

# Analysis

## The Complexities of Comparative Climate Constitutionalism

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### ABSTRACT

Climate constitutionalism is a relatively novel legal field that has nonetheless adopted a very distinct character. Picking up on the classical liberal tack, it is marked by a distrust of state power as it relates to climate action or inaction. This is a venerable approach. In his 1967 classic, MJC Vile recounts that the ‘great theme of the advocates of constitutionalism [had been] the frank acknowledgement of the role of government in society, linked with the determination to bring that government under control and to place limits on the exercise of its power’. This mode of distrust has been ported to the climate constitutionalism literature and in particular its focus on adjudication of constitutional rights provisions for climate purposes. This, we argue, is but one aspect of climate constitutionalism that no longer speaks to the needs of the world when we think about the relationship between climate change, the doctrines and institutions of comparative constitutional law, and the underpinning theory of constitutionalism for this relationship. The institutional dimension of the constitutional management of climate change must go beyond courts and rights to processes and institutions in the two political branches of the state. The normative theory of climate constitutionalism—why should climate change be a constitutional subject on a global scale?—should address itself to the matter of how that question can be answered from a wider and more pluralistic set of normative standpoints than simply only liberalism. In other words, how can climate constitutionalism be normatively justified beyond, although not against, liberalism?

KEYWORDS: climate law, climate constitutionalism, comparative constitutional law, climate clauses

### 1. INTRODUCTION

Comparative constitutional law’s dominant engagement with climate change issues so far has two institutional and normative features. The institutional feature is that it is mainly focussed around the constitutionalisation of justiciable rights and how courts enforce them. The

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institutional feature is an outgrowth of the normative feature, which is that the normative justification for rights and judicial action is predominantly based on some variant of constitutional liberalism. We feel that this no longer speaks to the needs of the world when we think about the relationship between climate change, the doctrines and institutions of comparative constitutional law, and the underpinning theory of constitutionalism for this relationship. The institutional dimension of the constitutional management of climate change must go beyond courts and rights to processes and institutions in the two political branches of the state. The normative theory of climate constitutionalism—why should climate change be a constitutional subject on a global scale?—should address itself to the matter of how that question can be answered from a wider and more pluralistic set of normative standpoints than simply only liberalism. In other words, how can climate constitutionalism be normatively justified beyond, although not against, liberalism?

Climate constitutionalism is a relatively novel legal field that has nonetheless adopted a very distinct character. Picking up on the classical liberal tack, it is marked by a distrust of state power as it relates to climate action or inaction. This is a venerable approach. In his 1967 classic, MJC Vile recounts that the ‘great theme of the advocates of constitutionalism [had been] the frank acknowledgement of the role of government in society, linked with the determination to bring that government under control and to place limits on the exercise of its power.’<sup>1</sup> This mode of distrust has been ported to the climate constitutionalism literature and in particular its focus on adjudication of constitutional rights provisions for climate purposes. As an indicative example, note the introductory words to one recent edited collection: ‘Our idea in this book is to explore a conception of the constitution conceived as an axiological core of a certain society...This substantial idea of constitution is intimately related to its use by the courts and a set of norms to control power.’<sup>2</sup> This, we argue, is but one aspect of climate constitutionalism, properly conceived. To advance the proposition, we draw on a variety of legal materials, both primary and secondary. These include the burgeoning climate litigation literature, and critically, current developments in comparative constitutional law scholarship, especially as they pertain to constitution-making, and constitutional law in jurisdictions not committed to liberal constitutionalism. We also provide the first comprehensive global survey and analysis of constitutional provisions that make specific mention of climate change.

An early and enduring identification of the constitutional character of legal responses to climate change came from McHarg anticipating that in enacting climate action, national governance systems would draw on the pre-commitment capacity of constitutional law.<sup>3</sup> Others have followed with the notion of ‘climate constitutionalism’ as a means to establish credible and long-lasting climate action.<sup>4</sup> Much analysis of climate constitutionalism has focussed on the way in which the phenomenon of climate change litigation<sup>5</sup> has deployed existing constitutional structures, forcing judiciaries around the world to confront the novel fact-patterns of

1 MJC Vile, *Constitutionalism and the Separation of Powers* (Oxford University Press 1967) 1.

2 Jordi Jaria-Manzano and Susana Borrás, ‘Introduction to the Research Handbook on Global Climate Constitutionalism’ in Jordi Jaria-Manzano and Susana Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar Publishing 2019) 5, citing *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803) and The Federalist Papers.

3 A McHarg, ‘Climate Change Constitutionalism? Lessons from the United Kingdom’ (2011) 2 *Climate Law* 469, discussed at Navraj Singh Ghaleigh, ‘Paris Agreement, Article 2: Aims, Objectives and Principles’ in G Van Calster and L Reins (eds), *Research Handbook on Climate Change Mitigation* (Edward Elgar Publishing 2021) 2.28.

4 LJ Kotzé, ‘A Global Environmental Constitutional Constitution for the Anthropocene’s Climate Crisis’ in J Jaria-Manzano and S Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar Publishing 2019) 55.

