



CONSTITUTION  
TRANSFORMATION  
NETWORK



## CLIMATE CHANGE AND CONSTITUTIONS

**The Eighth Melbourne Forum on Constitution Building in Asia and the Pacific**

**Jointly organised by International IDEA, Constitution Transformation Network  
and National Taiwan University College of Law**

**Taipei, Taiwan**

**23-24 May 2024**

**CONCEPT NOTE**

Climate change is the defining global challenge of our time. It directly affects the lives and wellbeing of peoples across the globe. If it is unaddressed, climate change will deepen existing inequalities within and between states. Increased severity of natural disasters will challenge the capacity of governments and threaten human security. For some, climate change is an existential threat, leading to the displacement of peoples and even the loss of territory of nation-states. At the local, national, regional and international levels, governments are called upon to urgently address the severe and worsening consequences of climate change and to mitigate future harms.

Climate change and its effects are disruptive and affect all areas of life. It requires that we rethink how we think about and use constitutions, exposing their limitations as well as their potential. The disruptions and disconnections can be traced across three dimensions of climate change and constitutions.

### ***1. The spatial scale of climate change and constitutions***

The spatial scale of climate change and its effects present challenges for constitutional governance. Constitutions are typically associated with nation states, but climate change requires actions beyond the nation state, from the international level to the very local community level.

At the international level, climate change affects all countries, although the severity of its effects is experienced unevenly, due to factors such as poverty and resources, population size and geography. Divisions within and between states exacerbate the issues, with a disjunction between larger economies largely responsible for the creation of the problem, and developing economies whose contribution to global warming often is slight, but which are now torn between contributing to the global effort to respond to climate change and inhibiting their own opportunities for economic development.

Constitutions primarily operate within the borders of the nation state, but they also need to be able to deal with transnational issues, including climate change. How do constitutions structure legal and economic relations with states and organisations outside, to recognize interdependence and promote cooperation? How do national constitutions work to support action at the regional level, so that small island states, for example, can combine their voices on the international plane?

At the local level, communities – whether in cities or rural areas – are at the frontlines of the harms caused by climate change, and have a key role in mitigation and adaptation to ensure basic services

to support the livelihoods of peoples. Governments at this level are often closer to their (smaller) communities, which can foster community-centred leadership. However, smallness may also mean that successes in climate action are outweighed by failures in other communities or at the national level. Are there ways that the constitutional principles of subsidiarity can better support local level climate action? Can national constitutions provide a framework for coordination mechanisms to support cross-sectoral local efforts to address climate change?

Climate change is thus an issue of multilevel governance, raising associated issues of representation, subsidiarity, accountability and co-ordination, from the international to the regional, to the national and subnational.

## **2. *The temporal scale of climate change and constitutions***

The temporal scale of climate change also presents challenges for constitutions, and for democratic governance in particular. Constitutions are enduring, stable and deliberately more difficult to change than ordinary legislation, while climate change is an urgent problem requiring immediate action, putting pressure on governments. Climate change is sometimes described as an emergency, but it is a long emergency and not the kind that can be addressed through constitutional emergency provisions that permit governments to temporarily suspend some rights to the extent necessary to respond to the crisis. Temporality matters in other ways too. There is a gap in time between the actions that cause climate change and their effects now and into the future, with the result that future generations are likely to be most affected by climate change action/inaction but have no direct involvement in democratic decision making and government of today. Climate change starkly exposes the problems of the short-termism of democratic elections and the limits of current frames of representation.

## **3. *Anthropocentrism***

Written constitutions developed in the western tradition are anthropocentric: they regulate institutions created by people, and the relationships between those institutions and peoples. In this, they might be contrasted with conceptions found in many Indigenous cultures, where (often unwritten) constitutions are framed more broadly around relationships within land, sea and natural phenomena, as well as past and future generations. There are increasing calls to better incorporate Indigenous values of guardianship and custodianship in resource management and responses to climate change, including greater recognition and support for Indigenous leadership in climate justice. Are there ways in which state constitutions might accommodate Indigenous law and governance or better reflect Indigenous values to address environmental crisis?

