Common but Differentiated Constitutionalisms: Does ‘Environmental Constitutionalism’ Offer Realistic Policy Options for Improving UN Environmental Law and Governance? US and Latin American Perspectives

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CHAPTER 6

Common but Differentiated Constitutionalisms

Does ‘Environmental Constitutionalism’ Offer Realistic Policy Options for Improving UN Environmental Law and Governance? US and Latin American Perspectives

Erin Daly, Maria Antonia Tigre and Natalia Urzola

1 Introduction

Environmental law and governance have taken many different forms in the Americas in response to climate change mitigation. This chapter describes recent developments in the United States (U.S.), Colombia, and Brazil, highlighting the divergent approaches to climate protection. Notwithstanding the rhetoric of rights in the popular imagination, rights-based approaches have never driven policy in the United States, either in the context of environmental and climate policy or otherwise. Nor has popular will often impelled government action. Nor for that matter has the U.S. tended to be swayed by international winds. Instead, the U.S. tends to rely on a combination of market-based approaches and administrative enforcement of broad legislative principles to advance well-being, in the belief that markets, rather than political or judicial elites, are more likely to be responsive to both existing conditions and popular will. The Inflation Reduction Act of 2022, which contains the most innovative and ambitious climate mitigation goals in the country’s history, exemplifies this approach.

Elsewhere in the Americas, however, rights-based approaches have held sway as constitutional courts have been especially responsive to individual and collective claims for environmental protection and climate change mitigation. This has taken the form of increasingly robust environmental constitutionalism. In particular, the courts of Colombia and Brazil have been global pioneers in the recognition of environmental and even climate rights to galvanize political action. Colombia’s Constitutional and Supreme Courts have for many years protected environmental rights as part of an integrated web of human rights including rights to food, water, shelter, health, education and dignity for indigenous and non-indigenous communities. Brazil’s judiciary has been equally committed to environmental protection. In the summer of 2022, the Brazilian Federal Supreme Tribunal held that the obligation to comply...
with the Paris Agreement creates enforceable human rights that individuals can vindicate in court and that the government is obligated to respect; failure to establish a climate fund, for instance, is not only a violation of the accord but an actionable violation of a constitutional and human right that controls the government. While the U.S. may provide a model of political and economic approaches to climate mitigation, courts in Latin America, as exemplified by Brazil and Colombia, are providing a model of progressive rights-based judicial action. This chapter analyzes these national examples from a comparative perspective, assessing their promise for climate mitigation and adaptation.

2 Climate Accountability in the United States

In 1981, President Ronald Reagan announced his vision for his presidency in his first inaugural address by boldly declaring: “Government is not the solution to our problem; government is the problem.”¹ This echoed another popular president, John F. Kennedy who, in his inaugural address twenty years earlier, invited his “fellow Americans” to “ask not what your country can do for you – ask what you can do for your country.”² These phrases resonate in the American psyche and reinforce a particular relationship between people and the government, one that looks to private entrepreneurs rather than public servants to address problems that Americans face. Thus, the American government is mostly a negative one, designed to stay out of the way, more than to engage helpfully in the lives of citizens. And that view has remained largely static from the nation’s 19th century founding to today, even while the rest of the world has demanded more of their governments and bent the arc of sovereignty around the needs of human and ecological dignity.

2.1 Strong Constitutionalism across the Globe

It is perhaps easiest to see the basic structure of American constitutionalism in relief against the backdrop of constitutionalism in the modern world. For most of the world, including Europe, the Americas (outside the United States), Asia, and much of Africa, states are set up, according to their constitutions, to provide for some version of the good life for their citizens.

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² President John F. Kennedy’s Inaugural Address (National Archives, 1961) <www.archives.gov/milestone-documents/president-john-f-kennedys-inaugural-address#:~:text=My%20fellow%20citizens%20of%20the,for%20the%20freedom%20of%20our> accessed 8 June 2023.
According to Constitution Project, out of the 193 constitutions in force, 140 mention free education, 84 constitutions contain a right to shelter, 63 mention health care, and 44 establish a Human Rights Commission. These numbers reveal the prevalence of social and economic rights in constitutions and, by implication, demonstrate the extent to which people look to the state to solve social problems, to advance social progress, and to progressively realize social justice. The turn toward the social state continues to be relevant both in Europe and in Latin America, where it began roughly simultaneously in the early 20th century – to the point where countries like Colombia, as will be seen below, commit to being an Estado Social De Derecho – a social state of rights. Brazil’s Constitution contains a single chapter on the social order that is longer than the entire United States Constitution including its amendments, and the Colombian Constitution’s 83 articles on Fundamental Rights amount to slightly less than the length of the US Constitution.

For present purposes, the extent and quality of the satisfaction of these promises is not as important as the fact that people expect governments to commit to them and may seek to hold them responsible if they fail to provide. In these countries, the state is looked not only to pass laws and execute them, not only to provide for national security, and to protect economic interests, but to do so in a way that promotes human dignity (mentioned in 161 constitutions⁴); indeed, some constitutions identify the promotion of dignity as the foundation of the constitutional order,⁵ or as the very purpose of the state: for example, the Peruvian Constitution asserts that “The defense of the human person and respect for his dignity are the supreme purpose of the society and the State,”⁶ and the Dominican Republic puts it this way: “The State bases itself on respect for the dignity of the person and organizes itself for the real and effective protection of the fundamental rights that are inherent to it. The