5 For an overview of trends in climate change litigation, see Joana Setzer and Catherine Higham, ‘Global Trends in Climate Litigation: 2021 Snapshot’ (2021) Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

climate change and climate justice in their interpretation of constitutional provisions.<sup>6</sup> Other approaches are less court centric, highlighting the constitutional function of other institutions of political authority in climate policy and their significance in constitutional processes not limited to adjudication.<sup>7</sup> The latter both follow and depart from said classical approaches. While Lane notes that constitutionalism 'is the political doctrine that claims that political authority should be bound by institutions that restrict the exercise of power',<sup>8</sup> lawyers may recognise that those latter institutions are often courts, and are *themselves* exercising political authority. Less widely discussed, however, are the emerging efforts of constitution-makers around the world to ensure that constitutions drive and reflect the need for climate action. This is, we contend, a quintessentially constitutional purpose, a *writ small* version of the way in which constitutions provide the 'institutional and normative framework for our common forms of political life ... supplied through a legal code'.<sup>9</sup> As climate changes increases in public salience, constitutional means to recognise and address it are developing.

Triggered initially by presentations given by Setzer and Ghaleigh at the Dullah Omar Institute at the University of the Western Cape,<sup>10</sup> this analysis grew from a partnership between the Grantham Research Institute on Climate Change and the Environment and the Edinburgh Centre for Constitutional Law to conduct the first comprehensive mapping of climate-relevant constitutional provisions for inclusion in the Grantham Research Institute's Climate Change Laws of the World database.<sup>11</sup> *Inter alia*, by making this data widely available and with this analysis, we seek to support constitution-makers, legislators and publics to better understand and deploy the tools of climate constitutionalism. This work is in that sense deeply practical. In the course of this initial work, two shortcomings (one descriptive, one scholarly) in the literature of climate constitutionalism became apparent. First, the literature lacks a globally comprehensive mapping, much less analysis, of constitutional provisions which make specific mention of climate change. Given the highly dynamic nature of constitution-making and -reform, equally important is the need to develop a methodology for the same. Second, there is a substantial body of comparative constitutional law scholarship which has developed in response to the challenges of democratic backsliding, authoritarianism and adjectival constitutionalism,<sup>12</sup> which bears on environmental and climate considerations, but has not yet been fully embraced by them. Both elements share a necessary engagement with the Global South, as the locus of the extant climate clauses we identified, and that part of the world in which cultures and modes of constitutional practice beyond the liberal are prominent.

Below we provide a preliminary overview of the relevance of constitutional law to climate change, and the gradual emergence of climate constitutionalism, before exploring the existing constitutional provisions that expressly implicate climate change. We also touch upon constitutional institutions (such as climate change commissions) and processes (such as judicial and

6 Brian J Preston, 'Climate Change Litigation (Part 1)' (2011) 5 Carbon & Climate Law Review 3, 3–14; César Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) AJIL Unbound 114, 40–44; James R May and Erin Daly, 'Global Climate Constitutionalism and Justice in the Courts' in Jordi Jaria-Manzano (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar Publishing 2019) 235; Joana Setzer and Délon Winter de Carvalho, 'Climate Litigation to Protect the Brazilian Amazon: Establishing a Constitutional Right to a Stable Climate' (2021) 30 Review of European, Comparative & International Environmental Law 197.

7 Navraj Singh Ghaleigh, 'Climate Constitutionalism of the UK Supreme Court' (2021) 33 Journal of Environmental Law 441.

8 J-E Lane, *Constitutions and Political Theory* (Manchester University Press 1996) 19.

9 Neil Walker, 'Constitutionalism and Pluralism: A Conflicted Relationship?' in Anthony Lang and Antje Wiener (eds), *Handbook of Global Constitutionalism* (Edward Elgar Publishing 2017).

10 'Webinar on Next Generation Constitutionalism—Climate Change: Implications for Constitutional Law [8 December 2020]' (Dullah Omar Institute) <<https://dullahomarstitute.org.za/events/webinar-on-next-generation-constitutionalism-climate-change-implications-for-constitutional-law-8-december-2020>> accessed 1 May 2022.

11 'Climate Change Laws of the World' (Grantham Research Institute on Climate Change and the Environment 2022) <<https://climate-laws.org/>> accessed 1 May 2022.

12 Mark Tushnet, 'Editorial' (2016) 14 International Journal of Constitutional Law 1.

non-judicial mechanisms to climate justice, eg, Chilean constitutional reform process 2020 onwards). Future work will dive more deeply into these issues.

## 2. SHIFTING PATTERNS IN CONSTITUTIONAL PRACTICE AND SCHOLARSHIP

Comparative constitutional law has grown in waves, corresponding to historical shifts in global politics and the international legal order.<sup>13</sup> After World War II, the global decolonisation process saw the largest creation of new states in global history, each of which needed some form of underpinning constitutional instrument. After the end of the Cold War, the transition of many countries from authoritarianism to democracy or from conflict to peace, again saw the widespread use of constitutions to frame and embed new orders of democratic government. Legal constitutions have thus come to be seen as one of the key instruments in the toolbox of policy-makers to use in transforming societies towards constitutional democracy, in parallel with the development of international normative standards in relation to good governance, human rights and the rule of law.<sup>14</sup>

In addition to these international processes of normative homogenisation, constitutional design practices too became increasingly universal or, at least, widely compared and shared between countries facing similar needs of democratisation.<sup>15</sup> Devices and procedures such as bills of fundamental human rights and judicial constitutional review came to be widely used by constitution-makers across the world, well beyond the countries in which such mechanisms had developed organically from historical experience.<sup>16</sup> Such was the degree of convergence that Kay was able to write:<sup>17</sup>

As the twentieth century comes to a close, the triumph of constitutionalism appears almost complete. Just about every state in the world has a written constitution. The great majority of these declare the constitution to be law controlling the organs of the states. And, in at least many states, that constitution is, in fact, successfully invoked by courts holding acts of the state invalid because inconsistent with the constitution....[the] central idea, forged in the American founding, of public power controlled by enforcement of a superior law is present everywhere constitutional government is proclaimed.