While climate change presents challenges for constitutions, there are ways in which constitutions can provide a framework, entrenched in higher law, for the institutions of government and for peoples to protect the environment and address the issues of climate change. This might be done through provisions in constitutions that deal explicitly with climate change. The past decades have seen a rise in “environmental constitutionalism” in which a range of different specific provisions are added to written constitutions, or existing provisions interpreted to protect environmental rights and promote environment-related duties. As with any constitutional provisions, these need to be implemented effectively to make a difference in practice.

Apart from specific constitutional provisions, constitutions also provide the framework within which government actions to address climate change must be taken, including policy making, legislation, adjudication, and the entry into international commitments. These measures might be directed to:

- **Mitigation:** efforts to reduce or prevent the emission of greenhouse gasses, such as renewable energy and carbon markets.

- **Adaptation:** adjustments in ecological, social or economic systems in response to climate change and its effects, now and in the future. It includes environmental restoration, building homes, infrastructure and governance that can handle the challenges of climate change, and, in some cases, relocation of communities.
- **Loss and Damage:** consequences of climate change that go beyond what communities can adapt to within their resources, such as loss of land and livelihoods due to extreme weather events or rising sea levels.

The **Eighth Melbourne Forum on Constitution Building in Asia and the Pacific** will consider the challenges to constitutionalism presented by climate change, and the opportunities for constitutions and constitutional reform to promote ways to better protect the environment and to address the causes and effects of climate change. These issues arise globally.

The Melbourne Forum will focus on Asia and the Pacific, a region highly affected by climate change, although with important variations between countries and sub-regions in relation to vulnerability, capacity and response. The region is also the site for important constitutional innovations. Some of the earliest examples of public interest litigation and the interpretation of socio-economic rights and directive principles arose in Asia, with some courts in the region to take a leading role in environmental protection. Bhutan's Gross National Happiness indicator, which expressly includes conservation of the environment as an indicator, presents a new way to measure wellbeing holistically. Written constitutions of Pacific Island states have dealt head-on with climate change and its effects, from Tuvalu's new constitutional provisions to define the state in perpetuity in the event of loss of land through sea-level rise to the ways in which Fiji and Kiribati have managed the cross-national relocation of peoples following environmental damage.

The Melbourne Forum provides a dedicated space for practitioners and experts from across the region to share knowledge, compare experiences, gain insights, and build connections to aid in better understanding and meeting the challenges of constitution building.

## **Organisation**

The Forum will consider these issues from a comparative perspective, with participants from 16 countries across the region. An introductory session will set up a framework for discussing the complex and wide-ranging impacts of climate change on constitutional systems with opportunities of input from all participants. There will be four thematic sessions, each with case study countries. The format enables all participants to contribute to every session, and not just the session in which their country case study is highlighted. A closing session will draw out the common threads and insights for future constitutional development and reform.

### **Introduction: Framing the discussion**

This introductory session seeks to open discussion by mapping the various different ways in which climate change impacts on constitutions in practice, arising from efforts to mitigate climate change, adaptations in response to climate change and the consequences of climate change.

Drawing on the knowledge and experiences of all participants, this session will develop a framework for connecting climate change and constitutions that captures the broad range of impacts to government institutions, representation, policy making, peoples and polities, and international and regional relations.

## Session 1: Representation and democratic decision making

One way in which climate change is addressed is through legislative and executive action. Legislation and government policies have been adopted to reduce emissions and mitigate climate change, for example through carbon taxes, carbon trading schemes, clean energy standards, and the promotion of green renewable energy. In some countries, significant legislation and policies are also required to adapt to climate change, for example to protect the environment, manage risks relating to natural disasters and relocate communities at risk.

The design and implementation of policies and legislation to address climate change depend on the practical capacities of governments, their constitutional powers, and political will to address the issues. One impediment to legislation and policies to address climate change are limitations that arise from constitutional systems of representative democracy. Electoral cycles can privilege short-term interests over long-term goals. In some countries, powerful private industries have a strong influence over government policy and marginalize other groups and interests.

