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SYMPOSIUM

The City as a Contested Space: Constitutional Law Perspectives on Urban Housing Disputes: An Introduction

By *Anna-Katharina König*[*] and *Timo Laven*[**]

A. Introduction

In many cities around the world, access to adequate housing has become one of the most pressing challenges of our time. Rapid urbanization, the eviction of informal households, precarious living conditions, rising rents and the financialization of real estate have made secure and affordable housing in cities increasingly scarce. These pressures are compounded by widening inequalities between urban centres and peripheries, the ongoing exclusion of low-income households, and the increasing vulnerability of tenants and informal households at risk of eviction or homelessness.

These dynamics cannot be reduced to technical matters of zoning or market regulation. They cut to the core of what it means to live in a city: who can claim a place in the city, who shapes the urban landscape and who sets these rules? In this sense, housing disputes are never merely about buildings or rents. They concern the fundamental conditions of belonging to and participating in urban life.

This is where urban housing disputes intersect with constitutional law. Struggles over who belongs in the city directly translate into disputes over rights, duties, and the meaning of equality before the law. The city thus becomes a constitutional space—a site where abstract guarantees of liberty, equality, social welfare and democratic participation are tested against specific conflicts over rent, eviction, homelessness, segregation, or gentrification. It is therefore no surprise that urban housing disputes have emerged as a highly contested arena in constitutional discourse, sparking litigation and constitutional argumentation across jurisdictions. This Special Issue, *The City as a Contested Space: Constitutional Law Perspectives on Urban Housing Disputes*, seeks to illuminate these conflicts by situating local housing struggles within the broader framework of constitutional law. Viewing these

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disputes through a constitutional lens enables us to understand how legal systems generally respond to highly politicized distributional conflicts and how these responses vary across jurisdictions.

B. On the Background of this Special Issue

This Special Issue grows out of our personal experience as German legal researchers. In our work, we have witnessed a deepening housing crisis across Western Europe, where rising rents have turned access to affordable housing into a central social concern. In Germany, the average cost of newly concluded tenancy contracts has risen by around 50 % over the past twelve years and by an astonishing 108 % in the capital, Berlin.[1] As constitutional lawyers, we have followed these developments with concern, analyzing the impact of the current legal framework on the realization of fundamental rights and exploring possibilities for a more just housing policy. In our research, the particular circumstances of the German housing market illustrated how constitutional law serves as a reference point in addressing a housing crisis. While Germany is not a case study in this Special Issue, we believe it can still illuminate the foundational framework of the debate.

The housing crisis in Western Europe is above all a crisis of affordability. In urban areas, adequate housing is either unavailable or offered at prices that far exceed what ordinary households can bear. While new construction is geared towards high-end, luxurious developments at high cost, the most vulnerable part of society is left scrambling for few affordable apartments or displaced from urban centres altogether.[2] Political discourse has long sought to explain and address this crisis through the familiar framework of supply and demand. The dominant response has been to create incentives for private actors to build new housing.[3] According to this paradigm, an increase in housing supply remedies the demand and results in a cost-effective equilibrium. In practice, however, this strategy has been entirely unsuccessful. More recent developments suggest that the European housing crises are not merely the result of insufficient supply; rather, they are deeply rooted in the way housing is organized as a market commodity.[4] Deregulation and the European Central Bank's prime-rate policy caused a sharp increase in private investment in the housing mar-

1 *Oliver Falck / Simon Krause / Pascal Zamorski,* Mieten – Wachstumshemmnis und sozialer Sprengstoff in Großstädten, ifo Schnelldienst 10/2025, pp. 8–9.

2 *Andrej Holm,* Die Lage der sozialen Wohnraumversorgung in Berlin. Stellungnahme für die Expertenkommission zum Volksentscheid «Vergesellschaftung großer Wohnungsunternehmen», Berlin 2022, pp. 9–11.

3 The current federal coalition treaty sets as the primary goal of its housing policy to create incentives for new development by increasing private spending and by decreasing taxation and bureaucracy. Koalitionsvertrag zwischen CDU, CSU und SPD, 21. Legislaturperiode, p. 22.

4 *Susanne Heeg*, Finanzialisierung und Responsibilisierung, in: Barbara Schönig / Justin Kadi / Sebastian Schipper (eds.), Wohnraum für alle?!, Bielefeld 2017, pp. 55 ff.

ket, leading to what has been called its financialization.[5] Rather than private individuals, large corporations driven by investment funds have taken over the market and established a new logic of profit maximization.[6] This created specific incentives to invest in low-income neighborhoods and to transform them into areas "desirable" to higher-income groups. The so-called rent gap—that is, the difference between the current and the highest attainable price of a dwelling—became the metric for driving investment.[7] As a result, developers are specifically targeting low-income areas, forcing residents to move and displacing entire communities. In other words: The market logic itself is part of the problem, not the solution.

In Germany this diagnosis is confirmed by recent legal efforts to tackle the urban housing crisis, which have revealed that existing ordinary legislation is ill-suited to the task. Since the 1980s, public provisions and management of housing have been steadily dismantled.[8] Instead, the regulation of housing today is located primarily within private contractual law. Previous attempts to counter rising rents centred on the so-called *Mietpreisbremse* (rent brake), a mechanism designed to limit rents for new lease agreements. Through this instrument, the existing system of rent regulation was extended to newly signed contracts.[9] However, enforcement lies entirely with tenants themselves, which not only creates high practical barriers but also means that there is no reliable data on how well the rent break works.[10] Moreover, the law provides numerous exemptions, which landlords

5 In principle, financialization describes a process of managing a certain asset through a fund. Applied to housing, it is understood as a tendency of a drastic increase of the activity of financial actors in the housing market, that brings with it the application of market principles and the necessity to increase shareholder revenue while losing sight of the needs of tenants. A terminological overview can be found at *Manuel B. Aalbers*, The Financialization of Housing: A Political Economy Approach, Abingdon / New York 2016, pp. 2 ff. For an overview of financialization in major European cities see *Andrej Holm / Georgia Alexandri / Matthias Bernt*, Housing policy under the conditions of financialisation, Sciences Po Urban School Research Report 2023.

6 *Andrej Holm*, Wohnung als Ware: Zur Ökonomie und Politik der Wohnungsversorgung, in: Sebastian Schipper / Lisa Vollmer (eds.), Wohnungsforschung, Bielefeld 2020, p. 76; *Till Baldenius / Sebastian Kohl / Moritz Schularick*, Die neue Wohnungsfrage, Leviathan 48 (2019), pp. 196, 215.

7 The so-called rent gap theory, developed by urban scholar Neil Smith, explains how the profit-driven structure of capitalist land markets can trigger dynamics of residential displacement: *Neil Smith*, Toward a Theory of Gentrification: A Back to the City Movement by Capital, not People, Journal of the American Planning Association 45 (1979), pp. 538 ff.; cited from *Inga Jensen / Sebastian Schipper*, Jenseits von schwäbischen Spätzlemanufakturen und kiezigen Kneipen – politökonomische Perspektiven auf Gentrifizierung, in: Sebastian Schipper / Lisa Vollmer (eds.), Wohnungsforschung, Bielefeld 2020, p. 141.

8 *Pia Lange*, Staatliche Wohnraumvorsorge, Tübingen 2023, pp. 162 ff.

9 Previously, § 558 of the Civil Code limited a landlord's ability to increase rents to a regional average price. § 556d Civil Code now limits the rent for new lease agreements to 110 % of said regional price average. However, it applies only to areas deemed to have a stressed housing market.

10 *Anna-Katharina König*, Vom Papier zur Praxis, Kritische Justiz 58 (2025), pp. 82 ff.

readily exploit.[11] The continuing rise in rents demonstrates that the instrument has failed to produce its intended effects. In short, marked-based legislation rooted in private contractual law has proven incapable of mitigating the housing crisis.

In Berlin—the city experiencing the sharpest rent increases in Germany—lawmakers sought to address this shortcoming through public law. In 2020 the regional parliament introduced a rent cap that set a legally binding maximum rent, while public authorities were responsible for overseeing compliance and imposing penalties on landlords who exceeded it.[12] While the mechanism itself remained similar to the rent brake, a stronger enforcement dramatically improved its effect. Yet, this approach was struck down by the Federal Constitutional Court, which held that the legislative competence for such regulation lay exclusively at the federal level.[13] Without the constitution commenting on the matter of rent regulation itself, it suddenly became a crucial hindrance to an alternative housing policy. The court's ruling came as a surprise to many. Previously, scholars primarily discussed whether individual fundamental rights inscribed by the constitution would prevent a stronger price regulation.[14] Traditionally, constitutional law had largely been perceived as an impediment to effective housing policies: particularly the protection of private property and the right to economic freedom[15] were seen as barriers to stronger regulation.

11 Apartments build after October 2014 are excluded entirely from the rent brake (§ 556f Civil Code), as are apartments that were leased to a higher price previously (§ 556e Civil Code). Additionally, it also does not apply to furnished apartments, creating a drastic increase in furnished apartments.

12 *Andreas Fischer-Lescano / Andreas Gutmann*, Mietpreisregulierung im Föderalismus, Kritische Justiz 53 (2020), p. 4.

13 BVerfG, Order of 25 March 2021 – 2 BvF 1/20, 2 BvL 5/20, 2 BvL 4/20 –, BVerfGE 157, 223 – "Berliner Mietendeckel", english press release: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-028.html (last accessed on 14 November 2025).

14 This issue was discussed primarily after the rent break entered into force. The Federal Constitutional Court, however, upheld the measure's constitutionality and affirmed that the legislature enjoys a wide margin of appreciation in the regulation of rental prices. In particular, it held that the prevention of gentrification constitutes a legitimate public-interest objective capable of justifying restrictions on the use of private property. This remains the case even where the measure's practical effects have not yet been empirically established and continue to be contested by opposing political actors. BVerfG, Order of 18 July 2019 – 1 BvL 1/18 / 1 BvL 4/18 / 1 BvR 1595/18 –, "Verfassungsmäßigkeit der Mietpreisbremse", paras. 59 ff. The court recently upheld its decision, arguing that generating the maximum profit through rent is not protected by the right to property, BVerfG, Order of 19 March 2026 – 1 BvR 183/25 –, "Verlängerung der Mietpreisbremse". By focusing solely on rent prices, the court shifted its attention towards financialization, see *Timo Laven*, Missverständnisse zur Mietpreisbremse, Verfassungsblog, 27 February 2026, https://verfassungsblog.de/bverfg-mietpreisbremse/ (last accessed on 4 March 2026).

15 While economic freedom is not specifically protected by the constitution, the freedom of occupation is largely interpreted as such, protecting businesses from state interventions. *Fabian Michl*, Das Sondervotum zum Apothekenurteil, Jahrbuch des öffentlichen Rechts 68 (2020) pp. 365 ff. For a more critical perspective of the German economic order as set by the constitutional court see *Florian Meinel / Christian Neumeier*, Die Politische Ökonomie des öffentlichen Rechts, Der Staat 64 (2025), pp. 97 ff.

The Court's decision, demonstrating that even rules on legislative competence could limit effective housing policy, only reinforced this perception.

Amidst the inadequate regulation of rents and legal barriers to more effective alternatives, scholars and activists began to rediscover the transformative potential of the German constitution. In 2021 a group of lawyers and housing activists launched a campaign for a so-called "socialization" of large housing corporations in Berlin seen as particularly responsible for rising costs.[16] They based their proposal on Art. 15 of the German Basic Law (GBL), which permits the transfer of land and natural resources to public ownership in exchange for just compensation.[17] In contrast to Art. 14 GBL that protects private property and enables expropriation primarily on an individual level, Art. 15 GBL is ascribed an economy-shaping function that extends beyond individual instances. Its purpose is to replace an entire, previously market-based sector of the economy with welfare-oriented public ownership.[18] Affected businesses should no longer serve the maximization of profit but the common good of society. Art. 15 GBL envisions socialization as an end in itself.[19] It aims to withdraw specific sectors of the economy from a capitalistic distributive order altogether and to place them under democratic control. However, ever since the constitution came into force, this article has never been implemented in practice.[20] As a result, it has attracted relatively little attention in public debates and legal scholarship. Yet, it remains one of the most far-reaching economic policy instruments that the constitution has to offer.

Nowhere are the implications of Art. 15 GBL as tangible as in Berlin. The Berlin initiative specifically proposes to transfer up to 220,000 apartments from large corporate landlords into public ownership and to allocate them through forms of democratic participation

16 The so called „Initiative Deutsche Wohnen & Co enteignen" (Initiative for the expropriation of Deutsche Wohnen & Co), named after the then largest housing company, Deutsche Wohnen. An English summary of their plans can be found under https://dwenteignen.de/en/argumente (last accessed on 14 November 2025).

17 Art. 15 GBL: "Land, natural resources, and means of production may be transferred to public ownership or other forms of public enterprise for the purpose of socialization by means of a law that regulates the nature and extent of compensation. Art. 14, paragraph 3, sentences 3 and 4 shall apply mutatis mutandis to compensation."

18 This interpretation was established by *Helmut Ridder*, Enteignung und Sozialisierung, Veröffentlichung der Vereinigung der Deutschen Staatsrechtslehrer 10 (1952), p. 140; it is currently undergoing a renaissance, as exemplified by *Tim Wihl*, Vergesellschaftung als juristische Kategorie, in: Niklas Angebauer / Jacob Blumenfeld / Tilo Wesche (eds.), Umkämpftes Eigentum, Berlin 2025, pp. 227 ff.

19 The constitution clearly references socialization as the purpose. Whether socialization is its own purpose in a proportionality test, is heavily debated by scholars. An overview is provided by the report of the expert commission on socialization in Berlin, Expertenkommission zum Volksentscheid Vergesellschaftung großer Wohnungsunternehmen, Abschlussbericht, Berlin 2023, pp. 36 ff. For a historical perspective see *Timo Laven*, Vergesellschaftung als Selbstzweck?, Kritische Justiz 56 (2023), pp. 318 ff.

20 For a history of Art. 15 GBL see *Timo Laven,* Zwischen Sozialismus und Sozialstaat? Art. 15 GG in der Staatsrechtslehre des 20. Jahrhunderts, Tübingen (to be published).

by residents and tenants, thereby providing affordable housing for those most in need.[21] According to calculations by housing scholars, this would largely cover Berlin's housing needs.[22] From a fiscal perspective, proponents argue that such a scheme would be compatible with the constraints of public finance. Under the prevailing interpretation in the literature, Art. 15 GBL does not require a compensation corresponding to the full market value but allows for significant reductions.[23] Moreover, compensation is to be paid in the form of government bonds, thereby reducing the immediate fiscal burden.

In an effort to invoke Art. 15 GBL, the socialization campaign sought to organize a referendum on the issue in Berlin. After three years of collecting support signatures and passing administrative procedures, the vote was finally held in September of 2021. With a turnout of almost 1.8 million voters, more than 57 % supported the proposal.[24] The referendum, however, did not itself enact a legal statute. Its purpose was to oblige the Berlin government to draft and adopt a law on socialization. The political response to this mandate was, however, cautious: the regional government set up an expert commission to examine the legality of a socialization. Despite the commission's positive response, politicians have remained fairly silent.[25] As a result, efforts are now undertaken to organize a second referendum—aimed directly at passing the bill this time.[26]

The mobilization of Art. 15 GBL represents an approach that is novel in two distinct ways: Firstly, constitutional law has been used as a key mechanism for a grass roots political campaign in the context of a local housing crisis. It provided the blueprint for a political campaign that gathered a mass following and remains one of the few examples in which

21 The calculations of the draft of the statute conclude that around 220.000 apartments would be affected, Begründung zum Gesetz zur Überführung von Wohnimmobilien in Gemeineigentum, pp. 15 ff., https://content.dwenteignen.de/uploads/2025_09_26_dwe_vergesellschaftungsgesetz_begruendung_d1802094f7.pdf (last accessed on 14 November 2025).

22 Scholars diagnosed a deficit of approximately 300.000 apartments in 2018, *Holm,* note 2, p. 12.

23 The debate mostly focusses on the possible percentage of reductions as well as the calculation methods of determining the value. An overview of the predominant opinions can be found at Expertenkommission zum Volksentscheid Vergesellschaftung großer Wohnungsunternehmen, note 19, pp. 63 ff. and pp. 122 ff.

24 The official report is published by the regional government: Bericht der Landesabstimmungsleiterin, Volksentscheid über einen Beschluss zur Erarbeitung eines Gesetzentwurfs durch den Senat zur Vergesellschaftung der Wohnungsbestände großer Wohnungsunternehmen, https://download.statistik-berlin-brandenburg.de/eb55b8b784d62692/df8fedf66eb0/SB_B07-04-02_2021u00_BE.pdf (last accessed on 14 November 2025).

25 *Daniel Haefke*, Verschleppte Vergesellschaftung, Verfassungsblog, 5 July 2023, https://verfassungsblog.de/verschleppte-vergesellschaftung/ (last accessed on 14 November 2025); *Georg Freiß / Timo Laven*, Vergesellschaftungsverzögerungsgesetz, Verfassungsblog, 7 July 2023, https://verfassungsblog.de/vergesellschaftungsverzogerungsgesetz/ (last accessed 14 November 2025).

26 The draft version of the bill has been made public in September 2025, however the procedure to organize the referendum will take upwards of a year. The draft is available at https://content.dwenteignen.de/uploads/2025_09_26_dwe_vergesellschaftungsgesetz_2d336724db.pdf (last accessed on 14 November 2025).

thousands of people took to the streets not in opposition to, but in favour of the application of a law. Rather than protecting the private property of the few, the constitution is now used by the people for the people. By invoking a constitutional article, activists were able to lend discursive legitimacy to their demand for adequate housing for all. In this sense, Art. 15 GBL functions as a source of normative legitimacy for what might otherwise appear as a radical proposal. Secondly, this mobilization actively contests the exclusionary mechanisms of private property, putting an established legal doctrine of property protection to the test. Instead, it presents the opportunity of an alternative: a system in which the constitution is not primarily used to protect the interests of the powerful and wealthy, but to secure housing rights for a broader population. Art. 15 GBL thus establishes the progressive potential that even constitutions that primarily focus on individual rights can contain. This shift was not merely political. It also changed the scholarly perception of the transformative potential of constitutional law.

Building on this development, this Special Issue takes the mobilization of Art. 15 GBL in the context of the Berlin housing crisis as its point of departure. While the German example provides the starting point and inspiration for our work, the Special Issue itself is not about Germany. Rather, it uses the questions prompted by the Berlin experience to explore the role of constitutional law in the global housing crisis. Although access to adequate housing has become a global challenge, the ways in which constitutional law shapes, enables and constrains responses to it differ markedly across regions. The issue therefore aims to highlight both the divergences as well as the commonalities in constitutional approaches to this pressing global challenge.

Yet any comparative inquiry into the role of constitutional law in urban housing disputes must take account of the distinct social and legal contexts in which such disputes arise. It is therefore instructive to look beyond the Berlin housing crisis and to reflect on the diverse realities that shape urban housing disputes across the globe.

C. How Urban Housing Disputes Differ

Patterns of living and the organization of housing stem from the interplay of culture, society, politics, market conditions, and history. These forces shape how people live and how housing is distributed within cities. They also lead to regional differences in urban housing systems which are visible in the supply and quality of dwellings, their design, and in the institutions that govern their provision. The conflicts surrounding urban housing are equally diverse. They reflect particular historical experiences, geopolitical pressures, climatic conditions, and religious traditions.

The Berlin housing conflict discussed above illustrates this well. For decades, the city was divided by a wall that marked the Cold War fault line. In the East, a socialist housing regime prevailed, with dwellings allocated primarily by the state, and households typically

spending no more than about three per cent of their income on rent.[27] After the Wall fell in 1989, the system transitioned to a market-oriented regime. Inexpensive housing in the East has now quickly become a lucrative asset class for private investors. Speculation in residential property and the subsequent gentrification of Berlin's inner districts reflect this specific historical trajectory. While the city is no longer divided by political systems, it is increasingly divided by wealth.[28]

By contrast, other cities reveal different lines of conflict. Indian cities, for example, are shaped by the historical conflict between Hindus and Muslims, which is evident in residential patterns and the formation of segregated Muslim enclaves.[29] Cities in South Africa display racial segregation rooted in apartheid and the exploitation of Blacks.[30] In the United States, tent encampments have become an increasingly visible feature of the urban landscape, linked to decades of restrictive welfare policies and limited social housing provision.[31] In France, today's banlieues took shape through the large public-housing programs of the 1950s and 1960s, which ultimately reinforced the segregation of households of North African origin.[32]

Despite the complexity of the historical, political, and cultural contexts, several broad patterns stand out. A key divide separates cities in the Global South from those in the Global North.[33] In many Southern cities, informal settlements, insecure tenure, and weak

27 *Axel Schildt*, Wohnungspolitik, in: Hans Günter Hockerts (ed.), Drei Wege deutscher Sozialstaatlichkeit, München 1998, p. 180.

28 *Talja Blokland / Robert Vief*, Making Sense of Segregation in a Well-Connected City: The Case of Berlin, in: Maarten van Ham / Tiit Tammaru / Rūta Ubarevičienė / Heleen Janssen (eds.), Urban Socio-Economic Segregation and Income Inequality: A Global Perspective, Cham 2021, p. 251; in the same vein see also: *Hartmut Häußermann / Andreas Kapphan*, Berlin: Von der geteilten zur gespaltenen Stadt? Sozialräumlicher Wandel seit 1990, Wiesbaden 2002.

29 See, for example: *Laurent Gayer / Christophe Jaffrelot* (eds.), Muslims in Indian Cities: Trajectories of Marginalisation, New York 2011; *Abdul Shaban / Zinat Aboli*, Socio-Spatial Segregation and Exclusion in Mumbai, in: Maarten van Ham / Tiit Tammaru / Rūta Ubarevičienė / Heleen Janssen (eds.), Urban Socio-Economic Segregation and Income Inequality: A Global Perspective, Cham 2021, pp. 154 ff.

30 *David Everatt*, Poverty and Inequality in Gauteng City-Region, in: Philip Harrison / Graeme Götz / Alison Todes / Chris Wray (eds.), Changing Space, Changing City: Johannesburg after apartheid, Johannesburg 2014, p. 64.

31 For an inquiry into this phenomenon see: *Julie Hunter / Paul Linden-Retek / Sirine Shebaya / Samuel Halpert*, Welcome Home: The Rise of Tent Cities in the United States, March 2014, https://homelesslaw.org/wp-content/uploads/2018/10/WelcomeHome_TentCities.pdf (last accessed on 14 November 2025).

32 *Richard L. Derderian*, Les Banlieues: Suburban Space and National Identity, in: Richard L. Derderian (ed.) North Africans in Contemporary France: Becoming Visible, London 2004, p. 148.

33 For a global comparison of urban housing systems between the Global South and the Global North, see: *Aysegul Can*, Informality and Affordability: Approaches from the Global South and Opportunities for the Global North, Critical Housing Analysis 6 (2019), pp. 1 ff.; *Jan Nijman / Yehua Dennis Wei*, Urban Inequalities in the 21st Century Economy, Applied Geography 117 (2020), pp. 1 ff.; *Charlotte Lemanski*, Hybrid Gentrification in South Africa: Theorising Across

urban infrastructure prevail. Urban housing disputes thus focus on legal security of tenure, access to basic services such as electricity and water, and the persistent risk of displacement or eviction. In Northern cities, housing crises tend[34] to look different. As illustrated by the case of Berlin, rising rents, the financialization of housing markets, and the social consequences of gentrification dominate housing conflicts.

Despite these differences, cities in the Global North and the Global South cannot be understood apart from one another. They are tied together by a shared colonial history. Much of the wealth and urban fabric of Europe's metropolises arose from colonial expansion and extraction.[35] Commodity flows, such as tobacco, coffee and sugar, enabled cities like Hamburg,[36] Amsterdam,[37] Lisbon,[38] and Berlin[39] to flourish, leaving lasting marks on infrastructure, architecture, and urban prosperity. The counterpart to this history is visible across many cities in the Global South, which were shaped by European appropriation of land, resources, and labor.[40] Many of these postcolonial cities[41] took shape along major trade routes or in resource-rich regions,[42] and their internal geographies still reflect colonial hierarchies, with districts once reserved for colonial elites often adjacent to extensive areas of entrenched poverty.[43] In this context, the term "Global South" does not refer to

Southern and Northern Cities, Urban Studies 51 (2014), pp. 2943 ff.; *Ryan Powell / Abdou Maliq Simone*, Towards a Global Housing Studies: Beyond Dichotomy, Normativity and Common Abstraction, Housing Studies 37 (2022), pp. 837 ff.; *Darinka Czischke / Alonso Ayala*, Housing in the Global North and the Global South, in: Anthony M. Orum / Javier Ruiz-Tagle / Serena Vicari Haddock (eds.), Companion to Urban and Regional Studies, Hoboken 2021, pp. 579 ff.

34 The conflicts discussed above in cities of the Global South are by no means confined to those settings; they also surface in cities of the Global North, not least when it comes to informal housing: *Can*, note 33, pp. 1 ff.

35 *Christoffer Kølvraa,* Decolonizing European Colonial Heritage in Urban Spaces – An Introduction to the Special Issue, Heritage & Society 13 (2020), p. 1.

36 *Frank Eckardt/Johanna Hoerning*, Postkoloniale Städte, in: Frank Eckardt (ed.), Handbuch Stadtsoziologie, Wiesbaden 2012, pp. 275 ff.

37 *Csilla E. Ariese*, Amplifying Voices: Engaging and Disengaging with Colonial Pasts in Amsterdam, Heritage & Society 13 (2020), pp. 119 ff.

38 *Márcia Chuva / Paulo Peixoto*, The Water that Washes the Past: New Urban Configurations in Post-Colonial Lisbon and Rio de Janeiro, Heritage & Society 13 (2020), pp. 108 ff.

39 *Ulrich van der Heyden / Joachim Zeller* (eds.), Kolonialmetropole Berlin. Eine Spurensuche, Berlin 2002.

40 As *Garth Myers* argues with regard to African cities: *Garth Myers*, African Cities: Alternative Visions of Urban Theory and Practice, London 2011, pp. 51 ff.

41 For the different forms of the postcolonial city, see: *Gerrit Adriaan de Bruijne*, The Colonial City and the Post-Colonial World, in: *Robert Ross / Gerard J. Telkamp* (eds.), Colonial Cities, Dordrecht 1984, pp. 231 ff. *De Bruijne* distinguishes between cities founded by colonial regimes, cities that played a central role in the colonial administrative system, and cities whose structures continue to exhibit "Western" elements.

42 *Myers*, note 40, p. 51 ff.

43 With regard to African cities: *Catherine Coquery-Vidrovitch*, The History of African Cities South of the Sahara, Princeton 2005, p. 5; *Myers*, note 40, p. 54.

a geographic boundary but rather is an analytical lens for tracing how colonial legacies continue to shape urban development.[44] This shows that the notion of the "Global South", as discussed in comparative constitutional scholarship[45] (including in this journal[46]), is also central to comparative housing studies. Bringing these fields together promises fruitful insights into the interplay of law, policy, urban governance and its colonial legacies.

The distinction between cities in the Global South and the Global North, however, is not the only one that can be made. Urban housing conflicts can take many forms, and so do the criteria by which they can be classified and compared. One might distinguish between forms of protest and mobilization,[47] or between the legal and institutional forms of housing provision,[48] or between a city's demographic trajectory.[49] Scholars examining urban housing conflicts from a comparative law perspective should bear in mind these possibilities and the diversity of local contexts. Comparative housing studies—the sociological counterpart to comparative law—offer a rich body of material to guide that inquiry.[50]

D. What Do Urban Housing Disputes Have in Common

Although different historical and local conditions shape urban housing disputes, they also show significant similarities. At their core, they revolve around competing claims to scarce urban resources, in which diverging and often opposing needs and interests collide. The

44 Along similar lines, see also: *Can*, note 33, p. 2; *Philipp Dann*, Southern Turn, Northern Implications: Rethinking the Meaning of Colonial Legacies for Comparative Constitutional Studies, Comparative Constitutional Studies 1 (2023), p. 181.

45 *Philipp Dann / Michael Riegner / Maxim Bönnemann*, (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, pp. 1 (4); *Dann*, note 44, pp. 174 ff.; *Daniel Bonilla Maldonado* (ed.), Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia, Cambridge 2013; *Milena Petters Melo / Thiago Rafael Burckhart*, A Constitutionalism "of" the Global South? Epistemological Reflections on Emerging Constitutional Trends, Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito 14 (2022), pp. 420 ff; *Michaela Hailbronner*, Transformative Constitutionalism: Not Only in the Global South, The American Journal of Comparative Law 65 (2017), pp. 527 ff.

46 See for example the Special Issue on "Cities and the Global South", World Comparative Law 53 (2020).

47 See for example: *Gertjan Wijburg / Richard Waldron*, Social Movements against Housing Financialization: An Introduction to the Special Issue, Critical Housing Analysis 11 (2024), pp. 56 ff.

48 *Jim Kemeny*, From Public Housing to the Social Market. Rental Policy Strategies in Comparative Perspective, London 1995.

49 *Jaekyung Lee / Galen Newman / Yunmi Park*, A Comparison of Vacancy Dynamics between Growing and Shrinking Cities Using the Land Transformation Mode, Sustainability 10 (2018), pp. 1513 ff.

50 *Walter Matznetter*, Quo vadis, comparative housing research, in: Sebastian Schipper / Lisa Vollmer (eds.), Wohnungsforschung, Bielefeld 2020, pp. 161 ff.; *Jim Kemeny / Stuart Lowe*, Schools of Comparative Housing Research: From Convergence to Divergence, Housing Studies 13 (2), 1998, pp. 161 ff.; *Manuel B. Aalbers*, Towards a Relational and Comparative Rather than a Contrastive Global Housing Studies, Housing Studies 37, 2022, pp. 1054 ff.

persistence and intensity of such housing disputes stem from the dual role of housing in capitalist societies: housing is both a market commodity and a basic social necessity - two functions that inherently stand in conflict with one another.[51] In urban settings, these functions collide within the confines of very limited space, making competing claims especially visible. While the specific form of tension between housing as a commodity and housing as a social necessity varies across historical and geographical contexts, the underlying contradiction recurs in cities worldwide, making housing a paradigmatic site in which broader conflicts over distributional justice and urban belonging are played out. To grasp the meaning of this fundamental contradiction, it is necessary to examine the dual nature of housing in more detail. Such an inquiry not only illuminates the structural tensions at the heart of urban housing disputes but also provides a basis for understanding how constitutional law becomes entangled in these struggles.

I. Housing as a Social Necessity

Every society depends on housing in a very literal sense: people need a place to live that protects them from the elements and unwanted intrusion, and provides a private space for family life, rest, and everyday routines. Housing also is the platform from which people participate in work, education, as well as cultural and political life. Although dwelling arrangements have varied across centuries and cultures, the need for a place to live has never changed.

Against this backdrop, housing differs from other essential goods in several decisive respects. It is inherently scarce, tied to a fixed location, and its production requires significant labor, capital, and time.[52] Therefore, expanding the housing stock demands planning, finance, construction capacity and supporting infrastructure. Moreover, the adequacy of housing is inseparable from its location. The proximity of housing to employment, schools, transport, and health services is part of its social value. Housing supply is, therefore, not freely transferable across space; a vacant unit on the periphery is not a meaningful substitute for a scarce unit near employment or transit. These features reduce supply elasticity, raise adjustment costs, and make shortages slow and difficult to remedy.[53] Urbanization magnifies these constraints, as large numbers of people share limited space. Within cities, housing needs are concentrated precisely where land is most limited, and where competing claims for residential, commercial, infrastructural, and environmental land use are most intense.

51 *Andrej Holm*, Wohnung als Ware. Zur Ökonomie und Politik der Wohnungsversorgung, Widersprüche 31 (2011), p. 10.

52 *Barbara Schönig / Lisa Vollmer*, Wohnungsnot gestern und heute, in: Sebastian Schipper / Lisa Vollmer (eds.), Wohnungsforschung, Bielefeld 2020, p. 181.

53 Ibid.

II. Housing as an Asset

In market economies, housing also functions as a commodity. It is produced for sale or rent, priced according to supply and demand, and treated as an asset that can generate profit. This market logic allocates housing by price, steers new construction toward higher-profit segments, and rewards scarcity of housing with rising values. Where demand for housing is strongest, land values and expected returns are highest.[54]

These mechanisms often conflict with the previously outlined function of housing as a social necessity. People still require a place to live even as prices climb, and the social costs of inadequate housing do not appear on private balance sheets. When market prices determine access to housing, households with low incomes are the first to be excluded by rising rents or purchase prices. The immediate consequence is the segregation and crowding of low-income households and displacement into substandard or informal arrangements; at the extreme, individuals fall into homelessness. None of this reflects a reduced need for housing, but only a reduced ability to pay. This shows that the features that optimize housing as an asset tend to undermine its function as shelter. The need for housing is strongest where jobs, schools, transport, and services cluster. Those same locations are where land values and expected returns are highest. To sum it up: The places with the greatest social need are precisely the places where the commodity logic operates most intensely.

This market-based provision of housing has its historical origins in nineteenth-century Europe when private property in land and private rental law was legally consolidated and standardized. Enclosures and the creation of land registers converted land into an asset that could be bought, sold and rented, while ownership and contracts became enforceable through courts.[55] At the same time, industrialisation drew large numbers of people into fast-growing cities. Many workers moved into overcrowded substandard tenement blocks, which had been constructed by the propertied elites to generate profit. It is in this context that the modern "housing question" emerged: The idea of housing as exclusionary private property clashed with the social need for adequate housing.[56] Through imperial rule and commercial networks, these property regimes spread globally, overlaying or displacing local tenure systems such as collective customary use.[57] Today, the private right to property

54 For insightful accounts of the political economy of housing, see: *Peter Marcuse / David Madden*, In Defense of Housing: The Politics of Crisis, London / New York 2016; *Aalbers*, note 5.

55 *Katharina Pistor*, The Code of Capital, Woodstock / Princeton 2019, pp. 30 ff.

56 The "modern housing question" was first articulated by *Friedrich Engels* in his study of industrial Manchester. *Friedrich Engels*, Die Lage der arbeitenden Klasse in England [1845], Marx-Engels-Werke, 1962, pp. 225 ff.;

57 For the complex and multifaceted forms of imperial property transfer, see: *Allan Greer,* Property and Dispossession, Cambridge 2017; *Naama Blatman / Alistair Sisson*, Rethinking Housing Inequality and Justice in a Settler Colonial City, in: Keith Jacobs / Kathleen Flanagan / Jacqueline De Vries / Emma MacDonald (eds.), Research Handbook on Housing, the Home and Society, Cheltenham / Northampton 2024, pp. 548 ff.

has become a central organizing principle of urban life. While its design and effects may vary across contexts, the fundamental tension between housing as a commodity and housing as a social necessity remains.