Enter environmental constitutionalism, as a subset of this broader phenomenon of higher law ‘checking’ the state. Since the 1970s environmental constitutionalism—the practice of incorporating environmental rights and obligations in national constitutions—has developed into a widespread practice.<sup>18</sup> There was a close relationship between the growth of substantive environmental constitutional provisions (especially rights), processes of constitution-making and

13 Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (2nd edn, Edward Elgar Publishing 2018) 1–11.

14 Tom Ginsburg, ‘The State of the Field’ in DS Law (ed), *Constitutionalism in Context* (Cambridge University Press 2022) ch 2; Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) 9–15; Lorraine E Weinrib, ‘The Post-war Paradigm and American Exceptionalism’ in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) ch 4.

15 Guenter Frankenberg, ‘Constitutional Transfer: The IKEA Theory Revisited’ (2010) 8 *International Journal of Constitutional Law* 563. There was convergence, too, around the practices and institutions surrounding the process of constitution-making: Donald L Horowitz, *Constitutional Processes and Democratic Commitment* (Yale University Press 2021) ch 1.

16 Michael W Dowdle and Michael A Wilkinson, ‘On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity’ in Michael W Dowdle and Michael A Wilkinson (eds), *Constitutionalism Beyond Liberalism* (Cambridge University Press 2017) 17–20.

17 Richard S Kay, ‘American Constitutionalism’ in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998) 16.

18 David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (University of British Columbia Press 2012).

the underlying model of constitutional democracy that was dominant in the post-Cold War period.

The incorporation of environmental values into these texts, whether through the creation of a right to a healthy environment, or through the imposition of state obligations to protect or maintain the integrity of the environment, or both, was seen to create several important benefits.<sup>19</sup> These included helping to guide public discourse and creating broad substantive protections for the environment, accompanied by an increased likelihood of compliance with environmental laws.<sup>20</sup> Environmental rights protections were also seen as enhancing access to justice and the availability of remedies for those impacted by environmental harms. Recognition of the right to a healthy environment in national constitutions has raised the profile and importance of environmental protection and provided a basis for the enactment of stronger environmental laws, standards, regulations and policies. The first report submitted in 2018 to the UN General Assembly by the Special Rapporteur on human rights and the environment concluded that at least 80 States enacted stronger environmental laws in direct response to the incorporation of the right to a healthy environment into their national constitutions.<sup>21</sup>

As of 2017, more than 150 countries around the world had incorporated environmental provisions into their constitutions.<sup>22</sup> In addition to being enshrined in numerous national constitutions, as of October 2021, the right to a healthy environment was for the first time recognised by the Human Rights Council. Resolution 48/13, recognised that having a clean, healthy and sustainable environment is a human right and calling on UN Member States to cooperate to implement this right.<sup>23</sup> While such recognition can be understood as part of an incremental process, it might embolden judges in the adjudication of environmental disputes in countries where such right is not explicitly recognised by domestic law<sup>24</sup> and has been characterised as the first step towards the introduction, within the realm of human rights law, of the duty for each State to protect the global environment and the global climate per se, regardless of the repercussions of environmental harms on existing individual human rights.<sup>25</sup>

It is also worth noting that in some prominent jurisdictions, environmental constitutionalism has flourished in the absence of constitutional environmental clauses explicitly recognising a right to environment, and antedating a supportive international soft law regime. India is the poster child of this approach, with its sophisticated system of environmental rights being almost wholly a function of judicial intervention—as Bhullar notes, ‘There is no explicit reference to the right to environment either in the Constitution of India or in any of the domestic environmental law.’<sup>26</sup> This is a well surveyed field,<sup>27</sup> which will not be repeated herein. For present

19 Setzer and de Carvalho (n 6).

20 Boyd (n 18).

21 United Nations General Assembly (Human Rights Council), ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John Knox’ (19 July 2018) UN Doc. A/73/188.

22 UN Environment, ‘Environmental Rule of Law: First Global Report’ (UNEP—UN Environment Programme, 24 January 2019) <<https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report>> accessed 1 May 2022.

23 United Nations Human Rights Council, ‘The Human Right to a Clean, Healthy and Sustainable Environment’ (adopted 18 October 2021 UN Doc A/HRC/RES/48/13).

24 Annalina Savaresi, ‘The UN HRC Recognizes the Right to a Healthy Environment and Appoints a New Special Rapporteur on Human Rights and Climate Change. What Does It All Mean?’ (EJIL:Talk!: Blog of the European Journal of International Law, 12 October 2021) <<https://www.ejiltalk.org/the-un-hrc-recognizes-the-right-to-a-healthy-environment-and-appoints-a-new-special-rapporteur-on-human-rights-and-climate-change-what-does-it-all-mean/>> accessed 1 May 2022.

25 Elena Cima, ‘The Right to a Healthy Environment: Reconceptualizing Human Rights in the Face of Climate Change’ (2022) 31 RECIEL 38, 39.

