955)*, which prohibited the use of explosives to kill aquatic species.

Before 1990, few environmental cases were brought to court, those that were typically invoked the right to a dignified life. In 1992, a landmark case was filed against a marble company operating in the Godawari hill region,⁸⁵ which was causing significant environmental pollution and damage. Although the 1990 Constitution did not explicitly guarantee the right to a clean environment, the court recognised the need for environmental protection and issued a directive to develop necessary laws, leading to the enactment of the *Environment Protection Act* in 1995.

Continued marble extraction led to another case in 2008, *Prakash Mani Sharma v GON (2008)*,⁸⁶ which resulted in significant court orders, including declaring Godawari Hill a prohibited area for industrial activity. The petitioner sought (a) the revocation of the license of the Godawari marble company for an additional ten years; (b) declaration of Godawari hill as a prohibited area for any industrial activity; (c) an application of principles such as the polluter pays principle, sustainable development, and the intergenerational principle to support the issuance of a mandamus decision against the Godawari marble. The full bench of three justices issued following orders, (i) a continuous mandamus order; (ii) to declare Godawari Hill as prohibited area for any industrial activity, and (iii) to immediately stop all the mining activity inside the area. Notably, during this time, Nepal underwent significant political changes, including the integration of the Maoists into mainstream politics. As a result, the Interim Constitution of Nepal 2006 was promulgated, which explicitly guaranteed the right to a clean and healthy environment as a fundamental right. In response to the verdict of the court, the Government eventually declared Godawari a conservation area in the national gazette in 2022. This marked a significant achievement, as it took nearly three decades to transition Godawari into a conservation area, with the process spanning from the case initiated by Surya P. S. Dhungel to its culmination in the case of Prakash Mani Sharma.

In the case of *Narayan Prasad Devkota v GON (2010)*,⁸⁷ the court addressed the extraction of boulders and stones from the Chure region. This case led to a directive order to establish a green tribunal and apply principles like sustainable development, public trust doctrine, and the polluter pays principle. The government responded by initiating the President Chure-Terai Madhes Conservation Area Programme in 2010.

In response to the 2021 budget speech proposing mining in the Chure region, *Advocate Shailendra Prasad Ambedkar v GON (2022)*⁸⁸ challenged the budget under the right to a dignified life and the right to a clean

⁸⁴ *Singh Bir Basnet v Man Bahadur Buda*, 1953.

⁸⁵ *Surya Prasad Dhungel Sharma v Godawari Marble Company Pvt. Ltd.* (1992).

⁸⁶ NKP (2073), Number 4, Decision Number 9575.

⁸⁷ NKP (2067), Number 12, Decision Number 8521.

⁸⁸ Writ number 077-WC-0099.

environment. The Court ruled that existing laws do not support the depletion of natural resources and issued a mandamus order to halt the import of sand, stone, and other materials, recognizing the excessive utilization of natural resources as ecocide. It is essential to note that Dilip Mahato, a local environmental defender who played a pivotal role in bringing this issue to light, was unfortunately killed by the illegal miners in Chure region. This case was decided by an extended full bench consisting of five Justices. The court made significant rulings in this case: (1) it emphasised that existing laws do not support the depletion of natural resources; (2) it recognised the shift to a federal system, where the primary role of local government is to safeguard the welfare of their people rather than functioning as corporations involved in the export and import of natural resources; (3) it issued a mandamus order to the respondents, taking into consideration the country's geographical, geological, and environmental sensitivity, to halt the import of sand, stone, etc., with the involvement of the security forces; and (4) it issued a directive order to utilise sand, stone, and other natural resources that had accumulated due to flooding in a manner that would not degrade the area. This case marked the first instance where the court recognised that the uncontrolled and significant degradation of the environment resulting from such haphazard policies could be classified as ecocide.

These landmark decisions illustrate how the courts have asserted jurisdiction to protect the environment and natural resources by upholding the principles of sustainable development and correlating economic development with environmental protection.

3. What have been the results of such litigation, and what kinds of remedies have the courts ordered?

Some of the results of the litigation have already been highlighted above. In the case of *Advocate Ram Kumar Acharya v GON* (2013),⁸⁹ the court issued a mandamus order to stop the construction of a postal road inside Bardiya National Park. The court reiterated Nepal's commitments under several environmental conventions⁹⁰ and required the government to look for an alternative route for the road.