III. Constitutional Law in Urban Housing Disputes

Amid these competing interests and claims over housing, constitutional law has a particular part to play. Constitutions establish the basic frameworks for organizing the allocation of resources, such as housing, and thus provide the normative ground on which housing systems are designed. By setting fundamental commitments, such as property rights, social rights, equality or dignity, constitutions frame how a state may organize access to housing. As such, constitutional law becomes an important touchstone in disputes over who may access housing, on what terms, and subject to which constraints. In litigation and policy debate, it serves as a benchmark to defend or resist particular distributive arrangements. The Berlin campaign we introduced above, which invokes Art. 15 GBL to transfer large housing companies into public ownership, stands as just one example among the many movements contesting exclusionary housing systems with the means of constitutional law.

In practice, such housing disputes often take the form of questions of constitutional justification. Courts might ask whether eviction moratoria, rent regulation, social-housing quotas, or vacancy controls are compatible with constitutional standards. Moreover, constitutional law may authorize specific regulations, impose positive duties of protection and define the outer limits of private autonomy. Where a constitution recognizes a right to housing[58] or minimum conditions of existence,[59] litigation turns on the scope and enforceability of that guarantee. Where such rights are absent, attention often turns to how far property clauses can be interpreted to secure effective access to housing for all.[60] The institutional design of a constitution matters as well. Federal arrangements, the separation of powers, and the allocation of competences between the state and municipalities determine who may regulate, which instruments are available and how interventions affect urban housing

58 See, for example: Sec. 26 of the Constitution of the Republic of South Africa from 1996; Art. 65 of the Constituição da República Portuguesa 1976; Art. 6 of the Constituição da República Federativa do Brasil de 1988.

59 See, for example in Germany: BVerfG, Judgment of 9 February 2010 – 1 BvL 1/09 –, BVerfGE 125, 175-260 – „Gewährleistung eines menschenwürdigen Existenzminimums“, see also: Press Release - No. 5/2010 of 9 February 2010.

60 Much of the case law and academic literature on the German housing crisis centers on how far private property can be limited to give effect to its social obligation: BVerfG, Order of 18 July 2019 – „Mietpreisbremse“; *Anuscheh Farahat*, Eigentum verpflichtet: die Sozialbindung des Eigentums am Beispiel des Berliner Mietendeckels, JuristenZeitung 71 (2020), pp. 602 ff.; *Alexander Blankenagel / Rainer Schröder / Wolfgang Spoerr*, Verfassungsmäßigkeit des Instituts und der Ausgestaltung der sog. Mietpreisbremse auf Grundlage des MietNovGE, Neue Zeitschrift für Miet- und Wohnungsrecht 11 (2015), pp. 1 ff.; *Charlotte Kreuter-Kirchhof*, Verfassungsmäßigkeit von Mietpreisbremse und Mietendeckel?, Die Öffentliche Verwaltung 3 (2021), pp. 103 ff.

crises.[61] Taken together, these constitutional parameters shape urban housing systems and determine the way in which housing disputes are articulated and resolved. How we read these constitutional provisions and the priorities we derive from them ultimately decide how particular housing conflicts are settled. For this reason, struggles over urban housing are, unavoidably, also struggles over the meaning of constitutional law.

E. Dimension of Housing Disputes

The Special Issue is interested in examining how the role of constitutional law in housing varies across different contexts, what hinderances and opportunities it may entail, how it is mobilized and demobilized in different legal systems, and how constitutional courts have treated housing disputes within those systems. To approach these questions, our texts shed light on the different dimensions of conflict that constitutional law encounters when addressing housing issues.

The experiences in Germany described above highlight two diverging functions that constitutional law can assume. On the one hand, it can contain a progressive potential that lends legitimacy to a discourse and empowers political actors seeking transformative change. On the other hand, it can simultaneously hinder campaigns advocating social reform. While the protection of individual rights, such as the right to property or freedom of trade, appears as an obvious challenge to the allocation of housing, more technical aspects of constitutional law can also be significant. The distribution of competences between regional states and the federal state, for instance, may prevent regional actors from enforcing legislative changes.[62]

Our first article in this special issue builds on this insight by examining two contrary approaches in two different constitutional systems. In her article, Shraddha Dubey compares the constitutional regimes of Colombia and India, focusing on how attempts to decentralize governance have shaped housing policy in both states. Although both countries constitutionally recognized local forms of self-government in the early 1990s, the outcomes of decentralization have diverged sharply. While Colombia's strong and coherent decentralization has enabled a more effective urban housing governance, India's structurally weak and inconsistently implemented decentralization has hindered Mumbai's ability to address its severe housing challenges. In India, broad state discretion over the devolution of powers and financial resources enables states to bypass municipal decision-making, weakening the potential of local measures. As a result, conflicting state-level interests can impede regional projects aimed at resolving a housing crisis in a specific city. Shraddha Dubey's article shows that constitutionalised decentralization improves housing outcomes only when it is both structurally well-designed and meaningfully implemented.

61 *Ran Hirschl*, City State, Oxford 2020, pp. 10 ff.

62 Ibid.

The articles by Junaid ul Shafi and Eklavya Vasudev shift the focus from formal to substantive conflicts. They explore how housing issues intersect with other policy fields, emphasising how housing can reinforce existing societal problems and come into tension with unintended side effects of otherwise desirable political projects. Taken together, they highlight the need to integrate constitutional housing questions into a wide range of political considerations.

Junaid ul Shafi investigates the interrelation between housing and religious discrimination. His article argues that housing in Indian cities is a central arena in which religious identity—especially Muslim identity—shapes access to space, rights, and security, producing deeply segregated urban landscapes. Residential segregation is therefore not accidental but systematically produced. Private housing markets discriminate openly on religious grounds, as landlords, brokers, and resident associations routinely deny rentals or sales to Muslims. This creates religio-spatial filtering that pushes Muslims into contained, Muslim-majority areas. The state reinforces this segregation: planning and zoning decisions frequently label Muslim settlements as "illegal", "encroached", or "unauthorised", justifying demolitions and heightened policing. Demolition drives disproportionately target Muslim neighborhoods, treating them as out of place or illegitimate. In this way, state power acts on religious identity by controlling where Muslims can live and by making their neighborhoods vulnerable to arbitrary action. The article underscores the consequences of constitutional gaps: where discrimination law applies only to state actors, private housing markets remain governed by religious prejudice. At the same time, strong constitutional protection of religious freedom may help foster a more just housing market.

Eklavya Vasudev offers a critical perspective on the intersection between housing and environmental needs. His article examines how environmental regulation in India has come into increasing conflict with the urgent need for urban housing and sets this conflict in comparison with housing regulation in South Africa. While environmental protection is a constitutional imperative in India, the way courts and governments apply environmental principles often disproportionately burdens the urban poor, especially those living in informal settlements on lands deemed "encroached" or "ecologically sensitive." As a result, environmental law becomes a tool that reshapes urban space in exclusionary ways. Judicial expansions of the public trust doctrine have allowed courts to classify large areas of urban land as inalienable public resources requiring protection. This has enabled authorities to evict settlements, demolish homes, and prohibit regularizationoften without providing adequate alternatives. Informal settlements are framed as environmental threats, while upscale commercial or luxury projects in similar zones are more easily regularized. Thus, a doctrine intended to safeguard ecological resources is mobilised selectively, reinforcing spatial inequality. The article highlights that in contrast to the case law of the South African constitutional court, environmental jurisprudence in India rarely recognizes housing as a competing constitutional interest. The paper stresses that housing must be understood through its intersections with conflicting political aims rather than as an isolated policy field.

Taken together, the three articles show how closely legal mechanisms and social contexts are intertwined in shaping housing outcomes. Across the different settings discussed in this Special Issue, constitutional law proves to be highly context-dependent: it is shaped by the legal systems, housing regimes, and the social conflicts in which it is entangled. Housing, in turn, is not a self-contained policy field but a central site where conflicts over race, religion and environmental protection are negotiated and where constitutional norms are constantly invoked, contested and reinterpreted. The contributions in this Special Issue invite readers to approach constitutional law with this ambivalence in view: as a site where the limits and possibilities of transformative housing politics are continuously negotiated and produced.

Constitutionalised Decentralisation and its Impacts on the Urban Housing Crisis in India and Colombia

By *Shraddha Dubey*[*]

Abstract: In India's federal constitution, the urban housing agenda is allotted to the state governments. However, the overzealousness of the union government has meant that little of this power has been exercised by the state governments, with policies framed by the union government dominating the pursuit of the mandate. This overzealousness is not unique to the urban housing agenda, even though it has been an area of consistent interest and preoccupation, as evident in the overarching powers exercised by the union government. Such exercise of power appears to be facilitated by the use of the popular label of quasi-federal, recognising the unequal and centralising power of the union government. This situation is further complicated by the enactment of the 74th Constitutional Amendment Act, 1993, which sought to decentralise power by creating a third tier of government, local governments. This amendment placed the urban housing agenda as a function of local governments. However, the creation and operation of local governments are subject to the state governments' exercise of the authority to create and empower them with resources to perform these functions. On the other hand, Colombia, despite having a unitary constitution, displays a strong commitment to decentralisation, not just in the textual framing of its constitutional provisions but also in the exercise of power across different administrative units.

This stark contrast is explored by analysing how the urban housing agenda is pursued in India and Colombia, through the study of the administration of the cities of Mumbai and Bogota, respectively. The observation from the study, elucidated in the article, highlights the relative success of decentralisation in Bogota, enabling a satisfactory pursuit of the urban housing agenda, in comparison to that of Mumbai, which finds itself caught up in a complex web of governance structures impeding its ability to meaningfully address urban housing challenges. In doing so, the article aims to highlight the limitations of constitutionalised decentralisation in India by examining its federal constitution and government, as demonstrated in India's pursuance of the urban housing agenda.

Keywords: Decentralisation; Local Self-Governments; Housing

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A. Introduction

A glance outside from any of the several high-rises in the business centre of the Bandra Kurla Complex in Mumbai, India, reveals a stark contrast to its affluence. What lies before is Dharavi, a 557-acre vast slum with over 1 million inhabitants. Originally, a swampy area occupied by Mumbai's fishing community, it was gradually transformed into a manufacturing hub, which eventually evolved into Dharavi, Asia's largest slum.[1] Concealed in this description is its unique nature as a bustling commercial hub that generates an annual revenue of about one billion.[2] However, its inhabitants are currently consumed by the fear of losing their livelihood and facing spatial fragmentation due to the Dharavi Redevelopment Project.[3] This project, helmed by the State Government of Maharashtra in partnership with the Adani Group, one of India's largest multinational conglomerates, seeks to redevelop Dharavi as prime real estate at the heart of the city to make it fitting for the country's thriving financial capital.[4]

Beyond the immediate perils of the Dharavi Redevelopment Project for Dharavi and its inhabitants lies a larger issue: India's complicated relationship with addressing the challenge of urban housing in its governance. To gain a better understanding, a brief overview of India's constitutional governance structure is helpful.

Constitutions are typically classified as either unitary or federal. A unitary constitution vests the entirety of the state's power in a single government. Whereas a federal constitution divides power between two levels or tiers of government.[5] India is a federal state, derived from the features of its constitution. The first tier refers to the government for the entire country, and the other level refers to governments in multiple, different regions. This division of power, however, is not equal, with the union government possessing certain overarching powers over the state governments, earning it the label of quasi-federalism.[6] In

1 *Amar Farooqui*, Opium City: The Making of Early Victorian Bombay, New Delhi 2008; *Kalpana Sharma*, Rediscovering Dharavi: Stories from Asia's Largest Slum, New Delhi 2000.

2 *Dhaval S. Kulkani*, Dharavi revamp: Can Gautam Adani transform Asia's largest Slum?, India Today, 6 August 2025 https://www.indiatoday.in/india-today-insight/story/dharavi-revamp-can-gautam-adani-transform-asias-largest-slum-2767186-2025-08-06 (last accessed on 15 October 2025).

3 Land Conflict Watch, Adani's Dharavi Redevelopment Plan ignites fear of evictions and displacements among residents, https://www.landconflictwatch.org/conflicts/adani-s-dharavi-redevelopment-plan-ignites-fear-of-evictions-and-displacements-among-residents# (last accessed on 15 October 2025).

4 Dharavi Redevelopmnet Project, Slum Rehabilitation Authority, Government of Maharashtra https://drpmumbai.maharashtra.gov.in/ (last accessed on 15 October 2025)

5 *Mahendra Pal Singh*, The Federal Scheme, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), The Oxford Handbook of the Indian Constitution, Oxford 2016, p. 700.

6 *Mahendra Pal Singh*, The Federal Scheme, in: Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta (eds.), The Oxford Handbook of the Indian Constitution, Oxford 2016, p. 717.

this structure, matters of urban planning and governance were allocated as subjects of the state governments.[7]

However, the central or union Government of India, in its administration, gave housing significant primacy. It established the Ministry of Housing and Urban Affairs of India, originally the Ministry of Works, Housing and Supply in 1952 to deal with the substantial increase in the urban population by 53.7 per cent between 1941 and 1951.[8] Other efforts included the passing of the Slum Areas (Improvement and Clearance) Act, 1956, to ensure concerted efforts to clear slums and ensure better living conditions in urban areas across the country,[9] and creating the Planning Commission of India to launch plans focusing on India's economic and social development by addressing problems relating to housing and the existence of slums.[10] Therefore, while state governments have the power to legislate, issue directives, and develop policies, actions by the Union Government have dominated most efforts in the realm of urban development and housing.[11]

This situation was further complicated by the passing of the 74th Constitutional Amendment Act, 1993, which created the third tier of governance in the form of urban local bodies. It introduced Part IXA to the Constitution of India, titled "The Municipalities", which instructed the creation of local self-governing bodies by the respective state governments.[12] This gave state governments the discretionary powers to devolve resources to local self-governments to enable them to perform their functions. Out of the 18 identified functions, Entry 1 on urban planning, including town planning, and Entry 10 on slum improvement and upgradation, directly impact the governance and administration of housing-related concerns in the country.[13]

It is against this background that the urban housing struggle in Mumbai, primarily exemplified by the Dharavi Redevelopment Project, will be analysed to reveal the complex ways in which urban housing concerns are addressed across India's different levels of governance and administration.

7 Entry 5, Seventh Schedule, List II – State List, Constitution of India, 1950; Government of India - Ministry of Housing and Urban Affairs, About Us – Mandate, https://mohua.gov.in/cms/mandate.php (last accessed on 29 June 2025).

8 Government of India - Ministry of Housing and Urban Affairs, About Us – Mandate, https://mohua.gov.in/cms/mandate.php (last accessed on 29 June 2025); *Lalit Batra*, A Review of Urbanisation and Urban Policy in Post-Independent India, Working Paper Series, Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Delhi, April 2009, CSLG/WP/12, p. 5.

9 Slum Areas (Improvement and Clearance) Act, 1956, https://www.indiacode.nic.in/bitstream/123456789/1709/1/195696.pdf (last accessed on 29 June 2025).

10 *Rishi Muni Dwivedi*, Urban Development and Housing in India, New Delhi 2007.

11 *Annapurna Shaw*, Urban Policy in Post-Independent India: An Appraisal, Economic and Political Weekly, 31 (1996), p. 224; Government of India - Ministry of Housing and Urban Affairs, About Us – Mandate, https://mohua.gov.in/cms/mandate.php (last accessed on 29 June 2025).

12 Part IXA, Constitution of India (1950).

13 Twelfth Schedule, Constitution of India (1950).

This analysis will be undertaken as a comparative study with Colombia in the context of its decentralised federal governance structure and its impact on the country's urban housing challenges, especially its capital city of Bogota.

Concerns of housing in Colombia are linked to a long history of political contestation over land accumulation, dispossession, and displacement. After Independence, the 1886 Constitution of Colombia had formalised a unified nation-state by declaring it as a centralised republic.[14] Programs and policies were designed to prevent land-based conflict, however, they persisted, with the 1940s and 1950s being characterised by bitter internal political competition, along with continued displacement and dispossession.[15] Structural changes at the economic and political level were identified in the 1980s as an important strategy to combat continued violence and resultant displacement. One of the most significant changes adopted was the 1986 Decentralisation Reform, which provided for greater representation of local communities through popular elections of mayors and local councils, with the aim of facilitating the efficient provision of public goods and local administration.[16] This was formalised with the passing of the 1991 Constitution of Colombia, which adopted decentralisation as its core tenet and identified municipalities as the key authority in devising housing initiatives and addressing issues of informal settlement.[17] As will be seen in Part D in greater detail, decentralisation of power and devolution of such power to local governments in Colombia is widely viewed favourably and deemed as a success in addressing numerous prerogatives including urban housing.

We see that both the Constitutions of India and Colombia granted recognition to local self-governments in the early 1990s. However, the impact of such recognition has been widely disparate. This article attempts to highlight this disparate impact through the mandate of urban housing attributed to local self-governments in both countries with a specific focus on the urban housing status in the cities of Mumbai and Bogota in India and Colombia, respectively.

This analysis yields two key observations regarding the 74th Constitutional Amendment Act's limited ability to effectively decentralise governance in India. First, the framing of the 74th Constitutional Amendment Act possesses an inherent design flaw, which creates textual limitations that restricts meaningful decentralisation of power. Second, the resistance to devolving power by state governments, despite policy and administrative recommendations, can be understood within the larger context of the federal structure and federal culture that have evolved and are practised in the country. The label of quasi-federalism has created implications in the processes of ceding and devolving powers between

14 Article 1, Constitution of Colombia (1886).

15 *Francisco Gutierres Sanín / Tatiana Acevedo / Juan Manuel Viatela,* Violent Liberalism? State, Conflict And Political Regime In Colombia, 1930-2006, An Analytical Narrative in State-Making, Crisis States Research Centre, Working Paper No. 19, November 2007, p. 10; *Devesh Kapur / John P. Lewis / Richard Webb*, The World Bank: Its First Half Century, Washington DC, 1997.

16 Decentralisation Reform, Colombia (1986).

17 Article 1, 311 and 313, Constitution of Colombia (1991).

governance structures, which, as has been argued elsewhere, not only raises concerns about the model of federalism in India but has also contributed to the effective failure of meaningful decentralisation.

This study adopts a comparative approach as the suitable methodology given the increasing prominence of the 'city' as a contested space, particularly in the context of housing concerns, across countries. To address these challenges, countries are either harnessing their existing constitutional mechanisms or developing new ones through constitutional recognition of cities and their governance. Employing a comparative methodology lends richness to a relatively new attempt to explore the place of cities in constitutional theory.

In this context, the rationale for analysing decentralisation as a governance model and its impact on housing by comparing India and Colombia is manifold. Both India and Colombia, alongside a few other countries like Brazil and South Africa, have the distinction of formally recognising decentralisation of power by granting constitutional status to local self-governments as an intrinsic part of their governance and administrative structure. As post-colonial countries in the Global South, grappling with concerns of national unity, integrity and socio-economic difference, both India and Colombia experienced the impact of global economic policies and subsequent push for urbanisation, contemporaneously. As will be demonstrated in the subsequent parts, both India and Colombia experienced liberalisation of their economies, and the adoption of decentralisation in their constitutional framework around the same time. Both these factors have played an important role in how the countries have dealt with the housing crises in their urban centres. However, despite the similarity in circumstances and concerns, the impact of decentralisation in dealing with the urban housing crises in both these countries has been considerably divergent.

The article undertakes an analysis of decentralisation in India and Colombia in four substantive sections. Section B delineates the federal design and operation of the Indian Constitution. This is followed by Section C, which identifies the nexus between decentralisation of governance and urban housing in India. Section D traces constitutional development in Colombia to explain its unique unitary, decentralised republic. Section E analyses the impact of decentralisation through the role played by local governments in the context of urban housing in Mumbai and Bogota. The article concludes with a brief reflection of some key highlights and observations derived from the analysis.

B. The "Federation" of India – Design and Operation

As mentioned above, the Indian Constitution is a federal constitution. However, the terms "federal" or "federation" do not appear in the Indian Constitution. It opens with the declaration that India is a "Union of States."[18] According to Dr. B. R. Ambedkar, the Chairman of the Drafting Committee of India's Constituent Assembly, this phrasing conveys that while India and its people are divided into different regions with their own regional governments

18 Articles 1, Constitution of India (1950).

for the convenience of administration, "the country is still one integral whole, its people a single people living under a single *imperium* derived from a single source".[19]

Despite the absence of the term federal or federation in the Indian Constitution, its federal feature is derived from the distribution of power or competencies, legislative, executive and judiciary, between the two primary constituents of the Indian republic, the centre or the union government, and the regional or state government, which is protected by the Constitution.[20] Schedule Seven of the Constitution delineates legislative power to the union or central government in List 1 (Union List) and the regional or state government in List 2 (State List). There is a third list known as the Concurrent List, which enlists areas over which both the union and state governments can exercise legislative power. However, in the event of a conflict between the two, the decision of the union government prevails.[21] The union government enjoys significant financial control, with the power to collect larger revenues and redistribute them to the states, along with emergency powers that empower it to override State powers and assume greater control over States during emergencies.[22]

These features collectively reflect that the division of power and competencies between the two levels is vertical, giving the union government more power than the state government. The nature of Indian federalism was identified as quasi-federal by Prof. Wheare, a categorisation that continues to be widely used in both doctrinal work and judicial pronouncements.[23] His categorisation is based on the concern that the union government's overarching power to intervene in affairs of state governments makes a fragile case for Indian federalism.[24] He also recognised two terms: the federal constitution and the federal government.[25] These terms identify the federal elements in a nation's constitution, alongside assessing whether these elements have sufficiently created federal governments that follow the ethos of the federal principles. This terminology will be revisited in later sections of this article. In a similar vein, some scholars of Indian Constitutional Law have adopted the terminology of "centralised federalism" to suggest the need to enquire whether India is federal or not. Their concerns stem from the incorporation of the term "Union" in Article

19 Constituent Assembly Debates, 4 November 1948, https://www.constitutionofindia.net/debates/04-nov-1948/ (last accessed on 29 June 2025).

20 *Singh,* note 5, p. 700; SR Bommai v. Union of India (1994) 3 SCC 1, para. 112; Kuldip Nayar v. Union of India (2006) 7 SCC 1, paras. 74, 75 and 233.

21 Seventh Schedule, Constitution of India (1950).

22 Articles 275, 280, 282 and 353, Constitution of India (1950).

23 *K.C. Wheare*, Federal Government, Oxford 1963; *Louise Tillin*, Indian Federalism: Centralism Amidst Diversity in: John Kincaid and J. Leckrone (eds.), Teaching Federalism, Cheltenham 2023; *Ashutosh Varshney*, How has Indian Federalism Done?, Studies in Indian Politics 1 (2013), pp. 43–63.

24 *Nidhi Sharma*, The quasi-federal constitution? Taxonomincal influences on interpretation of federalism in India, Global Constitutionalism (2025), p. 2.

25 *K.C. Wheare*, Federal Government, Oxford 1963.

1 of the Constitution but are exemplified by the measures adopted by union governments, especially those with single-party dominance, both presently and historically.[26]

The need for a strong union government, ensured through the Constitution's centralising federal design, is attributed to the belief that only a "strong Union can keep the country together" as a religious, social and ethnically diverse nation. Concerns about internal peacekeeping, economic coordination, and international relations were identified as some important reasons for the central bias.[27] With the memory of the violent partition still fresh, the Constituent Assembly was concerned about managing the crisis of its aftermath, fears of possible disunity, and the resultant prospect of anarchy in a newly independent country, causing it to design its federation by empowering the union government more than the state governments.[28] This fear is reflected in the response to Constituent Assembly member, Prof. KT Shah's proposal to add the term "federal" in Article 1.[29] HV Kamath argued that "the tendency to disintegrate in our body politic has been rampant since the dawn of history, and if this tendency is to be curbed, the word "federal" should be omitted from this Article."[30]

With respect to urban housing, the Constitution of India did not present a holistic urban imagination. A lone reference to the urban sphere could be found in List II of Schedule Seven, which enlists the state governments' power to legislate on local governments, including urban bodies such as municipal corporations, for local self-governance.[31] This provision, in conjunction with administrative and policy instructions, is seen as indicating that matters of urban planning and governance were allocated as subjects of the state governments.[32]

However, the central or union government of India, in its administration, gave housing significant primacy. As mentioned earlier, the Ministry of Housing and Urban Affairs of India was originally established as the Ministry of Works, Housing and Supply in 1952.[33] This can be understood in the context of the developments before and after the partition of India in 1947. During the Second World War, from 1939 to 1945, the establishment of

26 *Singh,* note 5, p. 700.

27 *Gautam Bhatia*, The Indian Constitution, A Conversation with Power, Cambridge 2025, p. 6.

28 *Uday Singh Mehta*, Indian Constitutionalism, Crisis, Unity and History, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), The Oxford Handbook of the Indian Constitution, Oxford 2016, p. 139.

29 Constituent Assembly Debates, 15 November 1948, https://www.constitutio nofindia.net/debates/15-nov-1948/ (last accessed on 29 June 2025).

30 Constituent Assembly Debates, 15 November 1948, https://www.con stitutionofindia.net/debates/15-nov-1948/ (last accessed on 29 June 2025).

31 Entry 5, List 2, Schedule 7, Constitution of India (1950).

32 Seventh Schedule, List II – State List, Constitution of India (1950); Government of India - Ministry of Housing and Urban Affairs, About Us – Mandate, https://mohua.gov.in/cms/mandate.php (last accessed on 29 June 2025).

33 Government of India - Ministry of Housing and Urban Affairs, About Us – Mandate, https://mohua.gov.in/cms/mandate.php (last accessed on 29 June 2025).

war production plants led to the creation of employment opportunities in urban centres. This was exacerbated by the arrival of millions of refugees from the newly created Pakistan after the partition, in search of shelter and livelihood. The combined effect of the two was a substantial increase in the urban population by 53.7 per cent between 1941 and 1951, in contrast to the rural population, which increased by only 7.4 per cent during the same period.[34]

This sharp increase in urban population and the ensuing challenge of ensuring suitable housing for them prompted two responses. First, The Planning Commission of India launched its first five-year plan, focusing on problems relating to housing and the existence of slums, as an important part of driving independent India's economic and social development. The Plan described slums as a "national problem" and a "disgrace to the country", and advocated for their removal. It also recommended the need to strengthen local authorities in preventing the growth of slums. This was the first time that the important role played by urban local bodies was formally recognised in urban governance, particularly in the context of housing and slums.[35] Soon after this, the Slums Areas (Improvement and Clearance) Act, 1956, was also passed to ensure concerted efforts to clear slums and ensure better living conditions in urban areas across the country.[36]

These developments, in conjunction, reveal two things. First, a preoccupation with slums and their removal in India's governance strategy in the context of urban housing. This preoccupation has continued to persist not just in strategic planning—the last Planning Commission 5-year plan of 2012-2017 also highlighted the existence of slums in cities as a challenge to affordable housing—but also in more infamous administrative action—large scale removal of slums on grounds of illegality, without appropriate clearance from authorities and without notifying its inhabitants across different cities—have animated public knowledge and discourse about housing concerns in India.[37]

Second, an indication that even though within India's federal structure, state governments have the power to "issue directives, provide advisory services, set up model legislation and fund programmes which the states can follow at will",[38] actions by the union government have dominated most efforts in the realm of urban development and housing. In fact, the Government of India, Ministry of Housing and Urban Affairs of India, in its

34 *Batra*, note 8, p. 5.

35 *Dwivedi*, note 10.

36 Slum Areas (Improvement and Clearance) Act, 1956, https://www.indiacode.nic.in/bitstream/123456789/1709/1/195696.pdf (last accessed on 29 June 2025).

37 Rajendra Shankar Shukla v Chhatisgarh (2015) 10 SCC 400; *Gautam Bhan*, In the Public's Interest: Evictions, Citizenship, and Inequality in Contemporary Delhi, Telangana 2016; *Anuj Bhuwania*, Public Interest Litigation as a Slum Demolition Machine, MIT Journal of Planning, 12 (2016), p. 67.

38 *Annapurna Shaw*, Urban Policy in Post-Independent India: An Appraisal, Economic and Political Weekly 31 (1996), p. 224.

mandate clearly mentions that, while "matters pertaining to urban development have been assigned by the Constitution of India to the State Governments",

> *"the Govt. of India plays a much more important role and exercises a larger influence to shape the policies and programmes of the country as a whole. The national policy issues are decided by the Govt. of India which also allocates resources to the State Governments through various Centrally Sponsored schemes, provides finances through national financial institutions and supports various external assistance programmes for urban development in the country as a whole. The indirect effect of the fiscal, economic and industrial location decisions of the Govt. of India exercise a far more dominant influence on the pattern of urbanisation and real estate investment in the country."*[39]

Hence, we see that despite having the explicit constitutional power to formulate urban policies, state governments have rarely exercised it. In most states, urban policies are drawn from the national five-year plans and other programmes and policies adopted by the central government.[40]

This two-tier quasi-federal system was further diversified with the proposal to introduce a third tier of governance by establishing local self-governing bodies.

India has historically had a rich tradition of local self-governance.[41] During British colonial rule, governing bodies in Indian cities were formalised as "instruments of political and popular education" with representation of Indians as part of an exercise to inculcate democracy.[42]

However, support for local self-government dwindled after India's independence. The debates in the Constituent Assembly were divided on the question of decentralisation. While some voices had a strong desire to continue India's tradition of local self-governance, especially in rural areas through unelected councils or panchayats, others were concerned about the representation challenges this may produce in a highly plural and diverse society, like India.[43] Ultimately, a provision on creating local self-governments in rural areas was included as a recommendatory and unenforceable provision in the Directive

39 Government of India - Ministry of Housing and Urban Affairs, About Us – Mandate, https://mohua.gov.in/cms/mandate.php (last accessed on 29 June 2025).

40 *R. Ramachandran*, Urbanization and Urban Systems in India, New Delhi 1989.

41 *K.C. Sivaramakrishnan*, Local Government, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), The Oxford Handbook of the Indian Constitution, Oxford 2016 (2016), p. 562.

42 *SN Mallik*, Local Self-Government in India, Annals of the American Academy of Political and Social Science 145 (1929), p. 37; Lord Mayo's Resolution on Provincial Finance, 1870, Resolution No 3334, dated 14 December 1870 in: M Venkatarangaiya / M Pattabhiram (eds.), Local Government in India, Kolkata 1969, pp. 96–103; Recommendations of the Royal Commission on Decentralisation, 1909, in: M Venkatarangaiya / M Pattabhiram (eds), Local Government in India, Kolkata 1969, pp. 158–66.

43 Constituent Assembly Debates, 4 November 1948, https://www.constitutionofindia.net/debates/04-nov-1948/ (last accessed on 29 June 2025). Dr. Ambedkar's assertions were supported by Hussain

Principles of State Policy.[44] Urban local governments were listed among the legislative powers of state or regional governments, enabling state governments to legislate on local governments, including urban bodies such as municipal corporations.[45]

With the evolution of administrative systems and growth in population, numerous rural local self-government bodies were set up, facilitated by legislations passed by state governments that authorised their existence and assigned them duties and functions.[46] However, frequent changes in state governments and the absence of financial autonomy impeded the meaningful operation of these local self-government bodies.[47] The condition was worse for preexisting urban local bodies. Many preexisting municipalities in Indian cities were superseded and their work usurped by their respective state governments. This occurred in prominent cities such as Calcutta (present-day Kolkata) and Madras (present-day Chennai), both of which had a long-standing legacy of local urban self-governance.[48]

Over the years, concomitant with developments elsewhere, in India too, the importance of local bodies was increasingly recognised, especially in the context of urban planning and development.[49] As the economic landscape evolved to encourage industrialisation, a sharp increase in urban population was witnessed, with 25% of India's population residing in cities, a sharp increase since its independence.[50] This necessitated the examination of laws relating to urban development and local administration.[51]

Increasing urbanisation and the resultant problems of homelessness and pavement dwellings had also attracted the attention of the Indian judiciary, which has recognised the right to shelter for everyone as a part of the right to life and livelihood protected by the Indian Constitution.[52] National planning, led by the Union Government, progressively focused on the improvement of urban slums. Many of these efforts were seen as reactive

Imam and Begum Aizaz Rasul, 8 November 1948, https://www.constitutionofindia.net/debates/08-nov-1948/ (last accessed on 29 June 2025).

44 Article 40, Part 4, Directive Principles of State Policy, Constitution of India (1950).

45 Seventh Schedule, List Two, Entry Five, Constitution of India (1950).

46 *Dr. Marina R Pinto*, Metropolitan City Governance in India, Thousand Oaks 2000.

47 See e.g., Planning Commission of India, Report of the Task Force on Panchayati Raj Institutions (2001).

48 *Sivaramakrishnan,* note 41, p. 564.

49 *Pranab Bardhan*, Decentralization of governance and development, Journal of Economic Perspectives 16 (2002), p. 185.

50 United Nations, Patterns of Urban and Rural Population Growth, Department of International Economic and Social Affairs, Population Studies No. 68; https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/files/documents/2020/Jan/un_1980_patterns_of_urban_and_rural_population_growth.pdf (last accessed on 29 June 2025)

51 *J. K. Routray*, Urban and Regional Planning in Practice in India, Habitat International 17 (1993). pp. 55–74; 5th and 6th Five-Year Plan, Government of India, 1975-1985.

52 Olga Tellis v. Bombay Municipal Corporation, 1985 SCC (3) 545; 1985 INSC 151, para. 31, 37, 42 and 45.

measures to respond to the problem of rapidly growing cities, but they were criticised for not being designed to make cities equitable in the long run.[53]

These developments become clearer when located against the backdrop of India's economic liberalisation. In the years leading up to that, urban policy began to reflect the trends of economic policy. The 7th five-year plan recognised the important role that cities played in economic development, primarily to attract private sector participation and investment. The Plan called for "radical (re)orientation of all policies related to housing" and entrusted the private sector with the responsibility of housing construction.[54] The Union Government recognised the utility of urban local bodies to undertake infrastructure creation and proposed to set up a National Urban Infrastructure Development Finance Corporation to augment their capacity.[55]

By then, the country's political leadership had also begun to engage with the issue of local self-government bodies. In 1986, the incumbent government appointed LM Singhvi, an eminent jurist, to assess the experience of rural and urban local self-government bodies. The Committee, in its findings, recommended the need for constitutional recognition, protection, and preservation of local self-governments in India as a third tier of governance in India.[56]

This cause was officially endorsed in 1988, when the then government led by Prime Minister Rajiv Gandhi expressed its support for the recommendations of the Singhvi Committee. Prime Minister Gandhi asserted that for a massive polity like India, it was important to have a system of governance that truly represented its population. This could be ensured by designing a vast network of local governance system in rural and urban India which would significantly increase the number of representatives in the Indian political system. This idea was rooted in the belief that local governments would enjoy the same sanctity that the Parliament, at the central government level and the State legislation, at the state government level enjoys.[57]

He declared that "the transmission of democracy and development to the levels where the bulk of the people lived required a national debate and if necessary, an amendment to the Constitution".[58] This statement underscored the acceptance of decentralisation and, through it, the devolution of power to the locals as important features of not just a dynamic democracy but also a necessary condition for a developing society and economy.