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dignity of the human being is sacred, innate, and inviolable; its respect and protection constitute an essential responsibility of the public powers.\footnote{Constitución Política de la República Dominicana (2010) Title II Chapter I Section I Art. 38 Human Dignity, <https://observatorio10.cepal.org/sites/default/files/documnts/constitucion_republica_dominicana.pdf> accessed 8 June 2023.} Insisting that states take responsibility for the dignity of people is also evident in Europe at the national and regional levels, where political and judicial bodies routinely use their authority to solve the problems of the day, whether they be economic, social, or political.\footnote{As the democratically elected European Parliament explains: Members of the European parliament “fight against new and old attacks on essential liberties. ... Some of these freedoms are as old as Europe: life and liberty, thought and expression. But others have had to be redefined to keep pace with the times. Protecting personal data or prohibiting human cloning were far from the minds of the first elected MEPs, some four decades ago.” European Parliament, <https://www.europarl.europa.eu/about-parliament/en/democracy-and-human-rights> accessed 8 June 2023.} Here, the very purpose of state sovereignty is to bring about the good life, as Pascal Lamy put it during the conference, both by protecting people from threats (whether they be environmental or anthropogenic or both) and by ensuring that every person is able to live with a modicum of dignity, or a minimum existence.\footnote{For the German concept, see I. Leijten, ‘The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection’ (2015) 16(1) German Law Journal 23–48. doi:10.1017/S2071832200019416.} In this view (as described by some of the participants in this conference), the government is not the barrier to international cooperation but its conduit, harnessing (differentiated) sovereign power to address (common) global and regional challenges.

Thus, for most nations on earth, given the varied situations in which people live and the pervasiveness of poverty and discrimination throughout the world, the line between the positive and negative obligations of the state are blurred. This understanding of constitutionalism can be transformative, as the very purpose of the constitutional state evolves over time, always in the direction of “social progress and better standards of life in larger freedom,” as the UN Charter proclaims.\footnote{United Nations Charter (1945) Preamble, <https://www.un.org/en/about-us/un-charter> accessed 8 June 2023.}

\section*{2.2 Thin Constitutionalism in the United States}

This is not so in the United States, whose constitution is famously old and terse. It does not protect against discrimination (as the so-called “Jim Crow” era proved in mandating racial segregation and injustice from cradle to grave well into the post-war era); it includes no social, economic, cultural, or
environmental rights, nor a right to affirmative action to redress past harms; it contains no privacy rights, nor even a right to vote\textsuperscript{11}—much less the rights of indigenous peoples, or other rights extensively protected in constitutions such as Brazil’s and Colombia’s.

This is all by design. Perhaps the U.S. is unique in having been established by people who did not believe in a strong central government, but rather by slave owners and mercantilists who believed that the less the government did, the more they would prosper. The United States government was designed precisely to keep the peace among the states while ensuring that men could profit financially without concern for the burden it would impose on any others in present and future generations. It was established not to respect human dignity but to allow commerce (including the slave trade) to thrive, to allow states to establish their own rules of conduct (including allowing the establishment of churches, the genocide of native populations, and again the ownership, rape and abuse of other human beings). If there were problems to be solved, the drafters of the national constitution left them to the states to address. The entirety of the national legislative power in the original constitution is contained in 429 words\textsuperscript{12} and (with the exception of a trio of powers addressing the end of slavery), it has never been expanded nor amended to permit the government to address social problems. Indeed, most federal legislation designed to tackle the most significant challenges of the day must still be justified either as regulations of interstate commerce or as exercises of federal authority to tax and to spend, as the 2022 Inflation Reduction Act is.\textsuperscript{13}

It is well established that the federal government has no general power to act simply to improve the lives of people or to respond to social challenges.\textsuperscript{14}

\begin{enumerate}
\item The equality right simply prohibits a state from denying “equal protection of the laws,” (Amends. V and XIV) but it has been interpreted to prohibit only intentional discrimination (Washington v Davis, 426 U.S. 229 (1976)) and only where the government cannot justify the discrimination, and only on the basis of race and a very few other characteristics. There is no right to privacy, Dobbs v Jackson, and there is no right to vote in federal elections, but simply a prohibition of discrimination in the right to vote on the basis of race (Amend XV), sex (XIX), wealth (XXIV), or age over 18 (XXVI).
\item The Affordable Care Act was invalidated as an exercise of the interstate commerce power and upheld only as an exercise of the federal power to spend. National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).
\item As the Supreme Court explained in striking down a law that would have prevented people from bringing guns to school zones: “We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. 1, § 8. As James Madison wrote: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and
\end{enumerate}
Nor has the constitution been updated by text or interpretation since the 19th century. In the 235 years of its existence, it has been amended a scant 27 times: this includes 12 amendments in the first decade after its adoption, another three to end the Civil War and abolish slavery, another 2 dealing with the sale of alcohol, and only 3 in the 20th century expanding individual rights – all prohibiting discrimination in voting. The last time it was amended to expand rights was 1971. The last time it was amended at all was in 1992, making it one of only 28 countries whose constitutions have not been adopted or amended in the 21st century.

One might think that under such circumstances, the courts charged with constitutional application and implementation would ensure that the constitution was relevant to the conditions and needs of the times by interpreting it as a “living instrument,” as Colombia and the European Court of Human Rights (ECtHR) do, or as a “living tree” in the Canadian sense. But for most of its history, the United States Supreme Court has taken the opposite view. Rather, it has held tight to the view of the Constitution that many of its framers had: that the limits of federal authority must be strictly adhered to, to ensure maximal opportunity for capitalist enterprise. In the last 10 years alone, as the world has witnessed with increasing alarm the devastation that climate change produces, the U.S. Supreme Court has consistently withheld authority from the federal government to protect the environment, in favor of private interests.