In *Amarnath Jha v Office of PM (Disaster Management and Climate Change)* (2022),⁹¹ a resident of Terai filed a writ petition to rehabilitate families affected by yearly floods caused by monsoon rains. The petition sought immediate relief and long-term solutions, such as building resilient dams. The court highlighted the impacts of climate change and emphasised the government's duty to mitigate disaster factors, invoking environmental principles like sustainable development, common but differentiated responsibilities, and the precautionary principle. The court ordered an immediate relief package for flood victims and issued directive orders to:

- a. Create and implement a National Master Plan for disaster management.
- b. Prepare and implement land use policies based on river basins.
- c. Ensure the right to housing for disaster victims as guaranteed by Article 37 of the Constitution.
- d. Address the impact of climate change and disasters on farmers, providing protection measures and compensation.

⁸⁹ NKP (2070), Number 1, Decision Number 8942.

⁹⁰ UNFCCC 1992, UNCBD 1992 etc.

⁹¹ 073-WO-1404.

In *Advocate Padam Bahadur Shrestha v GON* (2019),⁹² the court mandated the government to amend existing policies and introduce a comprehensive climate change law in compliance with the Paris Agreement. It detailed specific instructions for the new law, including mitigation and adaptation measures, promoting low-carbon technologies, addressing vulnerabilities, ensuring ecological and environmental justice, and compensating victims of pollution and degradation. The court deemed the *Environmental Protection Act 1995* insufficient and instructed the government to implement the Climate Change Policy (2011) until the new law was enacted. This led to the adoption of a new National Climate Change Policy in 2019. Subsequently, the government enacted the *Environment Protection Act 2019* by repealing the old law, and attempted to address climate change by incorporating a chapter on carbon trade.

Recently, the Supreme Court of Nepal made a landmark decision directing the government to explore alternative sites for the proposed Nijgadh International Airport⁹³ due to significant environmental concerns and violations of international and domestic regulations. While the court did not explicitly prohibit Nijgadh as a potential site, it emphasized the need for sustainable development and environmental protection. The court's decision effectively excluded Nijgadh as a viable site for the airport due to its environmental and legal implications.

The judiciary in Nepal has issued appropriate and timely orders, but many of these orders are not implemented. In relation to the Nijgadh International Airport, the Investment Board of Nepal has extended the tenure of the panel studying the project's modalities until July 2024. Despite the imminent ecological damage this project will inflict on the Nijgadh forest, the government remains keen to initiate construction, while two already constructed international airports remain underutilised.

4. How effectively are the courts' orders enforced?

The effectiveness of enforcement of court orders varies significantly. While some orders have led to positive changes, many face challenges in implementation.

In the case of Chure region sand and boulder mining, illegal mining activities continue unchecked despite court orders. Residents of the Terai, affected by these activities, have been protesting in the capital, highlighting severe water shortages due to the depletion of water sources. The influence of these illegal miners extends beyond mere criminal activities, infiltrating national politics and undermining the rule of law, posing significant challenges to governance and stability in the country.

For instance, in the sub-judice case of the Kali Gandaki River, where the court issued an interim order to stop mining stone and boulders from the river basin, illegal activities persist. Despite the theoretical separation of powers in Nepal's federal system, judicial orders are often not enforced, leading lawyers to file contempt of court pleas to reinstate the orders.

The lack of effective enforcement can be attributed to Nepal's dire need for funding to support its federal government structure. Natural resources are viewed as a vital economic resource, leading the government to prioritise economic advancement over environmental protection. The proposed construction of the Nijgadh International Airport exemplifies this, where the government continues to push for the project despite its potential for irreparable ecological damage.

⁹² NKP (2076), Number 3, Decision Number 10210.

⁹³ Advocate Prakash Mani Sharma v GON (2022), Writ number 076-WF-0006.

5. Has climate change litigation had an impact on the wider constitutional system?

The Constitution of Nepal delineates concurrent rights among the three-tiered government system. Prior to the federal system, significant environmental cases like that of Surya P. Dhungel led to the development of the *Environment Protection Act*, highlighting the need for overarching environmental legislation.

In the 2019 case of *Padam Bahadur Shrestha v PM*, the court issued a mandamus order for the enactment of a Climate Change Act. The government responded by developing the National Climate Change Policy 2019. This policy is to create a resilient society by reducing the risk of climate change impact.⁹⁴ Further, carbon trading provisions was included in the new *Environment Protection Act 2019*. However, while carbon trading is a positive step, it does not fully address the broader issues related to environmental damage and climate change, indicating the need for more comprehensive measures and strategies. Although these litigations do have an impact on the system, albeit inadequate.

6. Has climate change litigation had wider public effects?

Climate change litigation has had significant public effects in terms of advocacy, raising awareness, and encouraging public participation. These litigations have promoted a discourse on environmental justice by acknowledging the rights of people to environment. The landmark decision in Surya P. Dhungel Sharma marked the beginning of increased advocacy and awareness regarding environmental protection and climate justice.