53 *Batra,* note 8, p. 14.

54 7th Five-Year Plan, Government of India, 1985-1990.

55 *Batra,* note 8, p. 16.

56 Ministry of Panchayati Raj, 'Recommendations of the LM Singhvi Committee' as mentioned in *Batra*, note 8.

57 The Constitution (Sixty-fourth Amendment) Bill (Bill No 50 of 1989, as introduced in the Lok Sabha).

58 *Rajiv Gandhi*, Three Pillars of Our Nation (inaugural function of the Golden Jubilee of the Maharashtra Legislative Assembly at Vidhan Bhavan, Bombay, 3 September 1988) in*: Rajiv Gandhi,* Selected Speeches and Writings 4, 1989, pp. 68–73.

As the political sphere slowly geared up to constitutionally recognise local self-governments, it also braced itself for major economic modifications. Two years before the 73rd and 74th Constitutional Amendment Acts were finally enacted, India liberalised its economy.[59] This period is also marked in international fora by the end of the Cold War, the opening up of national markets worldwide, and the "turn to the city" in development policies.[60]

In the context of decentralisation and urban governance, two developments become crucial. First, the setting up of the National Commission on Urbanisation in 1990 by the union government unequivocally emphasised the close link between urbanisation and economic development. Among its 78 recommendations, it highlighted the role of housing to ensure that cities should be prepared to play an enhanced role in economic development than they have before.[61] Second, the adoption of the 8th five-year plan, which was adopted in the same year as the passing of the 73rd and 74th Constitutional Amendment Acts. Emboldened by the decision to decentralise cities and towns through the creation of elected urban local bodies, the union government formulated a governance model for cities based on a heightened role for these urban local bodies.[62] This included the Mega City Scheme, a centrally sponsored scheme in five cities and the preparation of The India Infrastructure Report: Policy Imperatives for Growth and Welfare, June 1996, which set the tone for urban planning and governance by central and state governments.[63] To better understand these policies, especially in the context of housing, it is essential to be aware of the changes promised by the 74th Constitutional Amendment Act.

C. Towards Decentralisation in India

The 74th Constitutional Amendment Act begins with its Statement of Objects and Reasons, which states that such an amendment was required because, "[i]n many States, Local Bodies have become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged supersessions and inadequate devolution of powers and functions. As a result, Urban Local Bodies are not able to perform effectively as vibrant democratic units of self-government".[64] While we noticed that the role of urban local bodies was highlighted occasionally in the context of urban planning and governance, it did not have many strong advocates for its inclusion as a constitutional mandate. It was

59 The Constitution (Seventy-third Amendment) Act, 1993 and The Constitution (Seventy-fourth Amendment) Act, 1993.

60 *Helmut* , in: Eyal Benvenisti / Dino Kritsiotis (eds.), Cambridge History of International Law, Volume XII: International Law since the Cold War, Cambridge 2023, p. 1.

61 *Batra,* note 8, p. 17.

62 Ibid., p. 20.

63 Ibid., p. 24.

64 Statement of Objects and Reasons, The Constitution (Seventy-Fourth Amendment) Act, 1992, http://legislative.gov.in/constitution-seventy-fourth-amendment-act-1992 (last accessed on 29 July 2025).

when the cause of recognising rural local governance, or the Panchayati Raj system, was pushed by the then Prime Minister Rajiv Gandhi that the need for similar provisions for urban areas was also recognised.[65]

Prior to the amendment, local government was listed as a subject in the State List.[66] However, the 74th Constitutional Amendment Act envisioned that States would endow urban local bodies with the power necessary for them to perform their functions as institutions of self-government.[67] The Amendment lays down three types of municipalities based on their size. First is the Nagar Panchayat for areas transitioning from rural to urban; second is the Municipal Council for smaller urban areas; and third is the Municipal Corporation for larger urban areas.[68] Many state legislatures amended their municipal acts to ensure that the existing Municipalities were in conformity with the constitutional provisions.[69]

While the 74th Constitutional Amendment Act aimed to devolve powers from the state government to the local government, thereby shifting India's federal system from a two-tier to a three-tier system, its own textual design presented it with shortcomings in this regard. First, Article 234-W, which recognises the state government's prerogative to endow municipalities with power and authority, uses the term "may" instead of "shall", creating a provision that facilitates the devolution of power from the state government to the local level, rather than directly vesting them with autonomous powers.[70] Article 234-W states that, "Subject to the provisions of this Constitution, the Legislature of a State may [emphasis given], by law, endow the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities at the appropriate level, subject to such conditions as may be specified therein."

This, therefore, facilitates the creation of a level of urban local governance that operates primarily on the discretion of their state governments. In order to fulfil the constitutional mandate of the 74th Constituitonal Amendment Act, it would then be crucial for state governments to exercise their discretion in accordance with the letter and spirit of the Amendment reflected in its Statement of Objects and Reasons. However, the results so far indicate the contrary. An official review undertaken by the Jawaharlal Nehru Urban Renewal Mission (JNNURM) found that only eight states and one union territory had

65 *Ramesh Ramanathan*, Federalism, Urban decentralisation and citizen participation, Economic and Political Weekly 42 (2007), p. 674.

66 Item 5, List II, Seventh Schedule, Constitution of India (1950).

67 Article 243-W, Constitution of India (1950).

68 Article 243-Q, Constitution of India (1950).

69 *Sivaramakrishnan,* note 41, p. 562; *Mathew Idiculla,* Unpacking Local Self Goverment: The Uncertain Power of Cities in the Indian Constitution, World Comparative Law 53 (2020), p. 40.

70 *Idiculla,* note 69, p. 71.

devolved all functions under the Twelfth Schedule.[71] Even with respect to these states, their operation and devolution of powers remain shrouded in doubt.[72] Another analysis of 23 major cities in India highlighted that, on average, only about 9 out of the 18 functions were effectively devolved.[73]

Another inherent limitation identified in the 74th Constitutional Amendment Act is that it does not provide municipalities with an autonomous domain of taxation or other sufficient financial powers.[74] Like with other powers, the state government determines the taxes that local governments can levy. Most urban local bodies have limited taxation power and revenue sources and continue to depend on transfers from higher levels of government.[75] Many believe that urban local governments' limited effectiveness can be attributed to their lack of revenue-generating tools.[76]

The lack of compliance with the constitutional vision of the 74th Constitutional Amendment Act has led to the initiation of litigation in the Supreme Court and the High Courts. The former has largely endorsed the overarching power of the state government over local governments. For instance, in the case of *Bondu Ramaswamy v Bangalore Development Authority,* the Court held that the state legislature of Karnataka could remove the power of town planning from the duly elected municipality for the city of Bengaluru and vest it in the state government-created body, "Development Authority".[77] Similarly, in the case of *Sakshi Gopal Agarwal v. State of Madhya Pradesh,* the Supreme Court affirmed that the Amendment does not confer on local governments the authority to impose taxes on their own and that the source of power to bestow local governments with the authority to levy taxes rests with the State legislature and can be endowed by them.[78]

These judicial pronouncements are in tandem with the Indian judiciary's acceptance of the Indian Constitution's centralising tendency on the question of India's federal structure. Across cases, courts have accepted this tendency by deeming it as a federation with a strong

71 Grant Thornton India, Appraisal of Jawaharlal Nehru National Urban Renewal Mission- Final Report, March 2011, http://www.cmamp.com/CP/FDocument/JnNURMvolumeI.pdf (last accessed on 19 July 2025); These eight states are: Chhattisgarh, Himachal Pradesh, Jammu and Kashmir, Jharkhand, Kerala, Maharashtra, Odisha, Punjab and Puducherry.

72 *Idiculla,* note 69, p. 42.

73 Janaagraha Centre for Citizenship and Democracy, Annual Survey of India's City-Systems (ASICS) 2017, http://www.janaagraha.org/asics/ASICS-2017.html (last accessed on 19 July 2025).

74 *Idiculla,* note 69, p. 42.

75 Janaagraha Centre for Citizenship and Democracy, Annual Survey of India's City-Systems (ASICS) 2017, http://www.janaagraha.org/asics/ASICS-2017.html (last accessed on 19 July 2025).

76 *M. Govinda Rao*, Fiscal decentralization in China and India: A comparative perspective, Asia Pacific Development Journal 10 (2003), p. 25; *Rani D. Mullen*, Decentralization, Local Governance, and Social Wellbeing in India: Do Local Governments Matter?, London 2012.

77 Bondu Ramaswamy v Bangalore Development Authority (2010) 7 SCC 129.

78 Sakshi Gopal Agarwal v. State of Madhya Pradesh, 2003(4) MPHT1, para. 22.

Centre[79] or theorising it as quasi-federal,[80] while asserting "federalism" as a part of the basic structure of the Constitution.[81] This reflects not only an acceptance of a federalising approach by the union governments but also an inclination to justify them using federal vocabulary.[82]

In this light, it is easy to understand why, in the case of Bondu Ramaswamy and Sakshi Gopal Agarwal, the court endorsed the government's practice, although this time, it was the state government's practice of concentrating power despite a clear constitutional mandate to devolve it to the local governments.

These concerns will be looked at in greater detail in Part E through the case study of Mumbai. Before that, the article will look at the governance structure of the Colombian Constitution.

D. A Unitary but Decentralised Republic - Design of the Colombian Constitution

In Colombia, the journey towards adopting decentralisation as a governance structure was slightly different. Much like India, Colombia also had local self-government bodies, especially municipalities, which were involved in city planning since colonial times. Soon after Colombia gained independence from its colonial rulers in 1810, it began its process of nation building. This process reflected a centralising tendency in the system of governance in the form of a unified nation-state, overshadowing its pre-existing decentralised, local self-governance mechanisms. This was formally operationalised in the 1886 Constitution, whose Article 1 declared Colombia as a centralised republic.[83]

As already discussed in Part A, a historical struggle over land accumulation by powerful elites, combined with economic policies focused on development led by a centralised model of governance, created violent strife in Colombia. The strife was a reflection of opposition to a nation-state building process dominated by a centralised vision of growth, which neglected the concerns of less powerful actors removed from the centre.[84]

To counter this violent insurgency, a new development plan was envisioned in the 1970s, known as the "Four Strategies", which placed relatively more focus on the local community and its needs. The Four Strategies can be seen as the first imagination of developmental goals through efforts involving decentralisation. However, numerous international

79 S.R. Bommai v. Union of India, 1994 AIR 1918, para. 275; M. Karunnanidhi v. Union of India, AIR 1977 MAD 192, para. 32.

80 In Re: Article 370 of the Constitution, 2023 INSC 1058, para. 481.

81 S.R. Bommai v. Union of India, 1994 AIR 1918, para. 275; *Sharma*, note 23, p. 2.

82 See *Rav Pratap Singh*, Constitution of Tax: A Tale of Four Constitutional Amendments and Consumption Taxes, India 2021, for another instance of the adoption of federal vocabulary by the government to justify its perpetuating centralising tendency through constitutional sanctioning of the GST Council.

83 Article 1, Constitution of Colombia (1886).

84 *Sanín / Acevedo / Viatela*, note 15, p. 15.

development and consequent national issues created an accelerated push to address the question of the local.[85]

In the international fora, by the 1980s, it was widely believed that the nationally centred developmental policies had created social and economic exclusions. A key solution advocated to address this was to create sub-territorial units and increase their political, administrative, and economic autonomy, ensuring that government interventions would focus on local problems. Numerous international instruments and institutions also began to advocate for the cause of decentralisation and the need to focus on local actors and governance.[86]

In 1986, in response to a combination of domestic and international developments, the then-President of Colombia, Belisario Betancur, passed a constitutional amendment mandating the popular election of mayors. He also initiated legislative interventions that conferred administrative and political autonomy, along with developmental responsibilities, to local or subnational levels of government.[87] Later, Colombian President Virgilio Barco introduced a legislation supporting municipal control over development initiatives.[88] This was followed by the 1989 Urban Reform Act, which introduced principles of decentralisation in urban planning by granting local governments the power to control urban finance and determine urban development initiatives.[89]

Democratisation at the local level through decentralised governance was also seen as a crucial political foundation for the economic liberalisation process that occurred in the early 1990s. Therefore, the deconstruction of state control over the economy through liberalisation was seen as concomitant with re-designing the state's geography as suitable territory for development.[90]

85 *Luis Eslava*, Local Space, Global Life: The Everyday Operation of International Law and Development, Cambridge 2015, p. 131.

86 Stockholm Declaration, United Nations Conference on the Human Environment, UN Doc A/CONF.48/14/Rev.1 (1973): Vancouver Declaration on Human Settlements, United Nations Conference on Human Settlements (Habitat I), UN Doc A/CONF.70/15 (1976); *Martin Wortmann*, United Nations Human Settlements Programme (UN-Habitat) in: Rüdiger Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Oxford 2008; Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, UN Doc A/CONF.151/26 (vol. I) (1992); *Pranab Bardhan*, Decentralization of governance and development, Journal of Economic Perspectives 16 (2002), p. 185.

87 Acto Legislativo 1/86. Since the 1886 Colombian Constitution, Colombian presidents had appointed the governors of departments, who in turn appointed the mayors of municipalities. Ley 12/86 and Ley 9/89.

88 Decree 77 of 1987, Colombia.

89 UN Habitat, Urban Law in Colombia, Urban Legal Case Studies Volume 5, https://unhabitat.org/sites/default/files/download-manager-files/Urban%20legislation-Colombia11.pdf (last accessed on 29 June 2025); Urban Reform Act of Colombia, Law 9 of 1989.

90 *Miguel Urrutia*, Economic Reform in Colombia, in: Harry Costin / Hector Vanolli (eds.), Economic Reform in Latin America, Fort Worth 1998; *Luis Eslava*, Decentralization of Development

Ultimately, in 1991, Colombia adopted its new constitution. The constitutional reform process was driven by the objectives of strengthening state institutions, protecting citizens' fundamental rights, and enabling effective participation in public and private decision-making.[91] At the same time, it also recognised the limitations of actualising these objectives with the concentration of power and authority merely at the centre. Therefore, Colombia's new constitution adopted decentralisation as its core tenet. Article 1 of the new constitution declared Colombia a republic that was united, decentralised and constituted of autonomous local territories.[92] Therefore, the Colombian Constitution is unitary and organised in a decentralised structure comprising different territorial entities, namely, departments, districts, municipalities, and indigenous territories.

The use of the term "unitary republic" signifies the unity of the nation, with power held at the centre through an elected central government. However, the simultaneous use of the terms "decentralized" and "autonomy of local territories" indicates the acceptance of the need to devolve power to ensure effective and efficient administration.

A federal government requires the existence of two different levels of government with autonomy of operation in their own spheres.[93] The 1991 Colombian Constitution does not create two different levels of government. Instead, it envisages a single government, helmed by the President as the supreme administrative authority, while creating administrative territorial units run by representatives as an extension of the executive branch of the government.[94]

The department and the municipality are the two subnational administrative units, while districts are indigenous territories, special territorial entities with relative political independence.[95] Each department has its own local government and a local assembly elected for a four-year term. Multiple departments together form municipalities. The municipalities are identified as the fundamental political-administrative entity in Colombia and are also recognised as the primary locus for development.[96] Each municipality has its own political structure, with a Mayor elected through democratic elections for a four-year term.[97] The Mayor works alongside the City Council, which is also elected democratically through

and Nation-Building Today: reconstructing Colombia from the Margins of Bogota, Law and Development Review 2 (2009), p. 307.

91 *Luis Eslava*, Constitutionalization of Rights in Colombia: Establishing a Ground for Meaningful Comparisons, Revista Derecho del Estado 22 (2009), p. 183.

92 Article 1, Constitution of Colombia (1991).

93 *William H. Riker*, Federalism: Origin, operation, significance, Boston 1964.

94 Article 115, Constitution of Colombia (1991).

95 Article 330, Constitution of Colombia (1991).

96 Article 311, Constitution of Colombia (1991).

97 Article 312 and Transitional Article 61, Constitution of Colombia (1991).

popular vote, and prepares the local development plan, which includes land use and housing policy.[98]

This administrative decentralisation in Colombia was also accompanied by fiscal decentralisation to ensure that the administrative units have sufficient resources to fulfil their functions.[99] This was driven by the belief that local self-governments are better suited to deliver effective services and should, therefore, receive commensurate resources. This includes not only the horizontal transfer of resources from the central government to local governments, but also empowering them with the authority to raise their own resources by levying taxes.[100] Therefore, the decentralisation envisaged by Colombia's new constitution includes not just the aspiration for devolution of power, but also ensures in its textual design that such devolution is mandated and takes place sufficiently, unlike India.

Article 311 of the Colombia Constitution, which creates municipalities as the "fundamental entity of the political-administrative division", exemplifies the rationale of meaningful decentralisation. By sanctioning the creation of municipalities as administrative units with the responsibility to lead public services for local progress, development, community participation and social and cultural betterment of its inhabitants, the Colombian constitution is embodying and enabling the local government that is closer to the people to deliver goods and services as per their needs, while facilitating local citizens to participate in political processes and deepen democracy. This is in stark contrast with the 74th Constitutional Amendment Act of India, which, while attempting to create local governments for effective administration, has fashioned a tier of government that is neither empowered to deliver goods and services to local citizens by way of proximity nor to deepen democracy by facilitating public participation in governance.

With this backdrop, Part E of the paper will analyse the impact of decentralisation through the role played by local governments in the context of urban housing in the Indian city of Mumbai alongside the Colombian city of Bogota.

E. Local Self Governments and the Urban Housing Crisis

Before discussing these two cities, it is important to clarify the reasons behind choosing to analyse and juxtapose them. The reasons lie in the similar position that both these cities hold in the economic functioning of their respective countries. Although Mumbai is not the administrative capital, unlike Bogota, both cities are helmed as key centres for financial growth. This has meant that, with the shift in economic policies focused on industrialisation and free markets, often leading to the neglect of local trade and rural economies, both cities

98 UN Habitat, Urban Law in Colombia, Urban Legal Case Studies Volume 5, https://unhabitat.org/sites/default/files/download-manager-files/Urban%20legislation-Colombia11.pdf (last accessed on 29 June 2025)

99 Article 287, Constitution of Colombia (1991).

100 Article 356 and 357, Constitution of Colombia (1991).

experienced organic and indiscriminate migration.[101] This caused the growth of informal settlements or slums, often deemed unregulated, unplanned, and illegal[102] creating a serious housing challenge in both Mumbai and Bogota. The need to address this challenge was exacerbated by the economic liberalisation of both countries around the same time, thrusting both Mumbai and Bogota into a race to demonstrate themselves as "Global Cities", with capacities suitable for economic investment and financial infrastructure.[103] These factors, along with the constitutional recognition of decentralisation in the governance design of both India and Colombia, with implications for the administration of Mumbai and Bogota, make them suitable subjects for this analysis.

I. Mumbai

Mumbai is the capital city of the state or region of Maharashtra in western India. Even before the formalisation of decentralisation, Mumbai was locally governed by the Mumbai Municipal Corporation Act, 1888. Under the British colonial rule, Mumbai developed as a manufacturing hub and an important trade centre, necessitating the creation of a formal structure for governance.[104] Like most municipalities, it was not very active in the intervening period. However, soon after the enactment of the 74th Constitutional Amendment Act, the Maharashtra Municipal Corporations and Municipal Councils (Amendment) Act, 1994, was passed to modify the Mumbai Municipal Corporation Act, 1888, and make it uniform with the new rules, devolving powers and functions to the municipalities.[105] Under these, Mumbai is now governed by the Brihanmumbai Municipal Corporation (BMC), also known as the Municipal Corporation of Greater Mumbai. It performs civic functions and contributes to urban planning and development through public amenities and infrastructure projects.[106]

The BMC follows a mayoral system where a Mayor is elected to represent the community that is governed by the Act. The Mayor is elected from amongst the Councillors that represent the different wards within the Corporation, and is expected to perform the "decorative role of representing and upholding the dignity of the city and the functional

101 *Solomon Benjamin*, Occupancy Urbanism: Radicalizing Politics and Economy beyond Policy and Programs, International Journal of Urban and Regional Research 32(2008), p. 719.

102 *Usha Ramanathan*, Illegality and the Urban Poor, Economic and Political Weekly 41 (2006), pp. 3193-3197.

103 *Saskia Sassen*, The Global City: New York, London, Tokyo, Princeton 1991; *Saskia Sassen*, Cities in a World Economy, Thousand Oaks 2018.

104 *Amar Farooqui*, Urban Development in a Colonial Situation: Early Nineteenth Century Bombay, Economic and Political Weekly 31 (1996).

105 Maharashtra Municipal Corporations and Municipal Councils (Amendment) Act, 1994.

106 Brihanmumbai Municipal Corporation, https://portal.mcgm.gov.in/irj/portal/anonymous?guest_user=english (last accessed on 29 June 2025).

role of presiding over the deliberations of the Corporation".[107] Therefore, despite being the elected representative and a symbol of the urban community, the Mayor does not perform any executive functions. The executive functions of the Municipal Corporation are entrusted to its Commissioner, who is appointed by the Government of the State of Maharashtra as the Head of the Executive Wing. The Municipal Commissioner, along with a team of Additional, Deputy, and Assistant Commissioners, is responsible for performing all executive functions of the BMC.[108] This has reduced the BMC from an effective local self-government to an executive limb of the state government.

Alongside the BMC, the State of Maharashtra has numerous other para-state agencies, which are public corporations or authorities that operate with some autonomy but report to the State Government, many of which were already performing functions of urban planning, construction of buildings and slum improvement and upgradation, before the enactment of the 74th Constitutional Amendment Act.

For instance, the Maharashtra Housing and Area Development Authority (MHADA) is responsible for providing affordable housing in the state of Maharashtra. It was originally created under the Bombay Housing Board Act in 1948 and known as the Bombay Housing Board, in the aftermath of the partition, to tackle the problem of housing in the region due to the vast settlement of refugees.[109] With growing urbanisation and migration into the city, the problem of slum dwelling increased, which was dealt with by the creation of the Maharashtra Slum Improvement Board under the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971. Soon after, all housing boards in the State were merged into an umbrella authority known as MHADA through the Maharashtra Housing and Area Development Act, 1976. Its objective is to provide a coordinated and comprehensive approach to addressing the housing problem in the state of Maharashtra. This was concurrent with the union government's policies and recommendations aimed as slum removal.

This influence of the union government's policies with respect to slums is also evident in the gradual shifting of approach, from redevelopment by providing civic amenities in slums and undertaking improvement works, to adopting a comprehensive slum rehabilitation scheme.[110] This scheme was initially adopted in the 1980s with the assistance of the World Bank.[111] As this approach became popular, the state government felt the need for

107 Brihanmumbai Municipal Corporation, Mayor – the First Citizen of Mumbai, https://portal.mcgm.gov.in/irj/portal/anonymous/qlmayoffice?guest_user=english (last accessed on 29 June 2025).

108 Brihanmumbai Municipal Corporation, Administrative Wing, https://portal.mcgm.gov.in/irj/portal/anonymous?NavigationTarget=navurl://6f29601fef5d15a0da11eceff7177ce5&guest_user=english (last accessed on 29 June 2025).

109 Maharashtra Housing and Area Development Authority, History, https://www.mhada.gov.in/en/history (last accessed on 29 June 2025).

110 *Batra*, note 8, pp. 5, 31.

111 Slum Rehabilitation Authority, Brihanmumbai, Government of Maharashtra, Department History https://sra.gov.in/details/sub-category/department-history (last accessed on 29 June 2025).

a dedicated Slum Rehabilitation Authority (SRA), which was established in 1995 through an amendment to the above-mentioned Maharashtra Slum Improvement Board under the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971. The Chief Minister of the State of Maharashtra is the Chairperson of the SRA, while its Chief Executive Officer is an Indian Administrative Service officer.[112]

The SRA is now responsible for formulating schemes for slum rehabilitation and ensuring their implementation. In fact, the Maharashtra Regional and Town Planning Act, 1966, was amended in 1996 to classify the SRA as the planning authority for slum rehabilitation with the power to suggest modifications in development plans relating to slum rehabilitation schemes.[113] Therefore, an authority created by the State Government is empowered as a planning authority with the power to suggest modifications in development plans, proposed and prepared by local authorities, despite the existence of a local government, BMC, possessing the formal power to exercise its functions towards urban planning and slum improvement under the Twelfth Schedule of the Indian Constitution. This demonstrates how the state government has entrenched itself in functions and processes that are otherwise the prerogative of local authorities under the 74th Constitutional Amendment Act. This practice has, however, only persisted.

The Maharashtra Regional and Town Planning Act, 1966, was once again amended in 2002. This time, with the inclusion of Section 37(1AA), the state government was given the right to modify development plans proposed by local authorities.[114] This amendment was challenged in the Supreme Court, where the petitioners asserted that preparing development plans is the function of the Municipal Corporation as the suitable local authority to undertake urban planning initiatives as per Items 1 and 2 of the Twelfth Schedule. Hence, the state government should not have the authority to override those plans. The Supreme Court declared that Article 243W of the Indian Constitution, through the 74th Constitutional Amendment Act, has created an enabling provision for the state government to endow municipalities with the necessary power and authority to perform their functions, and does not create an obligation on the state government. The Court further held that the 74th Constitutional Amendment Act "does not envisage that the existing laws would become non-operative or a vacuum would be created in the matter of enforcement of existing laws relating to urban planning and/or regulation of land use."[115] The Court's finding in this case is emblematic of the aforementioned tendency of the judiciary to condone the concentration of power by state governments by utilising the limitations of the textual design of Article 243W. As before, this tendency can be seen as drawn from similar

112 Slum Rehabilitation Authority, Brihanmumbai, Government of Maharashtra, Department History https://sra.gov.in/details/sub-category/department-history (last accessed on 29 June 2025).

113 Maharashtra Regional and Town Planning Act, 1966, https://www.indiacode.nic.in/bitstream/123456789/16117/5/town.pdf (last accessed on 29 June 2025).

114 Slum Rehabilitation Authority, Brihanmumbai, Government of Maharashtra, About Us, https://sra.gov.in/details/about-us (last accessed on 29 June 2025).

115 Shanti G. Patel v. State of Maharashtra, (2006) 2 SCC 505: SC, para. 9.

approval of concentration and centralisation of powers by the union government, utilising the federal features of the Constitution.[116]

The Court asserted that statutes and the bodies empowered under the 74th Constitutional Amendment Act would continue to operate unless a new statute is passed under Article 243W to replace the existing laws, empowering local authorities to take over charge concerning their functions under the Twelfth Schedule.[117] This once again placed the prerogative on state governments, since new laws, even those to replace old ones, can only be passed by state governments for application in their jurisdiction.

The implications of this judgment are that multiple authorities existing before the 74th Constitutional Amendment Act and the municipalities after the Act share common functions, with the former continuing to perform those functions, while the latter, despite having the authorisation, have limited autonomy to undertake initiatives to pursue its functions meaningfully.

A persistent problem for Mumbai's ascent to becoming a "world-class" city is the existence of slums in which close to half of Mumbai's population resides.[118] Given this, it is no surprise that the most recent urban planning initiative in Mumbai is the redevelopment of Asia's largest slum, Dharavi.

Following the World Bank's intervention in the 1980's in slum upgradation in Mumbai, the government adopted an approach of slum rehabilitation as mentioned above. This strategy focused on the use of land as a valuable resource and sought to free up valuable land by rehabilitating slum dwellers elsewhere and utilising the land for commercial endeavours.[119] Given this strategy of development, the state government of Maharashtra decided to rehabilitate slum dwellers in Dharavi and use the land occupied by the slum dwellers to allow "incentive floor space index (FSI) in the form of tenements for sale in the open market".[120] The Urban Development Department of the government of Maharashtra appointed the SRA as the Special Planning Authority for the Dharavi Slum Redevelopment Project. In 2007, while preparing to undertake the project, the government declared it a Vital Public Purpose Project, indicating that the project would be a collective undertaking

116 See Part C.

117 Shanti G. Patel v. State of Maharashtra, (2006) 2 SCC 505: SC, para. 10.

118 Observer Research Foundation, The 'Slumbai' conundrum: Understanding the realities of rehabilitation & the future of slums in Mumbai, https://www.orfonline.org/event/the-slumbai-conundrum-understanding-the-realities-of-rehabilitation-the-future-of-slums-in-mumbai (last accessed on 29 June 2025).

119 Slum Rehabilitation Authority, Brihanmumbai, Government of Maharashtra, Department History https://sra.gov.in/details/sub-category/department-history (last accessed on 29 June 2025).

120 Slum Rehabilitation Authority, Brihanmumbai, Government of Maharashtra, About Us, https://sra.gov.in/details/about-us (last accessed on 29 June 2025).

between the government and private entities.[121] A first successful tender for the project was floated in 2018. However, it was withdrawn on alleged grounds that the COVID-19 pandemic and the Russia-Ukraine conflict had created complications, leading to economic and financial upheavals.[122] The tender was won by Seclink Technologies, which challenged its cancellation in the Supreme Court, on the grounds of unfairness, but failed to get a favourable order.[123]

Ultimately, a fresh tender was floated in 2022, which was awarded to the Adani Group, one of India's largest multinational conglomerates, with close ties to the incumbent majoritarian government at the central and state governments.[124] The redevelopment is being carried out through a Special Purpose Vehicle Company called Navbharat Mega Developers Private Limited. In this arrangement, the state government of Maharashtra holds 20% equity while the Adani Group holds 80% equity.[125] This arrangement is in consonance with the Ministry of Housing and Urban Affairs, Government of India's policy on Public Private Partnership Models for Affordable Housing, 2017 which encourages Public Private Partnerships and provides state governments subsidies to undertake such projects to provide affordable housing in cities.[126]

For its one million inhabitants and small-scale enterprises, with an annual revenue of close to $1 billion, the Dharavi Redevelopment project has stoked concerns about loss of livelihood and increasing social exclusion.[127] Severe concerns have been raised around the

121 Dharavi Redevelopment Project, Slum Rehabilitation authority, Dharavi – An Overview, https://drpmumbai.maharashtra.gov.in/en/About-Us/Dharavi-an-Overview (last accessed on 29 June 2025).

122 The Economic Times, Dharavi project: Old tender cancelled, fresh one issued due to impact on economic-financial affairs, Maha tells HC, 24 February 2023, https://economictimes.indiatimes.com/news/india/dharavi-project-old-tender-cancelled-fresh-one-issued-due-to-impact-on-economic-financial-affairs-maha-tells-hc/articleshow/98213147.cms?from=mdr (last accessed on 29 June 2025).

123 *Renni Abraham*, Dharavi Development: No easy Goal, Business India, 28 July 2025, https://businessindia.co/magazine/cover-feature/dharavi-redevelopmentno-easy-goal (last accessed on 28 July 2025).

124 The Economic Times, BJP win in Maharashtra: Breather for Adani's $3 billion Dharavi Project, 23 November 2024 https://economictimes.indiatimes.com/industry/indl-goods/svs/construction/bjp-win-in-maharashtra-breather-for-adanis-3-billion-dharavi-project/articleshow/115599517.cms?from=mdr (last accessed on 15 October 2025); CNBC, Adani's fall reignites scrutiny of billionaire's close ties with Modi, 16 February 2023 https://www.cnbc.com/2023/02/16/adanis-epic-fall-reignites-scrutiny-on-tycoons-close-ties-modi-.html (last accessed on 15 October 2025).

125 Dharavi Redevelopment Project, Slum Rehabilitation Authority, About the Development Authority, https://drpmumbai.maharashtra.gov.in/en/About-Us/DRP-Leadership (last accessed on 29 June 2025).

126 Ministry of Housing and Urban Affairs, Government of India, Public Private Partnership Models for Affordable Housing, September 2017, https://mohua.gov.in/upload/uploadfiles/files/PPP%20Models%20for%20Affordable%20Housing.pdf (last accessed on 29 June 2025).

127 *Dhwani Pandya / Arpan Chaturvedi*, Indian court dismisses challenge to award of Mumbai slum revamp contract to Adani, Reuters, 20 December 2024, https://www.reuters.com/world/india/i

question of rehabilitation, as recent investigations have found that the present slum population is likely to be shifted into accommodations at a nearby landfill, which is extremely polluted and unfit for human settlement.[128]

The Dharavi Redevelopment Project and the modalities of its creation and operation have also drawn criticism on grounds of involving minimal participation from municipalities that function as constitutional representatives of local communities and their needs. Since early 2022, the Brihanmumbai Municipal Corporation's elections have been delayed on account of numerous concerns.[129] This has rendered the only representative local government, bestowed with the responsibility of slum improvement and upgradation, defunct.

The issue of elections is a crucial one. A key feature of the 74th Constitutional Amendment Act is that it affords constitutional recognition to the elected representatives of local self-governments.[130] It is deemed to be one of the only areas where the Amendment has upheld the rights of the local self-governments, as one reason for introducing the Amendment was to ensure the conduct of regular elections and avoid extended supersessions.[131] This right has also been reaffirmed by the Supreme Court, which has stated that no delays should occur in the constitution of municipalities through regularly held elections.[132] The delay in holding elections to the BMC is clearly in violation of the Indian Constitution.

The case study of the Dharavi Redevelopment Project, along with the state government's pursuit of the urban housing mandate in Mumbai, demonstrates how numerous parastatal bodies perform functions assigned to the BMC by the Maharashtra Municipal Corporations and Municipal Councils (Amendment) Act, 1994, passed to implement the 74th Constitutional Amendment Act. This represents a resistance to meaningful decentralisation or distribution of power by the state government, which is enabled by the faulty textual design of the 74th Constitutional Amendment Act. This also demonstrates the union government's overarching influence on state governments, particularly in the context of urban housing, through numerous policies and recommendations. This facilitates a practice or culture of exercising overarching powers by state governments, by not empowering local governments and employing parastatal agencies, under their authority, to undertake their functions. Therefore, tendencies that are enabled by the union government under

ndia-court-dismisses-challenge-award-mumbai-slum-revamp-contract-adani-2024-12-20/ (last accessed on 29 June 2025).

128 Indian Express, Reclaiming Deonar landfill, moving a mountain, 13 June 2025, https://indianexpress.com/article/opinion/editorials/reclaiming-deonar-landfill-moving-a-mountain-10063658/ (last accessed on 29 June 2025).

129 Financial Express, Delayed and disputes – What's holding up BMC elections 2025?, 20 May 2025, https://www.financialexpress.com/india-news/delayed-and-disputed-whats-holding-up-bmc-elections-2025/3850950/ (last accessed on 29 June 2025).

