Comparative Constitutional Design: Northern Stagnation, Southern Innovation

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I. Introduction

It is hard to overstate the intellectual renaissance of comparative constitutional law over the last two decades. From its beginnings as a relatively obscure and esoteric subject studied by a devoted few, comparative constitutionalism has developed into a thriving area of contemporary legal scholarship, and has become a cornerstone of constitutional jurisprudence and constitution-making worldwide.¹ Since the adoption of the *Canadian Charter of Rights and Freedoms*, Canadian constitutional innovation, constitutional jurisprudence, and constitutional thought have acquired highly respectable status in shaping the comparative field’s new face.²

And yet, despite this tremendous renaissance, some challenges persist. In an earlier work, I suggested that the field of comparative constitutional law tends to draw on “a small number of overanalyzed, ‘usual suspect’ constitutional settings and court rulings.”³ The constitutional spheres in the US, the UK, Canada, and Germany are honorable members of that commonly (to put it mildly) explored “platinum club.” With notable exceptions such as South Africa,

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3 Hirschl, *Comparative Matters*, supra note 1.
India, and Colombia (frequently invoked supposed posterchildren of “Global Southness”), much of the so-called Global South is infrequently explored or represented. Consequently, “the constitutional experiences of entire regions … remain largely uncharted terrain, understudied and generally overlooked.”4 Unfamiliarity with (and possibly even disregard of) pertinent constitutional and jurisprudential developments in Global South settings further establishes an overarching presumption of a supposed one-way flow of new constitutional ideas from the Global North to the Global South. The question here is how truly “comparative” or generalizable is a body of knowledge that seldom draws on or refers to the constitutional experience, law, and institutions of the Global South? A similar sentiment has been echoed and further advanced by other authors.5 The shortcoming has been somewhat mitigated in recent years, with an increasing number of works focusing on democratic backsliding and constitutional retrogression. Even so, here too only a few constitutional settings (e.g. Hungary and Poland) have become the routine, and thus near-cliché reference points for any discussion in that area.

The “unofficial canon” phenomenon poses a set of normative, epistemological, and methodological challenges for a field that purports to advance universal, generalizable, scientifically sound insights. When it comes to materializing the potential of comparative constitutional inquiry, however, extensive focus on a dozen frequently explored constitutional settings is not only a matter of failure in terms of representation, fairness, or justice, but also a missed opportunity to engage with a living laboratory of constitutional innovation concerning some of the greatest challenges of our time. Unlike the largely stagnant national constitution-making enterprise throughout much of the Global North, many of the most daring and innovative constitutional experiments concerning issues such as climate change, urbanization, and democratic renewal have taken place in the Global South. Yet, the vast majority of these settings lie well beyond the contours of the oft-studied comparative constitutional “canon.”

II. Two Illustrations: Climate Change & Urbanization

Consider climate change and environmental protection — arguably the most significant global challenge currently facing humanity. As early as 1994, the revised Constitution of Argentina included an unalienable right to a healthy environment. Article 41 states that:

… all inhabitants enjoy the right to a healthful, balanced environment fit for human development, so that productive activities satisfy current needs without compromising those of future generations, and have the duty to preserve the environment. Environmental damage shall generate as a priority the obligation to repair it under the terms that the law shall establish.

Article 43 of the Argentinian Constitution then further frames environmental rights as collective rights and provides for the acción de amparo (an appeal for the protection of constitutional rights and guarantees) and for class action litigation (lawsuits regarding collective

4 Ibid.
rights that can be filed by those affected by environmental pollution or risks, by the National Ombudsman, and by civil associations representing diffuse interests).  

In 2008, Ecuador became the first country to enshrine the rights of the environment itself in its Constitution. Article 71 is dedicated to Pachamama (Andean "Mother Earth"), providing for Nature's right to:

… integral respect for its existence, the maintenance and regeneration of its life cycles, structure, functions and its evolutionary processes … All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature … The State shall give incentives to protect nature and to promote respect for ecosystems.

Article 414 states that: “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.”

