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# Cities in National Constitutions: Northern Stagnation, Southern Innovation

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Ran Hirschl



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TORONTO

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*By*  
Ran Hirschl

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# Cities in National Constitutions: Northern Stagnation, Southern Innovation

Ran Hirschl

## **Abstract**

In contrast with the constitutional silence concerning urban agglomeration and the stalemate with respect to city status in most Global North settings, several countries in Asia, Latin America, and Africa have generated new ideas about the constitutional governance of the metropolis and of the urban/rural divide more generally. In this paper, I explore what national constitutions around the world say (and do not say) about cities, before examining three of the most ambitious attempts to date to bolster the constitutional status of cities. These are the adoption in 1992 of the 73rd and 74th amendments to the Constitution of India; the protection of city status in the constitution of Brazil (1988) and its support through the City Statute (2001); and the inclusion of a chapter in South Africa's post-apartheid constitution (1996) devoted to cities as an order of government. The comparative analysis suggests that South Africa's constitutionalization of city power is arguably the most effective of these attempts. In India and Brazil, constitutional experimentation with city emancipation has proven less effective, often succumbing to deeply engrained intergovernmental hierarchies and blatant political manoeuvring. Taken as a whole, this paper highlights the significance of necessity (the vast majority of urbanization takes place in the Global South), constitutional malleability, and, above all, political will in addressing the constitutional status of cities.

**Keywords:** cities; national constitutions; Global South; Brazil; India; South Africa

**JEL codes:** H10, H77

# Cities in National Constitutions: Northern Stagnation, Southern Innovation

## I. Introduction: A Pressing Constitutional Blind Spot

Urban agglomeration is one of the most significant demographic and geopolitical phenomena of our time. The figures are striking. In 1900, about 150 million people, fewer than 10 percent of the world's population at that time, lived in cities. As of 2020, 4.4 billion people, or 56 percent of the world's population, lives in cities. In other words, within the last century, the world's urban population has increased nearly thirtyfold.

Within that timeframe, the proportion of the world's population living in non-urban settings has shrunk from more than 90 percent to 44 percent, and is set to further shrink within the next three decades. By 2050, 7 billion people, or 70 percent of the world's population (projected at 10 billion), will reside in cities. The majority of the growth is in the Global South, but the Global North has seen its fair share of change, also at accelerating rates.

An immediate by-product of the extensive urbanization of the last century is the emergence of very large cities and urban centres; while in 1900, there were only 12 cities in the world with a million or more residents, today the number has passed 550 (Hirschl 2020). The forecasts for 2030 or 2050 – let alone for 2100 – range from the disturbing to the near-dystopian. Projections suggest that megacities of 50 million or even 100 million inhabitants will emerge by the end of the century, mostly in the Global South, with cities such as Lagos, Kinshasa, Dar-es-Salaam, Mumbai, and Karachi leading the way (see Hoornweg and Pope 2017; Samet 2013; UN Department of Social and Economic Affairs 2019). The figures further indicate that more than 95 percent of worldwide urbanization in the coming three decades will take place in Asia, Africa, and Latin America.

It is hardly surprising that the last few decades have seen a burst of novel thinking about urbanization and cities throughout the human sciences. Highlights include Henri Lefebvre's *Le droit à la ville*, Saskia Sassen's work on global cities, Paul Krugman's theorization of megacities as economies of scale, Richard Florida's ideas about cities as magnets for the creative classes, and Benjamin Barber's *If Mayors Ruled the World*, to name a few (see Lefebvre 1996; Sassen 2001; Krugman and Fujita 2000; Florida 2002; Barber 2013).

Within legal academia, scholars of international and global law have identified the inter-connectivity of the urban with national and international governance levels (Blank 2005; Nijman 2019). More specifically, they have written on the increasing involvement of cities in international policy-making, particularly in environmental protection and global climate change regimes, but also in areas such as anti-poverty, international migration, and refugee policies (see, for example, Aust 2019).

While lacking formal standing in international law, international city and mayoral networks have formed around an array of common goals, from joining the

UN-Habitat program, to vowing to implement the Paris Agreement, to demanding representation at global and pan-European policy-making forums concerning the refugee crisis. Meanwhile, progressive cities and city leaders have assumed important roles in advancing initiatives in key policy areas, such as public housing, education, undocumented migration, and climate change. Cities worldwide have declared themselves “sanctuary cities” (often with respect to migrant and refugee-related policies) or “human rights cities,” promoting and implementing various human rights protections at the municipal level (see, for example, Oomen, Davis, and Grigolo 2016).

However, very little of this innovative energy has extended into the constitutional texts, constitutional jurisprudence, or constitutional thought of the Global North. Although we live in the century of the city, we are still captives of constitutional structures, doctrines, perceptions, and expectations that were developed alongside the modern nation-state and that evolved in a historical process that saw the subjugation of the sovereign city 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<sup>1</sup> state-centred constitutional framework, and assigned limited administrative local governance authority (see generally, Hirschl and Shachar 2019). Consequently, pertinent legal discourse about cities throughout much of North America and Europe occurs largely within the confines of administrative law or municipal law, but seldom in constitutional law – commonly defined as a given polity’s supreme law.

Whereas many constitutions recognize local government, cities are rarely construed as an equal partner or as an adequate order of government within the national constitutional scheme. In some countries, notably Canada, Australia, and the United States, cities remain a non-entity, constitutionally speaking, and are subject to near-complete subnational control. What is more, most constitutions that do recognize local government fail to distinguish between small settlements and large to mega-sized cities – all are often referred to generically as “municipalities.”

But size matters a great deal in this context, as the challenges facing large metropolises are markedly different from those faced by small villages in the countryside, particularly with regard to infrastructure and service provision, transportation, housing, immigration, education, public health, environmental protection, and the accommodation and management of super-diversity typical of modern urban life. The conceptual lumping together of villages and towns with huge megacities that are home to multimillions of residents, often exceeding the population size of entire nations, reveals a lapse in constitutional thought about urbanization.

1. The Treaty of Westphalia (1648) is commonly considered a historic foundation for a state-based political order.

In contrast with the constitutional silence in most Global North settings concerning urban agglomeration and city status, the constitutional “new world” – Asia, Latin America, and parts of Africa – has generated some new ideas about constitutional governance of the metropolis and of the urban/rural divide more generally. Countries such as China and Vietnam have experimented with granting special constitutional status to major cities as part of astute long-term planning for regional development and economic growth. In dozens of other Global South countries, detailed constitutional provisions commit central governments to balancing urban and rural interests (very few such provisions exist in Global North constitutions). Meanwhile, megacities such as Buenos Aires and Mexico City were granted enhanced constitutional status, reflecting strategic manoeuvring by key political stakeholders. And, perhaps most relevant to the Canadian constitutional context, large, diverse, multi-tier-government countries such as India, Brazil, and South Africa have introduced, with varying degrees of success, new constitutional provisions aimed at bolstering the status of cities.