130 Article 243R, Constitution of India 1950.

131 *Idiculla*, note 69, p. 45

132 Kishansing Tomar v. Municipal Corporation of the City of Ahmedabad, (2006) 8 SCC 352: SC, para. 20.

the quasi-federal structure are also facilitated and practised through faulty decentralisation measures by state governments. The analysis of Mumbai and its Dharavi Redevelopment Project exemplifies how, despite having a federal constitution with federal principles, the operation of its governance does not demonstrate the existence of a federal government.

II. Bogota

In Bogota, the administrative and fiscal decentralisation operationalised after the enactment of Colombia's new constitution has been very distinct from Mumbai.

Bogota's transformation into the massive urban centre that it is today started in the 1950s. In 1954, Bogota underwent an institutional process of absorption of six neighbouring municipalities to form the current structure of present-day Bogota City. This led to the rapid expansion of existing urban services and infrastructure networks to integrate them into the city's functional and economic structure. However, a lack of sufficient interconnectedness led to the city expanding its periphery, characterised by precarious housing that was disconnected from other public services and infrastructure, such as electricity, sanitation, and transportation.[133] These developments were exacerbated by the persistent armed struggle, resultant forced displacement, and rural to urban migration, creating strain on the existing urban infrastructure, especially housing provisions in Bogota with its population increasing almost tenfold between 1950s to 1990s.[134]

Bogota's crucial role in the country's political and economic relevance led to numerous administrative reforms devolving upon it greater power. This involved creating parastatal agencies in Bogota that pursued national agendas and priorities at the municipal level. Ultimately, to ensure a better administrative balance, decentralisation as a governance strategy was adopted with the hope of bringing the government and the people closer to enable effective local administration informed by local needs and preferences.[135]

Since the passing of the 1991 Constitution, Bogota is governed directly by a democratically elected mayor for a four-year term. Even though the city falls under the department of Cundinamarca, as the capital city, it is granted the status of a special district, which gives it more autonomy than the other municipalities. For instance, Bogota is governed by the Mayor together with the City Council, which consists of elected Councillors. However, after the enactment of the Organic Statute in 1993, the role of the Mayor of Bogota was expanded, granting the Mayor significant autonomy and flexibility in administering the city while limiting the power of the City Council with respect to passing laws and

133 *Luis A. Guzman / Daniel Oviedo/ Juan Pablo Bocarejo*, City Profile: The Bogotá Metropolitan Area That Never Was, https://discovery.ucl.ac.uk/id/eprint/10042955/1/City%20Profile%20Bogota%20V8.pdf (last accessed on 29 June 2025).

134 Ibid.

135 Ibid.

supervising the actions of the executive.[136] Hence, decentralisation in Bogota took the form of not just creating locally elected bodies and an executive head, but also empowering the executive head to respond directly to its people by minimising bureaucratic challenges created by liaising between multiple centres of power. In addition to the Mayor and the City Council, Bogota is also classified into 20 local administrative units that operate under the supervision and control of the Mayor with limited responsibilities.[137] This governance of Bogota under a democratically elected, representative Mayor, responsible for executive functions of the city is in sharp contrast with that of Mumbai, where the local government of BMC is helmed by the Mayor as a titular head, with little to no executive powers to govern the city and its people.

The administrative devolution of power to Bogota was complemented by simultaneous fiscal decentralisation. The 1991 Colombian Constitution, set up a revenue-sharing system categorised on the basis of sectors, designed to increase over time.[138] However, this created limitations for local governments when it came to managing their expenditure. In the case of Bogota, this challenge was addressed by the Organic Statute of 1993, which, along with greater political and administrative autonomy, also gave it greater fiscal autonomy. Bogota was able to, therefore, expand its tax base and increase several tax rates while improving its tax management system to ensure a reduction in its debt burden and an improvement in investments in public facilities.[139]

Therefore, the Mayor of Bogota exercises control over almost all public services, including transport, health, housing, education, and environmental policies.[140] This unilateral control of multiple functionaries has proven to be very useful in addressing the housing crisis in Bogota. A key approach adopted by Bogota's local administration was to understand that issues of urban planning were intertwined with one another, and that a holistic approach involving multiple public facilities would have to be adopted in order to create any improvement. In the context of housing, a major challenge was existing informal settlements that were split from the cities "legal limits" making them devoid of other public facilities such as transportation and sanitation.[141]

A key strategy adopted in Bogota was the plan to formalise or legalise the informal settlements. This included bringing them within the realm of formality by connecting them

136 *Alan Gilbert,* Urban governance in the South: How did Bogotá lose its shine?, Urban Studies 52 (2015), p. 669.

137 LSE Cities, Urban Age, Governance Structure, Bogota, https://urbanage.lsecities.net/data/governance-structure-bogota (last accessed on 29 June 2025).

138 Transitional Article 61, Constitution of Colombia (1991).

139 *Annalisa Fedelino*, Making Fiscal Decentralisation Work, Cross-Country Experiences, International Monetary Fund 2010, https://www.imf.org/en/publications/occasional-papers/issues/2016/12/31/making-fiscal-decentralization-work-cross-country-experiences-23731 (last accessed on 29 June 2025).

140 LSE Cities, note 137.

141 *Eslava*, note 85, p. 21.

to other public or civic measures, by the expansion of transportation networks to these neighbourhoods, allowing inhabitants spatial access to the city.[142] Another key strategy was to improve access to clean water and sanitation in these informal settlements. Significant investment was undertaken in these areas to modernise and expand water supply and sanitation networks to increase their quality, coverage, access and reliability. Inter-agency cooperation in Bogota across its administrative system was attributed for the success of undertaking such a task.[143] A combination of such initiatives has not only helped reduce informality but also improved the overall quality of life of city dwellers. In addition to relying on public resources, decentralisation also facilitated engagement with private entities to provide public services. One of the earlier instances of private sector intervention in providing public amenities in Colombia is the electricity sector, where such measures were adopted to help address the issue of electricity blackouts.[144]

Once again, this experience of Bogota is vastly different from that of Mumbai. Initial slum improvement strategies adopted in India and in Mumbai also focused on providing civil amenities to slums. This strategy was eventually replaced by a slum rehabilitation scheme, which prioritised the use of land as a valuable resource free of slum dwellings, resulting in the displacement of slum dwellers and their loss of livelihood, a problem that continues to be pressing.[145]

Holistic measures were undertaken in Bogota alongside focused measures to address the housing crisis by constructing new houses. The municipal government is also responsible for identifying and habilitating urban land for the purpose of developing social housing projects.[146]

These measures, in combination with multiple other initiatives by Bogota's local administration, have produced positive results in improving the housing crisis in Bogota, primarily in terms of formalising informal neighbourhoods and providing them with public amenities. However, the successes have been relative and must be seen in the light of a larger objective that is yet to be achieved. Housing continues to be a major challenge in Bogota, with highly stratified housing arrangements and continued informal, precarious

142 The Borgen Project, City Planning and Poverty Reduction in Bogota, https://borgenproject.org/city-planning-and-poverty-reduction/ (last accessed on 29 June 2025)

143 World Bank Group, Better Transport, Water and Sanitation for the Urban Poor in Bogota, 13 August 2015, https://www.worldbank.org/en/results/2015/08/13/better-transport-water-and-sanitation-for-the-urban-poor-in-bogota (last accessed on 29 June 2025)

144 *Gilbert,* note 136, p. 670.

145 *Batra*, note 8, p. 5 and 31; *Ahana Sarkar / Ronita Bardhan*, Socio-physical liveability through socio-spatiality in low-income resettlement archetypes – A case of slum rehabilitation housing in Mumbai, India, Cities 105 (2020).

146 OECD Urban Studies, National Urban Policy Review of Colombia, https://www.oecd.org/content/dam/oecd/en/publications/reports/2022/05/national-urban-policy-review-of-colombia_2c97aa27/9ca1caae-en.pdf (last accessed on 29 June 2025)-

housing at the periphery of the city.[147] Irrespective of this, there is immense consensus on the positive effects on the fate of Bogota after the implementation of decentralisation in its governance and administration.[148] The criticisms concern ways to improve administrative and fiscal decentralisation to advance local administration and better provide public services to the local population. They also highlight the limitations of policies like decentralisation in the light of prevalent challenging factors such as armed conflict, global economic policy challenges and social cohesion in a divided society.

Despite these challenges, the decentralised governance of Bogota displays concerted efforts to address the challenge of urban housing. Decentralisation, as envisaged in the 1991 Colombian Constitution, was not only textually designed for effective implementation, but subsequent actions of the Colombian government ensured that its spirit was also preserved, and objectives meaningfully pursued. In Mumbai, on the other hand, the improper implementation of decentralisation caused the urban housing mandate to become entangled in a complex web of governance structures, ultimately fragmenting the agenda and resulting in limited success.

F. Conclusion

The analysis of decentralisation's features and its implementation in pursuing the urban housing agenda in Mumbai and Bogota demonstrates divergent results. It can be argued that efforts aimed at addressing urban housing challenges in Mumbai have yielded limited success, largely due to the city's complex and overlapping governance structure. Observations drawn from the analysis undertaken are twofold. First, it highlights a clear limitation in the textual design of the 74th Constitutional Amendment Act of 1993, which fails to confer real power on urban local bodies despite granting them constitutional recognition. Second, it exposed the failure of the state governments to embody the spirit of the 74th Constitutional Amendment Act and respect the objectives behind its enactment. While this is a clear shortcoming of the state governments, this is also telling of the federal structure that has evolved and the federal culture that is being practised in the country. Its central bias has evolved into a federalising approach, where the central government appears to take primacy over the other two tiers of government. The example of the housing crisis in Mumbai is a useful illustration of this. The aforementioned explanation of Mumbai highlights how the state government serves as a facilitator of urban planning policies established by the central government. These policies are often released as reports or recommendations, suggesting changes in the governance of cities without undergoing any deliberations in the Parliament or the state legislatures. This not only creates a de facto supremacy of the centre in matters of urban planning and governance, which are clearly assigned as functions to local

147 *Angélica Patricia Camargo Sierra / Alex Smith Araque Solano / David Holguín Lozano*, Understanding urban densification in Latin American cities: determinants of the production of built space in informal areas in Bogota (2007-2018), Cities 148 (2024).

148 *Eslava*, note 90, p. 309.

governments, but also violates the principles of democracy, including representation and accountability. These factors collectively have reduced decentralisation to a truism instead of a possible reality.

Additionally, the resistance of state governments to cede power and resources under the 74th Constitutional Amendment Act is also reminiscent of the union government's tendency to centralise power, which has acquired increasing legitimacy within the framework of quasi-federalism.[149] This framework accepts the lopsided sharing of power between the union and state governments in a federal constitution, to the advantage of the union government.

As mentioned earlier, in his assessment of federations in different parts of the world, Prof. Wheare recognised two terms—the federal constitution and the federal government.[150] India's consistent institutional and judicial legitimation of centralising tendencies raises concerns about whether it constitutes a valid federal government or only a federal constitution, or neither.[151]

This terminology can also be adapted to undertake an appraisal of decentralisation in India. To determine this, the following features of decentralisation need to be assessed:

1. Does the constitution clearly devolve power, function and resources to the local government to undertake its duties?
2. Does the implementation of the constitutional provisions of decentralisation fulfil the rationale of decentralisation – facilitation of effective provision of public goods, and deepening of public participation in democracy?

As discussed at length earlier, in India's context, the text of 74th Constitutional Amendment Act vests in the state government the authority to create local governments, devolve powers and financial resources to them to operate meaningfully, thereby failing to establish an inherently strong system of local governments. Due to this textual limitation, state governments exercise considerable discretion in following the mandate of the 74th Constitutional Amendment Act, which has also earned the approval of the judiciary. Such exercise of discretion, alongside an increasing tendency to resist sharing power between tiers of governance, does not facilitate the effective provision of public goods and services to local citizens and does not encourage their direct representation in governance, thereby deepening democratic participation.

Therefore, the textual design of the Indian Constitution, following the enactment of the 74th Constitutional Amendment Act, creates a decentralised constitution in a limited manner. The implementation of this limited decentralised constitution is also marred with

149 In Re: Article 370 of the Constitution, 2023 INSC 1058.

150 *K.C. Wheare*, Federal Government, Oxford 1963.

151 *Sharma*, note 24, p. 19; S.R. Bommai v. Union of India, 1994 AIR 1918, para. 275; M. Karunanidhi v. Union of India, AIR 1977 MAD 192, para. 32.

inconsistencies and resistance to effectively sharing power, thereby failing to create a decentralised government.

In Colombia, on the other hand, the constitutional design reveals a clear commitment to decentralisation, not only as an aspiration but as an administrative strategy that is enabled by provisions elucidating the clear devolution of power, functions and resources to local governments. The operation of its local governments demonstrates the effective implementation of these decentralisation provisions, facilitating the provision of public goods and services to local citizens and deepening public participation in democracy through direct representation and participation in governance. These features suggest that Colombia has both a decentralised constitution and a decentralised government.

The findings of this assessment are validated by the case study of the pursuit of the urban housing agenda in Mumbai and Bogota. As urban housing continues to be a significant challenge in both these cities and their respective countries, its analysis helped identify how the implementation of decentralisation measures can successfully address challenges of urban housing, as seen in Bogota.

However, this is not without its challenges. The increased presence of private entities has generated anxieties about the neglect of community interests and public goods. This is exacerbated by increased records of corruption in local administration, which is seen as a shortcoming of the autonomy granted to entities like the Mayor in Bogotá as part of decentralising efforts. Despite this, opposition to decentralisation in Colombia remains minimal. It is widely deemed the most suitable way to revitalise nation-building in Colombia.[152]

In Mumbai, however, the possibilities of harnessing the strengths of decentralised governance remained unexplored due to the complexity of its governance structures, discussed above. It, however, remains to be seen if political developments and economic motivations in the urban polity will eventually bring about a change in this.

152 *Eslava*, note 91, p. 307.

Socio-Spatial Segregation in Indian Cities: Legal Violence and the Marginalization of Muslim Communities

By *Junaid ul Shafi**

In India's booming urban sprawl, Muslim communities are being boxed into corners geographically, socially, and economically. This paper explores the socio-spatial segregation of Muslim communities in Indian megacities, focusing on how systemic discrimination in housing perpetuates cycles of exclusion, poverty, and marginalization. It critically examines the interaction between legal neglect, private discrimination, and social violence that reinforce spatial and social boundaries. Despite constitutional protections for equality, private actors and social practices often undermine these guarantees, leading to practices such as discriminatory enforcement, communal violence, and territorial stigmatization of Muslim neighborhoods. These processes result in deteriorating living conditions, declining property values, and increased police surveillance, reinforcing their marginalized status. The paper advocates for comprehensive legal reforms and urban policies that aim to foster inclusive housing, promote social justice, and address structural inequalities that sustain spatial segregation. By reimagining urban spaces as sites of inclusion, these reforms can challenge entrenched inequalities and facilitate better integration of Muslim communities into urban life.

Keywords: Legal Violence; Private Discrimination; Segregation; Marginalization

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A. Introduction

In December 2024, in the Indian city of Moradabad, a Muslim doctor and his wife had just secured their dream home through a legitimate purchase from a colleague. But their joy quickly turned to despair as protests erupted, led by local Hindu residents.[1] The mob, fueled by opposition to the couple's presence in the neighborhood, made it clear: a Muslim family was not welcome in that space. Despite having every legal right, the couple found themselves caught in a storm of intimidation and fear, forced to back away from a home

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1 *Omar Rashid*, Take Your House Back: Hindu Residents Protest Sale of Flat to Muslim Doctor Couple in Moradabad, The Wire, 6 December 2024, https://thewire.in/communalism/take-your-house-back-hindu-residents-protest-sale-of-flat-to-muslim-doctor-couple-in-moradabad (last accessed on 31 July 2025).

they had every right to inhabit. This forced withdrawal is not an isolated event; rather, it is symptomatic of a deeper architectural flaw within India's urban landscape.

India's rapid urbanization and economic development have fostered the emergence of sprawling megacities that symbolize opportunities for social mobility and innovation. However, beneath this veneer of progress lies a persistent pattern of socio-spatial exclusion, disproportionately impacting Muslim communities. Urban India is marked by deep communal divides, with spatial segregation especially between Hindus and Muslims fueling tension and recurring violence.[2] These conflicts have led to repeated displacement, pushing minorities, particularly Muslims, into increasingly isolated and marginalised areas.[3] Despite constitutional guarantees of equality, systemic discrimination manifesting through legal neglect, institutional biases, and social prejudices has resulted in entrenched cycles of marginalization, poverty, and spatial segregation. These cycles are perpetuated through a variety of mechanisms, including discriminatory enforcement of housing laws, judicial and administrative inaction, bias from landlords and property owners, communal violence that forces spatial isolation, and the emergence of ethnic enclaves. Together, these mechanisms perpetuate segregation, creating a dynamic that intensifies over time, trapping Muslim communities in conditions of exclusion that are both legally sanctioned and socially enforced.

While this paper emphasizes religious segregation particularly the spatial marginalization of Muslim communities', it is crucial to note that caste-based segregation remains an equally significant dimension of urban inequality in India.[4] Analytically, religious segregation often operates through boundary-making along faith lines, reinforced by political identities, legal discourses, and narratives of communal conflict, which shape territorial stigmatization and policies targeting Muslim neighborhoods. Caste segregation, on the other hand, stems from historical social hierarchies and endogamous practices within Hindu society, leading to spatial divisions that often intersect with religious identities but are rooted in different social and structural processes.[5] Empirically, caste-based spatial patterns are evident within Hindu communities, where marginalized castes (such as Dalits and Other Backward Classes) reside in distinct enclaves or informal settlements, sometimes overlapping with religious minorities.[6] Although both forms of segregation contribute to urban spatial inequality, their origins, mechanisms, and discursive framing differ, warranting differentiated analysis. Future work could explore the interconnections and layered effects

2 *Shail Mayaram,* Resisting Regimes: Myth, Memory and the Shaping of a Muslim Identity, New Delhi 1997, p. 54.

3 *Rowena Robinson,* Tremors of Violence: Muslim Survivors of Ethnic Strife in Western India, New Delhi 2005, p. 106.

4 *Gayatri Singh / Trina Vithayathil, / Kanhu Charan Pradhan,* Recasting inequality: residential segregation by caste over time in urban India, Environment and urbanization 31 (2019), pp. 615-634.

5 *Neeha Susan Jacob*, Understanding Spatial Inequalities in South Indian Cities: Exploring Residential Segregation Based on Caste, Artha Vijnana 67 (2025), pp. 377-392.

6 *Naveen Bharathi / Deepak Malghan / Sumit Mishra / Andaleeb Rahman,* Fractal urbanism: City size and residential segregation in India, World Development 141 (2021), pp. 1-14.

of caste and religious spatialities to further deepen understanding of urban exclusion in India.

I. Aim and Approach of this Article

This paper critically examines how legal violence, both explicit and structural, serves to reinforce spatial divides by marginalizing Muslim populations within urban landscapes. Drawing on multidisciplinary approaches, it explores how discriminatory housing practices, urban planning policies, and sporadic episodes of communal violence collaborate to produce and sustain segregated enclaves characterized by inadequate infrastructure, limited social mobility, and ongoing insecurity. This article undertakes a constitutional inquiry into the entwined modalities of social and legal violence as they are enacted through state-facilitated relocations of Muslim families amidst episodes of communal discord. It contends that such displacements do not merely reflect moments of crisis but are symptomatic of a deeper architecture of exclusion one in which violence is spatialized, inscribed into the very geographies of urban life through the creation of stigmatized and segregated localities. This structural marginalization constitutes a form of social violence: not episodic, but continuous; not always visible but deeply embedded.

The paper begins by conceptualizing legal violence and situating it within the existing theoretical frameworks, particularly drawing on constitutional jurisprudence and critical legal studies. It then analyzes the mechanisms through which law facilitates or legitimizes displacement, including state-facilitated relocations during communal conflict and administrative inaction in the face of private discrimination. Subsequent sections examine how these legal processes intersect with social violence to spatialize exclusion, transforming urban geography into a site of normalized harm. The paper concludes by situating these dynamics within the constitutional domain, arguing that state rhetoric of protection often conceals systematic failures of accountability. It underscores the urgent need for comprehensive legal reform and inclusive urban policy, contending that meaningful social equity in Indian cities requires a fundamental reconfiguration of the relationship between law, space, and power. Through this analysis, the paper contributes to broader debates on rights-based urban inclusion and justice for marginalized religious communities in contemporary India.

II. Legal Violence, State Power, and Spatial Inequality

This paper employs the concept of legal violence to critically examine the ways in which legal structures and state policies contribute to the marginalization of Muslim communities within urban spaces. Legal violence, as understood here, refers to the forms of harm or exclusion sanctioned or legitimized by legal institutions or state power. Drawing from Robert Cover's seminal work[7] the paper recognizes that law does not merely regulate

7 *Robert M. Cover,* Violence and the Word, Yale Law Journal 95 (1985), p. 1601.

behavior; it also constructs narratives and frameworks that shape societal realities, often in ways that disproportionately harm marginalized groups. Legal violence, therefore, is not simply violence enacted by the state, but a structural form of harm embedded within legal norms and institutional practices, such as discriminatory policies, surveillance practices, and biased legal interpretations

In this sense, *legal violence* refers to the harm produced or sanctioned by the law itself, manifested through formal mechanisms such as discriminatory zoning regulations, policy-driven displacements, administrative neglect, or differential policing.[8] These forms of violence operate under the guise of legality, embedding exclusion and inequality within the institutional logic of the state. By contrast, *social violence* encompasses prejudicial practices, systemic discrimination, and communal hostilities that are sustained through societal norms and interpersonal relations but are not codified in law. Recognizing this differentiation illuminates the *productive* role of law not as a neutral arbiter but as an active instrument in the organization of social hierarchies and spatial stratification.[9] It underscores how legal frameworks, despite their ostensible role in protecting rights, can function to authorize, normalize, and reproduce structural oppression. Critical engagement with the notion of legal violence thus foregrounds the centrality of law in producing and maintaining systemic inequality and highlights the necessity of legal reform not merely as a corrective measure but as a fundamental reconfiguration of the relationship between law, space, and power.[10]

Legal violence manifests in the role of law not solely through overt sanction but equally through abdication. Whether in the active orchestration of displacement under the guise of public order or in the silent legitimation of private discrimination, law emerges less as a bulwark of rights than as a tacit accomplice to exclusionary practices. The constitutional promise of equality, though textually robust, is rendered functionally anemic in the face of such normalized harm. By situating these forms of violence within the constitutional domain, this article argues that the state's rhetoric of protection often conceals a more unsettling reality: that constitutional accountability is routinely deferred or denied when the violence in question emanates not from overt state repression, but from the sanctioned inaction and permissiveness of legal institutions. The study underscores the urgent need for comprehensive legal reforms and inclusive urban policies, emphasizing that genuine social equity in Indian cities can only be achieved through pathways that address both overt discrimination and structural inequalities. By interrogating the intersection of law, policy, and social practice, this work seeks to contribute to ongoing debates on rights-based urban

8 *Cecilia Menjívar / Leisy Abrego*, Legal violence: Immigration law and the lives of Central American immigrants, American Journal of Sociology 117 (2012), p. 1387.

9 *Julie Shackford-Bradley,* Legal Violence and Restorative Justice, Hastings Journal on Gender and the Law 34 (2023), p. 103.

10 *Elena Ruíz,* Structural Violence: The Makings of Settler Colonial Impunity*,* New York 2024, p. 34.

inclusion and justice for marginalized religious communities amid India's complex urban fabric.

III. Historical Roots of Urban Segregation

In contemporary Indian cities, the boundaries separating Muslim and non-Muslim neighborhoods are neither spontaneous nor apolitical. They are the cumulative result of centuries of institutional design and everyday discrimination. Understanding the persistence and transformation of spatial segregation of Muslim communities in Indian cities necessitates a historical perspective that distinguishes between longstanding patterns of exclusion and recent developments.[11] The patterns of segregation emerge from colonial practices of urban planning and bureaucratic policies including the creation of separate municipal wards, "camp" and "native" city divisions, and the codification of religious identity in census and law institutionalized a logic of segregation that physically inscribed religious difference onto the urban fabric.[12] The work of Gayer and Jaffrelot[13] and others demonstrates how colonial-era patterns were perpetuated and often reinforced through state-led housing policies, discriminatory implementation of land use regulations, and socio-economic marginalization that limited Muslim mobility. However, to attribute contemporary segregation solely to the inertia of these historical legacies is to overlook its distinctively modern manifestations. The recent decades have witnessed a shift in the *mechanisms* of segregation, marked by the intensification of legal and discursive strategies that normalize exclusion.[14] Post-independence, these patterns have persisted and been reinforced through state-led policies, discriminatory land laws, and socio-economic marginalization. However, what is distinctively new in recent decades includes the intensified legal and discursive strategies that depoliticize and normalize segregation, such as territorial stigmatization, legal violence, and discursive representations that frame Muslim neighborhoods as inherently problematic.[15] Additionally, the role of neoliberal urban policies privatization, real estate market dynamics, and private sector steering marks a recent shift that deepens spatial divisions beyond colonial legacies.[16] By tracing these processes over time, we see a layered history where older practices are reconfigured through contemporary legal, discursive, and economic forces, producing a

11 *Fuad S. Naeem*, Monotheistic Hindus, Idolatrous Muslims: Muḥammad Qāsim Nānautvī, Dayānanda Sarasvatī, and the Theological Roots of Hindu–Muslim Conflict in South Asia, Religions (2025), p. 256.

12 *Prashant Kidambi,* The making of an Indian metropolis: Colonial governance and public culture in Bombay, 1890-1920, Hampshire 2016, p 71.

13 *Christophe Jaffrelot / Laurent Gayer,* Muslims in Indian cities: Trajectories of marginalization, New York 2011, p. 1-22.

14 *Aakar Patel,* Our Hindu Rashtra: What it is. How we got here, New Delhi 2020, p. 198.

15 *Onaiza Drabu*, Who Is the Muslim? Discursive Representations of the Muslims and Islam in Indian Prime-Time News, Religions (2018), p. 283.

16 *Sripad Motiram / Vamsi Vakulabharanam*, Mapping religion, space and economic outcomes in Indian cities, Urban Studies 62 (2024), p. 71.

transformation in both the form and the normalization of spatial segregation. The story of Muslim segregation in Indian cities is neither purely historical nor entirely contemporary it is a layered phenomenon in which the past is continually reactivated through modern legal and urban practices. This spatial division is further reinforced by long-standing socio-political dynamics stemming from the legacy of partition, cultural stereotypes, and recurring communal violence, which have systematically confined Muslim populations to segregated enclaves and shaped the urban fabric of Indian cities. As a result, the physical and social boundaries of Muslim neighborhoods are not merely products of urban development but are deeply intertwined with these historical processes of marginalization and exclusion.

B. Social Violence Fear and Segregation

In the maze of India's urban landscape, Muslim communities often find themselves pushed to the periphery literally and metaphorically by a combination of discriminatory housing practices, communal violence, and the destruction of their homes. The exclusion of Muslims in India has deep historical roots that trace back to the colonial period and the subsequent partition of the subcontinent in 1947. Under British rule, policies of divide and rule heightened religious divisions, exacerbating tensions between Hindus and Muslims. The partition, which created India and Pakistan, formalized these divisions, leading to violent communal conflict. This process crystallized religious boundaries in ways that continue to shape urban segregation today. Bipan Chandra contends that the partition of 1947, which divided British India into the secular state of India and the Islamic state of Pakistan, formalized religious lines, resulting in widespread violence and the forced migration of millions.[17] Post-independence, while India adopted a secular constitution, socio-political dynamics, such as the politicization of religion and economic disparities, have perpetuated the marginalization of Muslims, reinforcing their exclusion in various spheres of national life.[18] This exclusion is further compounded by perceptions of Muslims as "other" within the Hindu-majority state.[19] Crucially, the state is not a passive actor in this process. Their exclusion is driven not only by formal legal mechanisms, administrative neglect and targeted urban planning, but by more insidious, informal processes of what can be termed "social violence," a persistent, structural force manifesting through discriminatory housing practices by private landlords and communal violence. Though this form of violence is often dismissed as soft or informal, it plays a central role in producing and reinforcing patterns of segregation and inequality. The result is a pervasive condition of "violent exclusion," where Muslims are repeatedly displaced, denied secure tenure, and confined to the margins of urban life. Historically, the political imagination of the modern

17 *Bipan Chandra*, Communalism in modern India, New Delhi 2008, p. 329.

18 *Ali Khan Mahmudabad,* Indian Muslims and the Anti-CAA Protests: From Marginalization Towards Exclusion, South Asia Multidisciplinary Academic Journal (2020), p. 24.

19 *Shayan Sheikh,* India's Muslims: The 'Other' Within?, The Columbia Journal of Asia (2022), pp. 74-79.

Indian state has cast Muslims as the internal "Other".[20] The legacy of Partition, combined with widespread cultural stereotypes of Muslims as violent, backward, or disloyal, has contributed to their social and spatial alienation. Since independence, recurring anti-Muslim violence, whether in Nellie in 1983, Mumbai in 1993, Gujarat in 2002, or Delhi in 2020, has displaced Muslim families from mixed neighborhoods, forcing them into segregated enclaves. According to Pew Research, 36% of Hindus prefer not to have Muslims as neighbors.[21] Such attitudes underscore that these episodes are not isolated bursts of unrest but operate as long-term instruments of spatial reordering. They do more than destroy lives and property, they redraw urban maps, concentrating Muslims in ghettos and informal settlements under the guise of safety and resettlement.[22]

The spatial segregation of Muslims in Indian cities cannot be meaningfully analyzed apart from the structural and cyclical recurrence of Muslim violence, often cloaked in the euphemism of "communal violence" within South Asian legal and political discourse. Such episodes, which disproportionately target Muslim communities, produce not only immediate physical devastation but also enduring geographies of fear, displacement, and exclusion.[23] Notably, this violence is overwhelmingly urban in character, rendering the city both a crucible of opportunity and a locus of existential vulnerability.[24] This urban concentration is often attributed to the density and diversity of city populations, where historical segregation, economic competition, and politicized identity formations are more evident. Scholars contend that urban communal tensions are often instrumentalized through electoral strategies, spatial segregation, and socio-political anxieties arising from rapid urban transformation.[25] Anti-Muslim violence in India, officially categorized as "communal violence", functions not only as episodic unrest but as a mechanism of structural exclusion. These acts of targeted violence often result in long-term spatial segregation through the forced displacement of Muslim communities.[26] From the 1947 Jammu Massacre[27] to

20 *Sonia Sikka,* The Ideal of Multicultural Nationalism and the Othering of Muslims, Ethnic and Racial Studies (2025), p. 1-9.

21 The Pew Research, Religion in India: Tolerance and Segregation, https://www.pewresearch.org/religion/2021/06/29/religion-in-india-tolerance-and-segregation/ (last accessed on 31 July 2025).

22 *Raheel Dhattiwala*, Next-door strangers: Explaining neighbourliness among Hindus and Muslims in a riot-affected city. in: Riaz Hassan (ed.), Indian Muslims: Struggling for equality of citizenship, Melbourne 2016, p. 146.

23 *Raheel Dhattiwala,* Keeping the peace: spatial differences in Hindu-Muslim violence in Gujarat in 2002, London 2019, pp. 74-75.

24 *Ashutosh Varshney,* States or Cities? Studying Hindu-Muslim Riots. Regional Reflections: Comparing Politics Across India's States, New Delhi 2004, pp. 177-218.

25 *Thomas Blom Hansen*, Wages of violence: Naming and identity in postcolonial Bombay, New Jersey 2001, p.124.

26 *Jaffrelot / Gayer,* note 14, p. 325.

27 *Christopher Snedden,* What Happened to Muslims in Jammu? Local Identity, 'the Massacre of 1947' and the Roots of the 'Kashmir Problem, South Asia: Journal of South Asian Studies 24 (2001), pp. 111-134.

more recent events in Muzaffarnagar or Delhi, such violence has significantly altered the demographic composition of affected regions. This violence has been predominantly urban in character; between 1950 and 1995, approximately 96% of all related deaths in India occurred in urban areas.[28]

The 2002 Gujarat pogrom and the 2020 Northeast Delhi violence represent this phenomenon, where Muslim families were not only displaced during periods of violence but also concentrated in specific ghettos or peripheral areas. This spatial reorganization is not a mere consequence of violence; it reflects a deliberate strategy by state and some non-state actors to isolate Muslim communities. The state's role in facilitating this segregation cannot be overlooked. Under the pretext of safeguarding Muslim families during communal unrest, law enforcement often orchestrates their relocation to so-called "safer" zones. Paul Brass argues that the "relocation" or displacement of Muslim communities following riots serves a long-term political function, facilitating demographic engineering and entrenching communal division. This process is often enabled by state apparatuses, with forced migration and violence functioning as instruments for reshaping urban space and consolidating Hindu majoritarian interests.[29] Yet, these moves seldom pave the way for a return to integrated, diverse neighborhoods. What begins as a temporary security measure often solidifies into lasting segregation, turning protective displacement into a quiet, enduring form of exclusion. This creates generational patterns of self-segregation, where Muslim families, having internalized the lessons of spatial risk, pass these fears on to subsequent generations, making housing choices based on inherited understandings of safe and dangerous spaces.

Communal violence in India has resulted in the large-scale displacement and spatial segregation of Muslim communities. In urban centers such as Mumbai, targeted violence, particularly following the 1993 Bombay riots after demolition of the Babri masjid,[30] led to a concentration of displaced Muslims in enclaves like Dongri, Mohammad Ali Road, and Bhendi Bazar. This pattern of relocation, driven by both fear and necessity, has entrenched segregation, with limited corresponding movement by Hindu populations.[31] Similar dynamics are evident in Jogeshwari, Kurla, and Mumbra, where Muslims reside in isolated pockets, often surrounded by Hindu-majority areas. In Ahmedabad, the 2002 riots reinforced a stark east–west division, with Muslims increasingly confined to areas such as

28 *Ashutosh Varshney,* Ethnic Conflict and Civic Life: Hindus and Muslims in India, New York 2002, p. 6.

29 *Paul R. Brass,* The production of Hindu-Muslim violence in contemporary India, Seattle 2013, p. 34.

30 *Qudsiya Contractor,* Jab Babri Masjid Shaheed Huyi: Memories of Violence and Its Spatial Remnants in Mumbai, in: Narayana Jayaram (ed.), Social Dynamics of the Urban: Studies from India, New Delhi 2017, p. 135.

31 *Abdul Shaban / Zinat Aboli*, Socio-spatial segregation and exclusion in Mumbai. In: Maarten van Ham et al. (eds.), Urban Socio-Economic Segregation and Income Inequality: A Global Perspective, 2021, p. 163.