Multilevel government also affects representation and democratic decision making to address climate change. The division of government powers between national and subnational levels of government can affect how representatives and governments respond, and the coordination between them. Some governments will have different priorities, based on the needs of their polities, their formal legislative and administrative powers, and capacities.

This session considers how countries in the region have dealt with these challenges of representation and policy making and the impact of constitutional processes, the relationship between representatives and those they represent and social movements.<sup>1</sup> It also considers innovations in representation and democratic decision making to counter the short termism of representative democracy, such as citizens assemblies and commissions for the environment or future generations; as well as the participation of affected but often excluded groups, such as Indigenous peoples and local communities, in decision making about climate change.

Questions to guide discussion:

- What have been the principal challenges in addressing climate change in your country?
- 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?
- What legislative and policy measures have been taken to respond to climate change:
  - At the national level?
  - At the subnational level, where relevant?
- Were there any constitutional barriers to taking measures to address climate change? If so, how were they dealt with?
- What other constraints (political, social, national and international) that limit people and governments achieving the measures needed to address climate change?
- Have there been any innovations in inclusive representation (eg citizens' assemblies, specialist commissions, representation of nature) to improve representation on issues of climate change?

Case study countries: Taiwan, Indonesia, India, Fiji

---

<sup>1</sup> The discussions in this session build on those during session 5 of the seventh Melbourne Forum on 'Representation from the Ground Up'. For the report of those discussions see <https://law.unimelb.edu.au/constitutional-transformations/Melbourne-Forum/2022-melbourne-forum>.

## Session 2: International, regional and domestic intersections

Climate change is a transboundary problem. It is also a case study of internationalisation, that is, the influence of international and supranational norms, institutions and processes on national constitutions and their effectiveness in practice.

Internationalisation can work to encourage and support climate action, but it can also limit it. The effectiveness of international actions (such as COP) and international commitments (for example to net zero emissions) in helping to effect change at the domestic level is open to question. Countries in the Asia-Pacific region have been leading efforts in international litigation under international human rights, the law of the sea and other international obligations. Countries have also utilised regional bodies, multilateralism and other connections to generate greater international influence than they would acting alone (for example, the Alliance of Small Island States).

Internationalisation in response to climate change can also place pressure on domestic constitutional systems. International activity can concentrate power in the executive and at the central level of government, at the expense of institutions such as the parliament and sub-national levels of government. Governments of countries dependent on external donors, multilateral development banks and climate finance providers are often presented with conditions that limit the scope of actions available to them and may even raise domestic constitutional issues.

International and regional frameworks can also provide a mechanism for accountability within states and beyond states, as demonstrated by current litigation under international law regimes, such as the ICJ and ITLOS advisory opinions on obligations of states in respect of climate change.

This session will examine the interactions and impacts of governance across the international, regional, national and local levels. It will include case studies from country as well as regional perspectives.

Questions to guide discussion (country level):

- What international or regional forums, mechanisms and commitments to address climate change have been adopted by your country?
- How are international commitments to address climate change entered into in your constitutional system? Who is responsible for negotiating and ratifying international commitments?
- How well are international commitments to address climate change implemented in domestic law in your country? What barriers or challenges arise?
- 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?

Questions to guide discussion (regional level):

- What international or regional forums, mechanisms and commitments to address climate change have been adopted in the region?
- What were the motivations for regional or international action on climate change in the Pacific?
- 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?
- 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?

Case study countries: Sri Lanka, Malaysia, Bangladesh

Case study regions: ASEAN, Pacific

### **Session 3: Constitutional text**

In constitution building, there is increasing emphasis on provisions in written constitutions that deal explicitly with climate change and environmental protection. Examples include:

- Individual rights, for example to a clean, healthy and sustainable environment;
- Limitations on rights, for example limitations on property rights to protect the environment;
- Rights of nature and non-human animals;
- Rights of future generations;
- Directive principles which impose binding obligations on the state (and sometimes also on citizens) to protect the environment;
- Mandated preservation of a proportion of nature reserves or forest cover;
- Provisions for the sustainable management of natural resources;
- The establishment of institutions with responsibility to protect the environment and monitor efforts to address climate change.