The case against the construction of the Nijgadh International Airport (*Prakash Mani Sharma v GON 2022*) is a notable example. The proposed airport construction threatened an environmentally sensitive area and involved clearing 8045 hectares of forested land, home to diverse wildlife and a crucial biological corridor. The court's decision to explore alternative options and restrict the land area for the airport construction highlighted the importance of environmental conservation, although it did not adequately address climate change concerns.

These cases underscore the significance of nature conservation in mitigating climate change hazards. The Chure case specifically mentions that haphazard development without scientific support has led to unprecedented catastrophes in the Terai region. In the Padam Shrestha case, the court recommended legislative provisions emphasizing climate change responsibilities and the adoption of low-carbon-emitting technologies.

Despite these judicial efforts, the government often prioritises economic development. A recent development is the Ministry of Forest and Environment's strategy, issued on 4 September 2023, allowing private farming of protected species with government approval. In such cases, the judiciary consistently reminds the government of its obligations towards future generations and its role as *parens patriae*.

Climate change litigation in Nepal has thus had wider public effects by initiating legal action and influencing public opinion and policy.

⁹⁴ Preamble, National Climate Change Policy 2019.

Pacific

Fleur Ramsay

1. What are the most pressing issues arising from climate change in your region and what impact do they have on the constitutional systems of states in the region?

Small Island Pacific States, now self-referring as Big Ocean States (hereafter Pacific Island States), are considered by the IPCC to be among the most vulnerable to climate change impacts. The most pressing issues include:

- Potential loss of sovereignty and exclusive economic zones for low-lying atoll states (e.g., Tuvalu, Kiribati, Marshall Islands) because of the likelihood of complete inundation.
- Sea level rise, changing seasonal patterns, heat and heavy rainfall are affecting land (and requiring relocation), the health of environments as well as traditional economies and, thus, having flow-on impacts on all aspects of culture.
- Melanesia which has around 10% of the World's biodiversity and one of the highest language densities (which are connected to place) is at risk.
- Impacts of ocean acidification and ocean warming on coral ecosystems (including world significant coral reefs).
- Risk of more intense extreme weather events, such as cyclones.
- Socio-economic barriers to adaptation and responding to natural disasters.

For countries which will lose their land territory, the risk is that they will lose their constitutional systems (particularly sovereignty). Moreover, there are dual legal systems (from deep legal pluralism to more fragmented versions) across the independent Pacific and thus the loss of culture from climate change impacts are a direct threat to local governance and legal systems. Many governance systems in the Pacific are directly tied to ecosystems (such as totems). Both these issues impact the right to self-determination.

Further, the Pacific region's contribution to climate change (excluding Australia and Aotearoa/New Zealand is negligible). Despite many constitutions that have human rights which can be horizontally applied (i.e., can be applied to natural and legal persons as well as the State), the source of the crisis is from overseas (except for Papua New Guinea as a fossil fuel exporter).

2. Have domestic courts in the Pacific region asserted jurisdiction to review action/inaction on climate change?

In Papua New Guinea in 2016 and 2020, Kandakasi DCJ has asserted jurisdiction to address climate change through the right to life (as a right to a healthy environment) enshrined in the PNG Constitution. In *Moura v China Harbour* [2020] PGNC 16, Kandakasi DCJ said at [52]: *"It should follow therefore that a failure of states to take adequate steps to address climate change may constitute a violation of the right to a healthy environment."* Kandakasi DCJ asserted that the Courts had a broad power to address climate change under the PNG Constitution (see, at [56]):

What does these mean for the case at hand? In my view, it means anyone could come to National or the Supreme Court in PNG, even the Courts on their own motion or acting *suo moto*. Section s. 57 (1) of the *Constitution* lays the necessary foundation for them to do so provided, they can connect that to an imminent, likely or reasonably probable breach of a right. Of all rights, the right to life is important and is central in my view to all other rights. Any human activity that is taking place or likely to take place that as an adverse impact on the environment no doubt, gives rise to the risk of environmental damage which could give rise to a possible breach of the fundamental right of, right to life which is dependent on a safe and clean environment. If the activities are large scale and serious, they could single handedly cause serious environmental harm and damage. If they are smaller, a repeat of such activities over time or combined with other adverse human activity already occurring can have an adverse impact on the environment. Unless, government properly and sufficiently, legislate, control, monitor and evaluate consistently all human activity and take appropriate actions against offenders, the risk of adversely affecting the environment and hence the right to life is there. Hence, any person concerned with his or her own or that of others' rights, has the right and opportunity to come to Court under s. 57 (1) of the *Constitution*. This provision already grants them the necessary standing to bring appropriate claims for enforcement or protection of human rights.