Juhapura, Shahpur, and Khanpur, while mixed neighborhoods like Paldi and Navrangpura have witnessed a withdrawal of Muslim residents.[32]

Aurangabad stands as another vivid portrait of a city split along religious lines. Neighborhoods like *Harri Patti Melaka* for Muslims and *Bhagwa Patti Melaka* for Hindus mark the map with invisible borders, etched deeper by the 1988 riots and their aftermath. For many Muslim residents, these divides are more than symbolic as they translate into real struggles, especially when seeking housing in areas backed by powerful political forces like the Shiv Sena.[33] These trends are not limited to older metropolitan areas; recent studies spanning over 3,000 cities and 100,000 neighborhoods confirm the widespread nature of Muslim residential segregation in India.[34] Saluja's research in Bhopal highlights a deepening sense of abandonment among Muslims, compounded by both state neglect and social exclusion. Despite aspirations for civic inclusion, many Muslims are relegated to marginalised spaces, reinforcing cycles of vulnerability.[35] These communalised geographies do not merely reflect pre-existing inequalities but actively reproduce spatialized injustice and socio-political exclusion. The Sachar Committee Report of 2006 highlights that, due to growing concerns over safety and security, many Muslims are increasingly moving into ghettos where they feel more protected.[36] This spatial separation has become a powerful tool for both exclusion and control, entrenching divisions that span generations. These communalized geographies are further reinforced by active exclusion in the private sphere.

I. Unequal Access: Housing Bias and Governance Failures

Discriminatory practices within the housing markets are perhaps the most pervasive form of social violence. Research consistently shows that Muslims face significant barriers to accessing rental and owned accommodations, particularly in mixed or predominantly non-Muslim neighborhoods. Studies have shown that Muslim responses to rental advertisements are significantly lower than those of non-Muslims, with landlords frequently

32 *Sazzad Parwez / Gazala Khan / Tabassum Khan*, Communal ghettoisation in urban India: A process of informal but systematic segregations, GeoJournal 89 no. 4 (2024), p. 123.

33 *Asaf Ali lone,* Housing and Spatial Segregation: Snippets from Aurangabad, Housing report CPR, https://indiahousingreport.in/outputs/opinion/housing-and-spatial-segregation-snippets-from-aurangabad/, (last accessed on 31 July 2025).

34 *Adukia and others*, Residential Segregation in Urban India (Center for Effective Global Action, 2019), https://cega.berkeley.edu/wp-content/uploads/2020/03/aant-segregation.pdf (last accessed on 31 July 2025).

35 Anshu Saluja, Whose city is it anyway? Place, community and the fractured urban, Contemporary South Asia 32 ((2024), pp. 580-592.

36 *Justice Rajinder Sachar,* The Social, Economic and Educational Status of the Muslim Community of India, Sachar Committee Report, Prime Minister's Office, Government of India, New Delhi 2006.

citing religious preferences in their rejections.[37] Much like rural panchayats, elite Resident Welfare Associations (RWAs) in Indian cities act as urban cartels denying housing to Muslims, whether openly or cloaked in codes like vegetarian only, Jains only or Brahmin only.[38] This explicit discrimination is not limited to outright refusal but extends to more subtle exclusionary tactics like higher security deposits, shorter lease terms, restrictions of religious practices, and invasive monitoring of personal activities. A significant proportion of home seekers from Scheduled Castes and Muslims face discriminatory practices, including direct refusals, subtle denials, and explicitly biased terms and conditions.[39] Empirical studies further substantiate these patterns of exclusion. A study by Thorat et al. in Delhi's NCR found that both Dalits and Muslims face discrimination in the rental housing market, with Muslims experiencing greater bias. Those who manage to secure housing often do so under unfair terms.[40] Such differential terms create a two-tier housing market where Muslims are forced to either accept substandard accommodations or pay a premium for inferior conditions in already segregated neighborhoods. Beyond in-person interactions, digital housing platforms also reflect entrenched biases. An audit of major real estate websites found Muslim applicants received responses from landlords only 22% of the time, compared to 35% for upper-caste Hindus. When both were contacted, landlords typically called upper-caste Hindus sooner.[41] A 2016 study conducted by UNU-WIDER documented substantial discrimination against Muslims in Delhi's rental housing market, demonstrating that Muslim applicants had a significantly lower likelihood of receiving callbacks from landlords compared to upper-caste Hindu applicants.[42] Further evidence from 2019 reports highlighted the pervasive challenges faced by Muslims in securing rental housing in major urban centers such as Delhi and Mumbai. These reports noted that many landlords explicitly refused to rent to Muslim tenants, effectively confining them to segregated neighborhoods.[43]

In numerous Indian cities, areas predominantly inhabited by Muslims are systematically deprived of access to basic civic infrastructure and public services by local municipal

37 *Saugato Datta / Vikram Pathania*, For whom does the phone (not) ring? Discrimination in the rental housing market in Delhi, India, WIDER Working Paper 2016/55. Helsinki: UNU-WIDER (2016), pp. 1-30.

38 *Sushmita Pati*, Properties of rent, New Delhi 2022, p. 122.

39 *Vinod Kumar Mishra*, Caste, Religion and Ethnicity: Role of Social Determinants in Accessing Rental Housing, CASTE: A Global Journal on Social Exclusion 1 (2020), p. 73.

40 *Sukhadeo Thorat / Anuradha Banerjee / Vinod K. Mishra / Firdaus Rizvi*, Urban rental housing market: Caste and religion matters in access, Economic and Political Weekly (2015), pp. 47-53.

41 *Saugato Datta / Vikram Pathania*, Dimensions of Discrimination: Discrimination in Housing, in: Ashwini Deshpande (ed.), Handbook on Economics of Discrimination and Affirmative Action, New Delhi 2023, p. 667.

42 *Ibid.*

43 *Mohsin Alam Bhat,* Bigotry at Home: How Delhi, Mumbai Keep Muslim Tenants Out Article 14. https://www.article-14.com/post/bigotry-at-home-how-delhi-mumbai-keep-muslim-tenants-out (last accessed on 31 July 2025).

authorities and other state institutions. These neighborhoods frequently suffer from inadequate sanitation facilities, irregular or unsafe drinking water supply, poor drainage systems, unpaved roads, and irregular supply of electricity.[44] Throughout this neglect, these areas have earned stigmas like "dirty" and "undesirable", with residents unjustly labeled as "illegal" or "criminal".[45] Over time, this constant vilification and disregard have tied Muslims to violence, crime, and societal decay, further deepening the divide and denying them even the most basic services, like clean water.[46] Consequently, Muslim neighborhoods are widely perceived as squalid, unhygienic, and incongruous within a broader urban landscape that increasingly reflects dominant ideals of civility and public order.[47] Such deficits are not coincidental or marginal; they reflect entrenched patterns of institutional neglect that have come to characterise urban governance concerning minority-dominated areas.[48] This deprivation is often rationalised through technocratic or economic justification, such as land tenure irregularities or lack of formal planning. However, these narratives obscure the underlying political and communal biases that structure urban development. As Rowena Robinson observes, the provision of urban infrastructure and amenities systematically bypasses Muslim localities. Basic facilities such as parks, widened roads, recreational spaces, and modern educational institutions are conspicuously absent from these areas. While these amenities are nominally designed for the general public, their actual spatial distribution reveals a pattern of implicit exclusion.[49]

The selective placement of public goods not only reflects underlying socio-religious biases but also reinforces patterns of marginalisation with long-term consequences for urban equity and inclusion. This pattern cannot be dismissed as bureaucratic oversight or market failure; rather, it reflects a deeper, systemic abdication of state responsibility. The Indian state, through both inaction and discretionary urban planning, has participated in the production of unequal cityscapes where Muslim areas are marked by infrastructural decay and civic invisibility[50]. In her research within the slums of Mumbai, Qudsiya reveals a stark narrative: the margins are not born, they are made. Through calculated spatial violence, the

44 *Anjali Adukia et al.,* Residential segregation and unequal access to local public services in India: Evidence from 1.5 m neighborhoods, Working Paper (2022).

45 *Parvis Ghassem-Fachandi,* Pogrom in Gujarat: Hindu Nationalism and Anti-Muslim Violence in India, New Jersey 2012, pp. 12-20.

46 *Nikhil Anand,* Municipal disconnect: On abject water and its urban infrastructures. Ethnography 13 (2012), pp. 487-509.

47 *Sudipta Kaviraj,* Filth and the Public Sphere: Concepts and Practices about Space in Calcutta, Public Culture 10 (1997), pp. 83-113.

48 *Tommaso Bobbio,* Informality, Temporariness, and the Production of Illegitimate Geographies: The rise of a Muslim sub-city in Ahmedabad, India (1970s–2000s), Modern Asian Studies (2021), pp. 1-34.

49 *Rowena Robinson,* Private Acts and Structural Inequality: Law and Housing Discrimination, Socio-Legal Review 18 (2022), p. 70.

50 *Javeed Alam,* The contemporary Muslim situation in India: A long-term view, in: Gurpreet Mahajan / Surinder S. Jodhka (eds.), Religion, Community and Development, New Delhi 2010, p. 203.

state redraws the city's map to exclude, while the Hindu right weaves cultural populism and communal politics into everyday life, further entrenching divisions.[51] Together, they shape these neighborhoods not just as physical edges of the city, but as lived peripheries, spaces marked by exclusion, insecurity, and contested belonging.[52] The cumulative effect of this denial is to naturalise marginalisation and reproduce spatial inequity as a seemingly apolitical outcome, when in fact it is the result of deeply political and discriminatory choices embedded within the machinery of the state.

Real estate agents further institutionalize this exclusionary practice through "steering" methods that direct Muslim buyers and renters away from certain areas, ostensibly to maintain neighborhood harmony. These agents, through informal networks, determine which areas are "suitable" for Muslim clients, effectively confining them to specific parts of the city.[53] This not only restricts access to quality housing but also reinforces patterns of spatial segregation, entrenching marginalization. Additionally, neighborhood resistance compounds these barriers, as local residents mobilize against the settlement of Muslim families. Residents' associations and neighborhood committees often discourage landlords from renting or selling properties to Muslims, creating informal social barriers that prevent integration.[54] Ghazala Jamil observes that housing segregation rooted in identity is not merely a reflection of social prejudice, it carries tangible, material consequences.[55] Property owners, driven by the desire to protect and grow their investments, often perceive the presence of Muslims in a neighborhood as a threat to property values. This perception is not just about personal prejudice it reflects how economic value is socially constructed and racialized within the housing market. Discrimination becomes a market logic, where exclusion is justified through financial reasoning, and neighborhoods are "curated" to maintain a certain kind of social and economic capital. The political economy of urban real estate thus facilitates and legitimises exclusionary practices, where private property interests align with, and indeed reinforce, systemic marginalisation. In their eyes, it "pollutes" the social fabric, dragging down real estate prices. As a result, Muslims find themselves barred from entering certain Hindu-majority localities striving to preserve their exclusivity or confined

51 *Qudsiya Contractor,* Remaking the 'mohalla': Muslim basti-dwellers and Entrepreneurial Urbanism in Mumbai., in: Kanekanti Chandrashekar Smitha (ed.), Entrepreneurial Urbanism in India: The Politics of Spatial Restructuring and Local Contestation, Singapore 2016, p. 137.

52 *Qudsiya Contractor,* Unwanted in My City – The Making of a Muslim Slum in Mumbai, in: Laurent Guyer / Christophe Jaffrelot (eds.), Muslims in Indian Cities: Trajectories of Marginalisation, New York 2011, p. 23.

53 *Zvi Weinstein*, Public Housing Policy among Project Renewal Neighborhoods in Israel, Journal of Welfare and Social Security Studies 94 (2014), pp. 45-80.

54 *Taran N Khan,* No Muslims, no single people: Anyone who rents in Mumbai has to follow an unspoken code of conduct, Scroll.in, 25 May 2016, https://scroll.in/article/808343/why-anyone-who-rents-in-mumbai-has-to-follow-an-unspoken-code-of-conduct (last accessed on 31 July 2025).

55 *Ghazala Jamil,* Accumulation by Segregation: Muslim Localities in Delhi, New Delhi 2017, p. 354.

to areas where their presence is tolerated but visibly marginalized, excluded by both market forces and social boundaries.[56]

II. Systematic Home Demolitions and Urban Dispossession

The most extreme form of social violence, however, is the destruction of property, or "domicide". This term, coined by Canadian geographer, J. Douglas Porteous, refers to the targeted destruction of homes against the will of its owners, often by means of expropriation, but not limited to it.[57] In India Domicide has encompassed not only homes but also businesses as a means of erasing Muslim presence from contested spaces. The systematic destruction of Muslim-owned property during communal violence is not random but follows a discernible pattern, as seen during the 2020 Northeast Delhi riots. Muslim properties were deliberately targeted, while those owned by non-Muslims were left largely unscathed.[58] The large-scale violence included systematic desecration, arson, and looting of Muslim religious sites and properties.[59] In recent years, "bulldozer justice" has increasingly targeted Muslim communities, with homes razed not through court orders but based on accusations, suspicions, or participation in protests.[60] Rather than adhering to established legal procedures such as issuing show-cause notices, providing an opportunity for a fair hearing, or obtaining prior judicial authorization state authorities have increasingly undertaken demolitions on the basis of unsubstantiated allegations, including alleged involvement in communal violence or participation in public protests. This pattern of executive overreach must be situated within a broader context of democratic backsliding. Since assuming power, the Bharatiya Janata Party (BJP)-led government has, as Khaitan argues, systematically and incrementally eroded institutional checks on executive authority, thereby weakening constitutional accountability mechanisms.[61] Empirical evidence underscores this concern: between April and June 2022, administrative authorities in four BJP-ruled states and one governed by the Aam Aadmi Party demolished at least 128 structures predominantly owned by Muslims.[62] These practices raise urgent legal and ethical questions regarding

56 *Ghazala Jamil,* The Capitalist Logic of Spatial Segregation: A Study of Muslims in Delhi, Economic and Political Weekly 49 (2014), pp. 52-58.

57 *J. Douglas Porteous / Sandra E. Smith*, Domicide: The global destruction of home, Montreal 2001, p. 12.

58 *Amnesty International,* Unearthing Accountability JCB's Role and Responsibility in Bulldozers Injustice in India.

59 *Saeed Ahmad,* Muslim pasts and presents: Displacement and city-making in a Delhi neighbourhood, Modern Asian Studies 56 (2022), pp. 1872-1900.

60 *Ananya Sharma,* Of Rubble, Ruins, and Bulldozers: Punitive Populism, Popular Culture, and the Indian Case, Global Studies Quarterly 5 (2025), p. 2.

61 *Tarunabh Khaitan*, Killing a constitution with a thousand cuts: Executive aggrandizement and party-state fusion in India, Law & Ethics of Human Rights 14 (2020), pp. 49-95.

62 *Vineet Bhalla,* Why does 'bulldozer justice' continue in spite of the Supreme Court ruling it illegal in November? Scroll.in, 26 March 2025, https://scroll.in/article/1080661/why-does-bulldozer-just

collective punishment, selective enforcement, and the normalization of extra-legal state action. These demolitions are frequently justified on planning grounds yet rarely target the majority community in similar circumstances.[63] What masquerades as law enforcement is, in reality, an extension of collective punishment and spatial control.[64] Their homes are demolished with judicial indifference, and they remain frequent victims of communal violence, from Ahmedabad to Assam. But the deeper violence lies in the aftermath: the steady ghettoisation not simply from riots, but from a system where law is drained of justice and bloated with political intent. It is shaped by a bureaucratic coldness on one side and inflammatory legal signals on the other a quiet architecture of exclusion built through the very instruments meant to protect.[65]

This landscape of exclusion is shaped not just by violence or planning policy, but by the state's deep complicity. During the Emergency, slum clearance projects disproportionately targeted Muslim areas.[66] The demolition at Turkman Gate in Delhi, which killed over a thousand Muslims and displaced thousands more, was framed as urban development.[67] Similarly, in 2004, over 300,000 mostly Muslim residents were evicted from Yamuna Pushta ahead of the Commonwealth Games, again under the pretext of beautification. In these instances, the rhetoric of modernization masked a violent remapping of the city, one that systematically erased vulnerable communities from central spaces.

C. Legal Violence and Socio-Spatial Segregation: The Marginalization of Muslims in Indian Megacities

India's megacities, despite their celebrated diversity, exhibit profound socio-spatial segregation that systematically marginalizes Muslim communities through legal violence, the deployment of ostensibly neutral laws as instruments of exclusion and displacement. This marginalization transcends economic inequality, manifested through deliberate legal architectures that weaponize constitutional provisions, planning regulations, and administrative procedures to entrench religious segregation. While scholarly attention has predominantly focused on caste-based spatial exclusion, the religious dimension of urban marginalization,

ice-continue-in-spite-of-the-supreme-court-ruling-it-illegal-in-november (last accessed on 31 July 2025).

63 *M. Mohsin Alam Bhat,* The Irregular and the Unmaking of Minority Citizenship: The Rules of Law in Majoritarian India, Social & Legal Studies 33 (2024), pp. 690-721.

64 *Sushmita Pati,* Bulldozers in the City Economies of Excess and Repair, Public Culture (2025), p. 218.

65 *Fahad Zuberi / Raphael Susewind,* Totalitarian law and communal ghettoisation: an Arendtian perspective, Social & Legal Studies 33 (2024), p. 745.

66 Commission of Enquiry, also known as the Shah Commission, published three reports on the abuse of authority, excesses and malpractices committed and action taken or purported to be taken in the wake of the Emergency (Shah Commission 1978).

67 *Yasir Hameed,* Master plans and patterns of segregation among muslims in Delhi, Critical Planning 23 (2017), p. 112.

particularly the systematic targeting of Muslims through legal mechanisms, demands critical examination as a form of state-sanctioned violence.

I. Planning as Violence: The Weaponization of Urban Development

Urban planning emerges as a particularly insidious form of legal violence, deploying seemingly technical regulations to achieve exclusionary outcomes. Municipal authorities systematically designate Muslim neighborhoods as "unauthorized" or "high-risk", justifying their exclusion from development initiatives and their targeting for demolition.[68] The Dharavi Redevelopment Project exemplifies this pattern, prioritizing commercial interests while displacing Muslim and Dalit communities to peripheral areas lacking basic infrastructure.[69] This exclusionary logic is not confined to isolated projects but is embedded within everyday planning practices.

The selective implementation of beautification drives, and slum rehabilitation programs reveals the violent potential of planning law.[70] While Muslim settlements face demolition under "illegal encroachment" provisions, similar violations in Hindu-majority areas remain unsanctioned. Such uneven application of the law has broader spatial and communal consequences. This differential enforcement transforms urban planning from a tool of development into an instrument of communal cleansing, systematically erasing Muslim presence from valuable urban real estate. The recent phenomenon of "bulldozer justice", the demolition of Muslim homes and businesses under municipal regulations following communal tensions, represents the apotheosis of planning law as violence.[71] In September 2020, the Delhi Development Authority (DDA) launched a demolition drive in the national capital targeting over 100 homes of poor Muslims on the Yamuna floodplains near Batla House, Jamia Nagar.[72] Citing the National Green Tribunal's ban on riverbank construction, ignoring statutes mandating rehabilitation before eviction.[73] The selective nature of enforcement becomes especially evident in comparison. While poor Muslim communities face swift demolition, structures like the Akshardham Temple and Sri Sri Ravi Shankar's Art of Living Centre also on the floodplains was left untouched, facing only

68 *Bhat*, note 64, p. 704.

69 *Ayesha Mueller-Wolfertshofer,* Does Identity have Space in Dharavi's Redevelopment? Understanding the Interrelation of Hybridity and Identity in the Indian Context, International Journal of Urban and Regional Research (2025), pp. 1323-1340.

70 *Ananya Roy,* Why India cannot plan its cities: Informality, insurgence and the idiom of urbanization, Planning theory 8 (2009), pp. 76-87.

71 *Darshini Mahadevia / Renu Desai*, Everyday violence in urban India: is planning the driver or mitigator?, in: Jennifer Erin Salahub / Markus Gottsbacher / John De Boer / Mayssam D. Zaaroura. (eds.), Reducing urban violence in the Global South, New York 2019, pp. 177-199.

72 *Amir Malik,* This Is Like Killing Us: DDA Demolition Leaves Hundreds of Batla House Slum Dwellers Homeless, The Wire, 5 August 2025, https://thewire.in/rights/batlahouse-slum-demolition-dda-yamuna (last accessed on 31 July 2025).

73 Delhi Laws (Special Provisions) Act, 2006.

fines after prolonged negotiations.[74] This selective enforcement reflects the state's ability to bend legality, revealing a deeply unequal urban governance shaped by religion, class, and political proximity.

II. The Disturbed Areas Act: Institutionalizing Segregation

The Disturbed Areas Act (DAA)[75] in Gujarat represents the clearest manifestation of law as an instrument of segregation. Originally framed as a conflict prevention mechanism, the DAA has evolved into a sophisticated apparatus for blocking Muslim access to Hindu-majority neighborhoods.[76] Through bureaucratic complexity and administrative discretion, the Act transforms property transactions between communities into sites of state surveillance and control.[77]

The DAA's operational logic reveals what Tejani conceptualizes as "saffron geographies" urban spaces that embody Hindutva ideology through systematic exclusion.[78] By requiring official approval for inter-community property transfers, the Act institutionalizes segregation while maintaining the fiction of communal harmony. The consolidation of Muslim ghettos like Juhapura in Ahmedabad represents not policy failure but policy success, the deliberate concentration of Muslims in marginalized spaces subjected to systematic neglect.[79] This legal architecture depicts ethnocratic governance, wherein seemingly neutral administrative procedures serve majoritarian political projects. The DAA's discourse of "disturbance" constructs Muslim presence as inherently destabilizing, justifying perpetual segregation as necessary for public order.[80] This discursive violence through legal categorization of communities as problematic, precedes and enables physical violence, creating conditions where Muslim displacement appears both necessary and legitimate.

74 *Gaurav Vivek Bhatnagar*, National Green Tribunal Holds Art of Living Responsible for Damage to Yamuna Floodplains, The Wire, https://thewire.in/environment/ngt-yamuna-art-of-living (last accessed on 31 July 2025).

75 The full name of statute is 'The Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in Disturbed Areas Act 1991'.

76 *Bushra Saba / Sumana Gupta*, Residential apartheid in India: a matter of people or state? Case of Ahmedabad, Journal of Asian and African Studies (2024), pp. 4079-4099.

77 *Zuberi / Susewind,* note 66, pp. 756-757.

78 *Sheba Tejani,* Saffron geographies of exclusion: the disturbed areas act of Gujarat, Urban Studies 60 (2023), pp. 597-619.

79 *Sazzad Parwez,* An Empirical Inquiry into the Nature of Systematic Discrimination and Trajectory of Increasing Communal Segregation in India, Journal of Underrepresented & Minority Progress 8 (2024), p. 216.

80 *Bushra / Gupta,* note 77, p. 4081.

III. The Lived Experience of Legal Violence

For many urban Muslims in India, legality is not experienced as protection, but as vulnerability, where rights are denied through both active repression and calculated neglect by the Indian state and its institutions. Following the formation of the modern Indian state, properties worth billions belonging to Muslims were seized under the pretext of the Enemy Property Ordinance, later formalized into law as the Enemy Property Act.[81] Municipal bodies routinely deny construction or renovation permits in Muslim neighborhoods, courts fail to address bias, and police often enable communal intimidation. These are not administrative failures, but deliberate silences that legitimize exclusion under the guise of democratic governance.

This violence extends beyond housing. In many cities, Muslims don't get permission for building mosques, and the state usually restricts the construction of mosques or the allocation of burial grounds. Their food practices are criminalized, their clothing stereotyped, and their heritage sites either neglected, seized by the state, or demolished on arbitrary grounds. Even heritage buildings and waqf properties, once seen as repositories of collective memory and identity, have increasingly been seized, repurposed, or left to decay under state custodianship. These processes manifest the erasure of religious and cultural presence through legal and bureaucratic mechanisms that are formally secular yet substantively discriminatory.

Even where attempts are made to integrate Muslim settlements into the legal framework, such as through regularization policies, they often offer only partial recognition. While some informal neighborhoods receive basic services or limited tenure security, these measures seldom translate into full legal incorporation. Many residents remain vulnerable due to technical violations tied to outdated or exclusionary master plans. In areas like Jamia Nagar, ownership is often mediated through Power of Attorney arrangements, which were rendered legally invalid by a 2011 Supreme Court ruling.[82] This decision not only delegitimized these arrangements but further entrenched the legal precarity of entire communities. Many residents, especially in informal settlements or disputed properties, depended on PoA to establish ownership or conduct transactions an arrangement that, although legally questionable, provided a pragmatic means for residents to secure rights or manage property. The Court's decision rendered these arrangements legally invalid, stripping residents of their acknowledged legal standing and rendering their property rights vulnerable to dispute or eviction. This judicial action deepened legal precarity because it increased residents' exposure to arbitrary eviction, loss of property, or lack of formal tenure security without providing clear, accessible, and equitable legal alternatives. It essentially eliminated a practical avenue through which marginalized communities could assert and protect their

81 *Sanober Umar,* Constructing the Citizen Enemy-The Impact of the Enemy Property Act of 1968 on India's Muslims, Journal of Muslim Minority Affairs 39 (2019), pp. 457-477.

82 Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana, AIR 2012 Supreme Court 206.

property rights, leaving them in a state of legal limbo. This accumulation of legal precarity then contributes to the systemic devaluation of these areas.

IV. Territorial Stigmatization and Legal Abandonment

The spatial concentration of Muslim communities within segregated urban enclaves facilitates a form of structural harm that sociologist Loïc Wacquant identifies as "territorial stigmatization", the systematic devaluation of geographic areas associated with marginalized populations.[83] Within the legal and administrative imaginaries of the state, such neighborhoods are frequently constructed as zones of deviance or disorder, thereby justifying heightened surveillance, discriminatory resource allocation, and exclusionary planning practices. Consequently, this process effectively translates socio-spatial segregation into a legally and institutionally reinforced stigma, wherein residence in a particular area becomes a proxy for risk, illegitimacy, or criminality, often with profound consequences for the constitutional rights of those who inhabit it. These areas, designated as "disturbed" or "high-risk", become subjects of legal abandonment, excluded from development initiatives, and subjected to punitive policing. The state's withdrawal of services and investment from Muslim neighborhoods constitutes a form of slow violence, gradually degrading living conditions while maintaining the fiction of neutral governance.

This spatial stigmatization creates self-reinforcing cycles of exclusion. As Muslim neighborhoods deteriorate due to systematic neglect, they become easier targets for further marginalization.[84] Compounding this physical degradation, the normalization and perpetuation of spatial segregation are profoundly influenced by discursive practices. Property values decline, making these areas even less desirable to non-Muslims, while justifying continued exclusion from development programs. The legal framework thus produces the very conditions it claims to address, creating "problem" spaces that require continued intervention and control. Legal responses to this spatial injustice have been largely absent or ineffective.

The normalization and perpetuation of spatial segregation are profoundly influenced by discursive practices that justify and narrate the exclusion of Muslim communities. Public discourse, media representations, and political rhetoric often construct Muslim neighborhoods as sites of insecurity, disorder, or moral decline, thereby framing segregation not merely as a material outcome but as a justified response to perceived threats. Such narratives are imbued with symbolic elements religious and cultural markers that serve to stigmatize Muslim localities further.[85] The affective dimension, involving fear, and

83 *Loïc Wacquant,* Territorial stigmatization in the age of advanced marginality, Thesis eleven 91 (2007), pp. 66-77.

84 *Anasua Chatterjee,* Margins of citizenship: Muslim experiences in urban India, New Delhi 2017, p. 10.

85 *Syed Abid Ali Bukhar / Nadia Saleem / Waqar Ahmad,* Islam and Muslims in the Indian Press: A Content Analysis, Pakistan JL Analysis & Wisdom 3 (2024), p. 109.

suspicion, plays a crucial role in reinforcing these narratives, translating social prejudice into spatialized practices of exclusion. By framing Muslim neighborhoods as clusters of risk, these discourses normalize their marginalization, making segregation appear as a rational or necessary measure under the guise of security and public order.[86] Recognizing this discursive dimension is essential to understanding the deep embedment of exclusionary practices within societal narratives that sustain legal and material inequalities.

The securitisation of urban space has resulted in intensified surveillance and policing of Muslim-majority neighbourhoods, which are routinely pathologized as zones of disorder by state authorities. These neighborhoods, often reductively labelled as 'mini-Pakistan', are transformed into internal borderlands, evoking imaginaries of national alterity within the territorial core of the Indian state.[87] This spatialised anxiety finds sharp expression in the discourse of Hindutva, where Muslim visibility both corporeal and architectural is framed as an existential threat. As Grant observes, the very presence of Muslim bodies and buildings becomes "threatening".[88] Muslims of Bengali origin in Indian cities are subjected to surveillance, dehumanization, and detention, with their citizenship constantly questioned and dignity denied.[89] They face institutional stigma rooted in colonial-era laws, enforced through policing, monitoring, and identity verification.[90] Complementing this securitised framing, Chatterjee illustrates how in Kolkata, Muslim-dominated areas are discursively cast as culturally deviant, inhabited by residents presumed to lack the civility and modern sensibilities associated with cosmopolitan urban life.[91] These interlocking narratives of suspicion and inferiority are not incidental;[92] they are central to the processes by which Muslims are excluded from broader access to the urban commons. This legal violence is not aberrant but structural, embedded in the very architecture of Indian urban governance.

D. Private Discrimination, Public Silence: The Legal Void in Housing Rights

The Indian Constitution's promise of equality before the law (Article 14) and protection against discrimination (Article 15) confronts a fundamental doctrinal limitation: its inability

86 *Zainab Farhat,* Spatial Segregation and Muslims in India: A Review. Journal of Muslim Minority Affairs 43 (2023), p. 60.

87 *Deepak Mehta,* Collective violence public spaces and the unmaking of men, Men and Masculinities 9 (2006), p. 204.

88 *Will J. Grant,* The Space of The Nation: An Examination of the Spatial Productions of Hindu Nationalism, Nationalism and Ethnic Politics 11 (2005), p. 339.

89 *Salah Punathil*, Precarious citizenship: detection, detention and 'deportability' in India, Citizenship Studies 26 (2022), p. 55.

90 *Sanjeev Routray,* The Postcolonial City and its Displaced Poor: Rethinking 'Political Society' in Delhi, International Journal of Urban and Regional Research 38 (2014), p. 2292.

91 *Anasua Chatterjee,* Narratives of Exclusion: Space, Insecurity and Identity in a Muslim Neighbourhood, Economic and Political Weekly 50 (2005), p. 92.

92 *Burhan Majid*, The Suspect Muslim and the grammar of epistemic violence, Economic and Political Weekly 61 (2026), p. 12.

to address horizontal discrimination, exclusionary practices by private actors that systematically marginalize religious minorities in urban housing markets. This doctrinal shortcoming highlights a broader issue where state neutrality inadvertently enables discrimination by private entities. This constitutional silence on private discrimination creates what Sandra Fredman identifies as a "regulatory gap" where state neutrality operates as complicity in systematic exclusion.[93] For Muslims in contemporary Indian cities, this gap manifests as routine denial of housing access by landlords, cooperative societies, and developers practices that remain legally permissible despite their discriminatory impact.

I. The Legal Gap and the Impact of Horizontal Discrimination in Housing

The theoretical foundations of anti-discrimination law distinguish between vertical discrimination (state action against individuals) and horizontal discrimination (private party exclusion). While classical liberal theory prioritizes negative rights against state interference, critical race theorists like Patricia Williams[94] argue that this formulation obscures how private discrimination can be as systematically exclusionary as state action. The Supreme Court's jurisprudence on equality rights consistently maintains that fundamental rights operate exclusively against state action. In *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*[95] the Court reaffirmed that "fundamental rights are primarily rights against the state and not against private individuals." This doctrinal position, while protecting individual autonomy and contractual freedom, creates systematic blind spots where private discrimination operates beyond constitutional reach. Nowhere are these doctrinal blind spots more evident than in urban housing markets, where private decision-making effectively governs access to citizenship-defining resources. In housing markets, where access to shelter constitutes a fundamental aspect of citizenship, private discrimination assumes quasi-governmental effects in determining who can participate in urban life.

The Supreme Court's decision in *Zoroastrian Cooperative Housing Society Ltd. v. District Registrar, Cooperative Societies*[96] crystallizes the judiciary's approach to religious exclusion in private housing. The case arose when a Parsi member sought to sell his apartment to a non-Parsi, which the society claimed violated its bye-laws. The same clause was struck down by the Bombay High Court and upheld by the Supreme Court of India. The apex Court ruled in favor of the society, holding that the member could not sell the apartment to a non-Parsi. The Court's validation of religiously restrictive membership clauses prioritized associational autonomy under Article 19(1)(c) over equality concerns. The judgment's reasoning reveals several problematic assumptions. Firstly, the

93 *Sandra Fredman,* Substantive equality revisited, International Journal of Constitutional Law 14 (2016), p. 712.

94 *Patricia J. Williams,* The alchemy of race and rights, Massachusetts 1991, p. 150.

95 2002 5 SCC 111.

96 2005 5 SCC 632.

Court treated religious exclusion as analogous to other forms of voluntary association, ignoring housing's fundamental character as a basic necessity rather than a recreational activity. Secondly, the decision failed to consider the cumulative impact of multiple exclusionary societies on minority access to housing. Housing, as an essential human right, is a key determinant in the broader landscape of inequality, influencing access to education, healthcare, employment, and political participation thus reshaping social and political rights. As Kimberle Crenshaw argues in her theory of intersectionality, social exclusion operates across multiple axes such as race, class, and religion shaping individuals lived experiences in complex and compounded ways.[97] By treating exclusionary practices in housing as an issue of voluntary association, the Court failed to account for how religious identity, combined with other socio-economic factors, exacerbates the marginalization of minority communities, particularly Muslims. The Court's formalistic approach to freedom of association obscured the deeper issue of substantive inequality resulting from systematic religious exclusion.[98]

Most significantly, the *Zoroastrian Cooperative* precedent established a "discrimination privilege", the legal right to exclude based on religious identity when exercised through private associational forms. This privilege operates asymmetrically, benefiting dominant communities who can afford exclusive housing while constraining minorities to segregated enclaves with inferior amenities and services. The precedent thus legitimizes what amounts to residential apartheid, where religious identity determines access to urban space and resources.

II. Global Approaches and the Case for Legislative Change

International experience demonstrates alternative approaches to horizontal discrimination that extend beyond India's restrictive state action doctrine. The United States Fair Housing Act (1968) explicitly prohibits discrimination by private landlords, real estate agents, and housing developers, creating comprehensive protection against exclusionary practices. Similarly, the United Kingdom's Equality Act 2010 applies anti-discrimination principles to both public and private housing provision. The South African constitution's horizontal application clause (Section 8(2)) provides a particularly relevant model, requiring courts to develop common law consistently with constitutional values even in private relationships. This approach enables judicial intervention against systematic private discrimination while preserving contractual autonomy in genuinely private arrangements.[99] These comparative

97 *Kimberle Crenshaw,* Mapping the Margins: Intersectionality Identity Politics, and Violence Against Women of Color, Stanford Law Review 43 (1991), p. 1241.