To be sure, the formal constitutional entrenchment of city status does not guarantee much real, on-the-ground decision-making power or democratic representation. A realization of the right to the city, however broadly or concretely defined, is at least as much a function of political will as it is of formal constitutional recognition. However, to the extent that constitutional status matters – and one must assume it does, judging by the tremendous efforts of pertinent stakeholders to trigger or prevent constitutional change – it is mainly countries in the Global South that have become a living laboratory for novel constitutional thinking on the unprecedented urban agglomeration of the last few decades.

In this paper, I explore three of the most ambitious attempts to date to bolster the constitutional status of cities:

- the adoption in 1992 of the 73rd and 74th amendments to the Constitution of India;
- the protection of city status in the constitution of Brazil (1988) and its support through the City Statute (2001);
- the inclusion of a chapter in South Africa’s post-apartheid constitution (1996) devoted to the city status.

As we shall see, South Africa’s constitutionalization of city power as part of its 1996 constitutional transformation is arguably the most effective of these attempts to date. In India and Brazil, constitutional experimentation with city emancipation has proven less effective, often succumbing to deeply engrained intergovernmental hierarchies and blatant political manoeuvring. To put that exploration in comparative perspective, I survey in the following section what national constitutions around the world say (and do not say) about cities.

## **2. The Constitutional Status of Cities: Mapping the Terrain**

In many countries worldwide, hard-wired constitutional arrangements originating from outdated concepts of spatial governance are increasingly detached from 21st-

century realities. Cities governed by constitutional orders that were adopted between the late 18th century and the 1970s do not enjoy constitutional standing as a fully-fledged order of government. This includes constitutional orders that are federal (e.g., Canada, Australia, the United States), unitary (e.g., France, Netherlands, Sweden), or somewhere in between (e.g., Spain, the United Kingdom), in North America, Europe, and Oceania as well as parts of Africa, Asia, and Latin America. Their *constitutional* statuses range from secondary to non-existent.

While about 60 percent of the national constitutions currently in effect designate their respective country's "national capital," only a small handful of these constitutions address these cities as metropolitan centres *per se*, let alone other large cities within their territorial jurisdiction. Scattered examples of non-capital city-provinces in Europe (e.g., Bremen or Hamburg in Germany, Brčko in Bosnia-Herzegovina, Basel-Stadt in Switzerland) are among the few exceptions to this rule, and virtually none is predicated on a deep, sweeping constitutional recognition of the metropolis as an autonomous or distinct order of government.

American cities, some of which are among the world's largest, lack constitutional personality, and are principally at the mercy of state governments, constitutionally speaking. Doctrines such as "Dillon's Rule" and home rule (the "Cooley Doctrine"), formulated in the mid-19th century and endorsed by the U.S. Supreme Court in the early 20th century, continue to govern the constitutional status of American megacities today (see *Atkin v Kansas* 1903; *Hunter v City of Pittsburgh* 1907).<sup>2</sup>

American constitutional jurisprudence on city power therefore represents a very 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 "pre-empt" city legislation. Leading experts on American cities' constitutional status note that states could frustrate cities' efforts to address the welfare of urban residents by implementing redistricting and rezoning to dilute local power to the suburbs (see Briffault 2018; Schragger 2018). Instances of pre-emption have increased considerably in the last decade: states have pre-empted or overridden city ordinances on issues as diverse as gun control, tobacco regulations, living wage regulations, sanctuary city policies, municipal civil rights law, LGBTQ anti-discrimination rights, posting nutritional information in restaurants, and anti-plastic and environmental protection legislation. Several states have also enacted laws that prohibit cities from joining international city networks.

2. Formulated by jurist John Dillon in the 1860s, "Dillon's rule" (applied in 40 U.S. 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. In "home rule" (the so-called Cooley Doctrine) jurisdictions (10 U.S. states), cities enjoy a broader initial grant of authority and are able to act without specific authorization. In these 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 U.S. constitutions. In practice, however, even in states that follow the "home rule" principle, legislatures can (and often do) override municipal laws with ordinary legislation.

American proponents of enhanced city power may find solace in the fact that, disempowered as American cities may be, Canadian cities easily win the title of the constitutionally weakest in North America. Lacking any direct constitutional powers, cities and municipalities in Canada exist only as bodies of delegated provincial authority, entirely dependent on provincial legislation for their power and sources of revenue. Large Canadian cities, the front-line delivery agents of Canadian multiculturalism and social integration, are governed by a constitutional order that dates back to 1867 (at which time Toronto's metropolitan population was less than 50,000; today it is 7.5 million).

In this reckoning, "municipal institutions" are creatures of provincial governments, controlled exclusively by provincial authority (through s. 92 of the *Constitution Act*, 1867) alongside "charities," "eleemosynary institutions" (non-profits), "shops," and "saloons and taverns."<sup>3</sup> Since 85 percent of Canada's population lives in cities, and more than 50 percent of the nation's population is concentrated in six metropolitan areas, it would be something of an understatement to say that the constitutional non-status of cities in 21st-century Canada reflects serious constitutional datedness. And Canada is purportedly one of the world's leading constitutional democracies, featuring abundant scholarly awareness for and legal recognition of diversity and differentiated citizenship. This democracy deficit may violate some of the country's constitutional pillars, as defined by the Supreme Court of Canada.<sup>4</sup>

Similarly, Australia's constitutional order<sup>5</sup> also allows for near-complete state domination of cities and metropolitan governance more generally (Sansom and Dawkins 2013; Saunders 2005). Despite some ambivalence in High Court jurisprudence on the Commonwealth's (federal) power to invest in massive urban renewal projects, Australia's major cities remain patently underrepresented within the existing constitutional order. Unlike in Canada, Australia's Constitution does not specify the states' enumerated powers. Instead, it identifies only the Commonwealth (federal) Parliament's powers (primarily in sections 51 and 52). Any legislative area not granted to the Commonwealth remains with the states. Since local government was a subject of colonial legislation prior to confederation, it is not one of the powers given to the Commonwealth.

Consequently, Australia's large cities – Sydney (metro population 5.2 million; approximately two-thirds of New South Wales's population); Melbourne (metro population 5 million; approximately three-quarters of Victoria's population);

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3. See Good (2019) for a recent argument in favour of granting Canadian municipalities status in provincial constitutions.

4. In its decision in *Reference re Secession of Quebec* (1998), the Supreme Court of Canada stated that the Canadian Constitution is based on four equally significant underlying principles: (1) federalism, (2) democracy, (3) constitutionalism and the rule of law, and (4) the protection of minorities. None of these principles trumps any of the others.

5. Note that Australia and New Zealand are considered part of the Global North, despite their latitude.

and Brisbane (metro population 2.5 million; approximately half of Queensland's population) – are largely at the mercy of state governments. The states effectively control key policy areas ranging from education, health, and policing to planning, land use, infrastructure, and major utilities. Three prominent and unsuccessful attempts to amend Australia's constitution to empower cities have either failed in referenda (1974 and 1988) or were withdrawn due to lack of support (2013).