As of 2022, the national constitutions of ten countries — all in the Global South — have followed Ecuador’s precedent. Neighboring Venezuela (2009) and Bolivia (2009) adopted constitutional provisions on the duty of the state and present generations to future generations. Vietnam (2013), Tunisia (2014), and the Dominican Republic (2015) similarly outlined the state’s policy to protect the environment and respond to climate change. Zambia (2016) included a broad commitment to implement mechanisms to address climate change. Thailand (2017) provided for a national reform of water resource management to respond to climate change. Cuba’s (2019) climate clause is explicitly framed by language vowing to respond to climate change as part of a commitment to “anti-imperialism,” a more “equitable international economic order,” and the “eradication of irrational patterns of production and consumption.” Both Côte d’Ivoire (2016) and Algeria (2020) include a commitment to climate protection in their constitutional preambles. To be sure, politics plays a key role in any constitutional transformation; not all, or even most, of these constitutional commitments were driven by genuine care for the environment. Nor does inclusion in constitutional text guarantee effect. But the fact remains that these innovations provide constitutional drafters and constitutional scholars alike with a range of new design options to consider.

At the sub-national level too, the environmental protection agenda has taken hold. The Constitution of Mexico City (an autonomous state within the Mexican confederation since 2017), to pick one example, states that “[t]he City-State Government will develop a long-term plan for adaptation to climate change” (Art 16 I (2)); that “the authorities shall guarantee the right to a healthy environment … [and] apply the necessary measures to reduce the causes, prevent, mitigate and reverse the consequences of climate change” (Art 16A(4)); and that “[e]nvironmental damage or deterioration generates liability. Those who cause them are obliged to compensate and fully repair the damage, without prejudice to criminal or administrative sanctions established by law” (Art 16A(7)).

7 Constitution of Cuba (2019), Art 16(f).
Trends in constitutional jurisprudence parallel the adoption of climate clauses, and most cases taking a constitutional rights-based approach to climate litigation are found in the Global South. A textbook illustration is the 2018 Colombian case of *Future Generations v Ministry of the Environment and Others*. Here, 25 youth plaintiffs sued the Colombian government, alleging that its failure to take steps toward a target of net-zero deforestation in the Colombian Amazon by 2020 (as agreed under the Paris Agreement and the National Development Plan 2014–2018) threatened their fundamental rights. The Colombian Supreme Court of Justice, analyzing the Constitution from a “green” perspective, elevated the environment to the category of a fundamental right. The Court recognized that the rights of life, health, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem.

While not, strictly speaking, in the constitutional realm, another clear indication of the Global South’s lead in climate change jurisprudence is the recent Supreme Court of Brazil ruling (in June 2022) recognizing the Paris Agreement as a human rights treaty. Such a designation — the first of its kind concerning the Paris Agreement worldwide — establishes a basis for requiring the federal government to reactivate its national climate fund and allocate resources from it to fight extensive deforestation in Brazil, acknowledged by the Court as a major source of emissions and as jeopardizing attempts to effectively fight climate change. In January 2023, to pick another recent example, Chile and Colombia filed a request for an advisory opinion from the Inter-American Court of Human Rights regarding the scope of state obligations for responding to the climate emergency under the frame of international human rights law. The request acknowledged the human rights effects of the climate emergency, especially highlighting the vulnerability of communities and ecosystems in Latin America. In this line, Colombia and Chile emphasized the need for regional standards to accelerate action to confront climate change.

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9 In *Juliana v United States*, 947 F.3d 1159 (9th Circuit 2020), the Ninth Circuit dismissed a roughly similar claim by 21 young plaintiffs and the environmental organization Earth Guardians, who argued that the federal government’s failure to adequately address climate change violated their constitutional rights to life, liberty, and property (similar to *Future Generations* above). The case was dismissed for lack of Article III standing because the plaintiffs’ requested relief (requiring the federal government to implement a plan to phase out fossil fuel emissions) involved policy decisions delegated to the executive and legislative branches. This reversed Judge Aiken’s 2016 decision for the US District Court for the District of Oregon, which held that “a right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”
10 *PSB et al v Brazil*, STF, ADPF 708, 01.07.2022 (Braz). The national climate fund was established in 2009; however, in 2019 the Bolsonaro administration failed to allocate the available resources from it, thereby making the fund inactive. See Isabella Kaminski, “Brazilian court world’s first to recognise Paris Agreement as human rights treaty”, (July 7, 2022), online: Climate Change News <https://www.climatechangenews.com/2022/07/07/brazilian-court-worlds-first-to-recognise-paris-agreement-as-human-rights-treaty/> [perma.cc/8685-3G2V].
In contrast, there has been limited constitutional innovation with respect to climate change and environmental protection in national constitutions of the Global North. The US Supreme Court ruling of June 30, 2022 in *West Virginia v Environmental Protection Agency* speaks for itself. Consequently, efforts to tackle the climate change challenge now focus on macroeconomic instruments rather than on the constitutional arena. France’s failure to hold a constitutional referendum on a climate amendment in 2021 further illustrates the Global North’s disparate experience in constitutionally addressing climate change. Iceland, poised for potential “crisis-change” amendments in the aftermath of the 2008 financial crisis, failed to reach a consensus among opposing political parties on new constitutional provisions. No climate clause was adopted.