98 *Gautam Bhatia,* Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution, Global Constitutionalism 5 (2016), p. 351.

99 *Edgar Pieterse,* On a relational model of urban politics, Urban Africa: Changing contours of survival in the city (2005), p. 138.

models suggest that India's reliance on constitutional adjudication alone is insufficient to address systematic horizontal discrimination.

The absence of comprehensive anti-discrimination legislation in housing reflects broader politico-economic dynamics that benefit dominant communities. As Corbridge et al. argue, India's liberalization process has strengthened private property rights while weakening redistributive mechanisms, creating conditions where market-based exclusion operates with minimal state intervention.[100] By treating private discrimination as beyond legal concern, the state maintains plausible deniability while enabling exclusionary practices that serve majoritarian political projects. This silence is particularly pronounced regarding Muslim exclusion, where Islamophobic discrimination intersects with broader securitization discourses.

In Indian cities, the combination of private discrimination and legal silence creates zones of exclusion where Muslims experience diminished citizenship despite formal constitutional equality. The concentration of Muslims in segregated areas is more like a "regulatory abandonment", the state's withdrawal of services and protections from stigmatized areas. These neighborhoods face inferior infrastructure, inadequate policing, and exclusion from development initiatives, creating conditions where legal rights become practically meaningless.[101]

The persistence of horizontal discrimination challenges fundamental assumptions about constitutional equality in diverse societies. The Indian Constitution's emphasis on individual rights obscures how group-based discrimination operates through apparently neutral market mechanisms. The neglect of horizontal discrimination exposes a deeper constitutional failure and inability of legal frameworks to recognize and address the ways in which private power can systematically erode foundational constitutional principles. This shortcoming underscores the need to reconceptualize the notion of equality in a manner that extends beyond the traditional state action paradigm, recognizing that constitutional values can be equally threatened by non-state actors.

The legal void surrounding horizontal discrimination in housing represents more than doctrinal oversight. It constitutes a structural choice that privileges private autonomy over inclusive citizenship. As India's cities become increasingly segregated along religious lines, the absence of anti-discrimination legislation assumes the character of policy through omission, enabling systematic exclusion while maintaining the fiction of constitutional equality. Addressing this void requires comprehensive legislative intervention modeled on international best practices, extending equality principles to private housing provision while preserving legitimate associational autonomy.

100 *Stuart Corbridge / Glyn Williams / Manoj Srivastava / René Véron,* Seeing the state: Governance and governmentality in India, New York 2005, p. 159.

101 *Nabeela Ahmed*, Infrastructure as territorial stigma: labour migrant exclusions in the Indian city, International Journal of Urban and Regional Research 49 (2025), pp. 498-513.

E. Toward Substantive Equality: Legal and Institutional Reforms for Housing Justice

Despite the formal guarantees of equality enshrined in the Indian Constitution, the country's housing landscape continues to operate in a legal and regulatory vacuum, in which discrimination often conceals itself behind the façade of neutrality. The exclusion of religious minorities, particularly Muslims, from equitable access to housing is not merely incidental; rather, it is symptomatic of a broader spatial and legal architecture that normalizes and entrenches systemic disadvantage. The exclusion of religious minorities from equitable housing access in India is rooted in what Peter Marcuse terms the "layered city", a spatial configuration that reflects and reinforces systemic power hierarchies.[102] Planning systems, regulatory omissions, and enforcement failures contribute to this dynamic, where seemingly neutral policies systematically disadvantage marginalized communities.

Comparative constitutional and planning frameworks from other jurisdictions offer instructive lessons. Post-apartheid South Africa's Spatial Planning and Land Use Management Act (SPLUMA) embeds principles of redress directly into planning law, mandating that decision-makers assess the spatial implications of their policies.[103] Similarly, the United States' "Affirmatively Furthering Fair Housing" (AFFH) doctrine extends beyond prohibiting discrimination by requiring active steps toward racial and economic integration.[104] The German concept of *Drittwirkung* (third-party effect)[105] and South Africa's horizontal application of constitutional rights provide alternative models for extending constitutional protections to private relationships.[106] These examples illustrate how planning law can shift from ostensible neutrality to an inclusive model of governance where inclusion, equity, and spatial justice are central to urban governance. India, by contrast, still treats housing discrimination as either an aberration or a private matter.

A key step lies in explicitly recognizing religious identity, particularly Muslim identity, as a protected category in housing rights law. Just as caste, gender, and disability have found place in anti-discrimination jurisprudence, so too must religion, without reverting to a reservation model. Yet India's legal framework remains underprepared. The Constitution provides sweeping declarations of equality through Articles 14, 15, and 21, but these principles rarely penetrate the private domain of housing transactions. The U.S. Fair Housing Act of 1968 offers a compelling model. Its genius lies not only in prohibiting discrimination but in recognizing its structural forms, particularly through the "disparate

102 *Peter Marcuse,* From critical urban theory to the right to the city, City 13 (2009), pp. 185-197.

103 *Stephen Berrisford,* Why it is difficult to change urban planning laws in African countries, Urban Forum 22 (2011), pp. 209-228.

104 *Robert G. Schwemm*, Source-of-income discrimination and the fair housing Act, Case Western Reserve University Law Review 70 (2019), p. 573.

105 *Eric Engle,* Third party effect of fundamental rights, (Drittwirkung). Hanse Law Review 5 (2009), p. 165.

106 *Deeksha Bhana,* The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution, South African Journal on Human Rights 29 (2013), pp. 351-375.

impact" doctrine, upheld in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.[107] This legal tool acknowledges that even facially neutral policies can produce deeply unequal outcomes, a recognition sorely missing from Indian jurisprudence[108]. Ultimately, India's urban future hinges on a simple but radical shift: from formal equality to substantive justice. If we continue to treat private discrimination and institutional exclusion as invisible, we risk reinforcing what Lipsitz termed a "possessive investment in whiteness"[109]. In the Indian context, the metaphor may be reimagined as an investment in upper-caste, majority-dominated spatial privilege. In doing so, we betray the egalitarian vision of social citizenship, where access to basic goods like housing is not a market favor, but a democratic right. What is needed now is a commitment to spatial justice a recognition, as Edward Soja argues, that geography is never neutral.[110] In other words, where one lives determines what one can access, how one is seen, and what one can become. Housing justice in India will not be achieved through piecemeal fixes. It demands legal recognition, institutional reform, and political will all aimed at reimagining the city as a site of inclusion, rather than exclusion.

F. Conclusion

The legal and spatial marginalization of Muslim communities in India's megacities is neither incidental nor anomalous, but rather a product of deeply embedded structures of legal violence and institutionalized exclusion. This inquiry has illuminated the pervasive role of legal violence and institutionalized discrimination in configuring the socio-spatial realities of Muslim communities residing in India's megacities. The sustained marginalization of these communities, evident in exclusionary housing practices, prejudiced modalities of urban planning, and episodic eruptions of communal violence, demonstrates that legal regimes frequently operate not as guarantors of inclusion but rather as instruments of exclusion.

Constitutional promises of equality, while rhetorically robust, are often rendered ineffectual by structural silences and weak enforcement mechanisms. These systemic deficiencies facilitate the reproduction of spatial segregation and deepen patterns of socio-economic inequality. In this context, law is not merely complicit but actively implicated in the production and perpetuation of urban marginality. Redressing these entrenched forms of exclusion demands a fundamental reorientation from a formalistic conception of equality towards a more substantive vision of justice. Such a shift necessitates the recognition of

107 576 U.S. 519 (2015).

108 *Kate Gehling,* The Fair Housing Act after the Inclusive Communities: Why One-Time Land-Use Decisions Can Still Establish a Disparate Impact, University of Chicago Law Review 90 (2023), p. 1471.

109 *George Lipsitz*, The possessive investment in whiteness: Racialized social democracy and the "white" problem in American studies, American Quarterly 47 (1995), pp. 369-387.

110 *Edward Soja,* Spatializing the urban, Part I. City 14 (2010), pp. 629-635.

religious identity as a legally protected category, the incorporation of anti-discrimination norms with a focus on disparate impact, and the recalibration of urban policy frameworks to prioritize equity over aesthetics.

Urban governance must eschew technocratic, depoliticized interventions in favor of participatory, justice-oriented approaches that foreground the lived experiences of marginalized groups. Planning and policy must be consciously restructured to dismantle the spatialized inequalities that have long defined the urban condition for minority communities.

Ultimately, any meaningful pursuit of social equity within India's urban milieu must adopt an intersectional lens that interrogates and disrupts both the juridical and sociopolitical architectures of exclusion. Only through such a comprehensive and critical undertaking can the constitutional ethos of equality be actualized, enabling the emergence of cities that are not only more just but also authentically inclusive spaces in which all communities may flourish with dignity and security. Until the law ceases to function as a silent architect of exclusion, efforts toward urban justice will remain incomplete, and the promise of democratic equality will continue to elude the most vulnerable.

Reclaiming the Public Trust: Constitutional Limits of Urban Exclusion

By *Eklavya Vasudev*[*]

Abstract: This article interrogates the role of the Public Trust Doctrine in adjudicating urban land disputes, particularly in the context of informal settlements. Through a comparative analysis of Indian and South African jurisprudence, it argues that Indian courts have often invoked or mirrored a fiduciary logic that underlies the Public Trust Doctrine. This logic has helped justify evictions and prioritise environmental or planning imperatives over socio-economic rights, thereby reinforcing exclusionary models of urban governance. In contrast, South African courts, despite lacking a formal Public Trust Doctrine, have developed a rights-sensitive and procedurally robust approach that centres reasonableness, participation, and proportionality in eviction decisions. Drawing on urban studies and legal theory, including the proportionality framework and the *Right to the City*, the article proposes a reconceptualization of the Public Trust as a dual-fiduciary framework, obligating the state to uphold both environmental protection and urban inclusion. This reframing seeks to align environmental law with constitutional values of dignity, equality, and participatory governance, offering a pathway toward more just and inclusive urban constitutionalism.
Keywords: Public Trust Doctrine; Environmental Law; Right to the City

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A. Introduction: Environmental Law at the Urban Threshold

As cities expand and transform under the pressures of population growth, infrastructural demands, and environmental degradation—legal disputes over urban land increasingly reflect deeper constitutional tensions. These tensions arise at the intersection of environmental protection, socio-economic rights, and spatial governance[1]—domains often treated separately in legal doctrine but brought into direct conflict in urban housing disputes. Among the legal tools mobilised in this context, the Public Trust Doctrine (PTD)—sometimes explicitly invoked and at other times implicitly relied upon, has emerged as a particularly contested

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1 *Ana Paula Pimentel Walker / María Arquero de Alarcón*, The Competing Social and Environmental Functions of Private Urban Land: The Case of an Informal Land Occupation in São Paulo's South Periphery, Sustainability 10 (2018), p. 4160.

terrain. Originally conceived as a principle of ecological stewardship,[2] the doctrine has been adapted to urban settings in ways that raise questions about its compatibility with constitutional values of inclusion, equality, and participatory governance.[3]

While the PTD formally refers to the judicially developed principle that the state holds certain resources in fiduciary trust for the public, which obliges it to prevent both private appropriation and arbitrary state action, this article uses the term in a broader sense to include an underlying "public trust" norm that animates PTD-like reasoning even when courts do not explicitly invoke the doctrine. In this sense, PTD denotes both the formal doctrine and its normative extension: the idea that public resources must be governed in the collective interest and that state stewardship is constitutionally accountable to present and future generations. Read in this broader way, PTD becomes a useful lens to ask who counts as *the public* in urban land disputes and how informal dwellers' claims are incorporated into, or excluded from, public-interest reasoning. This article also draws on the idea of the "Right to the City" to frame what is at stake in urban land disputes. Used here as a critical heuristic rather than a standalone legal doctrine, the Right to the City captures residents' collective claims to access, use, and help shape urban space, and it problematises the assumption that formal title or technocratic planning priorities exhaust the meaning of legitimate urban belonging. In the context of informal settlements, this idea helps clarify why displacement disputes are not only questions of legality or land use, but also of participation, distributive fairness, and whose needs count within "public interest" reasoning. The concept is therefore deployed to complement proportionality and socio-economic rights analysis, and to support the article's broader claim that trusteeship must be interpreted in an inclusion-sensitive way in the urban context.

In India, courts often rely on a fiduciary or trusteeship conception of public land, echoing the PTD's broader normative logic to justify the removal of informal settlements from urban areas. This jurisprudence often frames informal housing as a threat to environmental order or public interest, reinforcing a technocratic conception of urban planning that excludes the urban poor. Although the terminology of PTD may at times be absent, the idea that the state must act as trustee or guardian of public land for the general good remains central. The result has often been the displacement of vulnerable communities without adequate regard for their socio-economic circumstances or participatory entitlements, and the consolidation of an urban environmentalism that privileges formally planned, wealthier communities while casting informal dwellers as illegitimate occupants of public land.

By contrast, South African courts have developed a more procedurally robust and rights-sensitive approach to urban housing disputes, despite the absence of a formally articulated *Public Trust Doctrine*. Their reasoning reflects elements of a broader public-

2 *Michael C. Blumm / Mary C. Wood,* The Public Trust Doctrine in Environmental and Natural Resources Law, Durham 2021, p. li.

3 *Mary J. Wood*, Public Lands—The Public Trust Doctrine Includes a Right to Equality of Access to Municipal Beach Area, Loyola University Chicago Law Journal 4 (1973), p. 609.

trust logic—in the sense of demanding justification and accountability from the state—but channels these concerns through socio-economic and procedural rights rather than through a single doctrinal framework. Judicial interventions in this context have emphasised procedural fairness, meaningful engagement, and the duty of the state to justify any displacement in light of the constitutional right to adequate housing.[4]Environmental protection remains a constitutional imperative,[5] but it is not permitted to override socio-economic entitlements without proper justification.[6]

This article conducts a comparative analysis of selected Indian and South African judgments to examine how courts mediate the relationship between public land, environmental preservation, and the socio-economic rights of unlawful or informal occupiers. Although informal settlements are not confined to state-owned land, the analysis focuses on cases involving public land because they most directly implicate the state's dual role as both trustee and regulator of land held in the public interest. It argues that the prevailing judicial approach to public land governance in India, often informed by the broader logic of the PTD, reflects a formalist and exclusionary tendency that sidelines constitutional values of dignity, equality, and participation.[7] In contrast, the South African experience, while not without its limitations, offers an alternative framework for balancing competing public interests through deliberative procedures and proportionality-based reasoning. Rather than positioning environmental protection and urban inclusivity as mutually exclusive goals, the article proposes that courts must reimagine the public trust as a dual-fiduciary framework: one that advances ecological sustainability while also safeguarding equitable access to the urban commons.

Methodologically, the article combines doctrinal analysis with comparative constitutional inquiry. It examines key Indian and South African decisions on public or state-owned land and the rights of those who inhabit it, especially where environmental concerns frame the dispute. It also engages with critical scholarship on environmental justice, urban legality, and socio-economic rights to evaluate the normative and institutional consequences

4 *Lilian Chenwi*, Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions, Human Rights Law Review 8 (2008), p. 127.

5 *Constitution of the Republic of South Africa, 1996*, ss. 24, 26, 27.

6 *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg* 2008 (3) SA 208 (CC). In these landmark decisions, the Constitutional Court emphasised that any limitation or interference with socio-economic rights through eviction must be properly justified and must be "just and equitable" in the circumstances, reflecting both procedural and substantive requirements of constitutional accountability.

7 Although participation is not expressly enumerated as a constitutional value in the South African Constitution, it has been consistently recognised by the Constitutional Court as an essential component of democratic governance and accountability. *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), paras 111–115. For this reason, the term is used here in a functional sense, alongside dignity and equality, to denote values that underpin deliberative and inclusive constitutionalism.

of judicial reasoning. The comparison is functional rather than formal: it does not equate doctrinal vocabularies, but assesses how each constitutional order mediates competing claims over public land.

The article proceeds in five parts. Part B traces the evolution of the PTD, understood to include both its formal doctrinal articulation and its underlying fiduciary logic—from its ecological roots to its contemporary application in urban governance. Part C analyses how Indian courts have invoked this logic in ways that can result in exclusionary models of urban planning and environmental protection. Part D turns to South Africa to explore an alternative judicial approach grounded in procedural fairness and constitutional accountability. Part E proposes a normative reconstruction of PTD that integrates proportionality analysis, participatory governance, and insights from the Right to the City. Part F reflects on the broader doctrinal and institutional implications of this reframing for constitutional courts dealing with urban exclusion.

B. From Commons to Cities: The Public Trust Doctrine and Urban Governance

I. Origins and Evolution of the Public Trust Doctrine

The Public Trust Doctrine is among the most enduring legal principles in environmental law, with roots that trace back to Roman law's conception of common property.[8] In Roman law, *res communes* such as air, sea, and running water were held to be incapable of private ownership and to belong to the public, a principle later absorbed into Anglo-American law through the idea that certain resources, especially navigable waters and shorelines, are held by the state in trust for public use.[9] The modern formulation of PTD, however, owes much to Joseph Sax's seminal article in 1970, which repositioned the doctrine as a tool of judicial intervention to constrain administrative discretion in the management of natural resources.[10] Sax argued that the state bears a fiduciary duty to preserve certain environmental assets for present and future generations, and that courts have a duty to enforce these obligations where state action undermines public access or ecological integrity.[11]While this section traces the formal evolution of PTD as a doctrine, the analysis that follows interprets it more broadly to include its underlying fiduciary logic.

8 *Bruce W. Frier*, The Roman Origins of the Public Trust Doctrine – Domenico Dursi, Res communes omnium. Dalle necessità economiche alla disciplina giuridica, Journal of Roman Archaeology 32 (2019), p. 641.

9 *Roberto Cavallo Perin* / *Dario Casalini*, Water Property Models as Sovereignty Prerogatives: European Legal Perspectives in Comparison, Water 2 (2010), p. 429; *Michael C. Blumm* / *Aurora Paulsen*, The Public Trust as an Antimonopoly Doctrine, Boston College Environmental Affairs Law Review 44 (2017), p. 1.

10 *Joseph L. Sax*, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, Michigan Law Review 68 (1970), p. 471.

11 *Sax*, note 10, pp. 474, 487, 509.

Sax's rearticulation of PTD marked a paradigmatic shift. The doctrine no longer simply preserved public access to rivers or beaches, but provided a normative basis for environmental constitutionalism. Since then, courts in multiple jurisdictions have adopted the principle as a foundational environmental obligation, often linking it to constitutional rights to life, health, and a clean environment.[12] Yet the precise contours of PTD—its scope, enforceability, and normative content vary across jurisdictions, and its doctrinal malleability made it susceptible to both progressive and regressive interpretations. While PTD can function as a constraint on state inaction or corporate overreach, it can also operate as a technocratic tool that privileges environmental or aesthetic values without adequately engaging competing socio-economic interests.

II. PTD in Indian Constitutional Environmentalism

In *MC Mehta v Kamal Nath*,[13] the Supreme Court formally introduced the Public Trust Doctrine into Indian environmental jurisprudence, as part of the broader evolution of environmental jurisprudence under Article 21[14] of the Constitution. In several public interest litigation (PIL) cases, the Supreme Court held that the right to life includes the right to a clean and healthy environment, and that this right imposes positive duties on the state.[15] The Court has explicitly or sometimes implicitly invoked the Public Trust Doctrine and its underlying fiduciary logic, declaring that the state acts as a trustee of all natural resources, which are meant for public use and cannot be converted into private property at the cost of ecological harm.[16]

Initially applied to forests, rivers, and coastal zones, PTD soon migrated to cases involving urban land. Here, its implications grew more complex. As urbanisation intensified, environmental degradation was increasingly attributed to informal settlements, often located on ecologically sensitive land or near public infrastructure. Although courts rarely referenced PTD by name in these contexts, its underlying fiduciary logic surfaced in judgments authorising the removal of informal settlements situated on land designated as environmentally sensitive or reserved for infrastructure. These rulings portrayed informal

12 *Erin Ryan*, Public Trust Principles and Environmental Rights, Harvard Environmental Law Review 49 (2025), p. 259.

13 *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388.

14 *Constitution of India*, art. 21. The provision guarantees the fundamental right to life and personal liberty, which the Supreme Court has expansively interpreted to include access to a clean environment, health, shelter, and livelihood.

15 *Maya Nirula*, Pioneering Decision from the Indian Supreme Court Recognizing Freedom from the Adverse Effects of Climate Change as a Fundamental Right, Columbia Law Blog, 28 August 2024, https://blogs.law.columbia.edu/climatechange/2024/08/28/guest-blog-pioneering-decision-from-the-indian-supreme-court-recognizing-freedom-from-the-adverse-effects-of-climate-change-as-a-fundamental-right/ (last accessed on 13 December 2025).

16 *Shailesh Kumar*, Environmental Governance, Indian Constitutional Framework and the Dilemma of Public Trust Doctrine, Journal of the Campus Law Centre IV–V (2017), p. 5.

settlements as illegal encroachments that violated the state's trustee obligations toward the environment and the public at large.[17]

This application of PTD signalled a shift in the doctrine's function: from safeguarding public access against private enclosure to legitimising state-driven exclusion of marginalised urban populations. In doing so, Indian courts often ignored or downplayed the socio-economic factors that compel the urban poor to occupy environmentally precarious land in the first place. Moreover, these judgments rarely engaged with the procedural or substantive rights of displaced persons, such as the right to housing, rehabilitation, or participation in planning decisions.[18] PTD's fiduciary logic was thus mirrored in ways that reinforced an exclusionary model of urban environmentalism that valorised spatial order and ecological purity over distributive justice.

III. Environmental Duties without PTD: The South African Trajectory

South African constitutional law does not explicitly incorporate the PTD in its formal sense.[19] Instead, environmental obligations arise under Section 24 of the 1996 Constitution, which guarantees every person the right to an environment that is not harmful to health or well-being and imposes duties on the state to protect the environment for the benefit of present and future generations.[20] While Section 24 shares PTD's intergenerational and fiduciary logic, its interpretation by South African courts has avoided some of the exclusionary tendencies evident in Indian jurisprudence. Crucially, Section 24 has not been central to eviction jurisprudence, where courts have grounded their reasoning primarily in socio-economic and procedural rights rather than environmental doctrine.

Rather than treating environmental protection as a justification for limiting other rights, South African courts have interpreted Section 24 in conjunction with socio-economic and procedural rights, particularly the right to access to adequate housing (Section 26) and the right to dignity (Section 10). Judicial interventions in urban eviction cases have tended to emphasise the need for reasonableness, meaningful engagement, and equitable relocation

17 *Naveen Thayyil*, Judicial Fiats and Contemporary Enclosures, Conservation and Society 7 (2009), p. 268. Thayyil examines the Supreme Court of India's decision in *T.N. Godavarman Thirumulpad v. Union of India, (1997) 2 SCC 267*, where the Court assumed responsibility for determining access to and use of forest resources, ostensibly to protect the environment. He argues that this intervention has significantly affected the lives, livelihoods, and habitats of marginalised groups, as the Court's judgments determine who may or may not access forests.

18 *Soumya Ghosal*, In whose interest? – Exploring the court's role in basti evictions and its effects on the residents, Law School Policy Review, 21 January 2021, https://lawschoolpolicyreview.com/2021/12/01/in-whose-interest-exploring-the-courts-role-in-basti-evictions-and-its-effects-on-the-residents/ (last accessed on 7 December 2025).

19 *Andrew C. Blackmore*, Getting to Grips with the Public Trust Doctrine in Biodiversity Conservation: A Brief Overview, African Biodiversity & Conservation 48 (2018), p. 1.

20 Constitution of the Republic of South Africa, 1996, s. 24. The provision guarantees everyone the right to an environment that is not harmful to their health or well-being and obliges the state to protect the environment for the benefit of present and future generations.

policies.[21] Environmental justifications for eviction have not been categorically rejected, but they have been subjected to rigorous scrutiny and balanced against the rights of affected communities.

This judicial posture reflects the broader ethos of South Africa's transformative constitutionalism, which commits the state and its institutions to dismantling structural inequalities inherited from apartheid.[22] Courts have interpreted constitutional rights not in isolation but as interdependent, requiring public institutions to coordinate their duties and justify any rights limitations through participatory and transparent processes.[23] In this context, the absence of a formal PTD has not weakened environmental protections; it has instead limited the doctrinal tendency to elevate environmental interests above socio-economic entitlements through a single overriding framework.

IV. The Urban Turn: PTD as a Tool of Spatial Governance

The migration of the PTD from rural or natural landscapes into urban settings marks a significant doctrinal development. Once applied to rivers, forests, and coasts, PTD is now being used to govern contested urban spaces such as public parks, transport corridors, wetlands, and vacant government land.[24] This "urban turn" reflects both the changing geographies of environmental litigation and the intensifying struggle over land in rapidly urbanising regions.

However, the translation of PTD into the urban context is not merely geographic; it is deeply ideological. In Indian jurisprudence, informal settlement dwellers have at times been portrayed as violators of the public trust, even where their occupancy reflects systemic housing failures or policy neglect.[25] Public land is reimagined as sacrosanct ecological territory, and those who inhabit it without formal title are recast as encroachers rather than rights-bearers. The doctrine, originally intended to preserve the commons for the public, thus becomes a tool for displacing the very populations most reliant on them.

21 *Arthur van Coller*, Judicial Problem-Solving: An Evaluation of Grobler v Phillips and Others [2022] ZACC 32, Law, Democracy & Development 28 (2024), p. 76.

22 *Karl Klare*, Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights 14 (1998), p. 146.

23 *Oliver Njuh Fuo*, Public Participation in Decentralised Governments in Africa: Making Ambitious Constitutional Guarantees More Responsive, African Human Rights Law Journal 15 (2015), p. 167; *New Nation Movement NPC v. President of the Republic of South Africa* Case CCT 110/19, [2019] ZACC 27.

24 *Serena M. Williams*, Sustaining Urban Green Spaces: Can Public Parks Be Protected under the Public Trust Doctrine, South Carolina Environmental Law Journal 10 (2002), p. 23.

25 *Almitra Patel v Union of India* (2000) 2 SCC 679 (characterising informal settlers as encroachers undermining environmental order); *Okhla Factory Owners' Assn v. Government of NCT of Delhi* (2002) 104 DLT 484 (framing informal residents as illegal occupants of public land); contrast *Sudama Singh v. Government of NCT of Delhi* 2010 SCC OnLine Del 612 (recognising rights-based entitlements in relocation and rehabilitation and cautioning against stigmatic portrayals of informal settlers).

By contrast, South African courts have resisted this logic. They have largely addressed environmental and spatial governance through a framework that centres human dignity, participatory governance, and reasonableness. This contrast underscores that the meaning and effects of doctrines like PTD are shaped not only by their legal form but by the broader constitutional culture in which they are deployed.

The urban deployment of PTD thus raises critical questions for constitutional law. Can a doctrine originally designed to protect shared natural resources be adapted to support inclusive urban spaces rather than justify the exclusion of those who inhabit them without formal sanction? What principles should guide courts in weighing environmental protection against socio-economic vulnerability where both values carry constitutional weight?

Answering these questions requires not only comparative analysis but also doctrinal reconstruction. PTD must be reinterpreted as a framework that recognises the complex interplay between environmental sustainability and urban inclusion. As the following sections demonstrate, the divergent judicial trajectories of India and South Africa offer instructive examples for how courts might navigate this terrain.

C. India's Jurisprudence of Exclusion: Environmentalism, Encroachment, and the Urban Poor

I. From Environmental Protection to Spatial Purification

Over the last three decades, Indian courts have increasingly positioned themselves as active participants in the governance of cities. Through PIL, especially in the realm of environmental law, the higher judiciary has expanded its role from adjudication to ongoing policy supervision,[26] issuing continuing directions, requiring periodic compliance reports, and monitoring implementation. This has blurred the conventional boundary between judicial review and executive governance.

Although rarely invoked explicitly, Indian courts have occasionally drawn on ideas resonant with the Right to the City,[27] especially in the more rights-sensitive Delhi High Court interventions discussed below.

Nowhere is this more visible than in cases involving informal settlements, where judicial interventions frequently blur the lines between environmental protection and spatial control. What begins as an effort to safeguard ecological or civic spaces often culminates in rulings that authorise the large-scale removal of urban poor communities. This convergence of environmentalism and "urban purification" the use of ecological rationales to sanitise

26 *Mihika Poddar / Bhavya Nahar*, Continuing Mandamus – A Judicial Innovation to Bridge the Right–Remedy Gap, NUJS Law Review 10 (2017), p. 19.

27 *Mathew Idiculla*, A Right to the Indian City? Legal and Political Claims over Housing and Urban Space in India, Socio-Legal Review 16 (2020), p. 1.

urban space of populations deemed disorderly—has become a recurring feature of Indian urban jurisprudence.[28]

The judicial turn towards environmental protection in the 1980s and 1990s was initially celebrated for its expansive reading of Article 21 of the Constitution, which guarantees the right to life. In a series of landmark cases, the Supreme Court declared that this right includes the right to a clean and healthy environment.[29] This doctrinal expansion was coupled with procedural innovations such as relaxed standing rules and *suo motu* cognisance. As environmental PIL expanded, it became increasingly entangled with urban land disputes, particularly in metropolitan centres.

In these disputes, courts often treated informal settlements as impediments to environmental restoration, urban mobility, or aesthetic order. While such objectives carry legitimate ecological and civic weight, the framing of informal settlements as inherently polluting or chaotic constructed the urban poor not as constitutional subjects but as threats to urban order.[30]

This logic of exclusion draws strength from the judicial valorisation of planned development and public order. Courts frequently treated city master plans as sacrosanct, despite their politicisation and revision.[31] Slums located on land designated for parks, transport corridors, or civic amenities were read as violations of legality rather than symptoms of housing inequality. The label "encroacher" collapsed displacement, unaffordability, and policy failure into a single, delegitimising category.[32]

What emerged from this jurisprudence was a conception of urban environmentalism that prioritised spatial order over socio-economic inclusion. Rather than interrogating how poverty, labour migration, and inadequate public housing push the urban poor onto marginal land, courts treated their presence as a disruption to urban modernity. The city became a space to be sanitised; informal dwellers a deviation from a legally idealised form.

Crucially, environmental justifications for eviction were rarely accompanied by detailed ecological assessments or harm evaluations. The designation of land as "public" or "environmental" was often sufficient to justify demolition.[33] This evidentiary thinness reflects

28 *Armin Rozencraz*, The Supreme Court of India exceeds its constitutional boundaries, Journal on Environment Law and Policy Development 3 (2016), p. 1.

29 *Sushovan Patnaik*, Giving the Green Signal: The Supreme Court and the Environment, Supreme Court Observer, https://www.scobserver.in/journal/giving-the-green-signal-the-supreme-court-and-the-environment/ (last accessed on 13 December 2025).

30 *Gautam Bhan*, In the Public's Interest: Evictions, Citizenship and Inequality in Contemporary Delhi, Hyderabad 2016; *Usha Ramanathan*, Illegality and the Urban Poor, Economic & Political Weekly 41 (2006).

31 *Bhan*, note 30.

32 *Ramanathan*, note 30.

33 *Idiculla*, note 27; *Asher Ghertner*, Analysis of New Legal Discourse Behind Delhi's Slum Demolitions, Economic & Political Weekly 43 (2008), p. 57.

a broader tendency to conflate legality with environmental value, and informality with degradation.

At the doctrinal level, courts did not always invoke the Public Trust Doctrine expressly. More often, they relied on generic references to public interest, illegality, and protection of state land.[34] Yet the underlying logic of trusteeship remained: public land was to be protected from unauthorised occupation in the name of an undefined public, implicitly aligned with formal residents and elite urban imaginaries.

This vision of environmentalism as spatial purification is not unique to India. It echoes global trends in urban governance.[35] Yet in the Indian context, the authority of the judiciary, the pliability of PIL, and the absence of statutory safeguards for informal dwellers have made this logic particularly potent. The result is a jurisprudence that combines high constitutional language with low procedural scrutiny, privileging elite visions of the city while marginalising the urban poor.

In sum, Indian urban environmental jurisprudence has often operated through a logic of purification rather than inclusion, raising the question whether environmental law advances public trust in a democratic sense or reinforces a spatially exclusive conception of the public.

II. Encroachment, Illegality, and Public Interest Reasoning

A central feature of Indian judicial discourse on informal settlements is the concept of encroachment. While not a formal doctrine, courts have developed a consistent pattern of "public interest" reasoning, invoking civic order, environmental cleanliness, and planned development to justify eviction. This justificatory frame, although distinct from PTD, similarly enables the state to prioritise selective visions of the city over the rights of marginalised residents.

By categorising informal communities as "encroachers", courts treat entire populations as unlawful occupants and thereby lower the threshold of constitutional protection.[36] Illegality becomes not merely a zoning defect but a moral and civic indictment. This framing enables sweeping deployment of doctrines such as public nuisance, defence of public land, and protection of civic order without requiring rehabilitation.

Courts seldom rely on detailed statutory definitions of encroachment. Instead, they lean on abstract appeals to public interest and environmental protection, rarely interrogating

34 *Asher Ghertner*, Rule by Aesthetics: World-Class City Making in Delhi, in: Ananya Roy / Aihwa Ong (eds.), Worlding Cities: Asian Experiments and the Art of Being Global, Oxford 2011, pp. 279, 283–285.

35 *Marcelo Lopes de Souza*, For the Sake of the Common Good? Gentrifying Conservationism and Green Evictions, Nature of Cities, 13 August 2017, https://www.thenatureofcities.com/TNOC/2017/08/13/sake-common-good-gentrifying-conservationism-green-evictions/ (last accessed on 13 December 2025).

36 *Ramanathan*, note 30.

whose interests these categories serve.[37] The logic is formalist: because the occupation is technically unauthorised, removal is presumed justified regardless of vulnerability.[38]

This formalism is reinforced by the judicial separation of legality from justice. As Usha Ramanathan has observed, Indian law treats informality as illegality without acknowledging the state's role in producing or tolerating it.[39] Courts rarely ask why settlements emerge or whether authorities enabled their growth. Complex histories of exclusion are flattened into binary judgments of lawful versus unlawful use.

Even where hardship is acknowledged, it seldom produces robust rights-based reasoning. Rehabilitation is treated as administrative discretion rather than constitutional obligation.[40] Socio-economic rights remain supplementary to planning legality, despite their textual and doctrinal anchoring in Article 21.

The Public Trust Doctrine, even when not expressly invoked, illuminates this logic. At its core, PTD requires the state to protect resources for the public. In urban housing disputes, however, the identity of "the public" remains indeterminate and implicitly exclusionary. Informal dwellers are rarely recognised as part of the beneficiary class.

This selectivity reveals a skewed vision of trusteeship: rivers and forests receive expansive protection, while public land inhabited by the poor is treated as disposable. Trusteeship thus becomes a vehicle for exclusion when untethered from dignity, equality, and participation.