The European Charter of Local Self-Government, which came into force in 1988, suggests that European cities may be better off than their counterparts in Canada, Australia, or the United States. It protects the basic prerogatives of local government (without distinguishing between small townships and large cities) exercised by directly elected councils, and affirms the capacity of local authorities, within the limits of the law, “to regulate and manage a substantial share of public affairs under their responsibility and in the interests of the local population.” Article 2 states that the principle of local self-government must be recognized in domestic legislation and, where practicable, in the constitution. However, in reality, the Charter's net effect on enhanced city constitutional power in Europe has been modest at best, as the constitutional status of cities continues to reflect established national constitutional traditions (see Boggero 2017; Himsworth 2015; Kirchmair 2015).

The German Basic Law, to pick one example, protects the regulatory competences of municipalities in local affairs “within the limits prescribed by law” (Article 28.2). The German Federal Court has held that this competence includes local affairs that have not been explicitly assigned by law to other levels of government, and that it may be overridden only in the name of public interest (the definition of which remains vague) (Bumke and Voßkuhle 2019, 418–20). In practice, however, the residual power German municipalities enjoy with respect to regulating local affairs not addressed by other laws has been limited considerably by a large number of federal and *Land* statutes.

What is more, the pertinent German constitutional structure on local government does not differentiate between villages, small towns, and large urban centres. Consequently, the Rhine-Ruhr metropolitan region (Germany's largest urban agglomeration, with more than 11 million people) lacks any autonomous constitutional standing or personality; it is not even mentioned in the state constitution of North Rhine-Westphalia within which it lies. The same is true of Frankfurt, described in Saskia Sassen's seminal work (2001) as a “global city” alongside New York, London, and Tokyo – yet the Hessian state constitution contains not so much as a whisper about Frankfurt.

Practices vary considerably elsewhere in Europe, but in general, slightly higher constitutional attention is given to local government, whether rural or urban. Italy's constitutional order established in the aftermath of the Second World War is known for its highly decentralized character. But it was not until 2015 that Italy's major cities (hitherto part of Italy's 107 provinces) were granted enhanced status through Article 114 of the constitution. Accompanying legislation

created an elected metropolitan mayoral position in each of these cities and granted extended autonomy to the designated cities with respect to matters such as local planning and zoning, provision of local police service, and local transportation. However, the new legal framework did not grant these cities any transformative fiscal autonomy beyond what was needed to assume authority over the devolved governance functions.

Meanwhile, in Switzerland, Article 50 of the revised Swiss Constitution (1999) recognizes the autonomy of communes (in accordance with cantonal law) and warrants that the Confederation “shall take account of the special position of the cities and urban areas as well as the mountain regions.” However, Article 50 does not establish new competences for cities, nor does it serve as the basis for federal or cantonal subsidization of cities. In practice, city status varies across cantons.

In the U.K., an increasingly intricate nexus of legislation aims to devolve power to cities and to local government more generally, without granting cities formal constitutional authority. In practice, this trend, which includes the *Greater London Authority Act* (1999) and the *UK Cities and Local Government Devolution Act* (2016), reflects more of an administrative and fiscal devolution trend than a constitutional transformation.

Several constitutional orders, all of them outside North America and Western Europe, acknowledge the new reality of megacity prominence and extend fiscal autonomy and policy-making authority to such cities (Hirschl 2020). Tokyo, the world’s largest metropolis, enjoys recognition as both a “city” and a “prefecture,” owing to a mix of primary legislation, constitutional provisions, and political traditions that evolved from the 1940s onward.

Article 30 of China’s 1982 constitution establishes the notion of centrally administered municipalities (CAMs), which are viewed as engines of economic growth and centres of national importance. It assigns to CAMs (currently, four megacities: Beijing, Shanghai, Tianjin, and Chongqing) a constitutional status equivalent to that of provinces and stipulates that these province-level megacities are held directly accountable to and controlled by the central government.

A similar notion is expressed in the constitution of Vietnam, where a constitutional division was established in 1992 and further reinforced in 2013 between provinces and “cities directly under the central authority” or “centrally run cities,” referring to Hanoi and Ho Chi Minh City. Such constitutional designation entrusts these two Vietnamese megacity authorities with considerably wider policy-making tools than those available to other cities.

The constitution of South Korea 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. In these settings, constitutional support of megacities reflects astute, long-term central government planning aimed at fostering megacity power as the engine of regional or national economic growth.

In other instances – as with recent constitutional reforms concerning urban affairs in India and Brazil – constitutional treatment of megacities is part of an

overhaul of federalism. In India, the 73rd and 74th constitutional amendments (1992) were aimed at enhancing the constitutional autonomy of local government. They articulated a vision of decentralized power and responsibility through the provision of constitutional status to urban centres. Interestingly, the Indian model distinguishes between rural settlements (addressed in the 73rd Amendment) and cities (74th Amendment), thereby formally recognizing the differences between, yet the equality of, rural and urban areas.

Brazil's City Statute (2001), alongside Articles 182 and 183 of the constitution (1988), addresses matters of urban development and self-governance. In both countries, however, long-standing subnational control over cities and politically driven intergovernmental affairs have brought about mixed results (Hirschl 2020, 119–28).

Arguably, the most expansive constitutional protection of cities on offer today is featured in the South African constitution (1996), where a nexus of constitutional provisions (notably Chapter 7, ss. 151–164) guarantee municipal standing and empower cities' planning and fiscal autonomy.

More than 100 of the world's national constitutions designate their respective country's "national capital." Virtually all these constitutions assign special status to capital cities as the nation's symbolic pillar and the contemporary seat of government; virtually none addresses these cities as large metropolitan centres *per se*. However, certain capital cities that have grown into some of the world's largest urban centres, such as Delhi, enjoy a self-governing "national territory" status.

In other countries, a similar outcome is achieved via quasi-constitutional decrees. The Philippines' Presidential Decree 940 (1976) establishes Manila as the capital; section 1 reads: "The capital of the Philippines is hereby designated to be Manila and the area prescribed as Metro Manila under Presidential Decree No. 824 shall be the permanent seat of national government."

Article 49 of the constitution of Ethiopia, (1995) states: "Addis Ababa shall be the capital city of the Federal States... The residents of Addis Ababa shall have a full measure of self-government. Particulars shall be determined by law... The Administration of Addis Ababa shall be responsible to the Federal Government." It also acknowledges the special interest of the State of Oromia, within which Addis Ababa is located, in the city with respect to the provision of social services and the use of natural resources.

The constitutional status of other megacity capitals (such as Buenos Aires in 1994 or Mexico City in 2017) has been elevated from a "federal district" status to a full-fledged state or subnational unit constitutional status with a full state-like status, on par, constitutionally speaking, with other recognized subnational units, states, and provinces.

In yet other Global South countries, constitutions make direct reference to balancing urban and rural interests. The constitution of Ecuador (2015), for example, establishes that "persons have the right to fully enjoy the city and its

public spaces, on the basis of principles of sustainability, social justice, respect for different urban cultures and a balance between the urban and rural sectors” (Article 31). In establishing institutions of local government, it further states that “the urban and rural population of the canton shall be proportionately represented on the council” (Article 253). It goes on to state that strengthening the development of organizations and networks of producers and consumers, along with those for the marketing and distribution of foodstuffs, will be pursued “so as to promote equity between rural and urban spaces” (Article 281.20).