In 2021, Kandakasi DCJ also found that climate change was a relevant issue for judicial review of a Deep Sea Tailings project that the objectives and purpose of the *Environment Act 2000* required the relevant Minister to ensure any development project conform to these objectives and purpose.

If we include Australia and New Zealand within the Pacific orbit, there have been a number of cases which have conflicted over the role of courts in addressing climate change action/inaction, including *Sharma* (Federal Court of Australia), *Youth Verdict* (QLD Land Court), *Smith v Fonterra* (New Zealand High Court, Court of Appeal and Supreme Court). Except for *Sharma* these cases have been spearheaded by or included Pacific peoples (Maori and Torres Strait Islanders). *Pabai Pabai v Commonwealth*, a damages claim, is currently before the Federal Court of Australia, which has been brought by Torres Strait Islanders.

i) What have been the results and what remedies have been ordered?

Pacific Island Courts have not had the opportunity to decide a climate change case yet and the statements by Kandakasi DCJ are obiter dicta.

The Full Federal Court dismissed the *Sharma* application. *Youth Verdict* resulted in a recommendation by the QLD Court to reject approval for a coal mine.

The *Smith v Fonterra* litigation so far has involved a strike out application. At the level of the High Court, public nuisance and negligence was struck out and the third cause of action, an inchoate tort addressing climate change survived strike out. The Court of Appeal struck out the inchoate tort and dismissed the appeal by Smith in relation to public nuisance and negligence. The Supreme Court upheld Smith's appeal. It said that Smith should have his day in Court and evidence heard. The Supreme Court said in *Smith v Fonterra* [2024] NZSC 5 (at [166] and [172]):

How the law of torts should respond to cumulative causation in a public nuisance case involving newer technologies and newer harms (GHGs, rather than sewage and other water pollution) is a matter that should not be answered pre-emptively, without evidence and policy analysis exceeding that available on a strike out application ...

As we have said already, real caution is necessary before pre-emptively disposing of a claim where seriously arguable non-trivial harm is in issue. The courts in New Zealand have barely touched (let alone grappled with) the law of public nuisance in the last century. The leading authority in this country—*Abraham and Williams Ltd*—was delivered by the Court of Appeal almost 75 years ago, and most of the case law cited within it was English.²⁴⁹ The principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The common law, where it is not clearly excluded, responds to challenge and change in a considered way, through trials involving the testing of evidence.

It also provided useful obiter dicta on how the Court could address climate change asserting a place for the common law to do so and pointing to common law cases dealing with multiple river polluters. This is in contrast to *Sharma*, where the majority found that tort could not deal with climate change.

ii) Has climate change litigation had an impact on the wider constitutional system?

Separation of powers, particularly judicial power, was central to Allsop CJ's decision in *Sharma* at the Full Federal Court level (and that climate change is better dealt with on an international level by the executive as well as the legislature). Allsop CJ in *Minister for the Environment v Sharma* [2022] FCAFC 35 (at [7])

the Minister's appeal against the imposition of a duty of care ... that human safety was an implied mandatory statutory consideration should be upheld. The latter implication cannot be derived from the EPBC Act. The primary judge's conclusions in this respect were not sought to be supported by the respondents. The imposition of the duty should be rejected. First, the posited duty throws up for consideration at the point of breach matters that are core policy questions unsuitable in their nature and character for judicial determination [i.e. this is a matter for the elected government and Parliament to decide, not the courts]. Secondly, the posited duty is inconsistent and incoherent with the EPBC Act. Thirdly, considerations of indeterminacy, lack of special vulnerability and of control, taken together in the context of the EPBC Act and the nature of the governmental policy considerations necessarily arising at the point of assessing breach make the relationship inappropriate for the imposition of the duty.

Similar issues arose in *Smith v Fonterra* [2024] NZSC 5, though the Supreme Court found that there was a role for the common law. The Court said (at [155]):

Climate change was described to us as an existential crisis, and the respondents would have it that its range and diffuse and disparate causes exceed the capacity of the common law for response. The Court of Appeal appeared to share that view. Another assessment, that might arise after the benefit of evidence and a full trial, may be that climate change is different in scale, but a consequence of a continuum of human activities that may or may not remain lawful depending on whether the harm they cause to others is capable of assessment and attribution. It is here beyond question that the respondents are either very substantial emitters of GHGs or are (or have been) very substantial suppliers of fossil fuels that release GHGs when burned by others. Further, as we are dealing with a strike out application, where pleaded facts are assumed to be capable of proof, we have been required to assume for present purposes that the consequence of those emissions attributable to the respondents' activities is harm to the land and other pleaded interests held by Mr Smith.