III. The Margins of Rights: Socio-Economic Entitlements and Procedural Absence

Despite intensifying scrutiny of informal settlements, courts have not consistently enforced socio-economic rights in eviction jurisprudence. Rehabilitation is routinely framed as executive policy rather than constitutional duty.

In *Almitra Patel*,[41] *Okhla Factory Owners*,[42] and *MC Mehta*,[43] slum clearance was authorised in the language of pollution control, planning, and environmental order. Informal settlements were framed as sources of disorder, while the rights of affected communities were largely absent from the analysis. Once informality was judicially acknowledged, eviction became a presumed consequence, requiring little inquiry into proportionality or alternatives.

37 *Bhan*, note 30.

38 Ibid.

39 *Ramanathan*, note 30.

40 *Rishika Sahgal*, Evictions, Homelessness and the Constitution: The Delhi High Court and the Limits of Judicial Imagination, Constitutional Law and Philosophy, 12 August 2022, https://indconlawphil.wordpress.com/2022/08/12/evictions-homelessness-and-the-constitution-the-delhi-high-court-and-the-limits-of-judicial-imagination/ (last accessed 13 December 2025).

41 *Almitra H. Patel v. Union of India*, (2000) 2 SCC 679.

42 *Okhla Factory Owners*, note 25.

43 *M.C. Mehta v. Union of India*, Supreme Court Order, 31 August 2020, W.P. (C) No. 13029/1985.

Against this backdrop, two Delhi High Court interventions stand out. In *Sudama Singh*, the Court held that the right to housing forms part of Article 21 and required surveys, eligibility assessments, and protection against homelessness before eviction.[44] Rehabilitation was reframed as constitutional obligation rather than administrative charity. Yet its doctrinal influence remained limited.

The Court's reasoning in *Sudama Singh* also rejected the binary between legal and illegal occupants,[45] recognising that long-term residence, even if technically unauthorised, can give rise to enforceable entitlements when viewed through the lens of human rights and state policy. Yet despite its doctrinal promise, the impact of *Sudama Singh* remained limited. Authorities continued to treat rehabilitation as optional, and courts seldom followed its approach in subsequent eviction cases.

A more ambitious intervention came in *Ajay Maken*,[46] where the Delhi High Court explicitly invoked ideas associated with the Right to the City. It rejected the framing of informal dwellers as mere encroachers and required meaningful engagement, transparency, and adherence to rehabilitation policy. Eviction without due process was linked to violations of dignity, equality, and life.

Ajay Maken marks a rare instance in which the judiciary engaged not just with the procedural aspects of eviction but also with the substantive democratic claims of informal residents. The Court required prior notice, detailed surveys, transparency in eligibility determinations, and adherence to the *Delhi Slum & JJ Rehabilitation Policy*.[47] It also linked these requirements to constitutional principles, particularly Articles 14, 19, and 21 emphasising that eviction without due process amounts to a violation of dignity and equality.[48] The judgment thus provided a doctrinal blueprint for rights-compatible eviction governance. However, like *Sudama Singh*, its influence on broader jurisprudence remains precarious. It has not been uniformly adopted by other High Courts, and its approach is often overridden when land use legality or environmental compliance is foregrounded.

These cases demonstrate that the doctrinal architecture for rights-based adjudication exists, but is applied selectively. Courts possess the constitutional tools to condition evictions on proportionality, participation, and rehabilitation. Yet in most urban land disputes, these tools are not invoked. Instead, socio-economic rights are treated as supplementary

44 *Sudama Singh & Others v. Government of Delhi & Another*, (2010) 168 DLT 218 (DB).

45 India often treats unauthorised occupation as a criminal or penal violation, unlike South Africa, where unlawful occupation is explicitly decriminalised under the *Prevention of Illegal Eviction from Unlawful Occupation of Land Act* 19 of 1998 (South Africa).

46 *Ajay Maken & Ors. v. Union of India & Ors.*, Delhi High Court, W.P.(C) No. 11616/2015, judgment dated 18 March 2019.

47 Delhi Urban Shelter Improvement Board, Slum & JJ Rehabilitation and Relocation Policy 2015, https://delhishelterboard.in/main/wp-content/uploads/2012/01/Policy-2015.pdf (last accessed on 13 December 2025).

48 The judgment linked these procedural safeguards to constitutional principles, Constitution of India arts 14 (equality), 19 (freedom), and 21 (right to life and dignity).

considerations - subordinated to planning priorities, land ownership rules, or environmental exigencies. The result is a jurisprudence that risks converting housing into a policy preference, rather than a fundamental right enforceable against the state.

In the context of the Public Trust Doctrine, this omission is particularly significant. If the state is a trustee of public land for the benefit of present and future generations, then that trusteeship cannot be read in purely ecological or infrastructural terms. It must include a commitment to inclusive governance and distributive fairness. Judgments like *Ajay Maken* show that this interpretation is doctrinally possible. But unless it becomes embedded in judicial reasoning across the board, PTD's underlying logic will continue to legitimise exclusion rather than enable transformation.

IV. Doctrinal Drift: The Silent Expansion of Public Trust Logics

Although Indian courts do not consistently invoke PTD in urban eviction cases, its fiduciary assumptions have quietly permeated judicial reasoning. This reflects a form of doctrinal drift: trusteeship logic migrates into eviction jurisprudence without explicit examination.

At its core, PTD holds that the state has a fiduciary duty to preserve certain resources —typically natural assets such as rivers, forests, and coastlines for public use and future generations. In Indian environmental jurisprudence, this doctrine has been deployed expansively to constrain the commodification or privatisation of ecological commons.[49] In these contexts, the "public" is broadly conceived, and the state's obligation is to ensure that environmental resources are managed equitably and sustainably. However, when the subject of adjudication shifts to urban land occupied by the poor, the meaning of "the public" narrows, and the doctrine's protective logic is inverted. The state's fiduciary duty is invoked, implicitly or otherwise, not to shield marginalised residents but to justify their removal in the name of environmental order or civic utility.

This double movement, that is, the expansion of PTD in ecological contexts and its contraction in urban housing disputes reveals a disjuncture in judicial reasoning. Courts readily embrace the trustee metaphor when it serves to limit elite overreach in ecologically sensitive areas, yet resist applying the same logic to protect vulnerable urban populations whose survival depends on informal tenure. In doing so, they adopt a selective interpretation of trusteeship, that recognises future generations but not present ones, natural commons but not inhabited commons, environmental purity but not urban equity.[50]

This selectivity becomes particularly apparent in the treatment of public land. In cases concerning riversides, wetlands, or forests, PTD is used to block commercial development

49 *Ashish Kumar Jha*, Borrowed Concepts, Undefined Boundaries: A Critical Examination of India's Public Trust Doctrine, Scconline, 27 May 2024, https://www.scconline.com/blog/post/2024/05/27/borrowed-concepts-undefined-boundaries-a-critical-examination-of-indias-public-trust-doctrine/ (last accessed on 13 December 2025).

50 For instance, Asher Ghertner shows that courts and planners in Delhi privilege ecological purity, urban aesthetics, and natural commons over the rights of informal residents; *Ghertner* note 34.

or industrial misuse, often citing intergenerational equity and ecological integrity.[51] Yet when public land in cities is occupied by informal settlement residents, courts seldom inquire whether that land serves a vital housing function, or whether its *restoration* to planned use produces social harm. The assumption is that public land has a pre-political function: it exists to fulfil planning mandates, not to accommodate need. This move naturalises the priorities embedded in urban master plans, treating them as expressions of the public interest rather than products of political economy or elite influence.

The result is a flattened vision of public trust, in which ecological or civic cleanliness becomes the overriding objective, and the presence of the urban poor is treated as a breach of fiduciary duty. In this register, the PTD functions not as a tool of democratic accountability, but as a doctrinal shield that insulates courts from engaging with the redistributive dimensions of spatial justice.

What is missing in this picture is a jurisprudence of coexistence where public land can serve multiple, overlapping purposes, and that the state's fiduciary obligations are not exhausted by physical clearance. The doctrine, if interpreted holistically, could support a more inclusive conception of public interest. What also shapes this jurisprudence is an implicit hierarchy of belonging: judicial readings of PTD often assume a pre-constituted "public" whose interests are worth protecting, typically formal residents and authorised users of the city. Informal dwellers rarely feature within this imagined public, which helps explain why their claims to survival, habitation, or use seldom register as public interests capable of constraining state action. Recognising this exclusionary baseline is essential, because a genuinely holistic interpretation of trusteeship would require courts to account for all urban users whose lives depend on public land.

There is precedent for such an approach. As seen in *Ajay Maken*, the Delhi High Court explicitly acknowledged that informal dwellers have a legitimate claim to shape the city, and that state obligations under housing policies and the right to life cannot be displaced by planning imperatives alone.[52] The court's reasoning reflected a deeper understanding of democratic trusteeship where the state's legitimacy derives not only from technocratic efficiency but also from inclusive governance. Embedding this reasoning into PTD logic would mean recognising that trusteeship entails mediation between competing claims, not the automatic displacement of weaker ones.

Furthermore, incorporating constitutional values of dignity, equality, and participation into PTD adjudication could prevent its instrumentalization as a tool of exclusion. As David Bilchitz and Aharon Barak have argued in other contexts, rights limitations must pass a test of proportionality: a structured balancing process that assesses the necessity, suitability, and minimal impairment of state actions.[53] A PTD-informed eviction decision that does not

51 A prime example is *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647.

52 *Ajay Maken*, note 46.

53 *David Bilchitz*, Necessity and Proportionality: Towards a Balanced Approach?, in: Liora Lazarus / Christopher McCrudden / Nigel Bowles (eds.), Reasoning Rights: Comparative Judicial Engage-

engage these tests risks becoming a blunt instrument, one that legitimates state coercion under the guise of public interest without attending to the burdens it imposes.

To move in this direction, courts must adopt a deliberative approach to trusteeship. This would involve recognising that public land, especially in urban contexts, is not a neutral canvas but a site of historical contestation and socio-economic struggle. This requires not abandoning PTD, but deepening it and infusing it with constitutional sensibilities that demand accountability not only for what the state protects, but also for how it protects and from whom.

D. South Africa's Housing Jurisprudence: Transformative Inclusion Without PTD

I. Rights, Procedure, and the Limits of Eviction

South Africa's urban eviction jurisprudence is rooted not in the PTD, but in a constitutional framework that guarantees socio-economic rights and procedural fairness. Section 26 guarantees the right to access to adequate housing and prohibits evictions without judicial oversight. Section 24 establishes environmental rights but is not interpreted as a vehicle for exclusion.

South African courts have consistently refused to treat unlawful occupation as a basis for extinguishing rights. In landmark cases such as *Olivia Road*,[54] *Blue Moonlight*,[55] and *Joe Slovo*,[56] the Constitutional Court emphasized that the legality of occupation does not negate the duty to respect dignity, provide alternatives, and engage affected communities.

In *Olivia Road*, the Constitutional Court considered the eviction of residents from inner-city buildings deemed unsafe by municipal authorities. The Court acknowledged the city's legitimate concerns about safety and urban regeneration but held that eviction without meaningful engagement violated Section 26. It introduced this concept as a procedural obligation requiring the state to consult with affected communities before seeking judicial authorisation for eviction.[57] The applicants had also challenged the constitutionality of legislative provisions that permitted eviction without the protections afforded by "The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act(1998)", arguing that the State's reliance on building-safety concerns could not justify bypassing constitutional safeguards. The reasoning in the judgment exemplifies the Court's refusal to reduce constitutional adjudication to a binary between legality and illegality. Instead, it framed eviction

ment, Oxford 2014, p. 41; *Aharon Barak*, Proportionality: Constitutional Rights and Their Limitations, Cambridge 2012, p. 179.

54 *Olivia Road*, note 6.

55 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33.

56 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; 2010 (3) SA 454 (CC).

57 *Olivia Road*, note 6.

as a site of constitutional conflict: a moment when multiple rights and interests must be reconciled through dialogue and proportionality. The Court explicitly rejected a formalist interpretation of rights, insisting that engagement is necessary not only for fairness but for the legitimacy of state action. This procedural device operates as a substantive check: while engagement does not guarantee outcome parity, it ensures that evictions are not carried out unilaterally or without considering the needs of those most affected.

In *Blue Moonlight*, the Court extended housing duties to situations involving private land, rejecting the view that municipalities could defer responsibilities when faced with private eviction claims.[58] The judgment reinforced the idea that socio-economic rights are not aspirational but impose concrete obligations, especially when eviction renders residents homeless. The Court also extended these duties to the private landowner, holding that eviction could not proceed without ensuring that residents would not be rendered homeless, a significant recognition of shared constitutional responsibility in eviction proceedings.

In *Joe Slovo*, which concerned the relocation of residents from an informal settlement to temporary accommodation as part of a government housing project, the Constitutional Court engaged with the tension between developmental planning and resident autonomy. The Court ultimately allowed the relocation but imposed strict procedural conditions: consultation, clarity on timelines, and access to final housing.[59] Notably, several judges expressed concern about the limits of court-enforced eviction orders and underscored the risk of turning constitutional rights into technocratic permissions for displacement. The judgment highlighted the Court's internal deliberation on how to avoid replicating historical patterns of spatial exclusion under a new constitutional order. However, in the subsequent *Joe Slovo 2* decision, the Court recognised that the relocation could not feasibly proceed as ordered, underscoring its willingness to revisit remedial directions when implementation would exacerbate vulnerability.[60]

These decisions reflect a commitment to procedural inclusion as a pathway to substantive fairness. Environmental and planning concerns are not disregarded but must be reconciled with rights through transparent, participatory processes.

II. The Architecture of Reasonableness

The South African Constitutional Court's approach to socio-economic rights, particularly in the domain of housing, has been marked by a doctrinal evolution that favours reasonableness-based review over fixed substantive entitlements. This trajectory reflects a conscious judicial effort to develop a form of constitutional adjudication that balances enforceability with institutional legitimacy, while remaining responsive to the lived realities of poverty,

58 *Blue Moonlight*, note 55.

59 *Joe Slovo*, note 56.

60 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (No 2)* [2011] ZACC 33.

inequality, and spatial injustice. The result is an architecture of reasonableness that does not rely on rigid minimum standards, but instead requires the state to demonstrate that its housing policies and eviction practices are inclusive, participatory, and tailored to meet the needs of the most vulnerable.

The foundational case in this trajectory is *Government of the Republic of South Africa v Grootboom*, where the Court declined to endorse a "minimum core" obligation under Section 26(1) of the Constitution.[61] Instead, it introduced a reasonableness test, requiring that housing policies be comprehensive, coherent, flexible, and attuned to both short-term and long-term needs. The Court held that the right to access housing could not be enforced as an abstract guarantee of shelter for every individual. Rather, it imposed an obligation on the state to take reasonable legislative and policy measures, within its available resources, to progressively realise the right. This rejection of minimum core obligations was not without controversy. Critics argued that it weakened the enforceability of socio-economic rights and allowed the state excessive discretion in determining compliance.[62] However, the Court's formulation of reasonableness was far from deferential. It required that state programmes include provisions for those in crisis situations such as those living in intolerable conditions or facing imminent eviction, and that such programmes be implemented with urgency and equity. In doing so, the Court effectively constructed a procedural threshold for constitutional compliance, shifting the inquiry from what the state must deliver to how it must act.

This approach reiterated the holding in *Minister of Health v Treatment Action Campaign*, where the Court reviewed a health programme through the lens of responsiveness and fairness.[63] This trajectory was later consolidated in *Mazibuko v City of Johannesburg*, where the Court reaffirmed that socio-economic rights are to be enforced through a standard of reasonableness rather than through a judicially defined "minimum core."[64] These criteria were adapted in housing law to assess evictions and resettlement plans.

A central procedural innovation has been meaningful engagement, first articulated in *Olivia Road* and systematised in *Blue Moonlight* and *Joe Slovo*. Engagement is more than notice or consultation; it requires substantive dialogue. The duty lies with the state and cannot be satisfied by perfunctory meetings or blanket notices. This framework reframes residents as rights-bearing constitutional subjects, not obstacles to planning. This approach echoes the earlier guidance in *Port Elizabeth Municipality v Various Occupiers*, where the Constitutional Court held that eviction decisions must balance competing interests with grace and compassion and that the state must engage with unlawful occupiers in a manner

61 *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).

62 *Sisay Yeshanew*, Combining the "Minimum Core" and "Reasonableness" Models of Reviewing Socio-Economic Rights, ESR Review 9 (2011), p. 1.

63 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15.

64 *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

consistent with dignity and the prevention of homelessness.[65] In *Blue Moonlight*, the Court held that municipalities must provide emergency accommodation, even when evictions are initiated by private parties. Constitutional obligations cannot be outsourced.

This architecture has important implications for the judicial role. South African courts do not claim to design or implement housing policy; rather, they act as constitutional auditors who assess whether government action aligns with the principles of reasonableness and inclusion. This stance contrasts with the Indian judiciary's interventionist posture in environmental PILs, where courts often substitute their own planning priorities for those of the state. The South African model insists on restraint, but pairs that restraint with normative discipline: the Court will not dictate what the government must do, but it will strike down actions that fail to meet constitutional thresholds.

III. Structural Remedies

South Africa's constitutional jurisprudence on housing rights not only embeds procedural fairness but also demonstrates a willingness to impose structural remedies in the form of judicial orders that go beyond declaratory relief to guide the state's future compliance. These remedies mark a distinctive feature of South Africa's transformative constitutionalism: an approach that seeks to recalibrate institutional relationships without displacing democratic legitimacy. While structural remedies have attracted critique for allegedly stretching judicial authority and straining the separation of powers, South African courts have defended their use where ordinary remedies would be inadequate to secure socio-economic rights.[66] In eviction and land-related disputes, structural orders have become an important tool for ensuring that socio-economic rights are not merely aspirational, but practically enforceable.

The most prominent example is *President of the Republic of South Africa v Modderklip Boerdery*, where thousands of landless people had unlawfully occupied private land.[67] The state failed to provide alternative housing, and the landowner obtained an eviction order. When the authorities did not enforce it, the landowner approached the courts for relief. The Constitutional Court held that continued non-enforcement violated the landowner's constitutional right of access to courts under section 34, as the state's failure rendered the eviction order meaningless. At the same time, immediate eviction would have rendered thousands homeless, and the state had taken no steps to provide alternatives.

To resolve this tension, the Court ordered the state to pay constitutional damages to the landowner for the violation of section 34 and simultaneously required the government to devise and implement a relocation plan for the occupiers. This dual remedy balanced the

65 *Port Elizabeth Municipality*, note 6.

66 *Shanelle van der Berg*, A Capabilities Approach to Remedies for Systemic Resource-Related Socio-Economic Rights Violations in South Africa, African Human Rights Law Journal 19 (2019), p. 299.

67 *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT 20/04) [2005] ZACC 5.

landowner's property and procedural rights with the occupiers' dignity and housing-related interests, without collapsing either set of rights or allowing state inaction to determine outcomes.

The case illustrates how judicial oversight can safeguard constitutional rights without designing policy. The Court did not craft a housing programme; instead, it required the state to account for, and fulfil, its constitutional obligations. This stands in contrast with Indian jurisprudence, where eviction orders even when justified on environmental grounds are often issued without corresponding mechanisms to ensure meaningful alternatives, monitoring, or remedial follow-up.

Structural remedies were also used in *Residents of Joe Slovo*, where the relocation of informal settlers for a government housing project raised concerns about forced displacement.[68] The Court approved the relocation but imposed conditions: transparent timelines, consultation, and access to final housing. Importantly, it retained supervisory jurisdiction to ensure compliance, signalling that constitutional protection does not end with the judgment. Structural interdicts here were not a judicial incursion into policy but a means of holding the state to its own commitments.

This supervisory model reflects the Court's broader institutional philosophy. Rather than mandating specific outcomes, it creates a dialogic space in which rights holders, government agencies, and sometimes private actors must negotiate solutions that comply with constitutional values. In this respect, the South African approach resonates with Jeff King's concept of judicially managed constitutional implementation: courts issue principled guidelines while deferring to the state on policy detail, ensuring both accountability and flexibility.[69]

There are, however, limits. Structural remedies can be difficult to monitor, and municipalities may lack capacity or political will to comply. In *Joe Slovo 2*, for instance, the Court itself acknowledged that the originally ordered relocation had become practically impossible to execute, underscoring the fragility of remedial supervision when implementation conditions shift.[70] More broadly, compliance in the aftermath of *Joe Slovo* was uneven, reflecting the challenges of sustaining iterative engagement over time.[71]

These concerns are echoed in the wider jurisprudence. Cases such as *Pheko I–III* reveal repeated non-compliance and the need for ongoing judicial intervention,[72] while *Black*

68 *Brian Ray*, Residents of *Joe Slovo Community v Thubelisha Homes and Others*: The Two Faces of Engagement, Human Rights Law Review 10 (2010), p. 360.

69 *Jeff A. King*, Institutional Approaches to Judicial Restraint, Oxford Journal of Legal Studies 28 (2008), p. 409.

70 *Joe Slovo 2*, note 60.

71 *Lilian Chenwi*, Socio-Economic Gains and Losses: The South African Constitutional Court and Social Change, Social Change 41 (2011), p. 427.

72 *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 1)* [2011] ZACC 19; *Ekurhuleni Metropolitan Municipality v Pheko (No 2)* [2012] ZACC 31; *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 3)* [2016] ZACC 20.

Sash demonstrates how supervisory jurisdiction can become prolonged and institutionally burdensome, even as it remains indispensable for protecting socio-economic rights.[73] Critics argue that without sustained judicial follow-through, structural remedies risk lapsing into symbolic oversight rather than fostering meaningful accountability.[74] At the same time, these critiques do not undermine the dialogic promise of the model; rather, they highlight the extent to which its success depends on institutional capacity, political cooperation, and the Court's willingness to persist with oversight when state actors resist compliance.

Yet despite these shortcomings, the use of structural remedies signals a normative shift in adjudicating socio-economic rights. Instead of treating courts as passive arbiters or hyperactive planners, the South African model presents them as facilitators of transformation. This contrasts with the Indian pattern where courts often assume a managerial posture over urban governance—issuing directives on slum clearance, environmental preservation, or infrastructure without sustained oversight or inclusive consultation.[75] The South African experience suggests that judicial minimalism need not preclude effectiveness, provided it is accompanied by mechanisms that demand transparency, participation, and justification.

IV. Comparative Implications: PTD and Transformative Constitutionalism

The preceding analysis reveals two divergent judicial logics in the governance of public land and urban housing. In India, the Public Trust Doctrine has become a central, though contested, feature of environmental and urban jurisprudence, shaping how courts evaluate land use, encroachment, and the distribution of public resources. In South Africa, courts have developed an alternative framework grounded in socio-economic rights, procedural obligations, and structural remedies without invoking any formal equivalent to PTD. This contrast raises broader questions about the relationship between doctrine and transformation: how do courts navigate competing public interests, and what legal logics guide their resolution of conflicts between environmental protection and housing rights?

73 *Black Sash Trust v Minister of Social Development and Others* [2017] ZACC 8.

74 See *Helen Taylor*, Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation, Constitutional Court Review 9 (2019), p. 247.

75 For a discussion of the South African Constitutional Court's facilitative and dialogic approach to socio-economic rights, see *Jeff A. King*, Institutional Approaches to Judicial Restraint, Oxford Journal of Legal Studies 28 (2008), p. 409; On the Indian Supreme Court's managerial and interventionist approach in cases concerning slum clearance, environmental protection, and urban governance, see *Shylashri Shankar* / *Pratap Bhanu Mehta*, Courts and Socioeconomic Rights in India, in: Varun Gauri / Daniel M. Brinks (eds), Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World, Cambridge 2008, p. 146; *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545; *M.C. Mehta v Union of India* (1987) 1 SCC 395. For critiques of the lack of sustained oversight and inclusive consultation, see *Gautam Bhan*, This Is No Longer the City I Once Knew: Evictions, the Urban Poor and the Right to the City in Millennial Delhi, Environment and Urbanization 21 (2009), p. 127.

The Indian approach reflects a form of doctrinal enclosure, where PTD has migrated from its ecological origins into the domain of urban land governance. While this migration might appear to serve the public interest, it often operates to displace marginalised communities from informal settlements deemed environmentally or civically sensitive. The doctrine is framed in neutral terms such as public interest, ecological balance, civic order but its application reveals a deeper jurisprudential tendency to privilege spatial order over social inclusion. Despite constitutional protections for socio-economic rights under Article 21 and judicial recognition of the right to shelter, PTD is frequently mobilised to override these protections.

Seen from a broader normative perspective, this amounts to competing visions of who constitutes "the public" and whose interests structure the urban commons. In India, trusteeship is often implicitly aligned with formally housed residents and master-plan priorities; in South Africa, the jurisprudence comes closer to a relational, use-based understanding of urban belonging, which resonates with claims associated with the *Right to the City*.

In this context, PTD functions less as a fiduciary principle than as a technocratic rationale for exclusion. Its elasticity allows it to accommodate a range of priorities—urban beautification, infrastructure projects, green space preservation without requiring the state to justify how these priorities were determined or whether they account for distributive justice. Judicial reasoning in such cases tends to focus on land legality, unauthorised occupation, and environmental degradation, sidelining the broader structural conditions that lead to informality. Moreover, procedural safeguards are weak or absent: courts often issue demolition orders without mandating consultation, relocation, or compensation.

South African jurisprudence, by contrast, offers a model of transformative adjudication that foregrounds both rights and process. The absence of a public-trust doctrine has not hindered courts from protecting environmental or civic interests; instead, South Africa's constitutional framework channels these concerns through rights-based reasoning, particularly Section 26(3), which prohibits evictions without judicial oversight that is "just and equitable."[76] This provision, read alongside the Court's explicit rejection of the criminalisation of unlawful occupation, has required courts to analyse evictions as moments of constitutional tension rather than as straightforward questions of land use or illegality. The foundational judgment in *Port Elizabeth Municipality v Various Occupiers* (PE Municipality) crystallises this approach: it holds that even where occupation is unlawful, evictions must be assessed through a humane, context-sensitive enquiry that balances competing values, including environmental management, the rights of landowners, and the historical and socio-economic vulnerabilities of occupiers.[77] Rather than treating *informality as illegality*, South African courts incorporate housing rights, participatory governance, and proportionality to ensure that any interference with occupation is justified through transparent, contextually grounded reasoning.

76 Constitution of the Republic of South Africa, 1996, s 26(3).

77 *Port Elizabeth Municipality*, note 6.

This does not mean that evictions are always prevented or that informal settlements are legally regularised, but that the constitutional framework demands justification and dialogue. Environmental or planning objectives cannot be pursued in abstraction; they must be shown to be necessary, proportionate, and procedurally fair. The result is a legal culture in which socio-economic rights exert real normative force, even in contexts of illegality or infrastructural development.

The South African model also challenges the assumption that public trust necessarily implies environmental priority. If the state is indeed a trustee, then it owes obligations to all members of the public, including those without formal tenure or legal recognition. Trusteeship cannot be equated with ecological purity or middle-class aesthetics alone. The South African jurisprudence, while not articulated through the language of trust, arguably operationalises the fiduciary idea more faithfully: it demands accountability, equity, and justification from public authorities tasked with managing contested spaces.

This comparative insight exposes the risks of conceptual drift in Indian PTD jurisprudence. When courts invoke trusteeship without clarifying who the beneficiaries are, what interests are at stake, or how competing claims are to be balanced, the doctrine becomes a cipher for exclusion. The South African approach, by contrast, embeds balancing within its doctrinal structure, particularly through reasonableness review and meaningful engagement. Even when relocation is deemed necessary, courts impose conditions that aim to preserve dignity and prevent arbitrary displacement.

E. Reconceptualising the Public Trust Doctrine

This article has shown that while the PTD originated as a safeguard against environmental degradation, its deployment in Indian urban cases has often served to legitimise the displacement of vulnerable communities. Unlike in South Africa where environmental considerations rarely feature in Constitutional Court eviction jurisprudence, and where no direct analogue to the PTD exists,[78] Indian courts have extended the doctrine into urban governance in ways that reinforce exclusionary conceptions of the public interest. To address this, PTD must be reinterpreted as a dual-fiduciary framework that obligates the state to uphold both ecological sustainability and the socio-economic rights of those who depend on public land for shelter and livelihood.

This reconceptualization draws on principles of proportionality, which require that state action affecting rights be suitable, necessary, and minimally impairing.[79] Proportionality offers a doctrinal structure for balancing environmental or infrastructural goals against

78 Environmental considerations do arise though in South African private-law neighbour disputes, for example, *Laskey and Another v Showzone CC* 2007 (2) SA 329 (C) (noise nuisance) and *Herselman v Lane* 2011 (2) SA 601 (FB) (noxious fumes), but these doctrines have no analogue in Constitutional Court eviction jurisprudence under s 26(3), which has not incorporated environmental reasoning.

79 *Barak,* Note 53.

fundamental rights, ensuring that exclusion is not treated as an automatic consequence of illegality. Rather than framing informal settlements as categorical threats to public resources, courts must assess actual harm, the availability of less restrictive alternatives, and the impact on dignity and housing security.

As outlined in the Introduction, the Right to the City is used here as a heuristic that foregrounds participation and inclusive urban belonging, and it helps specify why a trusteeship framework must account for differentiated urban needs rather than presume a single, pre-defined public.

This shift would also require courts to engage more rigorously with the conditions of occupation and the processes of exclusion. Long-term residence, state acquiescence, or lack of viable alternatives should influence judicial determinations on eviction and rehabilitation. Fact-sensitive inquiry must replace assumptions of illegitimacy, and procedural safeguards such as notice, consultation, and meaningful engagement should become integral to public land adjudication.

Such a transformation of PTD does not entail abandoning its ecological foundations. Rather, it strengthens its democratic legitimacy by demanding that the state's fiduciary duties be exercised through inclusive governance and context-sensitive adjudication. Just as environmental harm must be prevented, so too must courts recognise that displacement of the poor can constitute a constitutional harm that violates dignity, equality, and access to shelter.

Courts have a responsibility not only to protect public resources but also to interpret doctrines in ways that advance democratic accountability. If grounded in proportionality and participatory governance, PTD can serve as a principle of democratic trusteeship, enabling courts to balance competing claims over urban land without reproducing exclusion.

F. Conclusion and Broader Implications

This article has explored how Indian High Courts and the South African Constitutional Court navigate the conflict between environmental protection and socio-economic inclusion in urban land disputes. In India, courts have often relied on the PTD to legitimise evictions, framing informal settlements as encroachments that threaten ecological or civic order. This use of PTD, while presented as upholding the public interest, frequently excludes the urban poor from constitutional protection. In contrast, South African courts, though lacking a formal PTD, have developed a jurisprudence that foregrounds procedural fairness, participatory governance, and reasonableness in eviction cases, demonstrating that environmental and housing rights can be reconciled through constitutional principles.

Rather than abandoning PTD, this article proposes its reinterpretation as a dual-fiduciary framework that obligates the state to protect both ecological resources and the socio-economic rights of those who depend on public land. By incorporating principles of proportionality and insights from the *Right to the City*, courts can ensure that environmental goals are not pursued at the expense of inclusion and dignity.

Ultimately, the legal governance of urban land is not simply a question of ecological stewardship or land use efficiency—it is a test of constitutional accountability in contexts of inequality. Courts play a pivotal role in shaping this balance. To remain faithful to constitutional values, doctrines like PTD must evolve, embedding participation, fairness, and distributive justice at the heart of public land adjudication.

ARTICLES / ABHANDLUNGEN

Constitutional Coup-Proofing

By *Melissa Crouch*[*] and *Christoph Sperfeldt*[**]

Abstract: The persistence of military coups in the Global South raises new questions in terms of how constitution-makers use constitutions to prevent, deter or resist a coup and to what effect. In this article, we examine how constitution-makers respond to the threat of future military coups. Building on and extending the literature on coup-proofing, we argue that coup-proofing is not only a political strategy but can also be a legal one. We define constitutional coup-proofing as constitutional design strategies that aim to both prevent coups and deter the future possibility of a coup. We further identify five strategies of constitutional coup-proofing. We illustrate these strategies through case studies. Contributing to calls for a military turn in comparative constitutional law, we outline an agenda for the study of constitutional coup-proofing. The coup-proofing function of constitutions is important but overlooked and requires greater sociological attention given the prevalence of this strategy by constitution-makers in countries with a history of military rule or unconstitutional overthrow of government by force.

Keywords: Constitutionalism in the Global South; Constitution-Making; Coup-Proofing; Constitutions in Authoritarian Regimes; Military

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A. Introduction

Constitution-making or amendment often takes place after coups and military coups remain a persistent feature in contemporary politics, especially in the Global South.[1] In the 21st century, successful coups have occurred in many countries, including in Bolivia, Burkina Faso, Ecuador, Fiji, Guinea, Honduras, the Maldives, Sudan and Venezuela. There have also been attempted coups in numerous countries. Military coups contribute to legal and constitutional instability and can have a devastating impact on democracy, the economy and society at large.

Yet, the aftermath of military coups is also often a catalyst for constitution-making. For example, in the 1990s in Myanmar, the military denied elected civilians the right to take office after the 1990 elections and instead drafted the 2008 Constitution to entrench its rule.[2] In Thailand, after the 2014 military coup, General Prayut Chan-o-cha established a new constitution to entrench the military's influence in politics.[3] In 2023, following a military coup three years earlier, Mali adopted a new constitution, while in the same year the coup in Niger has led to the dissolution of the constitution. In March 2023, Chilean constitution-makers considered a proposal to constitutionally empower the armed forces (after the failed 2022 referendum). Although rejected, the fact that the military made such a proposal demonstrates that it retains an active influence in politics in Chile, as it does across many other countries in Latin America. These examples are illustrative of the underexplored nexus between the military, coups and constitution-making.

A coup is the illegal overthrow of a government through violence or threats of violence, where the military or a faction within the military is often a central actor.[4] Coups may lead to regime change, elections and constitution-making.[5] The phenomenon of coups raises new questions for scholars of comparative constitutional law. This article contributes to the emerging agenda for the study of the military in comparative constitutional law[6] and the renewed attention of scholars to the role of constitutions in authoritarian regimes.[7] We

1 *John J. Chin / David B. Carter / Joseph G. Wright*, The Varieties of Coups D'état: Introducing the Colpus Dataset, International Studies Quarterly 65 (2021); *Barbara Geddes / Erica Frantz / Joseph Wright*, Military Rule, Annual Review of Political Science 17 (2014).

2 *Melissa Crouch*, The Palimpsest Constitution: The Social Life of Constitutions in Myanmar, Oxford 2025.

3 *Eugénie Mérieau*, Constitutional Bricolage: Thailand's Sacred Monarchy vs. The Rule of Law, Oxford 2021.

4 In this article, we exclude self-coups, that is, where an elected leader takes illegal or unconstitutional action in order to remain in power, as the Tunisian president did in 2021; although we acknowledge that in an era of populism, self-coups are becoming more common.