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15 None of these guarantees a right to vote; rather, they all prohibit the denial of the franchise on account of sex (Amend. xix), poverty (Amend. xxiv), and age for people over 18 (Amend. xxvi).
16 United States Constitution (n 12), Amend. xxvi (prohibiting denial or abridgment of the right to vote of 18-, 19-, and 20-year olds on account of their age).
17 Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) 26 (1978) at para. 31: “The Court must also recall that the Convention is a living instrument which, by way of progressive interpretation, accommodates and addresses the realities of modern life.”
18 Reference Re Same Sex Marriage, 2004 SCC 79 (CanLII), para. 22: “[O]ur Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.”
19 See Los Angeles County Flood Control Dist. v. NRDC, 568 U.S. 78 (2013) (limiting EPA’s authority under the Clean Water Act); Utility Air Regulatory Group v. EPA, 573 U.S. 302
Most recently, in 2023, the Supreme Court again limited the EPA's authority to regulate wetlands to waters encompassing “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’,” quoting nothing more than an earlier case and two dictionary entries. This holding can have a “catastrophic” effect on the federal government’s ability to protect wetlands throughout the country, which increases the risks associated with climate change. As the NRDC explains, “wetlands ‘are among the most productive ecosystems in the world, comparable to rainforests and coral reefs.’ By regulating water flow, they dramatically lessen the impact of both floods and droughts. They provide habitat for all manner of fish, birds, mammals, insects, reptiles, and amphibians. And they do all of these things while storing massive amounts of carbon in their abundant vegetation – making safeguarding wetlands a valuable natural climate solution.” The world loses, but the owners of waterfront property will now be able to develop it without having to seek prior authorization from the federal government, just as their 18th century property-owning forebearers could.

Thus, the Supreme Court has usually adhered to a historic view of constitutional application, thereby closing avenues to demand more of government than a few elite men from over 200 years ago would have wanted. Procedurally as well, the Supreme Court has more often closed the doors to the courthouse than opened them: it has developed extraordinarily high barriers to establish standing, for instance, and has never developed the kinds of procedures accepted in other countries to hold government accountable, such as Brazil’s claim for noncompliance, or Colombia’s tutela action, discussed below. Furthermore, among the 20th and 21st century innovations that the Supreme Court has rejected is the integration of international, and especially international human rights, law into its domestic constitutionalism. While some

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constitutions require this, and some countries – like Colombia – see themselves as monist in terms of the integration of international law, the United States is not among them, and its Supreme Court usually declines to look abroad for guidance or incorporate international norms, including *jus cogens*, into its analysis. Indeed, its refusal to engage with environmental and climate justice is just one example of its willingness to be a global outlier.

The United States’ deeply rooted commitment to a limited national government is not necessarily a rejection of popular will. Rather, it could be seen as a choice to understand popular will as reflected in market choices rather than as the product of electoral decisions. Through its spending power, the Congress can advance a social policy not by compelling behavior (with all the bureaucracy and consistency and expense of enforcement that regulation requires in order to be effective) but by providing additional choices to people about how, when, and how much to comply and by incentivizing, rather than compelling, policy choices. Using its spending power, Congress can offer financial benefits to those who choose a certain course of conduct over another – essentially offering carrots to those who change their behavior rather than using stick against those who do not. For instance, in the last few years, the Congress has used not its regulatory authority but its spending power to accomplish systemic health care reform, respond to the economic crisis resulting from the COVID crisis, and improve infrastructure. In a certain sense, this too advances dignity by enhancing opportunities for agency and reasoned decision-making and limiting regulatory compulsion. It is too early to tell if this approach is

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as effective as regulation to address climate change; we do know that waiting for the national government to respond legislatively or regulatorily to climate change has produced not behavioral change but more climate change. And courts have not been eager to intervene. With this in mind, it is not hard to see why environmental constitutionalism would not fare well as a regulatory matter in the form of command-and-control legislation as is popular in Europe, nor in the federal courts of the United States. As we will see, elsewhere in the Americas – notably in Brazil and Colombia – judicially managed environmental constitutionalism is the approach of choice.

2.3 A Market-Based Approach to Climate Change: the Inflation Reduction Act of 2022

In 2022, the United States Congress adopted landmark legislation designed to mitigate and adapt to the impacts of climate change in a way that is aligned with American (U.S.) sensibilities about the role of the federal government in responding to major social issues and adhering to faith in the markets over faith in government regulation to solve social problems.

Many things about the legislation have garnered attention. First, the spending commitment is enormous: most estimates put it at $369 billion, but some estimate that the overall impact could be as much as $800 billion. Second, it is the private sector, rather than government, that is expected to do the work of mitigation (just as Presidents Kennedy and Reagan suggested it should


29 See ibid: “The public spending will likely trigger private sector investment (i.e. the “leverage effect”). The multiplier generally ranges from 1.1x to 1.6x, meaning for every dollar of public spending, at least 1.1 dollar would be spent by the private sector. Subsidized lending from the Department of Energy’s loan program and Greenhouse Gas Reduction Fund (i.e. green banks) will supercharge green financing.”
be). Third, it is expected to be effective in reducing carbon emissions.\textsuperscript{30} As one analysis explains: “The legislation includes $369 billion for climate and energy provisions and will contribute to reducing carbon emissions from 2005 levels by approximately 40 percent by 2030 by accelerating the decarbonization of electricity production and other carbon-intensive sectors.”\textsuperscript{31} According to another, it may even enable the United States to meet its nationally determined contributions under the 2015 Paris Agreement.\textsuperscript{32} Moreover, the “significant commitment to a sustainable future aligns the legislation with the principles of” Environmental and Social Governance (ESG).\textsuperscript{33} But it accomplishes this not by command-and-control regulation but by extending and enhancing “existing energy-related tax credits and incentives, including those for: Renewable electricity investment and production, Energy storage, Carbon capture, Production of clean hydrogen, Sustainable aviation and biofuels, Electric vehicles and charging infrastructure, Advanced domestic manufacturing, [and] Greenhouse gas reductions.”\textsuperscript{34}

It will not be known for some time whether the promises of the legislation will be fulfilled. But it is quite likely to be more effective in moving the American economy in a more environmentally sensitive direction than would

\textsuperscript{30} “Multiple independent analyses show the bill will reduce U.S. greenhouse gas emissions some 40% below 2005 levels by 2030, a big step toward President Biden's goal of cutting them in half by 2030.” Fred Krupp, 'The biggest thing Congress has ever done to address climate change' (Environmental Defense Fund, August 2022), <https://www.edf.org/blog/2022/08/12/biggest-thing-congress-has-ever-done-address-climate-change> accessed 8 June 2023.