An important breakthrough may emanate from the jurisprudential front, however. In its landmark ruling in the *Urgenda* case (2019), the Dutch Supreme Court upheld lower court rulings stating that the Dutch government has a duty to urgently and effectively slash the country’s planet-warming emissions. Specifically, the Court ordered the government to set higher emissions reduction targets in accordance with the UN Intergovernmental Panel on Climate Change (IPCC) and the goals of the 2015 Paris Agreement. *Urgenda* was also the first ruling to hold a government legally accountable for its international commitments and national targets regarding emissions cuts. The Court referenced pertinent constitutional provisions and cited many other facets of law — both national and regional — as definitive of the obligation. A couple of years later, in its landmark ruling in *Neubauer et al v Germany* (March 2021), the German Federal Constitutional Court (FCC) struck down parts of Germany’s *Federal Climate Protection Act* as they set insufficient greenhouse gas emissions reduction targets.

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12 While the Global North holds the majority of climate cases globally, only a handful have been based on constitutional claims. See Jacqueline Peel & Jolene Lin, “Transnational Climate Litigation: The Contribution of the Global South” (2019) 113 Am J of Int’l L 711, 711-12. Though not, strictly speaking, a constitutional law case, the recent landmark European Court of Human Rights ruling in *KlimaSeniorinnen v Switzerland* (Application 53600/20; decision released April 9, 2024) may signal a new departure in that respect, at least with respect to the pan-European quasi-constitutional context. In a nutshell, the Court found that Article 8 of the European Convention on Human Rights encompasses a right to effective protection by state authorities from the serious adverse effects of climate change on lives, health, well-being, and quality of life. It held, *inter alia*, that the Swiss Confederation had failed to comply with its duties under the Convention concerning climate change (e.g. setting concrete national greenhouse gas emissions limitations). It also found that the applicants — a group of elderly Swiss women — had not had appropriate access to justice in Switzerland.

13 *West Virginia v Env’t Prot Agency*, 142 S Ct 2587 (2022).

14 See, for example, the US *Inflation Reduction Act* (2022), which included what is widely acknowledged as the most significant single government investment in history in tackling the climate crisis.

15 An attempt to anchor climate protection in the constitution failed in July 2021, as the Senate and the National Assembly could not agree on a common wording for the constitutional amendment. The proposed amendment was one of the main recommendations of a special citizens’ climate assembly summoned in 2020 by President Macron.

16 *Urgenda Foundation v Netherlands*, Case Number 19/00135, Dec 20, 2019 (Netherlands). The ruling emanated from a suit filed by a Dutch environmental group, the Urgenda Foundation, alongside 900 Dutch citizens that required the Dutch government to do more to prevent global climate change. The court ordered the government to set emissions reduction targets to 25% below 1990 levels by 2020, finding the government’s existing pledge to reduce emissions by 17% was insufficient to meet the country’s fair contribution toward the UN goal of keeping global temperature increases within two degrees Celsius of pre-industrial conditions.
beyond 2030, thereby failing to properly consider future generations’ constitutional rights to life and physical integrity.17 However, in the follow-up case, the FCC refused to hear the claim that subnational-unit climate change legislation was insufficient, noting that the constitutional complaints lacked “any prospect of success.”18 It determined that, while the federal government is obligated to implement emissions reduction targets, this obligation does not exist at the state-level. A second follow-up case, *Steinmetz et al v Germany*, was filed in 2022, with claimants arguing there that the emissions reduction measures taken by the federal government post-*Neubauer* are insufficient.