26 Lovleen Bhullar, ‘The Judiciary and the Right to Environment in India: Past, Present and Future’ in Shibani Ghosh (ed), *Indian Environmental Law: Key Concepts and Principles* (Orient BlackSwan 2019) 22.

27 *ibid*; Lavanya Rajamani, ‘Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability’ (2007) 19 *Journal of Environmental Law* 293.



purposes, the example is noteworthy for two reasons. Firstly, there is a lively debate critiquing the power relations exhibited, with Indian environmental rights litigation being identified as a space in which middle-class urbanites exercise their rights to the cost of poor residents, often slum dwellers or marginal industries and their workers.<sup>28</sup> In an analysis reminiscent of JAG Griffiths, this is judged to be a process of capture attributed to the middle-class preferences of the judiciary.<sup>29</sup> The Indian example is significant also in that it highlights the distance that may often operate between the *constitution* and *constitutionalism*: ‘its etymological kinship with the word “constitution” begets confusion. It is important to keep in mind that, as most European and North American scholars define those two terms, the closeness of their linguistic connection does not necessarily spark an intimate political relationship.’<sup>30</sup>

Climate constitutionalism is a more recent movement that sees environmental constitutionalism evolving to address the global threat created by the climate crisis.<sup>31</sup> Broad environmental protections in national constitutions have already been used in climate litigation in some countries (as exemplified in the case of *Neubauer v Germany*),<sup>32</sup> and this creative use of litigation and judicial power may well develop further in countries where this is possible. Stronger arguments in favour of mainstreaming climate change within comparative constitutional law, will, however, need to be conceived as something more than simply the extension of the previous generation of environmental constitutionalism. There are a number of reasons for this.

The nature of the global order is changing from one of Western dominance to a more pluralistic distribution of power and prestige.<sup>33</sup> The rise of China as a global power—as well as regional powers such as Russia, India, Turkey and Brazil—brings with it not only changes to established patterns of global military and economic power, but also alternative ideas, models and conceptions of constitutional order projected as rivals to Western liberalism.<sup>34</sup> These ideas will likely not wholly extinguish liberalism’s normative influence on comparative constitutional law, but they may well create a more complex and competitive marketplace of constitutional models than we have been used to since the end of the Cold War.<sup>35</sup> The implications for constitutionalism of these emerging global shifts will need to be clearly understood.

The once-dominant liberal conception of constitutional democracy originating in Western political thought is likely to become only one of many competing conceptions of constitutional order that are available to countries seeking models for their own constitutional development. In this changing global context, it would no longer be viable to think of constitutionalism as simply a synonym for liberal constitutionalism, and in particular as a category of legal and political practice that is primarily about the pursuit of individual liberty.<sup>36</sup> Constitutionalism would have to make accommodations with cultures that place emphasis on other, more communitarian,

28 Bhullar (n 26) 52, and Nivedita Menon, ‘Environment and the Will to Rule: Supreme Court and Public Interest Litigation in the 1990s’ in Mayur Suresh and Siddharth Narrain (eds), *The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India* (Orient Blackswan 2019).

29 Bhullar, citing Lavanya Rajamani, ‘The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?’ (2007) 16 *Review of European Community & International Environmental Law* 274, 302–3.

30 Walter F Murphy, ‘Civil Law, Common Law, and Constitutional Democracy’ (1991) 52 *Louisiana Law Review* 91, 104.

31 Setzer and de Carvalho (n 6).

32 *Neubauer v Germany*, BVerfGE, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (Federal Constitutional Court of Germany) paras 136–137, official English translation, <[https://climate-laws.org/geographies/litigation\\_cases/neubauer-et-al-v-germany](https://climate-laws.org/geographies/litigation_cases/neubauer-et-al-v-germany)> accessed 1 May 2022.

33 Amitav Acharya and Barry Buzan, ‘The Post-Western World Order: Deep Pluralism’ in Amitav Acharya and Barry Buzan (eds), *The Making of Global International Relations: Origins and Evolution of IR at Its Centenary* (Cambridge University Press) 261–84.

34 Christopher Coker, *The Rise of the Civilizational State* (Polity Press 2019); Robert Falkner and Barry Buzan (eds), *Great Powers, Climate Change and Global Environmental Responsibilities* (Oxford University Press 2022); Mark Tushnet, ‘The Possibility of Illiberal Constitutionalism?’ (2017) 69 *Florida Law Review* 1367.

35 Theunis Roux, ‘The Global South and Liberal Constitutionalism: Incommensurable Opposites?’ (Australian Public Law, 2 July 2021) <<https://auspublaw.org/2021/07/the-global-south-and-liberal-constitutionalism-incommensurable-opposites/>> accessed 1 May 2022.

36 Adrian Pabst, *Liberal World Order and its Critics: Civilisational States and Cultural Commonwealths* (Routledge 2019).

values. Accordingly, constitutional climate clauses will require to be defended on ethical values that arise from local contexts alongside universal standards.

Constitutionalism in general, and climate constitutionalism in particular, will need to possess sufficient conceptual suppleness and inclusivity to accommodate this emerging world of normative pluralism, in such ways that values of good governance and the rule of law can be realised through modes of legitimacy rooted in specific contexts and cultures.<sup>37</sup> In this regard, there is already a small but important group of countries that have recognised that protecting a stable climate for present and future generations constitutes a constitutional matter. In the next section, we analyse 11 jurisdictions that have introduced climate clauses in their constitutions and explore the implications of such provisions.