In neighbouring Bolivia, the constitution (2009) states: “the State, at all levels of the government, is responsible for promoting the development of housing for social benefit, using adequate financing systems, based on principles of solidarity and equity. These plans shall be directed preferentially to families with scarce resources, to disadvantaged groups and to rural areas” (Article 19.2).

Meanwhile, the constitution of The Gambia (1996, rev. 2018) lists “improvement in the quality of life in rural communities and redressing economic imbalances between rural and urban communities” (Article 215.3) among the country’s economic objectives.

Article 36.2 of the constitution of Ghana (1992, rev. 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: “the State shall take necessary measures to bring about balanced development of the different areas of Uganda and between the rural and urban areas” (Chapter 12).

These and other innovative constitutional mechanisms represent ways of addressing some of the challenges of extensive urbanization. However, in most Global North constitutional settings, these innovations remain beyond the purview of viable constitutional renewal discourse, let alone practice. Here, constitutional orders adopted between half a century and more than two centuries ago reflect a statist outlook and a bewildering silence with respect to cities, urbanization, or rural areas.

This structural problem is exacerbated by the intersection of demographic concentration in many urban areas with constitutionally protected malapportionment, which leads certain electoral systems to systematically underrepresent large urban centres and their residents. The commitment to the “one-person-one-vote” principle is, of course, central to constitutional democracy. In practice, however, the intersection of demographic concentration in many urban areas with constitutionally protected malapportionment leads certain electoral systems to systematically underrepresent cities and their residents. In metropolises as diverse as Toronto, Mumbai, and São Paulo, poorly apportioned electoral systems are structured in a manner that prevents increasingly large sections of a democratic

polity's population from having equitable representation in a legislative body (Hirschl 2020, 123–24, 127–28).<sup>6</sup>

In other settings (such as Zürich or Chicago), the political voice of city inhabitants is reduced and practically subsumed by larger subnational units. More often than not, this effect helps dilute the potential influence of progressive urban voices. The city of Zürich – Switzerland's most populous city – is embedded within the considerably broader canton of Zürich. Because political majorities in the canton and the city are allocated differently, electoral rifts commonly arise between the left-leaning city and the conservative canton, which often outvotes the city in cantonal as well as national referenda. Attempts to split the canton into two half-cantons to better reflect the city of Zürich's electoral preferences have failed.

Meanwhile, in the United States, politically motivated redistricting and gerrymandering – controlled by state legislators – has effectively reduced the power of urban areas by slicing them up or redrawing districts such that the rural parts of each district overwhelm urban areas. Attempts to challenge the present practice of districting on constitutional grounds before the U.S. Supreme Court have failed.

In its ruling in *Gill v Whitford* (2018), dealing with blatant partisan gerrymandering in Wisconsin, the Court remanded the case to lower courts, citing the plaintiff's difficulty in establishing harm. Consequently, in the November 2018 State Assembly elections, 54 percent of the popular vote, largely concentrated in urban areas, supported Democratic candidates, but the Republicans maintained their 63-seat majority. In its recent landmark ruling in *Rucho v Common Cause* (2019), the Court held (5–4 along traditional conservative-liberal ideological lines) that partisan redistricting is a political question, not reviewable by federal courts, and therefore ought to be addressed by Congress or by state legislatures, not by the judiciary.

What is more, as recent research has shown, in multi-district, single-member, first-past-the-post electoral systems (not only in Canada, Australia, the United Kingdom, and the United States, but also in India, Pakistan, Bangladesh, Nigeria, Kenya, Ethiopia, Philippines, and Brazil – anticipated sites of some of the world's most dramatic urban growth in the coming decades), urban centres tend to be underrepresented compared with rural areas. This outcome is mainly the result of the historic concentration of left-leaning voters in cities and the aggregative wide margin wins of progressive candidates in urban electoral districts compared with more moderate right-leaning candidate wins in rural districts (Boone and Wahman 2015; Borodin et al. 2018; Rodden 2019). Bias in favour of non-urban settings therefore does not result solely from intentional partisan and racial gerrymandering, but also emerges from patterns of human geography or

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6. Following a Supreme Court of Canada ruling that allows electoral district size to deviate up to 25 percent from the provincial average, some rural ridings in Ontario have slightly more than 60,000 voters, while some urban ridings in Toronto have nearly double that number of voters (*Reference re Provincial Electoral Boundaries, Saskatchewan* 1991).

“unintentional gerrymandering” (see Chen and Rodden 2013). Either way, the aggregated differential effect of muted voice and lack of ability to advance policy choices concerning a range of issues affecting cities is dramatic.

### **3. Constitutional Innovation and the Urban Challenge: Three Illustrative Global South Cases**

The American constitutional order often serves as an intuitive, “usual-suspect”-like comparator to the Canadian constitutional order. Yet when it comes to the constitutionalization of city status, it appears that experimentation with city status in three Global South settings – India, Brazil, and South Africa – presents at least as relevant a comparative context for any discussion concerning the constitutional augmentation of city status in Canada.

All three countries – large jurisdictions with diverse populations and an established tradition of subnational unit autonomy – have launched constitutional reforms aimed at empowering cities. While none of these attempts may be designated as complete success or as utter failure, some are more successful than others. South Africa’s constitutionalization of city power as part of its historic post-apartheid constitutional transformation is arguably the most effective of these overhauls to date. In India, the constitutionalization of city status has encountered resistance by decentralized, subnational units eager to retain control of cities (India), while in Brazil it has been affected by political clashes at the national level backed by opposing visions of the good society. Let us consider in some detail each of these settings.

#### **3.1 India**

India is set to be a main site of urbanization in the coming years. Recent reports project a dramatic growth in India’s urban population in the next three decades, with perhaps as many as 400 million additional people residing in cities by 2050. Even today, India is home to some of the world’s largest megacities, notably Delhi and Mumbai, each with an estimated population ranging between 25 and 30 million inhabitants. Other megacities include Kolkata (state of West Bengal), Bangalore (Karnataka), Chennai (Tamil Nadu), and Hyderabad (until 2014 in the state of Andhra Pradesh; in 2014, the new state of Telangana was created, and Hyderabad was made its official capital). Each has a core city population of more than 10 million and metro area estimates of between 15 and 25 million.

Some of these megacities have succeeded in attracting large-scale private-sector investment. Bangalore, for example, has become India’s IT and biotechnology capital. At the same time, India’s megacities are home to some of the world’s poorest neighbourhoods, and to some of the most vulnerable and marginalized urban residents.

In Mumbai’s Dharavi slum, 700,000 people live within little more than two square kilometres (roughly three-quarters of a square mile); 52.5 percent of Mumbai’s population occupy 9 percent of the city’s land, living in neighbourhoods

deemed illegal by the state and lacking almost any infrastructure or services. The housing shortage is dire. Estimates indicate that 65 percent of Mumbai households live in single-room units (see Zérah 2014). A confluence of legal, political, and economic factors prevents affordable housing supply or regulated improvement of slum dwellings.