\textsuperscript{32} “Under a business-as-usual scenario (without the IRA), the U.S. would be expected to reduce greenhouse gas (GHG) emissions by between 24% and 35% by 2030 compared to 2005 levels. This reduction is a far cry from the 50–52% reduction target set in the latest U.S. nationally determined contribution (NDC). With the passage of the IRA, GHG reductions are expected to reach 30% to 44% by 2030. When combined with renewed ambition from executive agencies like the EPA and Department of Agriculture, as well as states and cities, the Rhodium Group’s modeling suggests that the U.S. can meet its NDC commitment.” Melissa Barbanell, 'A Brief Summary of the Climate and Energy Provisions of the Inflation Reduction Act of 2022,' (World Resources Institute, October 2022) <https://www.wri.org/update/brief-summary-climate-and-energy-provisions-inflation-reduction-act-2022> accessed 8 June 2023.


\textsuperscript{34} Ibid.
The Right to a Healthy Environment in Brazil: the Decision in PSB et al. v. Brazil (on Climate Fund)

In Brazil, the scenario is quite different. Brazil has adopted in 1988 – after the end of the military dictatorship – a carefully crafted constitutional right to a healthy environment with an individual and collective dimension, as well as related responsibilities of governments (national and sub-national). This responsibility has evolved through decades of environmental litigation, and, more recently, through a growing trend of expanding climate litigation.

3.1 Brazil’s Environmental Constitutionalism

Among the fundamental rights enshrined in Brazil’s 1988 constitution is the protection of an ecologically balanced environment, which is essential to the quality of life and belongs to present and future generations.35 The constitutional protection effectively links environmental protection and human rights by ensuring that a healthy environment is essential for the fulfilment of the fundamental right to human dignity. The right to a healthy environment has an individual and a collective dimension. An infringement of the right can be claimed individually, similarly – and in relation to – violations of other traditional human rights through direct or indirect repercussions. However, the right also has a collective dimension, which applies due to its universal interest for present and future generations. The Brazilian Supreme Court – the country’s constitutional court and highest court – has repeatedly affirmed the importance of environmental protection since the constitutional recognition of the right to an ecologically balanced environment.36 The court considers the

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right to environmental integrity a ‘collective right’, which both enshrines the principle of solidarity and integrates the process of recognition and expansion of the content of human rights.\(^{37}\)

Relatedly, the right to a healthy environment sets a positive duty of the government and other stakeholders to defend and protect the environment for present and future generations. As a fundamental right, and therefore different from ordinary duties arising from the relationship with the respective rights and those directly set by the legal text, the right to a healthy environment requires effective implementation through infra-constitutional regulation. Minister Herman Benjamin, a judge at Brazil’s superior tribunal, clarifies that one of the characteristics of environmental law in Brazil is that the right and correlated duty have an ‘aversion for empty discourse.’ Environmental law is, therefore, ‘a legal discipline of result, that is only justified by what it reaches, definitely, in the social framework of degrading interventions.’\(^{38}\)

3.2 Political Backsliding and Judicial Engagement

This positive duty became even more pressing during the recent widespread backsliding of environmental and climate laws and policies during Jair Bolsonaro’s administration. Bolsonaro, who served as Brazil’s president from 2019 to 2022, was criticized for his stance on the environment and his efforts to roll back protections for the Amazon rainforest and other critical ecosystems.\(^{39}\) One of Bolsonaro’s main priorities was to boost economic growth and development, and he took a series of steps to relax environmental regulations and open protected areas for exploitation. This included weakening enforcement of environmental laws, emptying capacities of environmental bodies, reducing the size of protected areas, excluding civil society organizations from participation in environmental policy, reducing the resources available to environmental agencies, and weakening Brazil’s environmental and climate
commitments at the international level. Bolsonaro was skeptical of the Paris Agreement, claiming it jeopardized Brazil's sovereignty over the Amazon rainforest, and he extensively criticized the global effort to combat climate change as a threat to Brazil's economic growth.

The environmental rollbacks by the federal government resulted in a significant increase in GHG emissions. Placed within the wider context of deregulation of environmental laws, this has led certain political parties to bring a series of constitutional actions to the Brazilian Constitutional Court challenging state responsibility for the climate crisis. These cases, analyzed here, are part of a broader movement by civil society organizations that brought a series of climate litigation cases in Brazil, demanding compliance with the obligations established in national legislation and international law, and implementation of public policies to protect the environment, including concerning the climate crisis. During the period 2022–2023, the Constitutional Court analyzed environmental and climate cases (the "Green Agenda"), marking a historical moment that established the court as a climate action actor. The cases bring an abstract review of constitutional law before the Supreme Court in light of an apparent conflict between federal law, state law, or other normative acts and the federal constitution. These types of concentrated control cases, or abstract cases, are characterized by "abstraction, generality, and

impersonality," and can be brought by a limited type of actors and are directly analyzed by the constitutional court.45

3.3 The Incorporation of Climate Treaties into Domestic Law: the Supranational Obligation to Mitigate Climate Impacts

The case analyzed here was brought in 2020 using a constitutional mechanism called Claim for Noncompliance with a Fundamental Precept (Arguição de Descumprimento de Preceito Fundamental – ADPF). In 2019, political parties filed ADPF 708, requiring the Brazilian government to combat climate change as part of their constitutional right to a healthy environment. In particular, plaintiffs claimed that Climate Fund payments had not been disbursed. Brazil’s Climate Fund was created in 2009 as a financial instrument of its National Policy on Climate Change.46 Its annual budget is to be allocated to projects and studies aimed at mitigating and adapting to climate change. However, in 2019 and 2020, the Bolsonaro administration failed to allocate the available resources. Therefore, the plaintiffs sought a declaration of ‘unconstitutional omission’ against the paralysis of the Fund’s operations and governance and an injunction compelling the government to reactivate the Fund.