### 3. EMERGENCE OF ‘CLIMATE CLAUSES’

Our mapping exercise identified 11 jurisdictions that to date have included a dedicated climate constitutional provision or ‘climate clauses’: Algeria, Bolivia, Côte d’Ivoire, Cuba, Dominican Republic, Ecuador, Thailand, Tunisia, Venezuela, Viet Nam and Zambia.<sup>38</sup> We then identified characteristics about climate clauses and their constitutions, although inferences should be drawn hesitantly if at all, owing to the law of small numbers and in the absence of more contextual research. The more immersive contextual work surrounding the design of constitutional provisions in these jurisdictions, and the comparative generalisations that might be extracted from that work for building more abstract theoretical models of climate constitutionalism, are planned for the future.

Constitutions with climate clauses are few in number, regionally concentrated and recent. From a regional perspective, Latin America has about 45% and Africa about 36% of the total of countries with a climate clause, while Europe and North America have none. The majority of the Constitutions with climate clauses are recently created—63% were concluded within the past 15 years. Of the 11 climate clauses, 82% were located in their main texts, the remainder within their preambles. The difference between being located in the main text or in the preamble of the Constitution is that the preamble generally ‘sets the stage’ for the Constitution, communicating the intentions of the framers and the purpose of the document.<sup>39</sup> While it does not define government powers or individual rights (and therefore is normally not justiciable), preambles have acquired increasing importance in recent constitutional interpretation and in public debate, indicating that their significance can be political as well as legal.<sup>40</sup>

Most climate constitutional provisions identified are open textured, broadly stating a commitment to tackle climate change or achieve an aspirational climate scenario. This includes the provisions from Algeria, Cote d’Ivoire, Cuba, Ecuador, The Gambia and Viet Nam. For instance,

37 For an early theorisation of the possibilities of ‘post-liberal’ constitutionalism, see Guenter Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (Edward Elgar Publishing 2018). For comparative constitutional law’s recent ‘Global South turn’, see Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press 2020). For regionally focussed critical accounts of comparative constitutional law, see, respectively, for East Asia, Africa and the Middle East: Brian Christopher Jones (ed) *Democracy and Rule of Law in China’s Shadow* (Hart Bloomsbury 2021); Adunga Berihun Gebeye, *A Theory of African Constitutionalism* (Oxford University Press 2021); Al Ali Zaid, *Arab Constitutionalism: The Coming Revolution* (Cambridge University Press 2021).

38 The primary source is the Constitute Project, a comparative constitutional law tool and database that provides comprehensive, updated, and translated versions of all national Constitutions, available at <<https://www.constituteproject.org>> accessed 1 May 2022. We complemented our research reviewing governmental websites, media resources and other constitutional databases, including Oxford Constitutions of the World, which is available at <<https://oxcon.ouplaw.com>> accessed 1 May 2022.

39 ‘United States Courts’ (United States Courts) <<https://www.uscourts.gov/>> accessed 1 May 2022.

40 Liav Orgad, ‘The Preamble in Constitutional Interpretation’ (2010) 8(4) *International Journal of Constitutional Law* 737; Ronan Cormacain, ‘Constitutional Preambles: A Comparative Analysis’ (2018) 6 *Theory & Practice of Legislation* 143, 146; Nomi Claire Lazar, ‘Time Framing in the Rhetoric of Constitutional Preambles’ (2021) 33 *Law & Literature* 1–21.

Cote d'Ivoire's preambular provision<sup>41</sup> expresses the country's commitment to contributing to climate protection and Algeria's (also preambular) recognises a concern about the effects of climate change, as well as a pledge to take action, expressed in the voice of the people.<sup>42</sup> Cuba's 2019 Constitution is yet more expansive, drawing on its socialist heritage and commitments to anti-imperialism and internationalism to promote climate action through the joint lenses of the United Nations Framework Convention on Climate Change (UNFCCC) principles of differentiation and equity, and setting itself against 'irrational patterns of production and consumption'.<sup>43</sup> Some constitutions, such as Venezuela's,<sup>44</sup> include the climate alongside other natural resources to be protected. In other texts, climate is considered with respect to specific sectors or issues. For example, in the constitutions of Bolivia<sup>45</sup> and Cuba,<sup>46</sup> climate is explicitly referenced in the provisions related to agriculture; in the Dominican Republic in the provisions on territorial ordering and resource management;<sup>47</sup> and in Thailand with respect to national reforms regarding water management.<sup>48</sup>

In terms of the obligations that climate clauses create, only some of those surveyed establish specific and clearly actionable state duties to tackle climate change. Ecuador's provision, for instance, is wide-ranging with respect to the modes of climate action in respect of which the State will adopt measures: 'The State shall adopt adequate and cross-cutting measures for the mitigation of climate change, by limiting greenhouse gas emissions, deforestation, and air pollution; it shall take measures for the conservation of the forests and vegetation; and it shall protect the population at risk'.<sup>49</sup> However, more common are those which make broad commitments for climate action without imposing duties upon the State. In this vein, the constitution of Zambia makes wide commitments to implement mechanisms to address climate change,<sup>50</sup> and Viet Nam frames its cognate commitments in the language of State policy rather than a duty of the State.<sup>51</sup>

Despite potential connections between constitutional protection for climate, and individual environmental rights, only two constitutions—Tunisia and Venezuela—explicitly connect their climate provisions to environmental rights. Tunisia's Constitution guarantees all citizens

41 'Express our commitment to: [...] contributing to climate protection and to maintaining a healthy environment for future generations'. Côte d'Ivoire's Constitution 2016 Preamble.