3. What litigation under regional/international law is being pursued by Pacific states, and on what legal basis?

At present, virtually all Pacific States are involved in the International Court of Justice advisory opinion on the obligations of states with respect to climate change, which was spearheaded by Vanuatu. Of the independent states, only Papua New Guinea and Fiji were not involved at the written stages of the proceedings, but both are seeking to participate in the oral stage of the proceedings in December 2024. In any event, both States are members of numerous regional intergovernmental organisations which are participating in the proceeding (including, e.g., the Melanesian Spearhead Group, the Organization for African, Caribbean and Pacific States, the Alliance of Small Island States, the Pacific Community, and the Pacific Islands Forum, amongst others).

Vanuatu also filed a submission with the Inter-American Court of Human Rights, in relation to the request from Colombia and Chile for an advisory opinion on human rights and the climate emergency. The advisory opinion is reserved.

The Commission of Small Island States on Climate Change and International Law submitted a request to the International Tribunal on the Law of the Sea for an advisory opinion on the obligations of States under the UN Convention on the Law of the Sea to prevent, reduce and control marine pollution, and to protect and preserve the marine environment, in the context of climate change. The International Tribunal on the Law of the Sea advisory opinion was handed down on 21 May 2024.

Advisory opinions are not contentious cases.

i) What remedies are being sought?

These matters are all advisory opinions, but there are some key arguments that are being made by the Pacific region (specifically Vanuatu):

- UNFCCC and the Paris Agreement does not cover the field (i.e., is not *lex specialis*).
- Other international laws (customary law and treaty law) regulate greenhouse gas emissions and have done so well before the UNFCCC and Paris Agreement entered into force.
- Greenhouse gas emissions and State acts and omissions in relation to GHGs are cumulative and composite acts.

ii) Has international climate change litigation had an impact on the constitutional systems of states?

These international cases will be important to the constitutional systems of states, particularly the appetite of domestic courts to determine issues of liability and responsibility associated with climate change, especially given the prominence that Allsop CJ gave in *Sharma* to international multilateralism as a reason for the law not to intervene in this space. For example, Allsop CJ said (at [260]):

The duty requires Scope 3 emissions to be taken into account in the evaluation of reasonable conduct. This is the very matter covered by New South Wales and Commonwealth government policies and the Paris Agreement. With respect, one cannot dismiss this as a false premise (J [479]). It is not. A consideration of the proper response to the present risks, future dangers and potential harm to the world, humanity, and the Children is a matter of high public policy. To the

extent that the evidence and the uncontested risks of climate catastrophe call forth a duty of the Minister or the Executive of the Commonwealth, it is a political duty: to the people of Australia.

4. Has climate change litigation had wider public effects (eg, advocacy, raising awareness, representation and participation)?

Litigation has been one of the few avenues for Indigenous peoples who are specifically vulnerable to climate change. It has been the only avenue for Pacific States, given that climate negotiations have failed to limit warming at safe levels.

We are developing cases at the moment in the Pacific region, which hopefully will raise awareness on the plight of the Pacific and its specific vulnerabilities.



6. Conclusions

6. Conclusions

This Report seeks to deepen understanding of the relationship between constitutions, democracy and the challenge of climate change with a view also to suggesting constructive ways forward. It offers a rich array of case studies from across the Asia Pacific, which illuminate this relationship at state and regional levels, and contributes to the global conversation about how to facilitate more effective climate action.

This final section of the Report seeks to draw together some of its key insights, in relation to the barriers facing effective climate action and the potential role of constitutions in providing a framework within which barriers can be lessened, and more effective climate action pursued. It cannot replace the rich accounts of experience with responses to climate change in context, offered by each of the case studies. These are a valuable resource in their own right, to which what follows is a guide.

Prevention of harms and balance

The two broad aims of climate action are *prevention of harm* and *balance*.

- *Prevention of harm* means preventing harm to climate system and other parts of the environment caused by the conduct responsible for climate change, namely anthropogenic greenhouse gas emissions over time; as well as preventing harm to individuals and peoples arising from the adverse impacts of climate change. In this way, *prevention of harm* encompasses the core obligations of mitigation, adaptation and loss and damage often referred to in the context of the UNFCCC and Paris Agreement. Concretely, this may involve transitioning away from fossil fuels, regulating greenhouse gas-emitting conduct, including by companies; taking adaptation measures and building adaptive capacity, including through finance and technology; and compensating for loss and damage associated with the adverse effects of climate change.
- *Balance* refers to the manner in which such measures are pursued, including the allocation of burdens and risks. It acknowledges that some states are better positioned than others to take effective action; that some states have historically contributed more to climate change (and benefitted as a result) whilst others have made small or very small contributions to the problem; and that some states are especially affected by climate change or particularly vulnerable to the adverse consequences of climate change, as a result of their geographical circumstances and/or level of development. In this way, *balance* encompasses the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) in the context of the UNFCCC and the Paris Agreement. The idea of *balance* also involves the provision of technological and financial support by developed to developing States and the differentiation of prevention obligations, on the basis that developing States may require support and additional time. *Balance* also potentially refers to the need to ensure that future generations are not over-burdened.