Interestingly, even in the realm of commitment to future generations in matters related to climate change and environmental protection — where the aforementioned German Federal Constitutional Court ruling in *Neubauer* is often considered groundbreaking — one of the first pertinent apex court rulings emanates from the Global South: the Supreme Court of the Philippines’ 1993 decision in *Minors Oposa v Factorani*.19 Here the Court accepted a petition against massive deforestation schemes, based on Section 16 of Article II of the Constitution, which provides that the “State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.” In its ruling, the Court acknowledged that in the context of deforestation’s considerable environmental damage, “every generation has a responsibility to the next to preserve [nature’s] rhythm and harmony.”20

In the related area of Indigenous rights over customary forests too, novel constitutional ideas come from the Global South. In 2012, to pick one example, the Constitutional Court of Indonesia went further than most of its Global North counterparts in recognizing that Indigenous people in that vast country are entitled to the rightful ownership of customary forests across the nation. In ruling that forest lands occupied by customary communities should not be automatically classified as state land, the court drew on domestic constitutional and legal provisions, as well as on principle 22 of the 1992 Rio Declaration, which recognized Indigenous peoples’ important role in the management and development of the environment due to their traditional knowledge and practices.21

Another vivid illustration of the “Southern innovation” pattern in contemporary constitutional design is the North/South constitutional split concerning urbanization and cities. Urban agglomeration is one of the most significant phenomena of our time. The figures are striking: within the last century, the world’s urban population has increased nearly thirtyfold;22 UN projections suggest that by 2100, the world’s 100 largest cities will host a quarter of the

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17 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], March 24, 2021, Case no BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (Ger).
18 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], January 18, 2022, Case no 1 BvR 1565/21 (Ger).
20 Ibid at 185.
22 In 1900, approximately 150 million people — representing fewer than 10 percent of the world population at that time — lived in cities, while 90 percent lived in non-urban settings. As of 2021, approximately 4.5 billion people, or 57 percent of the world population, live in cities. See Richard Briffault, “The New
planet’s population. Megacities of 50 million or even 100 million inhabitants will emerge by the end of the century, mostly in the Global South. In many Global South megacities, density has already reached near-dystopian levels.\(^\text{23}\) In short, what has been termed the “urban era” and “the century of the city” marks a major and unprecedented transformation of the organization of society, both spatially and geopolitically.

Although we live in the century of the city, comparative constitutional studies, let alone mainstream constitutional theory and its overarching Global North tilt, are still the captives of constitutional structures, doctrines, perceptions, and expectations that were developed alongside the modern nation-state and evolved in a historical process that saw the sovereign city become increasingly subjugated to those states. Most current constitutional orders and virtually all those adopted prior to the great urbanization of the last few decades treat cities — including some of the world’s most significant urban centres — as “creatures of the state,” fully submerged within a Westphalian constitutional framework, and assigned limited administrative local governance authority.\(^\text{24}\) The constitutional orders of the US and Canada are “exhibit A” and “exhibit B” in the constitutional oversight of cities and the subjugation of the urban to a dated spatial constitutional imagination.

American cities, for example, lack constitutional personality and are at the mercy of state governments. Doctrines formulated in the nineteenth century (such as Dillon’s Rule and the Cooley Doctrine) and endorsed by the US Supreme Court in the early twentieth century continue to govern the constitutional status of American cities today (see Atkin v Kansas [1903] and Hunter v City of Pittsburgh [1907], for example).\(^\text{25}\) American constitutional jurisprudence on city power therefore represents a small fraction of the country’s federalism case law. Meanwhile, America’s dated yet rigid constitutional structure equips states with the powers to draw electoral district boundaries in a way that frustrates urban representation and, most importantly, allows state legislatures to “preempt” or override city legislation.\(^\text{26}\) Several states have also enacted laws that prohibit cities from joining international city networks. Cities and urbanization are largely absent from the voluminous American federalism literature, too. As

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\(^{23}\) In Dhaka and Manila, for example, city-wide density is approximately 120,000 people per square mile. It is five times denser than New York City, seven times denser than Hong Kong, 12 times denser than Paris, 16 times denser than Toronto, and nearly 30 times denser than Melbourne. If the entire world population (approximately eight billion) lived in similar density conditions as Dhaka or Manila, it would fit within an area the size of Oklahoma.

\(^{24}\) For a full account of these trends, see Ran Hirschl, *City, State: Constitutionalism and the Megacity* (Oxford: Oxford University Press, 2020).