42 'The people remain concerned with environmental degradation and the negative effects of climate change, and they are eager to ensure protection of the natural environment and the rational use of natural resources in order to preserve them for future generations'. Algeria's Constitution 2020 Preamble.

43 'The Republic of Cuba bases its international relations on the exercise of its sovereignty as well as on the antiimperialist and internationalist principles in accordance with the interests of the people and, in consequence: ... Promotes the protection and conservation of the environment as well as responding to climate change, which threatens the survival of the human species, through the recognition of common, yet differential, responsibilities; the establishment of a more just and equitable international economic order as well as the eradication of irrational patterns of production and consumption'. Cuba's Constitution 2019, art 16(f).

44 'It is a fundamental duty of the State, with the active participation of society, to ensure that the populace develops in a pollution-free environment in which air, water, soil, coasts, climate, the ozone layer and living species receive special protection, in accordance with law'. Bolivarian Republic of Venezuela's Constitution 1999 (with amendments through 2009), art 127.

45 'To protect agricultural and agro-industrial production from natural disasters and inclement climate, and geological catastrophes. The law shall provide for the creation of agricultural insurance'. Plurinational State of Bolivia's Constitution, art 407(4).

46 Boyd (n 18).

47 'The formulation and execution, through law, of a plan of territorial ordering that ensures the efficient and sustainable use of the natural resources of the Nation, in accordance with the necessity of adaptation to climate change, is a priority of the State'. Constitution of the Dominican Republic 2015, art 194.

48 'National reform in various areas shall be carried out to at least achieve the following results:[...] Other Areas: having a water resource management system which is efficient, fair and sustainable, with due regard given to every dimension of water demand in combination with environmental and climate change'. Constitution of the Kingdom of Thailand 2017, art 258.

49 Constitution of the Republic of Ecuador 2008 (with amendments through 2021), art 414.

50 'The State shall, in the utilisation of natural resources and management of the environment—[...] establish and implement mechanisms that address climate change'. Constitution of Zambia 1991 (with amendments through 2016), art 257.

51 'The State has a policy to protect the environment; manages, and effectively and stably use natural resources; protects the nature and biodiversity; takes initiative in prevention and resistance against natural calamities and response to climate change'. Constitution of Viet Nam 1992 (with amendments through 2013), art 63.



the right to participate in the protection of the climate,<sup>52</sup> while Venezuela's provision connects the individual and collective right to a healthy environment to the state's fundamental duty to ensure the population 'develops in a pollution free environment in which [...] climate [...] receives special protection.'

None of the Constitutions reviewed explicitly reference the temperature targets of the Paris Agreement, or the Intergovernmental Panel on Climate Change (IPCC) reports, or indeed any of the three pillars of the international climate regime—the UNFCCC, the Kyoto Protocol or the Paris Agreement. Nor are there as yet provisions relating to a right to a stable climate *per se*<sup>53</sup>, to 'just transitions',<sup>54</sup> or commitments to independent, evidence-based advice and policy making. It is also noteworthy that the central tenet of the climate regime—the principle of differentiation, in all its forms<sup>55</sup>—is absent from extant constitutional provisions, other than Cuba cited above. Although an inter-state principle for PIL purposes, it could be readily domesticated to formalise a State's climate ambitions or to highlight differentiated domestic obligations as between industrial sectors or socio-economic groups. Given the pitched battles which have been fought over differentiation in the context of climate regime negotiations since 1992, such an omission suggests that climate epistemic communities (eg environment ministries, officials and negotiating teams) have little sway in or engagement with either mainstream comparative constitutional law or constitution-making processes. Alternatively, jurisdictions that at climate negotiations profess to care deeply about differentiation of countries' responsibilities—and one could reel off a long list—have foregone the opportunity to embed and domesticate this principle into their own constitutional orders.

These climate clauses are first movers in the articulation of climate considerations in the language of constitutional provisions. The variety of forms discussed highlights the way in which such concerns are incorporated in diverse ways. None of the provisions reviewed contain references to systematic (much less systemic) climate action, whether in terms of references to climate science, or ensuring that national actions contribute to constraining warming to safe global temperature limits, much less constitutional mechanisms to achieve the same. Nevertheless, the absence of an underpinning normative commonality, or much design similarity, in these provisions also highlights a point we made earlier. Climate change may be a global-scale policy challenge, but in a world of increasing normative pluralism, how constitutions—as national expressions of both sovereignty and culture—choose to deal with it will also necessarily be diverse, at both the normative and institutional levels.

#### 4. A NEW CLIMATE CONSTITUTIONALISM

In addition to the 11 already-existing constitutions with climate provisions, there are countries that are trying—with more or less success—to introduce constitutional reforms or constitution-making in which climate considerations are explicitly foregrounded.