The inclusion of specific constitutional provisions may be motivated by a range of concerns: to promote action on climate change where international treaties and domestic legislation and policy come up short; to recognise the importance of the problem of climate change and environmental protection by reflecting it in supreme law; and to take environmental matters beyond the reach of day-to-day politics. There are risks, however, including entrenching provisions that then become difficult to formally amend, leaving the interpretation and application of the provisions largely to the courts.

Questions to guide discussion:

- What provisions relating to climate change or environmental protection are included in your constitution (or are being considered)?
- 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?
- What, if any, institutional arrangements were put in place to ensure new provisions were implemented?
- 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?
- Have constitutional provisions made a difference in how the state responds to climate change? Why or why not?

Case study countries: Tuvalu, Bhutan, Thailand, Pakistan.

### **Session 4: Climate change litigation**

Litigation for environmental protection has a long history in the Asia-Pacific region. The global rise of environmental constitutionalism has led to the increasing involvement by courts to review and monitor policies and actions (and inaction) by legislatures, executives and other actors on climate change. Climate change litigation has been 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.

Such litigation can arise under a range of different laws: our focus is on constitutional review, and, continuing discussions from Session 2, transboundary review by international and regional courts.

In some countries, courts have interpreted existing constitutional provisions (such as the right to life or human dignity) to include the right to environmental protection. Some courts have taken an active role in monitoring implementation and compliance, including by establishing specialist forums (such as India's National Green Tribunal or Pakistan's interdepartmental climate change committee).

This session considers how climate change litigation arises in different constitutional systems, how courts approach the polycentric issues that arise, the effectiveness of enforcement, and the impact that such litigation has on the wider constitutional system.

Questions to guide discussion:

- On what constitutional basis have courts in your country asserted jurisdiction to review action/inaction on climate change?
- What kinds of remedies have the courts ordered?
- How effectively are the court's orders enforced?
- 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?

Case study countries/regions: South Korea, Philippines, Nepal, Pacific.

### **Concluding session: Bringing the threads together**

This concluding session will collect together the insights developed through the discussions on the various ways in which constitutions connect with the issue of climate change in the countries across the region. It will seek to identify issues that require further research and the frameworks, concepts and methodologies that can help to understand and address the constitutional dimensions of the multi-dimensional problem of climate change.

### **Methodology and logistics**

In 2024, as in other years, the Melbourne Forum will examine these questions through experiences across Asia and the Pacific.

The Forum is organised under the auspices of International IDEA's Regional Programme for Asia and the Pacific in collaboration with the Constitutional Transformation Network at Melbourne Law School and the Policy and Law Center for Environmental Sustainability (PLES) of the National Taiwan University College of Law. It will take place over two days, **23 and 24 May 2024**, at the National Taiwan University in Taipei, Taiwan.

The event is sponsored by the National Science and Technology Council of Taiwan and International IDEA's Regional Office for Asia and the Pacific.

The format follows past Melbourne Forums and is designed to encourage the interchange of ideas, leading to shared insights on themes of constitutional design, change and implementation. Presenters for each case study country will be asked to provide brief written responses to questions which will be circulated to them in advance of the Forum, based on the theme of each session. These written responses will be circulated to participants in advance of the Forum. Presenters will give a short oral presentation on the key insights offered by their case at the beginning of each session, for a maximum of five minutes, so that the majority of time in each session is devoted to questions and discussion.

Each theme is linked, and insights from each country experience will be relevant across all sessions. We hope that all the invited experts will join and participate actively in all sessions.

Visit the [Melbourne Forum webpage](#) to see the themes, materials and videos from the previous seven Melbourne Forums.