While the discussions in the Report focus primarily on prevention, the various dimensions of balance are unexpressed assumptions on which the discussions rest.

Barriers to effective climate action

Effective climate action is constrained by both a policy and an implementation gap. The former results from states not committing themselves to climate action that is adequate to keep warming within safe levels, as informed by the best available science. The latter is caused by states falling short in the implementation of their commitments, as evidenced by low-ambition and ambiguous national climate action plans, planned increases in fossil fuel production and new fossil fuel projects. The immediate barriers to effective climate action therefore are attributable to the priorities set by governments and the choices made by them. Three explanations are suggested by the case studies.

First, decisions around climate action tend to be characterised by the short-termism that is a product of electoral cycles and affects both the policy positions of elected representatives and the preferences of voters. This concern runs through most of the contributions to the Report but is a major theme in part 1, dealing with representation and climate change. For many states climate change is still a slow-onset phenomenon, and thus does not get prioritised over other apparently more immediate salient benefits or threats, even where there is some understanding of the nature and scale of the risks. In others, the problem is more obviously pressing. Thus, for example, public expectations for climate action in Fiji are described in the Report as being ‘urgent and specific’ whereas in India ‘climate change is yet to become a politically salient issue’. And, as noted in International IDEA’s 2023 Report *Climate Change and Democracy: Insights from Asia and the Pacific*, short-termism also militates against a broad outlook that captures intergenerational equity in mitigation and adaptation efforts.

Second, there are knowledge gaps around climate change, caused by the novelty of the current threats, the significance of the challenges they pose and uncertainties about how best to deal with them. These issues permeate accounts in the case studies and manifest themselves in different ways. As the contribution from Taiwan shows, a knowledge gap invites misinformation, impedes rational deliberation, and encourages political division and competition, at cost to effective co-operative action. Another consequence of the knowledge gap is uncertainty about responsibility for action within state systems. Climate change requires a multi-faceted response across many areas of government activity. Which portfolio should take the lead, which institutions should take primary responsibility, and which level of government can and should legislate may be unclear and contested, leading to buck-passing and inaction, ultimately undermining accountability. These difficulties feed into attempts to harness expertise or encourage public participation. They may also impede attempts to build co-operation within government or across levels of government, where at least some solutions obviously lie. These concerns are raised in case studies throughout the report, but take particular form in part 2, dealing with multi-level government.

Third, choices about climate change are often made in an environment driven by economic considerations that prioritise the exploitation of natural resources. The problem is exacerbated where state institutions also are susceptible to capture by powerful economic interests. The tension between effective climate action and economic drivers of various kinds also is a constant theme throughout the Report. The Indonesian case study, for example, clearly demonstrates the tension between reducing carbon emissions in that country and economic development, which also noting the close connection between people in public life and private enterprise. Economic considerations may play out differently at different levels of government, also contributing to the difficulty of encouraging multi-level government co-ordination.

Many promising developments responding to climate change are taking place in courts. These are canvassed in successive contributions in Part 4 of the Report. As these accounts show, judicial decisions increasingly are accepting challenges to government action that falls short on meeting the standards required for an effective response to climate change. One such decision was handed down by the Constitutional Court of the Republic of Korea, shortly after the Melbourne Forum, holding the *Carbon Neutrality Act* unconstitutional on the grounds that it did not prescribe targets post-2030. Many other cases were discussed in the course of the Forum, some of which break new ground in recognising intergenerational rights or developing climate specific remedies. Climate litigation has many uses in current conditions, including through raising awareness, underpinning advocacy efforts and as a form of achieving legal accountability. In the right context, it can provide timely direction to state institutions and prompt more urgent action.

But effective political action also is essential. Courts also are limited in their ability to determine how the state acts and how effectively, to a degree that varies between states. And, as some case studies show, courts are naturally cautious in engaging with polycentric questions that arise in climate litigation; they are attuned to legitimacy risks associated with being seen as ‘activist’; and they are alive to the danger that, if they are too far out in front of elected institutions, their decisions may not be implemented. Practically, also, there may be limitations to what litigation can achieve for doctrinal or procedural reasons around jurisdiction, extraterritoriality and the enforcement of judgments.