In France, on 6 July 2021, the government dropped its plans to introduce a new constitutional provision which would have 'guaranteed' the efforts of the French state to combat climate change. The provision was reportedly opposed by senate members concerned that combatting climate

<sup>52</sup> 'The state guarantees the right to a healthy and balanced environment and the right to participate in the protection of the climate.' Constitution of Tunisia 2014, art 45.

<sup>53</sup> There are, however, attempts to bring such recognition through climate litigation. The ongoing case of *IEA v Brazil*, eg, seek the recognition of a fundamental right to a stable climate, for present and future generations, under the Brazilian Constitution; Setzer and de Carvalho (n 6).

<sup>54</sup> See generally Navraj Singh Ghaleigh, 'Just Transitions for Workers: When Climate Change Met Labour Justice' in Alan Bogg, Jacob Rowbottom and Alison Young (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Bloomsbury Academic/Hart Publishing 2020).

<sup>55</sup> See generally, Phillipe Cullet, 'Differentiation' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021) ch 19, and references therein.

change could create economic challenges.<sup>56</sup> While the failure of the debate in France shows just how difficult constitutional reform can be, the very existence of that debate also provides an example of the growing international recognition that the scale of the climate change challenge. The complex interacting questions of justice involved in the human response to climate change may require the creation or evolution of constitutional frameworks capable of ‘anchoring’ legal responses to the climate crisis.<sup>57</sup> In Chile, a Constitutional Convention approved statutes of the Convention to consider the climate emergency in its principles and rules. Article 3 of the Statute defines the protection of nature and an ecological approach as guiding principles for the constitutional debate. In addition, the Statute establishes a ‘Committee on Environment, rights of nature, common nature goods and economic model’ with the climate crisis one of the topics of its work.<sup>58</sup> Emerging from this process, the approved constitutional clauses include a chapter (Chapter 3 of the Draft Constitution) dedicated to ‘Environment and Climate Crisis’, which in Article 129 of the Draft Constitution recognises the ecological and climate crisis, placing a duty on the state to take actions to respond to climate risks, and promote international climate dialogue and cooperation. Article 127 of the Draft Constitution of the chapter recognises rights of nature,<sup>59</sup> and Article 128 of the Draft Constitution embeds a series of environmental principles, including ‘just climate action.’<sup>60</sup> These clauses were approved by the Constitutional Convention and transmitted to the President in July 2022, for submission to a national referendum in September 2022.

In a recent submission to the cabinet-appointed committee considering reform to Sri Lanka’s constitution, Welikala and Ghaleigh argued that incorporating specific climate-relevant provisions in the Constitution could support domestic public concerns on climate change and help the country to attract international climate finance.<sup>61</sup> The submission argues that Sri Lanka should devote a full chapter of the Constitution to the climate crisis, which could incorporate environmental rights protections explicitly linked to climate change, a ‘net zero’ emission target, just transition principles, and a mandate to create a Commission on Climate Change, an independent advisory body to provide advice and recommendations on how best the country can achieve the necessary transition to a low carbon economy. Without such provisions it may be harder to ensure that the climate crisis, one of the most complex environmental phenomena, is given the critical attention it deserves in the Sri Lankan context. Moreover, the submission makes an attempt to situate its institutional reform proposals within the Sri Lankan politico-cultural space by drawing upon the precepts and principles of Theravada Buddhism for justifications of the need for governmental action in relation to the environment, biodiversity, sustainability and the climate.

Such domestic action might be complemented by transnational efforts that aim to create institutional frameworks in which climate policy amount to credible commitments, whether to

56 ‘France Drops Plans to Enshrine Climate Fight in Constitution’ (*The New York Times*, 6 July 2021) <<https://www.nytimes.com/2021/07/06/world/europe/france-climate-change-constitution.html>> accessed 1 December 2022.

57 Jordi Jaria-Manzano and Susana Borrás, ‘Introduction to the Research Handbook on Global Climate Constitutionalism’ in Jordi Jaria-Manzano and Susana Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar Publishing 2019) 7.

58 ‘Convención Se Declara En Estado de Emergencia Climática y Ecológica’ (Convención Constitucional) <[https://www.chileconvencion.cl/news\\_cconstitucional/convencion-se-declara-en-estado-de-emergencia-climatica-y-ecologica/](https://www.chileconvencion.cl/news_cconstitucional/convencion-se-declara-en-estado-de-emergencia-climatica-y-ecologica/)> accessed 1 May 2022.

59 MMG de Cuenca, ‘Rights of Nature in the New Chilean Constitution: Comparative Law Lessons to Make It Real’ (RChDC, 3 April 2022) <<https://www.redchilenadederecho.comparado.cl/post/rights-of-nature-in-the-new-chilean-constitution-comparative-law-lessons-to-make-it-real>> accessed 10 May 2022.

60 For an argument that the ‘just climate action’ principle should consider mitigation, adaptation and the need for a just transition, see P Gaete Cisterna, <[https://www.distriglobal.org/assets/uploads/cisterna\\_derechos\\_humanos\\_para\\_la\\_incorporacion\\_del\\_cambio\\_climatico\\_en\\_la\\_nueva\\_constitucion.pdf](https://www.distriglobal.org/assets/uploads/cisterna_derechos_humanos_para_la_incorporacion_del_cambio_climatico_en_la_nueva_constitucion.pdf)> accessed 19 May 2022.