India's federal system has traditionally left most urban governance responsibilities to state governments, with little attention paid to addressing urban agglomeration at the national level. In 1993, two constitutional amendments were adopted that aimed to address local government. The 73rd Amendment deals primarily with governance of rural settlements and townships, while the 74th Amendment addresses cities. The latter defines a metropolitan area as "an area having a population of one million or more comprising one or more districts and consisting of two or more Municipalities or Panchayats or other contiguous areas."

Article 243W(a) of the constitution allows state legislatures to "endow the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government..." Such law "may contain provisions for the devolution of powers and responsibilities upon Municipalities at the appropriate level." (Note that it does not *require* states to devolve power to cities, but instead suggests that state legislatures *may* do so if they are so inclined, and also that state legislatures preserve discretion over the scope and nature of devolved powers.)

The 12th schedule attached to the 74th Amendment lists 18 concrete policy areas, including urban planning and urban poverty alleviation, wherein state legislatures may devolve power to city authorities. In addition, Article 243ZE provides for the establishment of metropolitan planning committees for each designated metropolitan area. On paper, then, the 74th Amendment represents a serious exercise in constitutional empowerment of cities and local government more generally.

In practice, however, the impact of this constitutional change on urban self-government has been varied at best, with most observers assessing its real effect as minimal. Because of the traditional strength of the states in Indian politics, and the significance of state governors' support for national parties and their leaders, the 74th Amendment left the actual designation of "metropolitan areas" in the hands of state governors, provided the designations met the criteria in the amendment as well as "such other factors as they deem fit."

Essentially, state governors are free to determine their own criteria for classifying urban centres within their respective states. Due to the liberal discretionary powers of state governors, "classification of cities in India tends to be driven more by political factors than a cohesive framework" (Castle-Miller 2014, 1061). States have generally been reluctant to abdicate responsibilities and provide unconditional funds to local governments. Governors tend to withhold metropolitan status from cities, as such designation would result in reduced state control over these urban

centres alongside greater state financial obligations toward the newly designated municipalities (Castle-Miller 2014).

Consequently, state governments maintain legislative, administrative, and financial control over cities. State-controlled agencies continue to dominate key city-related policy areas, from transportation and housing to land use and low-income neighbourhood improvement. The result is that “despite the promise offered by the 74th Amendment, urban local governments in India are rendered largely powerless since the Amendment does not ensure autonomy from the state government and also because states have refused to implement its core vision” (Idiculla 2020, 48).

Studies further suggest that the establishment of metropolitan planning committees (under Article 243ZE) suffers from too many structural and political barriers, making the process protracted and sporadic (see Sivaramakrishnan 2013). Moreover, comparative accounts show that, given India’s state-deferential approach to urban governance, urban governments are responsible for only 3 percent of the total public expenditure, compared with 20 percent to 35 percent in China, reflecting Indian urban authorities’ lack of fiscal autonomy and resources (Clark and Moonen 2016, 103).

Aggregate studies on cities across India also suggest that Indian cities generate on average less than 40 percent of their budgets, while the remainder, more than 60 percent, comes from higher levels of government (Janaagraha Centre for Citizenship and Democracy 2017). Inevitably, urban authorities resort to private-sector investment, which often comes with business-friendly strings attached. Other studies have gone as far as suggesting that, in some instances, the states’ unwillingness to devolve power has left local governments unable to operate, existing only in form and lacking any substantive content (Mathew and Hooja 2009).

Constitutional jurisprudence concerning the scope and nature of the 74th Amendment is scant. In the few cases in which the Supreme Court of India was called upon to rule on these matters, it adopted a deferential line, siding with the general understanding of the 74th Amendment as granting state governments the authority to determine whether and to what extent to devolve powers to local government.

In a 2006 ruling concerning a challenge to a State of Maharashtra legislation that allowed the state to intervene in municipal planning (one of the policy heads enumerated in the 12th Schedule), the Supreme Court held that “Article 243W contains merely an enabling provision, and it does not mean that the State is obligated to provide for such a statute” (*Shanti G. Patel v State of Maharashtra* 2006). The adoption of the 74th Amendment, the court held, does not change the exclusive state authority with respect to local government empowerment.

Other similar rulings issued by the Supreme Court and by several State High Courts have confirmed that local governments may not exercise independent powers beyond those granted to them by state legislation, and, importantly, that

the 74th Amendment does not grant municipalities a right to levy taxes on their own (see, for example, *Sakshi Gopal Agarwal v State of Madhya Pradesh* 2003).

Granted, India's constitutional deference to states on urban development matters may produce relative success stories of urban governance, but only when state authorities are so inclined. The ascendance of Bangalore (with a metropolitan population of more than 12 million) in the southwestern state of Karnataka, arguably India's most notable urban renewal success story, has been consistently cultivated by state authorities through massive public investments in infrastructure. These include the Bangalore-Mysore corridor expressway, connecting Bangalore with the closest major city; the International IT Park, a research facility dedicated to supporting tech firms; and the Kempegowda International Airport, serving nearly 35 million passengers annually and top international carriers such as Emirates, Lufthansa, Air France, British Airways, and Singapore Airlines.

Additionally, the Karnataka state government has adopted industrial policies that encourage and incentivize technology companies to establish themselves in Bangalore. High-tech giants such as Texas Instruments, IBM, and Tata have done so, leading to popular reference to Bangalore as the "Indian Silicon Valley." (Yet even today, Bangalore continues to feature large pockets of extreme poverty, with hundreds of slums, home to roughly a quarter of the city's population.<sup>7</sup>) As observers note, despite the 74th Amendment, the government of Karnataka has been able to effectively control urban planning and development processes in Bangalore (Idiculla 2020).

Prime Minister Narendra Modi's national government has prioritized national planning in the area of megacity development and has thrown its support behind Mumbai's modernization and infrastructure renewal efforts through various joint-venture and fund-matching schemes. Yet under the current constitutional framework, it is the government of the State of Maharashtra – until 2014 a traditional bastion of the Congress Party – that calls the shots on Mumbai governance. The state, not the national government, has full control over the appointment of the municipal commissioner of Mumbai, the city's chief executive officer (the mayorship is a largely ceremonial position).<sup>8</sup>

Furthermore, while metropolitan Mumbai's population constitutes approximately a quarter of Maharashtra's overall population, in India's electoral system, the Greater Mumbai region has only six of the State of Maharashtra's 48 MPs in a national parliament of 543 elected MPs. It is further estimated that, even though more than 40 percent of Maharashtra's population lives in urban centres,

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7. According to a recent study, "the number of slums in Bangalore has grown from 159 in 1971 to over 2,000 slums (notified and non-notified) in 2015. Those living in slums accounted for just over 10 percent of the city's population in 1971 and an estimated 25 to 35 percent in 2015" (Roy et al. 2018).