What role for constitutions?

Constitutions are not silver bullets for climate action. They are inherently limited in what they can achieve within jurisdictional limits. That being said, constitutions can — if they are respected, stable and implemented — play a role both in understanding and diminishing barriers to effective climate action. It is convenient here to consider the roles that constitutions might play by reference to the three dimensions of the linkage between constitutions and climate change outlined earlier. Because constitutions provide the framework for state action, they can help to explain shortfalls in climate action and potential remedies for the future. Constitutional arrangements are themselves impacted by climate change, attracting attention and potentially prompting reaction. And as enduring instruments that provide the fundamental law, constitutions are useful vehicles to mandate action in response to climate change. The case studies in part 3 of the Report, dealing with the substance of constitutions, indicates the form that such provisions might take.

First, the Report makes clear that systems of government, framed by constitutions, are falling short in responding to climate change in a range of ways. Elected governments lack political will to initiate the necessary compromises and take the necessary steps. There is insufficient policy continuity across electoral cycles. There are partisan divisions over climate change policies between parties contending for power. There is ambiguity about where lead responsibility for action lies, horizontally and often also vertically. There may be elements of state capture of political or bureaucratic institutions by vested economic interests, local or transnational. Procedures for co-operation within states involving compromise in the global or even regional public interest are typically underdeveloped. International and regional climate change commitments often are made by the executive government with little if any reference to legislatures or the public, as shown by the Sri Lankan experience. Accountability is weakened as a result, both for the commitments made and for their implementation in practice.

These are all big problems. But identifying them is a critical starting point. Once identified, it is possible to craft solutions that are workable in context and to press for them to be put into practice. As with so many aspects of government, transparency and public engagement are important tools. As many of the case studies note, civil society and, especially, young people are likely to be concerned about climate change and prepared to press for solutions. Indigenous people are likely to do so as well, reflecting their care for land and environment and their intimate association with it. In respect of such actors, procedural rights—such as the right to access information, participate in decision-making, and seek justice—are essential for increasing participation and facilitating the enforcement of constitutionally guaranteed human right with environmental dimensions. Freedom of speech, assembly, and associated voting rights also play an important role in keeping the civic space from shrinking further in an age of democratic backsliding and to protect environmental and human rights defenders, and so must also be respected, protected and promoted.

More specific mechanisms also are available and worth considering. A few drawn from the case studies are identified here. States are already familiar with conditions that prompt parties to work together in the public interest. Typically, this occurs in the face of a serious emergency or, sometimes, in areas of particular sensitivity from the standpoint of a state, such as foreign policy. There is no reason why greater cross-party unity and continuity should not be expected in relation to climate change as well. Ambiguity over responsibilities in a new and complex area such as climate change can be clarified in the same way as ambiguity over responsibility for any other aspect of government, by transparent changes to government practice that take adequate account of the new challenges. The popular initiative in use in Taiwan may be able to be adapted elsewhere as a further prompt to political action. A cross-party climate change committee is another potential constitutional or institutional mechanisms to lessen the instrumentalization of climate change by politicians. Lack of accountability for action taken in the exercise of the external sovereignty of the state in negotiating international commitments is an old issue, only now beginning to be tackled systematically. Climate change would be an excellent proving ground for the purpose.

Secondly, the operation of constitutions is affected by climate change in myriad ways. These include the impact of climate change on security, equality, culture and other rights; the capacity of governments to cope with the threats presented by climate change; the mass movement of people irrespective of state boundaries; and the potential for militarisation in dealing with climate induced crises. Such pressures on constitutions can be harnessed as tools in developing greater understanding of and concern about the implications of climate change. They can also lead to innovation, in terms of changes in practice, interpretation and the terms of the constitution itself. A spectacular, although harrowing, recent example are the provisions in the new Constitution of Tuvalu, anticipating the possible loss of territory to the rising seas and making claim to continuing sovereignty nevertheless.

Thirdly, constitutions are an obvious vehicle through which to respond to the specific challenges of climate change. The experiences recorded in this Report offer a range of examples. One is Bhutan, where the Constitution offers sweeping protection for the environment including biodiversity and guarantees the maintenance of a minimum of 60 per cent forest cover across the territory. The contribution from Bhutan claims no controversy in relation to this provision, which was an earlier response to severe degradation of the land and has now been Bhutanese policy for decades, giving environmental issues a measure of continuing priority that has not necessarily been enjoyed in other states. New rights are beginning to emerge, through new constitutional provisions or interpretation of existing ones, including rights to nature, for current and future generations, as in Fiji. Constitutional statements of duties, values and principles are

being used to influence how governments make decisions and exercise powers in relation to climate action; Fiji again is a case in point. Novel remedies also have emerged in some states, adapted to climate use. The Writ of Kalikasan in the Philippines is an example, used to compel the government to act in relation to environmental degradation that impacts more than one municipality.