\(^{25}\) Formulated by jurist John Dillon in the 1860s, Dillon’s Rule (applied in 40 US states) requires that all exercise of city power be traced back to a specific legislative grant of authority. The presumption is that cities do not have legislative authority unless it is explicitly granted to them through an identifiable piece of legislation. The so-called Cooley Doctrine stipulates that in “home rule” jurisdictions (10 US states) an article of amendment in the state constitution grants cities and municipalities law-making power to govern themselves as they see fit, provided they comply with state and US constitutions. In practice, however, even in states that follow the home rule principle, legislatures can (and often do) override municipal laws with ordinary legislation.

Heather Gerken writes, “American federalism scholars have typically confined themselves to states, the only subnational institutions that possess sovereignty.”

Lacking any direct constitutional powers, cities and municipalities in Canada, to give another example, exist only as bodies of delegated provincial authority, entirely dependent on provincial legislation for their power and sources of revenue. Large Canadian cities, the frontline delivery agents of Canadian multiculturalism and social integration — hallmarks of Canada’s constitutional identity — are governed by a constitutional division of powers that dates back to 1867 (at which time Metro Toronto’s population was less than fifty thousand; today it is 7.5 million). In this reckoning, “municipal institutions” are creatures of provincial governments, controlled exclusively by provincial authority (through section 92 of the Constitution Act, 1867) alongside “charities,” “eleemosynary institutions” (nonprofits), “shops,” and “saloons and taverns.” Constitutional jurisprudence has followed suit. A recent landmark Supreme Court of Canada ruling, Toronto (City) v Ontario (Attorney General) (2021), for example, confirmed a provincial premier’s constitutional authority to slash in half the number of city council seats, even while a municipal election campaign was already underway.

When we turn our gaze to constitutional orders in the Global South, a different picture emerges. Major attempts to bolster the constitutional status of cities have taken place in Global South countries as diverse as Brazil (1988) — the first national constitutional system to recognize Henri Lefebvre’s Right to the City [Le droit à la ville]; India (the 73rd and 74th amendments, 1992); and South Africa (1996) — arguably the most extensive constitutional design experiment to date in the context of nation-wide constitutional empowerment of cities.

In this regard, Article 40(1) of the South Africa Constitution (1997) holds that “government is constituted as national, provincial, and local spheres of government which are distinctive, interdependent and interrelated.” Chapter 7 (sections 151–164) of the Constitution further marks a fundamental shift away from the pre-1996 order. This chapter builds upon and operationalizes Article 40(1) by giving municipalities the ability to legislate and administer regulations in a number of areas (e.g. municipal planning, health services, public transport, trade), and, more importantly, the by giving them the ability to raise funds in these areas, subject to some oversight by provincial and national governments. The contrast with the constitutional non-status of cities in the US and Canada is striking.

At the same time, we have seen the constitutional empowerment of large cities in both federal countries in the Global South (typically by designating them as autonomous states,

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28 Two of Canada’s largest cities — Toronto and Vancouver — are, respectively, the world’s first- and third-most diverse cities, with 49 percent of Toronto’s population and 41 percent of Vancouver’s population born outside of the country.
29 Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss 92(7) & 92(9).
31 An array of additional constitutional provisions (e.g. Arts 5, 43, 153, 184, 187) further protect rural land, rural property, and the rights of rural area dwellers, with Art 194.2 of the Constitution of Brazil establishing “uniformity and equivalence of benefits and services for urban and rural populations.”
as with Mexico City, Buenos Aires, and Addis Ababa) and formally unitary countries such as South Korea, Vietnam, China, and Taiwan. While not all the attempts in the Global South to constitutionally bolster city status have proven equally successful (some in fact have been outright failures, India being a notable example), the fact remains that constitutional innovation in this key area occurs almost exclusively outside of North America or Europe.

A similar pattern is evident when we look at the closely related issue of the urban/rural divide — one of the most significant social, economic, cultural, and political rifts of our time. Here, too, constitution-drafters in the Global South have taken the lead in institutionalizing formal constitutional recognition of the urban/rural divide in national constitutions as a response to the rural experience of feeling “left behind.” In several Global South constitutional orders, direct reference is made to the need to balance urban and rural interests. In other Global South settings, most notably in Latin America, the “rural” intersects with other constitutionally recognized categories, notably peasant and Indigenous populations.