8. From 2014 to 2019, the governor of Maharashtra was Chennamaneni Vidyasagar Rao of the ruling BJP Party. As of September 2019, the governor is Bhagat Singh Koshiyari, also of the BJP.

only 25 percent of the Lok Sabha (“House of the People” – the lower house of India’s bicameral parliament) are from urban areas. This situation creates a further disincentive for the Maharashtra government to adopt pro-Mumbai policies at the expense of other statewide stakeholders. Thus the State of Maharashtra, rather than the central government of Mumbai itself, has control over the governance and fiscal autonomy of Mumbai – one of the world’s largest and densest megacities.

A similar institutional malapportionment and political incentive structure produces the underrepresentation of large urban centres elsewhere in India. Chennai’s current population of 10 million has grown exponentially in recent years and now constitutes about 15 percent of Tamil Nadu’s population. But Chennai is represented by only three of Tamil Nadu’s 39 MPs in the national parliament. Ahmedabad (population 8.5 million) accounts for approximately one-eighth of the state of Gujarat’s population (70 million) but has only two of the state’s 26 seats (one-thirteenth). The list of underrepresented urban areas goes on and on.

What is more, according to Articles 81 and 82 of the Indian Constitution (as amended by the 87th Amendment, 2003), apportionment of Lok Sabha seats within and among states is based on the 2001 census and is frozen until 2026 (*de facto* until after the national census in 2031), the year the country’s population is expected to stabilize. By 2031, the population figures drawn upon to allot parliamentary seats to each state will be six decades old (Vanishav and Hinston 2019). While the 87th Amendment did allow for redistricting within states based on the 2001 population figures, state authorities are reluctant to do so for fear of political reprisal, while the total number of seats assigned to each state may not be altered. Consequently, the massive urbanization trend in India over the last few decades is not reflected in either intra- or inter-state electoral seat allocation.

In short, while constitutionalization has enhanced the status of local governments in India’s multi-tiered federation, a confluence of constitutional and political factors – notably the political significance of states and their governors and the consequent constitutional deference to their interests – hinders the successful implementation of urban empowerment in India. Consequently, in a country containing some of the world’s biggest cities, where one-fifth of global urban growth in the coming decades is projected to take place, there is little room in the constitutional federalism framework for the central government to engage directly with local government.

Unlike in Japan, South Korea, or China, “in India, fear of the large city and the aggregation of municipal power are still regarded as a potential threat to provincial leadership” (Sivaramakrishnan 2015, 225). The adoption of the 74th Amendment has not accomplished much in altering this situation, as it left the urban agenda largely in the hands of subnational governments. The main exception is Delhi, India’s largest city, which is granted National Capital Territory (NCT) status.<sup>9</sup> Delhi is jointly administered by the Government of India and the Government of

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9. The 69th Amendment (1991) of the Constitution grants the National Capital of Delhi special status with its own democratically elected government and legislative assembly.

NCT through an elected Legislative Assembly and Council of Ministers headed by an appointed lieutenant-governor (currently Anil Baijal, former home secretary of India). This joint governance structure has been a source of strain at times when the central government attempts to override policies adopted by the Delhi governing bodies.<sup>10</sup>

### 3.2 Brazil

The federally driven constitutionalization of the urban development agenda in Brazil has been more active and more successful, although it, too, is tamed by vast socioeconomic inequalities and by the vagaries of national and intergovernmental politics in a large federal country.

Brazil's urban expansion in the 20th century is well documented; whereas in 1900, 10 percent of the country's population was urban, in 2000, the number was closer to 80 percent. One of the consequences of such rapid, nearly uncontrolled urbanization was the emergence of large urban *favelas* – informal settlements of mostly poor and disadvantaged populations. In the early 1980s, the harsh realities of Rio de Janeiro's slums became synonymous with “Third World” (to use the terminology of that time) shantytowns; and, more generally, political disenfranchisement of the poor, urban neglect, and state incapacity in the developing world.

Today, many of the economic and political challenges facing Brazil's megacities remain – notably in São Paulo (metropolitan population 22 million) and Rio de Janeiro (14 million). Nonetheless, Brazil's 1985 transition to democracy and the ensuing aggressive campaign for a “right to the city” represent a positive counterpart to India's Amendments 73 and 74.

In 1986, a national constituent assembly was established to write a new constitution in a socially progressive spirit, “daring and innovative without parallel in the constitutional history of Brazil and a rare occurrence even in comparative law” (Coelho and Oliveira 1989, 20). Extensive popular input was sought through public hearings and public submissions of proposed provisions and amendments. Following a charged debate, the new federal constitution was adopted in 1988. It included Article 182, warranting that “urban development policy, carried out by the municipal public authority, according to the general guidelines fixed by law, is intended to order the full development of the social functions of cities and to guarantee the well-being of their inhabitants.” In other words, an embryonic “right

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10. Drawing on principles of representative democracy and state autonomy, the Supreme Court of India ruled in July 2018 that the NCT Council of Ministers for Delhi has the executive power to take action in all the fields in which the Delhi legislative assembly can pass laws under Article 239AA(3) of the Constitution, including the State list – barring land, police, and law and order – and the Concurrent List of the Seventh Schedule. The court further held that decisions of the NCT Council of Ministers are binding upon the lieutenant-governor, and that in case of disagreement, the lieutenant-governor cannot bring governance to a standstill (see *Government of NCT Delhi v Union of India* 2018).

to the city” was born, the first of its kind in world constitutions. This constitutional provision alone has had significant effects on urban planning and zoning processes in Brazil.

According to Article 182.1, each city with at least 20,000 inhabitants – more than 85 percent of Brazil’s population live in cities that meet this criterion – must have a master plan approved by the city council as its basic tool for urban development and expansion policy.<sup>11</sup> Article 183 further states that “an individual who possesses as his own an urban area of up to two hundred and fifty square metres, for five years without interruption or opposition, using it as his or as his family’s residence, shall acquire title over it, provided he does not own another property.” In other words, “adverse possession” principles, aimed at preventing forced evacuations of long-term dwellers by land developers, were constitutionally recognized. Perhaps even more important, the inclusion of these two provisions in the new constitution signalled a transition to a new era in which elements of urban governance and reform are federally protected against encroachment by subnational governments, local authorities, or private-sector actors.

The federal entry into the urban governance scene was complemented by the adoption of the City Statute in 2001 as well as the establishment of the Ministry of Cities and the National Cities Council in 2003. The City Statute – the first of its kind in Latin America – regulates the implementation of Articles 182 and 183, and explicitly acknowledges the right to a sustainable city in Brazil’s large urban centres (see Bassul 2010; Fernandes 2010). It prioritizes the collective good and “social function” of urban life and urban land – essentially placing emphasis on improving the living conditions of Brazil’s urban poor and the notion that urban land should not remain vacant when it can serve a useful public purpose.