Grounded in the right to a healthy environment, the case specifically challenges the procedural duties of the state as it pertains to its political accountability in the context of climate change (i.e., providing reliable scientific information on climate change, transparency of policies and allocation of funds, and participation of communities in climate policies).47 The plaintiffs argued that the government’s failure to fulfill its obligations to reduce greenhouse gas emissions and protect the environment resulted in negative impacts on the health and well-being of the Brazilian people and jeopardized ecosystems and essential ecological processes. In July 2022, the Supreme Court found, in an unprecedented decision, that the Paris Agreement is a human rights treaty and that, as such, has supra-national status that binds the political
branches of the state.\textsuperscript{48} The Supreme Court thus confirmed that there is a ‘constitutional, supra-legal and legal duty’ to protect the environment and combat climate change.

When the Paris Agreement was negotiated, there was much disagreement about the extent of its commitment to human rights. In the end, human rights were relegated to a passing reference in the preamble, which notes that ‘climate change is a common concern of humankind’ and ‘Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights’.\textsuperscript{49} While the former UN special rapporteur on human rights and the environment, John Knox, has previously argued that the Paris Agreement is a human rights treaty,\textsuperscript{50} the Brazilian court is the first to recognize it as such formally.\textsuperscript{51}

Furthermore, the Supreme Court clarified that environmental law treaties constitute a particular type of human rights treaty, which enjoy ‘supranational’ status. This ‘supralegality’ of human rights treaties means that they are above ‘ordinary’ laws in the legal hierarchy.\textsuperscript{52} Thus, according to the decision, there is no legally valid option to simply not act in the fight against climate change.\textsuperscript{53} If a law passed by Congress conflicts with a provision of a human rights treaty, the human rights treaty (and based on this ruling, environmental and climate treaties) prevails. In practice, the law in question is overridden by the treaty. Accordingly, any Brazilian law or decree that contradicts the Paris Agreement, including the Nationally Determined Contributions, may be invalidated. Any action or omission contrary to this protection directly violates the constitution


\textsuperscript{53} Tigre, n 50.
and human rights. Therefore, as Justice Roberto Barroso explained, any doubts that the climate issue falls within the context of Article 225 and concerns a fundamental human right are dispelled.\(^\text{54}\)

The government had contended that the Climate Fund, deriving from Brazil’s international commitments within the scope of multilateral treaties on climate change, does not bind the government to its mandatory compliance since it is not a Brazilian law. However, the majority ruled that climate protection is a constitutional value. As such, the government’s constitutional environmental protection mandate is not a discretionary political decision but a mandatory obligation.\(^\text{55}\) The constitutional duty to allocate the funds effectively means that there is an obligation to mitigate climate change considering the international commitments under the climate change framework.\(^\text{56}\) Accordingly, the executive branch has a constitutional duty to execute and allocate the funds of the Climate Fund to mitigate climate change based on the separation of powers and the constitutional right to a healthy environment. The court further found that the judiciary, in turn, must act to avoid the regression of environmental – and climate – protection. Finally, the Court held that the government’s discretion in allocating the funds is subject to judicial review.\(^\text{57}\) The decision prohibits the ‘contingency’ of such amounts based on the constitutional right to a healthy environment.

Justice Barroso, writing for the majority, also emphasized the role of the Court in preventing setbacks to the protection of fundamental rights.\(^\text{58}\) This, too, is a binding obligation and not a matter of ‘free political choice’. The court determined that the executive must allocate resources to operate the Climate Fund, curing its intentional and wrongful omissions in violation of Articles 225 and 5, § 2, of the Federal Constitution.\(^\text{59}\)


\(^\text{56}\) Tigre, n 50.

\(^\text{57}\) Ibid.


\(^\text{59}\) Id., at 2.
3.4 Implications for Brazil’s Climate Constitutionalism

De Azevedo et al. argue that the ADPF 708 case mandates the duty to efficiently allocate the Fund’s resources to preserve its original function. This advancement can avoid the mismanagement of funds intended for mitigation and adaptation. Furthermore, the decision contributes to unravelling the much-needed climate finance to a net zero transition in Brazil’s economy. The resources from the Climate Fund (estimated to be around R$ 1.1 billion) are, therefore, essential in ensuring the implementation of policies to increase Brazil’s ambition.

This case and others like it have advanced the argument that the climate system should be understood as an integral part of an ecologically balanced environment. Plaintiffs have increasingly argued that the effectiveness of the fundamental human right to a healthy environment depends, at least in part, on climatic conditions that enable a dignified life. The diversity of constitutional human rights cited in climate disputes demonstrates the essential interdependence between the right to an ecologically balanced environment and other fundamental rights. There is a close correlation between Article 225 and several other fundamental rights in Brazilian climate cases: the rights to life (Article 5), health (Articles 6 and 196), and free enterprise (Article 170) – the latter lists environmental defense as one of its guiding principles (Article 170, item vi) – as well as the rights of indigenous peoples (Article 231), children and adolescents (Article 227). The rights of indigenous populations are invoked mainly in cases seeking to combat the advance of deforestation in Brazil. The violation of native communities’ rights also draws attention to the unequal impact of climate change on indigenous peoples due to their close relationship with and dependency on the natural environment. In line with the terms of Advisory Opinion 23/2017 of the IACtHR, the right

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60 De Azevedo et al., n 54.
63 Moreira et al., n 53.
64 The UN Special Rapporteur on Human Rights and the Environment has already recognized the interdependence and the impact of the climate crisis in the enjoyment of human rights (UN General Assembly 2019: 18–24).
to a healthy environment constitutes a human right in and of itself and it is the basis for the enjoyment of other rights necessary for a dignified minimum existence.\textsuperscript{65}

The decision in the ADPF 708 case has been widely recognized as the most important judgment on climate litigation in Brazil to date.\textsuperscript{66} Environmental advocates have hailed it as a significant victory, underscoring the importance of using the courts to address the pressing issue of climate change. The case has been commended for its role in addressing the urgent problem of climate change and is considered a landmark in the field of environmental law, setting a precedent for similar cases worldwide. Its significance lies in its contribution to Brazil’s efforts to combat climate change and its impact on the constitutional interpretation of the right to a healthy environment.