For example, Article 147.2 of the Bolivian Constitution further commits the state to “proportional participation of the nations and rural native indigenous peoples shall be guaranteed in the election of members of the assembly.” Article 147.3 states that the law “shall define the special districts of the rural native indigenous peoples, in which population density and geographical continuity shall not be considered as conditional criteria.” Article 126 of the Constitution of Panama (1972, revised 2004) states that the law shall “establish means of communication and transportation to link rural and indigenous communities with centers of storage, distribution and consumption.” Article 119 (“Obligations of the State”) of the Constitution of Guatemala (1985, revised 1993) commits the state to “actively promote programs of rural development which tend to increase and diversify the national production based on the principle of private property and of the protection of family patrimony. The peasant [campesino] and the artisan must be provided with technical and economic assistance.”

Furthermore, the core economic objectives listed in the constitutions of at least two dozen countries in Africa and Asia include improvement in the quality of life in rural communities and redressing economic imbalances between rural and urban communities. The Constitution of The Gambia (1996, revised 2018), lists “improvement in the quality of life in rural communities and redressing economic imbalances between rural and urban communities”

32 The Constitution of South Korea, for example, establishes 17 subnational units, of which eight are designated “first-level” cities (including Busan, Daegu, Gwangju, Incheon, and Seoul), with Sejong as a special self-governing city.

33 A notable exception is Italy, where a motley reform in this area has taken place. The constitutional status of cities in several other European countries (e.g. Spain, Germany, Switzerland) is stronger than their status in either the US or Canada, though even in those countries, it does not reach the level of recognition granted to cities by the South African Constitution.


35 Key international declarations such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) and the Declaration on the Rights of Peasants (UNDROP, 2018) — officially titled the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas — further illustrate the frequent overlap in the formal recognition of the “rural” with categories such as peasant and Indigenous populations living in remote geographic and economic hinterlands.
Article 215.3 among the country’s economic objectives. Article 236 of the constitution of Egypt (2014) expressly commits the state to “develop and implement a plan for the comprehensive economic and urban development of border and underprivileged areas.” Article 36.2 of the Constitution of Ghana (1992, revised 1996) commits the government to “undertaking even and balanced development of all regions and every part of each region of Ghana, and, in particular, improving the conditions of life in the rural areas, and generally, redressing any imbalance in development between the rural and the urban areas.” Likewise, Uganda’s Constitution (1995, revised 2017) states that “the State shall take necessary measures to bring about balanced development of the different areas of Uganda and between the rural and urban areas.” Similarly ambitious commitments to address the urban/rural divide are made in the constitutions of several Asian countries.36

Southern innovation in addressing the urban/rural challenge goes even further, however. One obvious characteristic of what counts as “urban” or as “rural” is high and low human density. An interesting possibility in this context is to give people living in dense inner-city neighborhoods or remote rural areas added power in key policy decisions related directly to the density conditions in which they live. We can plausibly speculate that these measures — when applied to policy issues directly affected by very high or very low density — hold some potential in alleviating alienation in both poor, densely populated city neighborhoods and left-behind, sparsely populated rural areas. The idea of varying democratic voice based on density is also likely to increase pressure on elected officials to pay attention to the grievances of those whose quality of life and range of opportunities are affected.

This idea is not purely hypothetical. Initial experimentation with density-sensitive representation matrices is already endorsed by several national constitutions worldwide. As of 2021, 27 national constitutions — 25 of which are of countries in the Global South — recognize density-based deviation from the baseline principle of equal number of voters per electoral district in order to enhance representation of high-density neighborhoods in cities or remote, sparsely populated regions. A few recent examples include the constitutions of Sierra Leone (2013), Nepal (2015, revised in 2020), Jamaica (2015), the Dominican Republic (2015), Botswana (2016), Malawi (2017), Uganda (2017), and The Gambia (2020). Likewise, the constitutions of several small island nations (e.g. the Bahamas, Trinidad & Tobago, Saint Vincent and the Grenadines, St Lucia, and Tuvalu) entrench enhanced representation for sparsely populated areas. In Nepal, to pick one example, a constitutionally protected (and non-challengeable for twenty years) corrective of 10 percent in seats allocation is granted to sparsely populated provinces where the proportional space share far exceeds the overall population share. Consequently, the province of Gandaki, with 15 percent of the country’s total area but only 9 percent of the population, has 11 percent (18) of the seats in parliament (165). Likewise, the province of Karnali, with 18 percent of the territory and 6 percent of the population, has 7.2 percent (12) of the seats in parliament.37