Notes of caution also appear in some contributions. Constitutional provisions are no panacea, unless put into effect by all relevant actors, including the elected branches and courts, with popular acquiescence if not support. They may also fall foul of constitutional or political instability, as the case of Thailand shows. Constitutional provisions also can become dated with time, unless adapted to new conditions: the need to transition from older-style environmental rights to the more demanding needs of climate change is an example. Some provisions dealing with environmental rights are cast in such general and open-ended terms that their requirements are unclear, limiting their effect. The Indonesian case study offers an example, by highlighting many unanswered questions around the interpretation of art 28H(1) of the 1945 Constitution, which provides that “[e]very person shall have the right to ... enjoy a good and healthy environment”.

Concluding observations

When it comes to climate change, the stakes are high. Solutions are needed to overcome the barriers to effective climate action. Constitutions are one, potentially helpful tool for this purpose. This Report reflects on a suite of questions and challenges associated with the role of constitutions in the context of climate change thrown up by experiences of polities across the Asia-Pacific region. In this as in other areas, states and communities in this part of the world offer insights into problems and solutions, some of which are distinctive and some of which are shared with polities elsewhere. In either case, they are critical to an understanding of the global picture.

Contributors

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Sejong Youn is the director of Plan 1.5, a non-profit climate organization based in Korea, and is the counsel for the Korean Youth Climate Litigation which is the first systemic climate litigation in Korea. Sejong was involved in many climate litigations in the jurisdiction regarding coal power plants, public financing to fossil fuel projects, and airport expansion permits. Before joining the civil society as a climate activist in 2019, he practiced law at Kim & Chang specializing in environmental law and international arbitration. He is a graduate of Seoul National University Law (LL.B.) and Law School (JD), and Harvard Law School (LL.M.).



Group photo: Participants at the Eighth Melbourne Forum, Taipei, May 2024

About the Organisers

International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organisation that supports sustainable democracy worldwide by providing comparative knowledge, assisting in democratic reform and influencing policies and politics. International IDEA's Constitution Building Programme raises awareness of the role constitution-building processes play in managing conflict and consolidating democracy. The Constitution Building Programme has produced a wide range of reports, handbooks and other resources on constitution building, available at www.ConstitutionNet.org.

The Programme's work involves:

- Providing technical assistance to national actors engaged in processes of constitution building;
- Providing knowledge and capacity-building resources that individuals and groups can use to strengthen their participation, and its quality, in processes of constitution building;
- Facilitating access to learning in comparative contexts so that national, regional and international actors have more options to consider when dealing with different constitutional issues;
- Servicing a global community of constitution building practitioners through physical and virtual spaces for dialogue.

Constitution Transformation Network

The Constitution Transformation Network (ConTransNet) at Melbourne Law School is a network of scholars and practitioners of constitutional transformation. Network members provide research and advice across the broad spectrum of constitutional change, encompassing peacebuilding, the process and substance of constitution making, and constitutional implementation. The Network takes a distinctively comparative approach to constitutional transformation, while exploring the expanding interface between domestic constitutions and international and regional influences, and the ways in which the very idea of a constitution is undergoing transformation in the face of internationalisation.

Network members work with global partner institutions and individuals to deliver quality, evidence-based advice, research and expertise on the development of constitution-making processes and the content, transformation and implementation of constitutions. More information on the members and the work of the Constitution Transformation Network is available at <http://law.unimelb.edu.au/constitutional-transformations>.

National Taiwan University College of Law

The Policy and Law Center for Environmental Sustainability (PLES) of the National Taiwan University College of Law was established on the World Environment Day, 5 June 2009. PLES supports research and participation for domestic and international environmental policy and law. It promotes wide discussion of environmental issues and the implementation of laws and policies to address environmental concerns. It seeks to create constructive dialogues between academics, practitioners, policy makers, environmental groups and concerned citizens, to promote discussion of environmental issues and policy implementation. Its activities include:

- Establishing environmental sustainability policy and law database, with domestic and international legal resources;
- Discussion and deliberation on environmental legislation and policy making;
- Promoting international participation and cooperation on environmental sustainability;
- Environmental legal education and NGO involvement.

Explore the Melbourne Forum website:

<https://law.unimelb.edu.au/constitutional-transformations#melbourne-forum>

**International Institute for Democracy
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