Specifically, the ADPF 708 case provides practical implementation of the right to a healthy environment by clarifying its scope and meaning in relation to climate change and the mismanagement of funds essential to tackling the climate crisis. It is therefore an important development in the constitutional interpretation of the right to a healthy environment. Procedurally, the case has enabled direct engagement with the constitutional court, providing a more effective way to promote access to justice and ensure that the matter is dealt with rapidly. This is in contrast to an ordinary action, which would likely take years to reach the constitutional court. Subsequent actions that rely on the Paris Agreement and seek to ensure its implementation can now draw on the constitutional interpretation of the right to the environment provided by the Court, which is more favorable to pro-climate plaintiffs.


4 Lessons from Colombia’s Constitutional Expansionism

Colombia’s 1991 Constitution was groundbreaking in the country’s civil law tradition. Based on an *Estado Social de Derecho* model, the Constitution places significant emphasis on social and economic rights as the basis of human dignity. In particular, the Constitution establishes a list of ‘fundamental’ rights, centered on both individual and collective interests. These fundamental rights are regarded as the most basic rights of all Colombian citizens and as such have been granted the highest standard of protection. The Constitution divides them into individual and collective rights according to the interest they protect and the mechanism designed to uphold them. Among these latter set of rights are environmental rights. As widely discussed by prominent scholars, the special emphasis on environmental rights, with over 30 articles dedicated to environmental protection, makes Colombia’s constitution a true ecological constitution.

The Constitution also established the Constitutional Court (cc) as the court of final review of all constitutional law issues and created an expedited judicial mechanism specifically designed and exclusively applied to the protection against the violation or threat of violation of fundamental individual rights.

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68 “[A] social state under the rule of law, organized in the form of a unitary republic, decentralized, with autonomy of its territorial units, democratic, participatory, and pluralistic, based on the respect of human dignity, the work and solidarity of the individuals who belong to it, and the prevalence of the general interest”. Elizabeth Macpherson, et al., ‘Where ordinary laws fall short: ‘riverine rights’ and constitutionalism’ (2021) 30(3) Griffith Law Review 438–473, 448 DOI: 10.1080/10383441.2021.1982119


71 Ibid., art. 79, 80 and 81. Also included in arts. 1, 2, 8, 49, 86, 88, 95, 333. 366.

72 Macpherson et al., n 67 at 448.

73 Nagle, n 66 at 59.

The *tutela*, as it is known in Colombian constitutional law, (similar to *amparo* mechanism in other jurisdictions) has become the preferred mechanism to uphold fundamental individual rights in Colombia in part because it holds priority over other judicial proceedings, and judicial bodies are bound to very strict decision times.\(^\text{75}\) Furthermore, every judicial entity in Colombia has competence to hear matters brought before them through *tutelas*, albeit subject to specific competences based on subject-matter jurisdiction.\(^\text{76}\) However, the CC is Colombia’s highest judicial body in constitutional matters and as such is the main entity to uphold constitutional provisions.\(^\text{77}\) The CC receives all *tutela* decisions and submit them to a judicial review procedure where only some are selected depending on different criteria, such as the need to unify a particular fundamental rights interpretation (known as unifying rulings-*sentencias de unificación*-) or the importance of a particular case of fundamental rights violations (known as *tutela* judicial review – *sentencia de revisión de tutela*).\(^\text{78}\) The third type of decisions the CC adopts are exclusive to this body and relate to the constitutionality of a specific provision, legislation or statute (known as constitutionality rulings-*sentencias de constitucionalidad*).\(^\text{79}\)

A second device to assert constitutional rights is the acción popular.\(^\text{80}\) This device was intended to allow any person, regardless of standing or particular interest in the matter, to bring action to protect collective rights and interests, including the right to a healthy environment.\(^\text{81}\) Notably, unlike the *tutela*, the *acción popular* does not convey the same preferential treatment. It must comply with standard rules of procedure and is not subject to judicial review by the Constitutional Court. As a result, many claims regarding the protection of the environment are often delayed in time. However, if a fundamental right of individual nature is being threatened or violated in tandem with the right to a healthy environment, the case will acquire priority due to related actions criterion (*conexidad*) and can be heard via the *tutela*.\(^\text{82}\) Due to the increasing recognition of the link and interdependence between the right to a healthy

\(^{75}\) Ibid.
\(^{76}\) Decree 2591 of 1991 n 73, arts. 37 to 41.
\(^{77}\) Ibid., art. 33.
\(^{78}\) Colombian Constitution n 69, art. 241.
\(^{79}\) Ibid.
\(^{81}\) Nagle, n 66 at 84.
\(^{82}\) See, e.g., Constitutional Court Decision T-341/16 (2016), &lt;https://www.corteconstitucional.gov.co/relatoria/2016/t-341-16.htm&gt; accessed 8 June 2023. See also Betancur-Restrepo, n 68 at 57.
environment and the enjoyment of other fundamental individual rights, many environmental claims in Colombia are being heard via tutela.

Hence, the entirety of the judicial branch in Colombia hears fundamental rights cases, resulting in diverse and progressive decisions throughout the country. Sometimes these decisions coincide in their overall interpretation of the situation, whereas other times contradictory decisions have been made, which has occasionally led to turmoil and unrest. In any case, judges across the country have started to put forth innovative theories resulting in what can be called rights expansionism. The following subsection will dive deeper on what rights expansionism looks like in Colombia regarding environmental rights.