37 Article 286(5) of Nepal’s revised Constitution (2020) states that: “While determining election constituencies pursuant to this Article, the Election Constituency Delimitation Commission shall, subject to sub-clause (a) of clause (1) of Article 84, determine the constituencies in a Province in accordance with
The list of recent Global South constitutional innovations goes on and on. Some of these initiatives have been more successful than others. From experimenting with constitutionally entrenched gender equality quotas across government and the public sector (e.g. Kenya\(^{38}\)) to embarking on massive public participation campaigns of constitution-making at the national level (e.g. Brazil, Uganda, South Africa, Fiji, Mongolia, and more recently the large-scale public input in constitution-making in Chile and the current constitutional renewal process in Jamaica) or at the local level (e.g. extensive solicitation of public input in the constitutional transformation of Mexico City from a federal district to an autonomous state within the Mexican confederation, which is the largest constitution-making crowdsourcing at the local/municipal level to date), Global South constitution-making, politically subservient as it sometimes is, is filled with fresh ideas and daring experimentation.\(^{39}\) While experimentation with public participation in constitution-making certainly occurs in the Global North too (e.g. the oft-discussed yet ultimately failed crowdsourcing of a new constitution in Iceland, public consultations concerning rights protections in Australia, or experiments with citizen conventions and assemblies in Ireland), its level does not match the near-canonical status Global North constitutionalism commonly enjoys.

To reiterate, the gap between formal constitutional commitments and political realities is well documented. The innovative constitutional provisions discussed in this short essay may or may not reflect genuine political commitment to deliver the promised constitutional goods, and they certainly do not always reflect the fiscal, administrative, or enforcement capacity to effectively do so. However, for constitutional thinkers and constitutional drafters alike, these and other instances of Global South experimentations with what is sometimes termed “transformative constitutionalism” do provide a valuable arsenal of novel constitutional design options that seldom attracts the scholarly interest it deserves.

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\(^{38}\) Article 27(8) of the Constitution of Kenya (2010) states: “The State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.” Article 81(b) stipulates that the electoral system shall comply with the principle that “not more than two-thirds of the members of elective public bodies shall be of the same gender.”

\(^{39}\) Interestingly, and counter to the widespread discourse on democratic backsliding and constitutional retrogression, several recent studies point to the actual resilience of democracy in settings, many of which are in the Global South, that lie beyond the commonly addressed sites of such backsliding. See, for example, Steven Levitsky & Lucan Way, “Democracy’s Surprising Resilience” (2023) 34 J of Democracy 5. According to Levitsky & Way (at 9), “Armenia, Colombia, the Gambia, Liberia, Malaysia, Moldova, Nepal, Senegal, Sierra Leone, and Sri Lanka have all made democratic advances over the last fifteen years, but these cases received less attention — from both media and scholars — than such well-known backsliders as Hungary, Turkey, and Venezuela. The same is true of many unsung successes, or democracies that have survived in ‘hard places,’ such as Romania, Ghana, and Mongolia.”
III. Coda: Parts Unknown

In contrast with constitutional silence in much of the Global North concerning some of the most acute challenges facing humanity in the twenty-first century, many Global South national constitutional settings have served as innovation labs for addressing these challenges. What may explain this trend? One obvious factor is necessity. The effects of climate change or extensive urbanization are considerably more pronounced in the Global South. A second factor is constitutional newness or susceptibility to change. It is plausible to assume that constitutional orders adopted in the late twentieth century onward — virtually all Global South constitutions referenced here fit that bill — are more likely to address the environmental challenge or the urban challenge than are older constitutional orders. It is likewise plausible that constitutional orders that are more amenable to change (for example, through flexible amendment structures) are more likely to effectively address new challenges than constitutional orders that are dated yet rigid and near-impossible to change. A third factor is politics. It is hard to envision significant constitutional renewal, whether through revolution, replacement, or amendment, without the considerable support, genuine or strategic, of political leaders, political elites, pertinent constituencies, and other key stakeholders.

Either way, if we are serious about the potential of constitutional design to offer effective remedies to some of the burning challenges of our time, closer attention to Global South constitutionalism is the call of the hour. This is not merely or even primarily a matter of justice or representation. Rather, it is a matter of practical utility. Alongside other non-canonical constitutional orders (e.g. supranational, sub-national), the Global South constitutional universe has become a bustling lab of innovation that is in many respects more promising than its Global North counterpart. To remain relevant, constitutional design scholars not only have to take core challenges such as climate change or urban agglomeration more seriously. They must also set their gaze southward.