61 ‘Need for a Constitutional and Statutory Framework on the Environment and Climate Change in Sri Lanka | Daily FT’ <<https://www.ft.lk/opinion/Need-for-a-constitutional-and-statutory-framework-on-the-environment-and-climate-change-in-Sri-Lanka/14-715165>> accessed 1 June 2021.

publics, international partners or markets.<sup>62</sup> An example is the International Climate Councils Network (ICCN), a network of international climate advisory councils launched during the 2021 UN Conference of the Parties (COP26).<sup>63</sup> The 'climate advisory bodies', including the UK Climate Change Committee, the Finnish Climate Change Panel and the Chilean Scientific Committee on Climate Change, among others, provide independent, expert advice to governments. Their core institutional function is to facilitate governments to balance societal competing democratic interests represented in executives and legislatures with technical expertise. By re-orienting decision-making from short-term political considerations to long-term expert conceptions of the public interest, these initiatives deploy a familiar method of constitutional pre-commitment.

Whether these nascent norms are substantive (as in the French or Sri Lankan examples) or functional (as in the ICCN), they present a form of governance in which climate action is removed from the fray of conventional politics and placed in institutional settings whereby it can be implemented in contextually appropriate forms. Allied with more conventional articulations of climate action via constitutional rights, these norms configure a more complex and potentially robust set of mechanisms by which climate action is advanced via a fuller set of constitutional channels.

## 5. CONCLUSION

In an important recent contribution, Law criticises comparative constitutional law scholarship for dealing with global-scale challenges such as democratic erosion 'through the prism of landmark rulings by assertive courts in liberal democracies', which, he observes, 'is akin to tackling disease by studying only healthy athletes: the objects of study are not indicative of the problem at hand'.<sup>64</sup> This may seem to some an overstatement in relation to how the large literature in comparative constitutional law has addressed the issue of democratic erosion recently. Law's observation certainly rings true for the way in which litigation-centric climate constitutionalism has developed until recently. Our purpose in this analysis has been to show how the idea of climate constitutionalism is, and ought to be, seen through a much broader lens, and to suggest pathways for further exploration.

This approach has many implications for constitutional design. In particular, elevating climate change from a subject of ordinary legislation and public policy to a subject of higher constitutional concern cannot be simply about the incorporation of more rights into constitutional texts, together with an attendant reliance on the courts to enforce them. An exclusively or primarily 'rights and courts'-centric constitutionalism may suffer from a legitimacy deficit in societies where individual autonomy or anti-statism are not the dominant cultural values or the overriding lessons of historical experience. If constitutions are to deal with climate change with the degree of effectiveness consistent with their supreme status, then climate clauses will need to *both* reflect general standards of good governance *as well as* resonate with the cultural ethos of the particular society within which they are embedded.

We have suggested that issues of culture are reemerging as core considerations for constitutionalism in a changing world. In regard to climate clauses, however, prevailing constitutional design philosophies will also need to adapt and expand for more general reasons than cultural

62 Navraj Singh Ghaleigh, 'Paris Agreement, Article 2: Aims, Objectives and Principles' in Greet van Calster and Leonie Reins (eds), *Research Handbook on Climate Change Mitigation* (Edward Elgar Publishing 2021) 2.28.

63 'Letter: (ICCN) The Role of Advisory Climate Councils in Supporting World Leaders to Deliver on the Paris Agreement' (Climate Change Committee) <<https://www.theccc.org.uk/publication/letter-iccn-the-role-of-advisory-climate-councils-in-supporting-world-leaders-to-deliver-on-the-paris-agreement/>> accessed 10 December 2021.

64 David S Law, 'Conceptualizing the Field of Comparative Constitutional Law' (Social Science Research Network 2022) SSRN Scholarly Paper 4067849 <<https://papers.ssrn.com/abstract=4067849>> accessed 10 December 2021.

particularisms. Any institutional framework established by or anchored in a constitution must be capable of meeting the multifaceted policy challenges of climate change. In addition to the protection of individual rights by judicial process, the institutional framework must be able to balance society's competing democratic interests represented in executives and legislatures, as well as technical expertise. Thus, as shown by the examples we have cited, constitutions will need to perform three primary functions: (1) set out key commitments of the state with regard to climate change; (2) establish a multi-nodal institutional framework that works efficiently and cooperatively to achieve those aims; and (3) articulate the broad principles that would govern the regulatory framework to be established by ordinary legislation and policymaking.

The task of developing an institutional and normative theory of constitutionalism that can facilitate constitution-making and constitutional implementation in respect of climate change commitments has only just begun. This task will have to be undertaken in a changing global environment of power, ideas, norms, and models. As such, it will need to go beyond, although not necessarily reject, the liberal model of constitutionalism of the post-World War II and especially post-Cold War world. This will involve the balancing of a central tension. On the one hand, such a theory of constitutionalism would need to represent and accommodate, rather than assimilate or subordinate, non-Western political cultures in a new, plural and inclusive ontology for comparative constitutional law.<sup>65</sup> On the other hand, it would need a conception of legitimate order and authority that simultaneously delivers the requirements of good government, including constraints, transparency, accountability and the rule of laws of general application. The success of constitutionalising climate clauses would depend on a new theory of constitutionalism that is able to deliver these competing objectives.

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<sup>65</sup> One such possible approach is recently advanced in David S Law, 'Pedagogy and Conceptualization of the Field' in David S Law (ed), *Constitutionalism in Context* (Cambridge University Press 2022) ch 1.