The City Statute further defines guidelines that must be observed by federal, state, and local governments to ensure a democratic civil society voice in city management. Created by President Luiz Inácio Lula da Silva upon his election in 2002, the federal Ministry of Cities (shut down by President Jair Bolsonaro in 2019) was aimed at expanding the federal stake in urban affairs while offering solutions to unsuitable housing and infrastructure in Brazil’s ever-expanding cities. Its portfolio included responsibility for urban development policy and sectoral policies for housing, sanitation, and urban transportation. It is estimated that in the 15 years of its existence prior to its termination, the Ministry of Cities offered new housing to 4 million families; however, the actual quality and reliability of these new solutions is contested (Scruggs 2019).<sup>12</sup> In 2004, Brazil became the first

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11. In 2015, Brazil’s Federal Supreme Court ruled that municipalities could adopt specific, not hitherto discussed, planning and zoning regulations, as long as they were compatible with the broader scope of an approved master plan.

12. Scruggs (2019) suggests that whereas “historically, the federal government had left favela upgrading to state and city governments... during the ministry’s flush years, Brasília got involved, too: it put 33.5bn reais [more than \$8 billion Canadian] into more than 3,500 favelas nationwide.”

developing country to join the Cities Alliance – a significant international network for urban development, supported by the UN-Habitat, the World Bank, and the World Association of Major Metropolises.

As well-intended as these constitutional and legal initiatives might have been, the political reality in Brazil at both the federal and the intergovernmental levels is such that the actual, on-the-ground effects of these reforms have depended largely on the political alignment of federal, state, and megacity leaders. When such alignment exists, federal and state support for megacity projects is likely; conversely, when there is a change of power, there is a tendency to discontinue funding for urban development projects (Clark and Moonen 2016, 126).

One of the first actions of newly elected President Bolsonaro (on January 1, 2019, his first day in office) was the abolition of the Ministry of Cities created by the Lula administration. In its early days, the Ministry of Cities, headed by Olívio Dutra – founding member of the Workers' Party and former Mayor of Porto Alegre – allowed urban reformers to present their progressive ideas to the Ministry (Scruggs 2019). The Ministry's redistributive policies and massive investment in alleviating living conditions in Brazil's poor urban neighbourhoods did not mesh with Bolsonaro's expressly conservative agenda. Refolded into the Ministry of Regional Development, the cities portfolio has been entrusted again to tight central government control with little representation of bottom-up voices or ideas.

Partisan alignment matters a great deal. From 2001 to 2005, and again from 2013 to 2017, the city of São Paulo, the largest metropolitan concentration in South America, was headed by mayors from the Workers' Party, which had led the federal government from 2002 to 2016. The strong ties between these mayors and the ruling party are clear. From 2001 to 2005, the mayor was Marta Suplicy; from 2013 to 2017, it was Fernando Haddad, both of the Workers' Party. Suplicy went on to serve as senator as well as federal minister of tourism (2007–8), and minister of culture (2012–14), all under the Workers' Party government. Haddad was the minister of education in the Workers' Party–led federal government from 2005 to 2012, before his four-year term as mayor of São Paulo. He then returned to play a key role with the Workers' Party at the federal level. In 2018, the Workers' Party selected him as the vice-presidential candidate for the October 2018 elections and later elevated him to presidential candidate when the imprisoned Lula was banned from running. During those years of alignment, federal funding for city development was generous. In 2013, in response to the Movimento Passe Livre demonstrations that advocated for free public transit in the city, the federal Ministry of Cities agreed to spend approximately \$18 billion improving urban transport. However, with the impeachment of President Dilma Rousseff of the Workers' Party in 2016, that funding came to a halt.

Furthermore, constitutional reform aimed at city empowerment has not done much to improve megacity representation at the federal level. Brazil's parliament is bicameral: the Senate (upper house) comprises 81 seats, with three senators from each of the 26 states as well as from the federal district. Like the U.S. Senate,

densely populated states (where Brazil's megacities are located) are thus chronically underrepresented. The State of São Paulo, for example, has 45 million people, while the State of Roraima has half a million inhabitants. Consequently, each senator from São Paulo represents 15 million inhabitants, while each Roraima senator represents only 170,000 inhabitants.

In the House of Representatives (lower house), too, megacities are patently underrepresented. Because the 1988 constitution requires that each state be represented in the lower house by a minimum of eight deputies and a maximum of 70, São Paulo – which in a truly proportional system would have between 60 and 90 times as many representatives as small states like Roraima, Acre, and Amapá – has 8.75 times as many (Rodrigues, Lorencini, and Zimmermann 2017). Put differently, a São Paulo voter's vote is worth about one-tenth that of a voter in any of these three smaller states.

In summary, in this second scenario of constitutional response to urbanization, the central government attempted to involve itself in the urban development sphere to address often dire governance needs. However, results have been modest, owing to pre-existing constitutional impediments alongside engrained patterns of politically motivated cooperation or resistance by subnational governments.

### 3.3 *South Africa*

An important contrast with the limited success of constitutional responses to the challenge of the city in India and Brazil is the post-apartheid constitution of South Africa, enacted in 1996. As part of its distinct democratizing break away from the country's political and constitutional past, the new South African constitution aimed to empower local government while curbing provincial power.

To that end, Article 40(1) holds that “government is constituted as national, provincial, and local spheres of government which are distinctive, interdependent and interrelated.” Chapter 7 (sections 151–64) of the constitution further marks a fundamental shift away from the pre-1996 order (Cameron 2001, 102). It builds upon and operationalizes Article 40(1) as it gives municipalities the ability to legislate and administer regulations in a number of areas (such as municipal planning, health services, public transport, trade), including, most importantly, the ability to raise funds in these areas, subject to some oversight by provincial and national governments.

As the Constitutional Court (Justice Johann Kriegler) noted shortly after the new constitution came into effect:

The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer

the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates (*Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999, para. 38).

Chapter 7 of the constitution sets out three categories of municipalities. A “category A municipality” refers to major urban centres, currently the metropolitan areas of Johannesburg (metropolitan population 10 million), Cape Town (4.5 million), and Durban (3.5 million), as well as the smaller urban areas of Bloemfontein and East London. The creation of such unified metropolitan governments and, by extension, integrated urban space, was a direct response to the apartheid policy of excluding certain neighbourhoods (notably Soweto in Johannesburg) from city boundaries and administration, thereby depriving these neighbourhoods of representation, services, and subsidies.

Chapter 7 further provides that a municipality has the “right to govern, on its own initiative” (Section 151(3)). Section 156 provides three avenues for municipalities to exercise their power: executive authority, the right to administer, and the authority to make and administer bylaws. In addition, Section 156(5) enables municipalities to exercise any power incidental to the effective performance of their functions.<sup>13</sup> Municipalities’ significant revenue-raising functions are entrenched in Section 229 of the Constitution, which confers the ability to impose rates on property and surcharges on fees for services, as well as other taxes if authorized by national legislation. The Constitutional Court has referred to the municipal revenue-raising power as an “original power,” clarifying the fact that the imposition of rates and surcharges does not require enabling federal legislation (*City of Cape Town v Robertson* 2005, para. 56).