4.1 Rights Expansionism through Stakeholders’ Recognition

Colombia’s judiciary, remarkably the cc, is transformative and progressive, despite its civil law tradition. Colombians have shown openness towards expanding dominant visions of democratic constitutionalism and rights’ creation and interpretation to extend their benefits to historically marginalized groups. Rights expansionism in Colombia has taken many forms, one of which is the increasing recognition of subjects of rights outside the dominant standard. Colombia’s constitution is considered a living instrument and as such its judicial interpretation allows broadening its initial scope, albeit not without restriction. Furthermore, Colombia follows a monist tradition where international agreements and treaties ratified by the country acquire a constitutional status in the country’s normative hierarchy, in addition to the comprehensive bill of fundamental rights. In particular, international human rights law has acquired a privileged position in Colombia’s legal framework, where human rights have precedence over domestic norms and human rights treaties should act as interpretative guides for the realization of all constitutional rights and duties. This is predominantly relevant to environmental rights since Colombia is signatory and has ratified most of the international and regional commitments on environmental protection and climate action.

Since its inception, the cc has used progressive approaches to constitutional law. In one of its first decisions, the court asserted its competence to determine

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83 Macpherson et al., n 67 at 449. See also Betancur-Restrepo n 68 at 49.
84 Ibid.
85 Thornhill et al., n 68 at 161.
87 Thornhill et al., n 68 at 163.
which rights are fundamental and should be protected as such.\textsuperscript{88} Thus, many novel interpretations of fundamental rights followed. Furthermore, other courts have also exercised their progressive reasoning through \textit{tutela} decisions, namely the Supreme Court (which is the highest-ranking court on matters of private law) as discussed in detail below. This section examines two sets of decisions adopted via \textit{tutela} (one by the Constitutional Court and the other by the Supreme Court) that demonstrate the country’s openness to rights expansionism in the context of environmental rights and climate change.

4.1.1 Rights of Nature: Rivers, the Amazon and Ecosystems

In Colombia, courts have granted legal rights to specific ecosystems, such as the Atrato River,\textsuperscript{89} and Colombia’s Amazon basin.\textsuperscript{90} In that case, Afro-Colombian and Indigenous communities filed a \textit{tutela} against the Colombian government and private companies for the violation of their fundamental rights to life, health, water, food security, culture and territory, along with their right to a healthy environment as a result of the pollution caused by mining activities in the River. The \textit{cc} agreed, granting protection to the plaintiffs’ rights and issuing orders to eradicate mining and decontaminate the river.

Significantly, the \textit{cc} went beyond the customary recognition of human rights violation of plaintiffs and expanded this protection to the Atrato River. The \textit{cc} ordered the recognition of the river as a subject of rights invoking the ecological nature of the Colombian Constitution.\textsuperscript{91} The \textit{cc} concluded that the superior interest of nature could be explained through an eco-centric perspective, where nature is considered a right-bearing entity and where plural worldviews take center stage.\textsuperscript{92} The \textit{cc} supported this decision

\begin{footnotes}
\item[88] Ibid. at 165.
\item[91] Atrato River case n 88, para. 9.31 and 9.32.
\item[92] Ibid., para 9.33.
\end{footnotes}
on the *Estado Social de Derecho* and multiculturalism to grant rights to the river.\(^3\)

Following this recognition of the rights of nature and relying almost entirely on this decision, the Supreme Court also recognized the Amazon rainforest as a subject of rights in the Future Generations case studied in the following section. This judicial reasoning has been echoed by other domestic judges who have furthered the rights of nature paradigm to accord rights to different ecosystems and features of nature throughout the country, including moors, national parks and other rivers.\(^4\) As stated by Gómez-Betancur (2020), this approach strengthens environmental constitutionalism by extending protection beyond the human being to other living beings.\(^5\)

4.1.2 Children, Youth and Future Generations

Usually, the judicial apparatus is set into motion by adults. Children and youth are often regarded as mere victims, whose rights need to be protected by adults who file actions on their behalf. However, in recent years children and youth have started to take matter into their own hands appearing before the courts and international negotiation bodies to demand protection of their rights.\(^6\) They have also brought up the need to protect the rights of generations yet to come, especially as it relates to the enjoyment of a healthy environment as a precondition to the enjoyment of other human rights.\(^7\)

One of the first decisions adopted in favor of children, youth and future generations’ rights is the 2018 Colombia’s Supreme Court decision known


as the Future Generations case. 98 Plaintiffs in this case are 25 children and adolescents, in tandem with Dejusticia (a Colombia-based social justice and legal NGO), who sued the Colombian government and several corporations as a result of the government’s failure to comply with its international commitment derived from the Paris Agreement and other international law to ensure net-zero Amazon deforestation by 2020. 99 Plaintiffs filed a tutela asserting that this failure to comply amounts to a violation of their and future generations’ fundamental rights to life, health, human dignity and the right to a healthy environment. 100 The Supreme Court recognized a substantial link between the government’s inaction regarding its commitment to reduce deforestation, GHG emissions and the plaintiffs’ fundamental rights. Furthermore, the Supreme Court invoked the principle of solidarity to conclude that every generation is entitled to environmental rights, whose protection is endowed by the responsibility of present and past generations.

The Supreme Court’s rationale is supported on the recognition of the ‘Other’ as a rights-bearing entity that extends not only to every other person, animal or plant species on the planet, but also to future generations. 101 The Supreme Court emphasized that the rights of future generations to access natural resources should be protected from violation. 102 In doing so, the Supreme Court developed a dual reading of environmental intergenerational equity: on the one hand, it is based on the ethical duty of solidarity, and on the other on nature’s intrinsic value, 103 particularly the Amazon basin deemed the ‘world’s lung’. 104 Hence, the Supreme Court recognized the Amazon basin as a subject of rights that is a vital ecosystem of global importance. The Supreme Court then concluded that the Colombian state’s failure to curb deforestation violated human rights and international climate commitments, such as the Paris Agreement, of present and future generations. 105
The Future Generations case was a pioneer and served as a blueprint for other youth climate lawsuits. More importantly, the case opened the door to substantially expanding constitutional provisions to future generations, following the country’s progressive and transformational judicial constitutionalism.\textsuperscript{106} Generations yet to come are now recognized as right bearers, entitled to environmental rights, thus expanding protection to previously unprotected subjects.