Consequently, a decade after the adoption of the new constitution, South African municipalities were estimated to have raised more than three-quarters of their operating revenue through their own taxation functions (National Treasury 2006, fig. 2.5). Additionally, municipal governments are further entitled to an equitable share of the revenue raised nationally to enable them to provide basic services and perform the functions allocated to them.<sup>14</sup>

The consensus among observers of municipal affairs in South Africa is that the constitutional recognition of local government has been effective in allowing cities

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13. What is meant by “incidental” was elaborated by the Constitutional Court in *In re: DVB Behusing (Pty) Limited v North West Provincial Government and Another* (2001). While this case dealt with provincial incidental powers, the Constitutional Court held that powers usually falling within the domain of the national government were *intra vires* the provincial government, as they were “inextricably linked to the other provisions of the Proclamation.” The same standard would likely apply to municipal incidental powers.

14. A municipality’s claim to an equitable share of national revenue was found to be justiciable in *Uthukela District Municipality & Others v President of the Republic of South Africa & Others* (2002).

to provide improved services to their residents. This seems to hold true even when a major city (such as Cape Town) is governed by an opposition party (the Democratic Alliance) (see, for example, Cameron 2014). This is not to say that the relations between major South African cities and the other orders of governments do not occasionally sour. However, unlike in India or Brazil, the constitutional order and the constitutional jurisprudence stemming from it successfully shield cities from the exclusive grip of federal or provincial governments.

That shield has been reaffirmed in several landmark rulings of the South African Constitutional Court pertaining to intergovernmental disputes under the 1996 constitution.<sup>15</sup> In its ruling in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* (2010), to pick one example, the Constitutional Court ruled that cities have exclusive authority over municipal planning, including zoning and land use management, and that national or provincial powers may not be used in ways that usurp or subvert municipal planning powers. In another important ruling (*Maccsand v City of Cape Town* 2012) two years later, the Constitutional Court ruled that while intergovernmental cooperation is to be favoured, a national competence may be limited by the exercise of a municipal competence. Specifically, the court held that the granting of mineral mining rights by the national government cannot circumvent municipal zoning decisions.

While large South African cities remain marred with problems extending well beyond the constitutional realm, their protected constitutional autonomy has had considerable effect on their ability to adopt socially progressive policies in land use and housing. The City of Johannesburg, for example, has drawn on its expansive constitutionally assigned land use and planning powers to adopt legislation requiring that all future residential private development projects with 20 units or more include 30 percent affordable homes, regardless of the project's location. The stated goal of the policy is to address the substantial inequality and segregation that persist in South Africa's largest metropolises (Malala 2019).

In September 2019, Johannesburg won the Sustainable City and Human Settlements Award from the UN for its partnership with local developers to build

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15. Johannesburg, for example, was involved in major litigation against the Gauteng Development Tribunal, a provincial body that has equivalent and parallel authority to the municipality to regulate land use. In a judgement affirmed by the Constitutional Court, the Supreme Court of Appeal declared two chapters of the *Development Facilitation Act* 67 of 1995 unconstitutional, as they encroached on the authority of municipalities to engage in "municipal planning" as set out in Part B of Schedule 4 (see *City of Johannesburg v Gauteng Development Tribunal* 2009; confirmed by the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010). More recently, the city launched a legal challenge against the chairman of the National Building Review Board. In this case, the Constitutional Court confirmed the ruling of the High Court of South Africa, Gauteng Division, that S. 9 of the *National Building Regulations and Building Standards Act*, which empowered the board to exercise appellate review powers over municipal decisions, was unconstitutional (see *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Review Board* 2018)

South Hills (nearly 6,000 housing units) in the south of the city. The UN recognized the city's "outstanding demonstration in promoting sustainable cities and human settlements, as well as the implementation of sustainable development goals." The project features a mix of fully subsidized homes, subsidized rental units, and open-market units, with more than 90 percent of the units within local legislation's definition of affordable housing. None of these new inclusionary policies would have been possible without the constitutional entrenchment of city powers in the post-apartheid Constitution of South Africa.

In other words, in contrast with the attempt at constitutional emancipation of cities in India, where no real alteration of the political and constitutional power structure occurred, or with Brazil, where bitter political divide has loomed large over the city empowerment issue, the constitutionalization of city status in South Africa reflects a genuine breaking with the past. While large South African cities still face daunting challenges, the constitutionally entrenched three-tier governance system allows urban centres a meaningful voice in addressing these issues.

#### **4. Conclusion: Southern Lights**

As extensive urbanization marches on, an ever-widening gap emerges between what is expected of a modern metropolis, and what cities can actually deliver in the absence of adequate constitutional standing, representation, taxation powers, or robust policy-making authority. The coronavirus pandemic of 2020 has accentuated the disparity between the tremendous pressures, threats, and challenges that ever-more populous urban centres face, and cities' limited independent capacity to provide services and support for their residents. The constitutional recognition of cities as an order of government may help ameliorate these structural shortcomings, and provide cities with greater representation, bargaining power, and policy-making leeway vis-à-vis state organs, governments, and big business alike.

In this paper, I have provided a comparative overview of city status in national constitutions worldwide, alongside detailed analysis of three of the most ambitious attempts to date to constitutionalize city status in Brazil (1988), India (1992) and South Africa (1996). As this exploration suggests, in stark contrast with most other areas of constitutional law, much of the innovative constitutional thinking concerning megacity governance emanates from Asia, Latin America, and parts of Africa. While most leading political theory and social science accounts of cities and urbanization have been written by scholars from the Global North, when it comes to actual constitutional innovation in those areas, the world beyond Europe and North America has taken the lead.

What explains the fact that constitutional innovation in this area is more likely to emanate from the Global South? One obvious factor is *necessity*. Much of the extensive urbanization of the last few decades has taken place outside North America and Europe. Data suggest that 88 percent of the 3.2 billion increase in the world's urban population growth between 1960 and 2018 has taken place in Asia,

Africa, and Latin America, compared with only 12 percent in Europe and North America. This trend is bound to intensify in the coming decades.

A second factor is constitutional *newness* or *susceptibility to change*. It is plausible to assume that constitutional orders adopted in the late 20th century onward – many Global South constitutions fit that bill – are more likely to address 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, as in India) are more likely to address the urban challenge, or indeed any other late-20th and early-21st century challenge of that scope (including climate change and environmental protection).

A third factor is *politics*. As we have seen, the constitutional empowerment of cities in Brazil (1988) and in South Africa (1996) was a direct by-product of the transformative political circumstances in those two countries. What is more, the actual impact of constitutional transformation of city status in the three countries has varied considerably – modest effect in India, mixed and erratic in Brazil, and considerable in South Africa – mostly as the realization of constitutional guarantees of city status in all three countries has taken place within broader historical, political, and institutional setups that may be more or less conducive to it.

With these insights in mind, we may reflect upon the constitutional stalemate in city governance in Canada, and in other, similarly situated Global North settings more generally. In that part of the constitutional universe, urban agglomeration is extensive, but is not perceived as an existential demographic transformation in the same way it has presented itself in the Global South. Additionally, the pertinent constitutional framework in Canada (and for that matter in the United States or in Australia) is dated and hard to change. Above all, a constellation of political incentives to empower cities constitutionally rarely presents itself. Without some confluence of these factors – systemic necessity, constitutional amenability, and broad political coalition in support of city emancipation – such a radical constitutional change is unlikely to materialize.

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