4.2 Coherent Constitutionalism: the Opportunities and Pitfalls of Colombia’s Environmental Constitutional Expansionism

Colombia’s rights expansionism is constantly evolving. Every year, new tutelas are filed, creating new opportunities for judicial transformative activism. But despite its many promises, constitutional rights expansionism also confronts some hurdles. This section will provide an overview of both benefits and challenges of constitutional expansionism as it relates to environmental rights protection from a Colombian perspective. This overview is not exhaustive but aims to outline the current state of Colombia’s constitutionalism as an avenue for future research.

As Colombia deals with socio-economic development in the midst of the triple planetary crisis, environmental issues are at the core of the country’s social conflicts.\textsuperscript{107} Environmental issues are among the most salient root causes of the internal armed conflict, which has lasted more than five decades.\textsuperscript{108} Unequitable access to land and natural resources fueled the conflict, and the climate and environmental crises exacerbate these precarious conditions.\textsuperscript{109} Furthermore, historically marginalized communities remained excluded from decision-making spaces while suffering the hardest consequences of...
the climate and peace crises.\textsuperscript{110} The country finds itself in a constant tension between its over-reliance on extractivism and natural resource exploitation to support its economy and peace building, and environmental protection as a hub of biological and cultural diversity.\textsuperscript{111}

Perhaps as a result, environmental constitutional expansionism appears as a way to coherently address the conflation of these complex problems. Particularly, in the aftermath of the recognition of the Atrato river as a subject of rights, and despite some implementation issues, the river’s legal guardians have noticed a significant improvement in policymaking. The CC’s ruling acknowledged the multiple forms of life expressed through cultural diversity and sought to integrate them to the ecosystem and territories’ diversity.\textsuperscript{112} Protection of one (biodiversity) would undoubtedly imply protection of the other (cultural diversity). Thus, environmental governance in Colombia is experiencing changes that move towards a more inclusive governance model where environmental protection is deeply intertwined with cultural protection.\textsuperscript{113} Formerly marginalized communities are taking center stage in the collective construction of the plans to restore the Atrato river’s ecosystem.\textsuperscript{114}

Likewise, the intergenerational plan envisioned by the Supreme Court to protect the Amazon basin from deforestation is expected to conflate different voices, especially from those most affected and historically neglected.

Moreover, Colombia’s environmental constitutional expansionism seems to aim towards protection of the environment in and of itself, but also in relation to its importance to the enjoyment and realization of other human rights. This expansionism aims to tackle intra-and intergenerational justice, seeking to guarantee the rights of present and future generations in the context of the climate crisis and social conflict. Protecting the rights of subjects previously outside of the dominant gaze (nature, children, future generations, armed conflict actors, etc.) could prevent fueling new and old conflicts, while achieving climate-related goals. Nonetheless, further research and discussion is needed to fully understand the effects of granting rights to nature on the existing fundamental and human rights, particularly those of marginalized communities.


\textsuperscript{111} Gómez Betancur et al., n 93 at 770.

\textsuperscript{112} Wesche, n 92 at 539.

\textsuperscript{113} Ibid., at 540, 544.

\textsuperscript{114} Ibid., at 547.
Constitutional expansionism needs to be studied with caution. Unrestricted rights expansionism may result in a rights overreach that could eventually have the undesired effect of rendering rights ineffective or unenforceable. As mentioned, the Colombian system of fundamental rights is inherently open, which allows an expanding body of rights granted sufficient legal grounding and reasoning. Generally, fundamental rights are a powerful means to protect and promote human dignity, and rights operate on interpretation and the creation of norms.\textsuperscript{115} As society evolves, it is not only expected but necessary that the bill of rights evolves with it to ensure human dignity remains shielded.

Some critics argue that this openness should have limits, otherwise we may risk denaturation and weakening of the concept of fundamental rights.\textsuperscript{116} Scholars state that an unrestricted proliferation of rights could diminish human dignity by affecting the separation of powers or states’ capacity to guarantee fundamental rights.\textsuperscript{117} Openness implies an active judiciary role, which could overstep other government branches affecting the overall constitutional fiber. Scholars have warned against judicial activism that oversteps other branches of the government threatening democratic institutions.\textsuperscript{118} Additionally, new rights impose burdens and demands on the state powers that if unmet, may hinder the protection of rights as a whole.\textsuperscript{119} New rights could also threaten other fundamental rights by diluting their significance.\textsuperscript{120} Nonetheless, these challenges do not imply that rights should be static or reduced (as they are in the United States). Rights are, and should be, open and dynamic. An active and progressive judicial approach is beneficial, especially if done within the framework of constitutionalism. These concerns may be overcome by approaching openness with caution and allowing it to evolve progressively and in alignment with other rights obligations. Future research could develop criteria to test emerging constitutional rights and how they interplay with existing rights in a way that is coherent.

\textsuperscript{116} Ibid., at 34.
\textsuperscript{117} Ibid.
\textsuperscript{119} Netto, n 114 at 35.
\textsuperscript{120} Ibid., at 37.
5 Conclusion

The creativity and forcefulness of the Brazilian and Colombian judiciaries, in the service of climate protection, is a model of human and environmental rights protection, though not one that the United States courts are likely to adopt any time soon. The Brazilian court imagined new legal relationships between the different levels of government necessary to commit to the environmental rule of law, holding that an environmental treaty aimed ultimately at protecting human rights globally, was binding on the national sovereign authorities; it integrated the commitments made internationally into a holistic and comprehensive vision of the nation’s constitutional commitments to its own people and to the world. For their part, the Colombian courts have reimagined how different stakeholders, including human and non-human rightsholders, could all be integrated so that a multiplicity of interests and perspectives converge in the service of environmental protection for present and future generations. The United States, meanwhile, holds fast to its antiquarian view of what people can expect of their government but may, in the end, find its own way to mitigate the impacts of climate change by incentivising changes in behavior from the ground up and through the entire social economy.

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