5 *Erica Frantz*, Authoritarianism: What Everyone Needs to Know, Oxford 2018, pp. 126-127.

6 *Melissa Crouch*, The Military Turn in Comparative Constitutional Law: Constitutions and the Military in Authoritarian Regimes, Annual Review of Law & Social Science 20 (2024), pp. 53-69.

7 See for example *Tom Ginsburg / Tamir Moustafa* (eds.), Rule by Law: The Politics of Courts in Authoritarian Regimes, Cambridge 2008; *Tom Ginsburg / Alberto Simpser* (eds.), Constitutions

begin by canvassing the literature on coup-proofing, which we characterise as political strategies that target the military for internal and external reforms. Extending and adapting this non-constitutional coup-proofing literature, we identify an underappreciated form of coup-proofing by law: constitutional coup-proofing.

We introduce the idea of constitutional coup-proofing as the inclusion of anti-coup provisions in a constitutional text in response to a coup or threat of a coup and with the intention of preventing or deterring future coups. An anti-coup provision is any written provision in a constitution that is included with the intention or function of preventing a future coup, reducing the incentives for the military to stage a coup or for the people to cooperate with coup leaders. Both democratising and authoritarian regimes engage in constitutional coup-proofing. We draw attention to five broad types of constitutional coup-proofing and explore their possible strengths and weaknesses, including: coup denunciations; inviolability clauses; the right or duty to resist; prohibitions on public service; and coup crimes.[8] Based on qualitative comparative analysis and case studies, we then illustrate these varieties of constitutional coup-proofing in states with current or former military authoritarian regimes, drawing primarily from the Global South where this is now most common, particularly across Latin America[9] and Africa.

We conclude by offering an agenda for the study of constitutional coup-proofing as one way of paying attention—sociologically and empirically—to the role of the military in comparative constitutionalism. Coup-proofing is not just a political strategy, as political scientists and security sector studies scholars have long argued, but it is also a legal and constitutional one.

B. Coup-Proofing: Internal and External Reforms to the Military

The role of the military in coups and politics more generally, and the different coup-proofing strategies that states adopt, has drawn the attention of scholars of political science, international relations, civil-military relations and sociology. This scholarship has identified or recommended a range of potential coup-proofing strategies for states to adopt. Drawing on this literature, we identify two broad ways of conceptualising coup-proofing as reform to the military: internal reforms and external reforms (primarily counterbalancing). We discuss the features of coup-proofing, the strengths and weaknesses of internal and exter-

in Authoritarian Regimes, Cambridge 2014; *Tamir Moustafa*, Law and Courts in Authoritarian Regimes, Annual Review of Law and Social Sciences 10 (2014); *Roberto Barros*, Constitutionalism and Dictatorship: Pinochet, the Junta and the 1980 Constitution, Cambridge 2002; *David Landau,* Abusive Constitutionalism, UC Davis Law Review 47 (2013).

8 We acknowledge that some coup-proofing strategies overlap with strategies to protect a right to a revolution.

9 For a quantitative analysis of the military in Latin America, see *Gabriel Negretto*, Authoritarian Constitution-making: The Role of the Military in Latin America, in: Tom Ginsburg / Alberto Simpser (eds.), Constitutions in Authoritarian Regimes, New York 2014.

nal reforms, and demonstrate how these strategies are shared by both authoritarian and democratic regimes. These non-constitutional strategies demonstrate how regimes seek to prevent coups. We also highlight that the discussion on coup-proofing has to date primarily focused on political or policy-based reforms, overlooking the role of constitutional coup-proofing.

I. Political Coup-Proofing as Internal Reforms to the Military

Internal reforms refer to coup-proofing measures taken by a regime that change, renew or diversify the military's internal composition and structure, and enhance its level of professionalism. Two main types of internal reform of the military are personnel reform and professionalisation. Personnel reform involves intentional recruitment strategies, or leadership change strategies, to reconfigure the composition of the military in terms of the individual identity of military officers to prevent coup.[10] Donald Horowitz has identified that such coup-prevention techniques replicate many of the discriminatory practises used by colonial powers in the recruitment of colonial forces, such as in Africa and South Asia.[11]

Authoritarian regimes may use personnel reform as a deliberate strategy to increase recruitment from one ethnic, kinship or religious group. Such reform skews the military composition in favour of a particular group to ensure loyalty to the regime,[12] or to prevent the military from being a threat to the regime such as by preventing the military from being united by ethnic or religious identity. A military dominated by personnel from one religious or ethnic group—who are sometimes majority groups but other times powerful minorities—may serve the interests of that group or worse oppress certain groups to ensure the dominance of the interests of that military group in politics. There are many examples, from the majority Sinhala Buddhist military in Sri Lanka to Myanmar's majority Bamar Buddhist military.

In democratic regimes, a government may undertake military personnel reform as a strategy to reduce the risk that the identity of a military officer may undermine their loyalty to the military as an institution that serves the civilian state. Democratic regimes may introduce ethnic, religious or kinship quotas to diversify the military corps and draw from a wide range of social groups, including minorities,[13] and to ensure that no one group dominates the military or certain (higher) ranks within the military. Democratic personnel reform may aim to eliminate military bias or the perception of bias based on the identity—

10 Donald Horowitz refers to personnel reform as compositional strategies because such strategies target the internal composition of the military: *Donald L. Horowitz*, Ethnic Groups in Conflict, Berkeley 2000, pp. 532-559.

11 See *Donald Horowitz*, Coup Theories and Officers' Motives: Sri Lanka in Comparative Perspective, Princeton 1980.

12 In Africa, see generally, *Philip G. Roessler*, Ethnic Politics and State Power in Africa: The Logic of the Coup-Civil War Trap, Cambridge 2016.

13 *Horowitz*, note 10, pp. 534-536.

religious, ethnic or otherwise—of individual military officers or the collective identity of certain military units or the military as a whole. In turn, such a strategy aims to prevent military-instigated violence or discrimination against certain minority groups that are not represented or underrepresented in the military. However, the literature emphasises that a democratic regime must take care how it undertakes personnel reform because it runs the risk of appearing to interfere in matters of internal military administration.[14] The challenge for a democratic regime is to justify personnel reform as within the boundaries of civilian authority, rather than military authority, otherwise they may risk backlash from the military. The boundary between civilian and military affairs depends upon the context.

Another key political strategy of internal reform identified in this literature is professionalisation, that is, the process of undertaking internal reform of the military to enhance the professional identity, efficiency and function.[15] The rise of professionalisation as a social process has been observed across a wide range of industries and institutions in the 20th century. Professionalisation of the military may include reforming army leadership, capacity building and training, and strengthening military discipline and loyalty.[16]

Sometimes coup-proofing as professionalisation may include downsizing the military in contexts where it has become too large. For authoritarian regimes, reducing the military may be a strategy to weaken it and minimise the risk that it may challenge the regime's power. In a democratic regime, downsizing the military may be necessary to subordinate the military to civilian control and reflect the military's role as one that is primarily focused on external security and not internal security. In addition, budgetary reforms and financial incentives can complement professionalisation by ensuring budgetary self-sufficiency and therefore prevent or end military efforts to generate alternative sources of income or engage in corruption. Similarly, provision of sufficient equipment; and raising the salaries and benefits of military officers, may reduce the likelihood of a coup.[17]

Regimes may undertake coup-proofing through professionalisation strategies to increase both the external image of the military and its internal functioning. Yet professionalisation and changing internal military culture can take time to become institutionalised and a state needs sufficient resources available to equip the military, including increasing wages. Budgetary increases may be possible for resource-rich governments such as in the Middle

14 Ibid., p. 559.

15 For an early characterisation of military professionalism as encompassing "expertness, social responsibility, and a corporate character" see *Samuel Huntington*, The Soldier and the State: The Theory and Politics of Civil-Military Relations, New York 1957, pp. 8-12; see also *Samuel Finer*, The Man on Horseback, London 1962, pp. 24-25.

16 For example, *Samuel Huntington*, The Third Wave: Democratization in the Late Twentieth Century, London 1993, pp. 251-253. On the military as a social institution, see *Morris Janowitz*, The Professional Soldier, Glencoe 1960.

17 Huntington refers to financial incentives and funding for the military as 'spoiling': *Huntington*, note 16, pp. 251-253. See also *James Quinlivan*, Coup-Proofing: Its Practices and Consequences in the Middle East, International Security 24 (1999); *Rita Brooks*, Political-Military Relations and the Stability of Arab Regimes, London 1998.

East but may be impossible in many other countries. Furthermore, the idea of the military as a professional institution has itself been the subject of debate.[18]

II. Political Coup-Proofing as External Reforms to the Military

A second common coup-proofing strategy is external reforms, that is, changes that are external to the military itself that ensure military subordination to the executive and reduce the likelihood of a military coup.[19] The ability of a regime to control the military is not merely an administrative or organisational problem, but a political problem.[20] Like internal reforms, external reforms have often been a technique used by authoritarian regimes to retain control although they may also be strategies used by democratic regimes to refashion civil-military relations and prevent future coups. External reforms have an indirect effect on the military in that such provisions seek to change the external conditions or incentives that ensure the military remains subordinate to the government and less likely to stage a coup.

One example of external reform discussed in the literature is counterbalancing[21] Counterbalancing involves the creation of non-military or paramilitary forces that are independent from the traditional military to counter the force of the military and reduce its power.[22] Counterbalancing is intended to address the dilemma that a state needs a strong military, but not so strong that it rivals the government. The creation of a paramilitary unit may take a range of forms, from militarised police such as gendarmerie, to presidential guards, interior troops or civilian militias.[23] These armed units are usually external to the military although occasionally it may be a special unit within the military. The idea is that this special force provides a counter force to the military that is close to the government of the day and disincentivises the military from staging a coup.

Studies of counterbalancing as a form of coup-proofing have often been inspired by the interests of foreign powers, such as the interests of the United States in the Middle East.[24] Counterbalancing aims to increase the difficulty of coordination by the military to stage

18 See for example *Eric López*, Latin America: Objective and Subjective Control Revisited in: David Pion-Berlin (ed.), Civil-Military Relations in Latin America: New Analytic Perspectives, Chapel Hill 2001.

19 Horowitz uses the term non-compositional strategies, however, his conception is a catch-all idea that refers to anything other than internal reforms (or compositional strategies).

20 *Milan W Svolik*, The Politics of Authoritarian Rule, Cambridge 2012, p.132.

21 For an early discussion, see *Eric Luttwak*, Coup D'Etat: A Practical Handbook, New York 2016, pp. 141-148 with reference to Saudi Arabia, Syria and Iraq.

22 See for instance *Erica De Bruin*, How to Prevent Coups d'État: Counterbalancing and Regime Survival, Ithaca 2020; *Tobias Bohmelt / Ulrich Pilster*, The Impact of Institutional Coup-Proofing on Coup Attempts and Coup Outcomes, International Interactions 41 (2015).

23 See for example *De Bruin*, note 22; *Elise Forbes Pachter*, Contra-coup: Civilian Control of the Military in Guinea, Tanzania, and Mozambique, Journal of Modern African Studies 20 (1989), pp. 606-609.

24 See for example *Quinlivan*, note 17.

a coup, as well as ensure there is a separate force capable of organising armed resistance to a coup. Coup plotters may disband rival forces if the coup is successful;[25] only in rare instances has a special force supported a coup.[26] The weakness of counterbalancing is similar to personnel reform in that it is open to democrats and authoritarians alike. Autocrats frequently engage in counterbalancing for their own ends.[27] An authoritarian regime may create a paramilitary unit merely to reinforce its own political longevity, although it runs the risk that such a force may itself become a powerful political force that later challenges a regime via a coup. In this regard, counterbalancing is a high-risk strategy because it creates the conditions under which a coup may escalate to civil war.[28]

In democratic regimes, there are a range of external reforms other than counterbalancing that aim to enshrine civilian supremacy and control over the military, including accountability of the military to democratic institutions. These measures generally fall under the broader field of sector security reforms, and some may indirectly contribute to reducing the risk of coups.[29] This includes measures to limit the military's role in internal security matters through constitutional or legal parameters, and limit the powers of military courts by subordinating them to civilian judicial oversight. In times of emergency, such measures are designed to set limitations on the military through mechanisms such as executive or parliamentary oversight, reporting requirements and time limitations, as well as potentially permitting a civilian government to declare an emergency in response to a coup.[30] To prevent militaries from using coups to overthrow the constitutional order, external reforms may include constitutional provisions and safeguards regarding the replacement or amendment of constitutions. The role and independence of the courts may be enhanced as a body that can act as a check on the power of the military and the executive.

The above strategies—both internal and external reform—are all preventative, that is, regimes use them to prevent a coup from occurring. Another external reform strategy, criminalisation, is ex post, that is, after a coup has occurred to punish those involved and in doing so act as a deterrent for would-be coup leaders (as criminal offences are generally applied prospectively). Prosecuting coup leaders may occur after political transitions by an authoritarian regime or once a democratic government regains power and the forces supporting the coup have declined in strength to the point where there is little resistance

25 *De Bruin*, note 22, ch. 2.

26 Ibid., p. 9.

27 *Aaron Belkin / Evan Schofer*, Toward a Structural Understanding of Coup Risk, Journal of Conflict Resolution 47 (2003); *Jonathan Powell*, Determinants of the Attempting and Outcomes of Coups D'etat, Journal of Conflict Resolution 56 (2012).

28 *De Bruin*, note 22, ch. 6.

29 *Zoltan Barany / Sumit Bisarya / Sujit Choudhry / Richard Stacey* (eds.), Considerations in Security Sector Reform During Constitutional Transition, Oxford 2019.

30 *Brian Loveman*, The Constitution of Tyranny: Regimes of Exception in Spanish America, Pittsburgh 1993; *Victor Ramraj / Arun Thiruvengadam* (eds.), Emergency Powers in Asia, Cambridge 2009.

or backlash to bringing the coup leaders before the courts. While coup leaders or followers are generally prosecuted according to the criminal law, below we focus on constitutional crimes as a new form of crime that uses the higher status of the constitution to criminalise involvement with a coup.

Our list of external reforms is non-exhaustive, and it relates to a broader agenda of security sector reform. Our focus on constitutional coup-proofing builds on the idea of coup proofing as external reforms by looking at the role and function of constitutions in societies with a history of coups or contemporary experience of coups. Coup-proofing is not just a set of political strategies resulting in internal and external reforms to the military, but also often involves a range of legal and constitutional reforms targeting the military or other unconstitutional armed opposition to prevent a coup.

C. Constitutional-Coup Proofing

Building upon the idea of coup-proofing discussed above, we develop the idea of constitutional coup-proofing. In broad terms, constitutional coup-proofing is the inclusion of anti-coup provisions in a constitutional text in response to a coup or threat of a coup, and with the intention of preventing or deterring future coups.

Drawing from contemporary case studies, we set out to identify and analyse common coup-proofing provisions found in contemporary constitutions. Given our specific focus on coup-proofing, we excluded from our focus general constitutional provisions addressing security sector reform, such as the separation of the military from the police, the external mandate of the military or general forms of civilian oversight on the military. We narrowly focused on constitutional provisions that specifically seek to prevent a coup from occurring. We followed established practices of qualitative coding to develop a codebook based on initial coding of a sample of constitutions and then undertook more focused coding of contemporary constitutions.[31] Our initial coding of provisions included direct references to coups, usurpation of power, the right to resist and prohibitions on overthrowing government, and was then expanded to include provisions concerning unconstitutional change of government, rebellion, mutiny, treason, and the inviolability or irrevocability of a constitution.

From our iterative qualitative coding of contemporary constitutional texts, we identified 64 constitutions with coup-proofing provisions. Given the overlap between countries experiencing a military coup and those dealing with other forms of unconstitutional takeover of government (such as fascism or totalitarianism), we reviewed the history of each of these countries and identified 51 constitutions with a history of military rule. We undertook iterative qualitative coding of these constitutions, analysed the scope and wording of constitutional coup-proofing clauses, and reviewed these constitutions for trends and patterns.

31 *Kathy Charmaz*, Constructing Grounded Theory, London 2014, pp. 108-161 (on initial and focused coding).

We sought to overcome limitations of translation into English by cross-checking against original texts in languages available to us, such as French and Spanish.[32] We then identified and developed case studies and undertook a review of all past constitutions of that country to identify when and under what conditions coup-proofing provisions first emerged.[33]

From this review of contemporary constitutions, we identify five varieties of constitutional coup-proofing, namely: denunciations of past coups; inviolability clauses to protect the constitution; citizens' right or duty to resist a coup; prohibitions on public service, that is, preventing coup leaders assuming public office; and coup crimes, including criminalising coups, coup attempts and/or collaboration with coup instigators.[34] In this section we explain the characteristics of each strategy.

Before we explain these five strategies, we also consider the ways that coup-proofing strategies vary in expression from soft to hard.[35] Soft constitutional coup-proofing strategies include clauses that condemn coups in declaratory terms or those that seek to enhance the resilience of the constitutional order by declaring its survival when faced with a coup. They may also include clauses that empower citizens in a limited set of circumstances to disobey or even resist coups. We characterise these provisions as soft due to the limited or narrow scope of the clause, including its more passive nature and lack of consequences, that conditions its ability to facilitate coup-proofing. As we will show below, examples include inviolability clauses; a narrow, reactive and non-violent right to resist clauses (including civil disobedience); an implicit or explicit public condemnation of past coups or attempts to overthrow a constitutional government that does not attract a constitutionally enshrined criminal sanction.

By contrast, harder strategies involve coup-proofing clauses that empower citizens to be proactive and take a wide range of actions against coups and casting a wide net in terms of criminalising behaviour of anyone who aides and abets a coup. Examples of hard coup-proofing provisions include constitutional prohibitions on coup leaders serving in public office as well as various constitutional coup crimes, from treason and sedition to general offences that make it a crime to participate in a coup. Hard strategies attract clear

32 In this article, references to or quotes from non-English language constitutions are unofficial translations from the French or Spanish.

33 We developed these case studies drawing on contemporary scholarship, including with reference to past constitutions found in the Oxford Constitutions of the World database, as well as to materials on the Hein Online World Constitutions Illustrated, and The Oxford Encyclopedia of the Military in Politics (2022).

34 This is intended as non-exhaustive, and we acknowledge there is a broader suite of provisions that attempt to prevent a longer-term role for the military, such the definition of the role of the military or police, the scope of military justice, and provisions that restrict military participation or deliberation in politics. See for example, *Julio*, The "new militarism" and the rule of law in Latin American democracies, in: Rachel Sieder / Karina Ansolabehere / Tatiana Alfonso (eds.), Routledge Handbook of Law and Society in Latin America, New York 2019, pp. 433-446.

35 Our emphasis here is simply on the *expression* of the written text, not on assessing the impact of the constitutional text.

consequences such as a criminal sanction, although the actual punishment may be specified in law. The right to resist may be hard where it permits all means necessary to resist a coup, including sanctioning violent resistance and the use of weapons. The right is even stronger where citizens are granted immunity for exercising their right to resist. We will also show in the case studies later that constitutional coup-proofing measures are frequently combined in mutually reinforcing ways, such as inviolability clauses with coup crimes.

But before we turn to the case studies, an explanation of the five strategies is in order. The first coup-proofing strategy is for a regime to denounce coups in the preamble to the constitution. General statements in the preamble to the constitution may acknowledge and/or explicitly denounce past coups or similar illegitimate takeovers of power. Generally, preambles may represent the real, projected or aspirational character, history and identity of a nation.[36] Declaratory statements against coups in preambles are a soft coup-proofing strategy because preambles are non-justiciable. While they seek to diminish the legitimacy and authority of those who seek to usurp power through coup d'états, no criminal sanction attaches to the acknowledgement of past coups or of opposition to any form of coup or violent takeover of the state. Condemnation of past coups signals that such actions are no longer accepted or tolerated. The acknowledgement of past coups in the preamble may be a means for the current regime (whether democratic or authoritarian) to protect its rule and distinguish itself from a past regime.

The second form of coup-proofing is inviolability clauses. During or after a coup, a regime may suspend or amend a constitution. In the face of such attempts, inviolability clauses insist on the endurance or survival of the constitution.[37] These clauses aim to protect the constitution itself and ensure its survival or resilience in situations of overthrow of the government by force, or where its authority may be contested. Inviolability clauses declare the irrevocability of the constitution often based upon the supremacy of the constitution as a higher law and as an expression of the will of the people. The clauses are sometimes framed as seeking to retain the "force and effect" of the constitution. Inviolability clauses have been referred to as Snow White clauses because they attempt to ensure the constitution remains in force, or is revived, after a coup, in the same way that in the fairy tale of Snow White and the Seven Dwarfs, Snow White did not die but was revived by the prince.[38] An inviolability clause attempts to ensure that the constitution is indestructible by making explicit the permanence of a constitution and mitigating against its amendment or demise by unconstitutional means.

In addition to the claim to protect the existing constitutional order, another claim of inviolability clauses is to actively declare null and void any attempts to alter the constitu-

36 See *Liav Orgad*, The Preamble in Constitutional Interpretation, International Journal of Constitutional Law 8 (2010).

37 *John Hatchard / Muna Ndulo / Peter Slinn*, Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective, Cambridge 2004, pp. 247-248.

38 Ibid.

tional order such as the abolition of the constitution and introduction of a new constitution. In addition, inviolability clauses often declare the acts of coup leaders or those who have usurped government as invalid or it presumes the non-recognition of coup leaders. We distinguish this declaration from the criminalisation of specific acts related to a coup (discussed below). Some inviolability clauses instruct citizens to continue to follow the constitution even during an attempt to overthrow the government. Inviolability clauses may range in expression from soft to hard. Soft expressions declare that the constitution is the source of legitimacy and that it is inviolable, targeting any claims to legitimacy that coup leaders make. Harder strategies of inviolability declare that any acts amounting to a coup are void and instruct the people to continue to follow the constitution.

The third form of coup-proofing is a citizens' right or duty to resist a coup. We acknowledge that there is a longer tradition of militant democracy[39] and history of constitutional right to resist provisions emerging from experiences of totalitarianism and authoritarian rule in Europe.[40] Our focus is on how such provisions are also part of constitutional design in military regimes or countries with a former history of military rule. While the right applies to all citizens, a primary motivation is to encourage military officers and civil servants to resist a coup staged by military leaders, denying the coup popular support. Sometimes the provision is framed as a constitutional right to disobedience and non-cooperation with coup leaders,[41] which has a broader history in response to a range of authoritarian regimes or foreign domination, not only coup d'états.[42] Such constitutional clauses recognise that coup leaders generally need collaboration with the bureaucracy and the military to succeed; empowering citizens to disobey or resist a coup is a mean of undermining the success of a coup. The rationale is that if would-be coup leaders know that the people have a right or duty to resist during a coup, then they may be less likely to stage a coup due to the risk of failure. The right to resist is a soft expression of coup-proofing when it is framed as a reactive right and only narrowly permits citizens to engage in civil disobedience in limited circumstances through non-violent resistance. By contrast, many right to resist provisions are in fact hard expressions of coup-proofing because they permit citizens to be proactive and use violence, take up arms or any other means necessary to resist a coup. Such a clause may even declare that a person who has exercised the right to resist has not committed a crime, when in other circumstances such action may be punishable by law.

39 *Karl Loewenstein*, Militant Democracy and Fundamental Rights I, American Political Science Review 31 (1937).

40 *Tom Ginsburg / Daniel Lansberg-Rodriguez / Mila Versteeg*, When to Overthrow your Government: The Right to Resist in the World's Constitutions, UCLA Law Review 60 (2013).

41 See for example *Gene Sharp / Brian Jenkins*, Against the Coup: A Guide to Effective Action to Prevent and Defeat Coups d'Etat, New York 1994.

42 Take for instance the right to resist provisions in the 1992 Constitutions of the Czech Republic and Slovakia, as well as the 2011 Constitution of Hungary following the experiences of communist authoritarian rule and Soviet domination.

The fourth constitutional coup-proofing strategy is prohibitions against coup leaders from holding public office. Again, we note that prohibitions and disqualifications on holding public office may not only target coup leaders, but our focus here is on military leaders.[43] Constitutional prohibitions on holding public office seek to prohibit those involved in a coup, primarily coup leaders, from being appointed to key governing roles, particularly positions of high office such as the president or vice-president, members of parliament in the legislature or the public service more broadly. Prohibitions on public service or elected office attempt to deter would-be coup leaders from staging a coup by limiting the person's future career prospects. These prohibitions differ in the scope of who is prohibited and what office they are prohibited from holding. For example, a soft prohibition may only prohibit coup leaders from holding key executive posts, such as president. In contrast, a hard prohibition may prohibit not only coup leaders but also coup collaborators, any person who financially supports a coup and active or former military officers (regardless of whether they have been involved in a coup in the past). An even stronger prohibition is one that applies to all public service or elected office roles. Finally, another characteristic of prohibitions is that they may have a time limit, after which the prohibition no longer applies, so holding office is a privilege delayed but not denied. Soft prohibitions include a short time limit; hard expressions contain prohibitions with a longer time period, or an indefinite prohibition.

Finally, coup-proofing includes coup crimes, that is, provisions in a constitution that criminalise support for or participation in a coup or coup attempt. Coup crimes are a deterrent for military coup plotters because there is the prospect that they will eventually be punished and lose any financial or other gains made from their actions. While crimes such as treason and sedition have longer histories in criminal law,[44] the emergence of coup crimes targeting the military in a written constitution is a modern phenomenon. Coup crimes are distinct from, and dependent upon, ordinary criminal law in one key respect: the crime is drafted in general terms without reference to the form of punishment and relies upon the general criminal law for the relevant sanction. Softer coup crimes contain limitations on the scope or application of the crime, such as only applying to acts prior to the introduction of the constitution.

Hard coup crimes broadly criminalise coup d'états and/or impose criminal liability for unconstitutional change of government, including treason and sedition.[45] The criminal laws

43 *Tom Ginsburg / Aziz H Huq / David Landau*, Democracy's Other Boundary Problem: The Law of Democratic Disqualification, California Law Review 111 (2023).

44 *Tayyab Mahmud*, Jurisprudence of Successful Treason: Coup d'Etat and Common Law, Cornell International Law Journal 27 (1994).

45 On sedition, see Constitution of Argentina 1853 (reinstated in 1983, with amendments through 1994), art, 22; Constitution of Bangladesh 1972 (reinstated 1986, with amendments through 2014), art. 7A; Constitution of Costa Rica 1949 (with amendments through 2020), art. 3-4; *Leonard A. Bird*, Costa Rica: The Unarmed Democracy, London 1984, pp. 24–28.

of many states already contain relevant provisions dealing with treason.[46] Yet there is a difference between criminal offences in ordinary law and criminal offences in the constitution. Constitutions are generally considered harder to amend, more so when combined with inviolability clauses, so there is less of a risk that a new regime can abrogate the offence. Further, the constitution has higher symbolic status compared to the ordinary criminal law and is potentially more widely known than the general criminal law. The idea of including crimes in a constitution also departs from the understanding of a constitution as a minimal document that should only include the essentials as a higher law.[47] Constitutional coup crimes seek to bring coup leaders to justice to break cycles of coups and eradicate a culture of coups.[48]

We turn now to illustrate these constitutional coup-proofing strategies across regions and drawing on country case studies of examples from former or current military regimes.

D. Case Studies of Constitutional-Coup Proofing

I. Denouncing Coups: Preambles

Seven contemporary constitutions denounce coups in their preamble: Benin, Chad, Central African Republic, Côte d'Ivoire, Niger, Republic of Congo and Suriname. Most of these are francophone African countries. In the early 1990s, as expectations grew for multiparty democracy, these regimes in Africa used preambles to condemn coups and affirm commitments to democracy and changes of regime via elections.

One example of a democratic regime that introduced a preamble to condemn coups is the Republic of Congo. Since 1979, the president, Denis Sassou Nguesso, has ruled the country for all but five years.[49] In 1992, after he lost power, a democratically elected government passed the 1992 Constitution that "condemn the coup d'État, the tyrannical exercise of power and the use of political violence, under all its forms, as a means of ascension to power or to its conservation".[50] In 1997, after ousting the elected government and signing a subsequent peace deal, Denis Sassou Nguesso returned to power and appointed a constitutional committee. The 1992 preamble was carried over into the 2002 Constitution and then the current 2015 Constitution, which was primarily drafted to allow Sassou to

46 For example, the offence of high treason in the Penal Codes of former British colonies: Indian Penal Code, s 124A; Pakistan Penal Code, s 124A; Myanmar Penal Code, s 124A, see *Mahmud*, note 44, pp. 51-53.

47 See for example *KC Wheare*, Modern Constitutions, Oxford 1966.

48 *John Hatchard / Tunde I. Ogowewo*, Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth, London 2003, pp. 12-14, 166-168.

49 *Joshua Shaw / Brett Carter*, The Republic of Congo: The Colonial Origins of Military Rule, in: William R. Thompson / Hicham Bou Nassif (eds.), The Oxford Encyclopedia of the Military in Politics, Oxford 2022.

50 Constitution of the Republic of Congo 1992, preamble.

run for another term in office.[51] Even where the condemnation of coups is introduced by a democratic regime, later authoritarian regimes may leave it intact.

Another example of the use of preambles to express opposition to coup d'états by both democratic and authoritarian regimes in the same country over time is the Central African Republic (CAR). After independence from France in 1960 up until 1982, the CAR experienced four coups.[52] In 1993, democratic elections installed Ange-Félix Patassé as president and his government introduced the 1994 Constitution, which declared in the preamble that the Central African people were "firmly in opposition by any means to conquest of power by civil or military forces and to any dictator forces".[53] Throughout the 1990s, the risks of coups and counter-interventions by France remained real. In 2003, former armed forces chief François Bozizé seized power through a military coup and enacted the 2004 Constitution, which maintained a similar anti-coup declaration in the preamble.[54] The CAR is an example of a government that gained power through a coup, despite the pre-existing coup declaration, and retained a declaration in the preamble. After yet another coup followed by international intervention, a new democratically elected regime introduced the 2016 Constitution, maintaining the same anti-coup statement in the preamble as the 2004 Constitution and introducing additional provisions, as will be explained later.[55] Even in the most recent 2023 constitution, adopted in a contested referendum, the anti-coup statement was maintained.[56]

The preambles of the constitutions of Benin (1990), Togo (1992), Chad (1996, maintained in 2018 Constitution) and Niger (2010) pronounce their opposition to any political regime founded in authoritarianism, illegality, and the absence of electoral democracy. For example, Niger's preamble states that the people "…reaffirm our absolute opposition to any political regime based on dictatorship, arbitrariness, impunity, injustice, corruption, concussion, regionalism, ethnocentrism, nepotism, personal power and cult of personality."[57] This statement in the preamble is the first of its kind in Nigerien constitutions, although it mirrors the language of its francophone peers. Implicitly, the preamble refers to the history of coups, personalist military rule and constitution-making in Niger. Since gaining independence from France in 1960, Niger has experienced five successful coups between 1974 and

51 Constitution of the Republic of Congo 2015, preamble.

52 *K Neldjingaye*, The Central African Republic: Introductory Note, in: Oxford Constitutions of the World, Oxford 2018; *Timothy Stapleton*, Central African Republic: Coups, Mutinies, and Civil War, in: William R. Thompson / Hicham Bou Nassif (eds.), The Oxford Encyclopedia of the Military in Politics, Oxford 2022.

53 Constitution of the Central African Republic 1994, preamble.

54 Constitution of the Central African Republic 2004, preamble.

55 Constitution of the Central African Republic 2016, preamble.

56 Constitution of the Central African Republic 2023, preamble.

57 Constitution of Niger 2010, preamble.

2023 and had seven constitutions.[58] The nature and motives of these coups differed, but constitution-making frequently followed. In 2010, the military intervened on the pretext of ending an authoritarian shift by the democratically elected president Mamadou Tandja that had prompted a constitutional crisis. The military empowered a *Comité des textes fondamentaux* to draft a constitution to ensure political stability and prevent future attempts to undermine democracy.[59] The Constitution included the above quoted anti-coup declaratory statement into the preamble, along with affirmation of adherence to international human rights and the African Charter.[60] In July 2023, another military coup d'état led to the ousting of the elected President Mohamed Bazoum and the suspension of the constitution, making this the eighth military coup within the three years prior to 2023 in the Sahel region.[61]

Some countries have been influenced by treaties of the African Union (AU) condemning an unconstitutional change of government.[62] One of the most stable countries in West Africa until the 1990s, Côte d'Ivoire has a recent history of constitutional instability and amendment due to coups.[63] After the extended rule of Félix Houphouët-Boigny (1960-1993) and the introduction of a multi-party system during the early 1990s, in 1999 the country experienced its first military coup. In 2016, Côte d'Ivoire introduced a new constitution in which the preamble expressly "condemn[s] any unconstitutional change of government and declare that perpetrators of this crime be subject to the full force of the law"[64]. This draws upon the language of an "unconstitutional change of government" as used in regional coup-proofing mechanisms of the AU.[65]

From the case studies above, coup declarations in preambles involve a range of different messages, including denouncing past coups and affirming opposition to coups generally. Preambles generally do not define what counts as a coup and much contention arises over

58 *Virginie Baudais*, Niger: Armed Force Politics and Counterterrorism, in: William R. Thompson / Hicham B. Nassif (eds.), The Oxford Encyclopedia of the Military in Politics, Oxford 2022.

59 Ibid., pp. 13-14.

60 Constitution of Niger 2010, preamble.

61 *Kamissa Camara / Susan Stigant*, Countering Coups: How to Reverse Military Rule Across the Sahel, United States Institute of Peace, 3 August 2023, https://www.usip.org/publications/2023/08/countering-coups-how-reverse-military-rule-across-sahel (last accessed on 11 December 2025). In 2025, the Niger junta had replaced the constitution with a transitional charter.

62 See generally *Oisin Tansey*, The Fading of the Anti-Coup Norm, Journal of Democracy 28 (2017); *Frederick Cowell*, Preventing Coups in Africa: Attempts at the Protection of Human Rights and Constitutions, International Journal of Human Rights 15 (2011).

63 For an assessment since the end of the Second Ivorian Civil War in 2011, see *Philip A. Martin*, Security Sector Reform and Civil-Military Relations in Postwar Côte d'Ivoire, African Affairs 117 (2018).

64 Constitution of Cote d'Ivoire 2016, preamble.

65 First introduced through a declaration by the Organisation of African Unity in 2000, and then further developed by the African Union, then through the 'Accra Declaration on Unconstitutional Changes of Government in Africa' (2022).

whether events constitute a coup. As a result, coup leaders have often seen it as expedient to retain such provisions.

II. Inviolability Clauses

Inviolability clauses are found in 12 constitutions, including four in Latin America, six in Africa and also in Fiji and Egypt. One example is Mexico, beginning with its 1857 Constitution,[66] which was introduced during a period of liberal reforms after the Santa Anna dictatorship ended in 1855. This clause was retained in the 1917 Constitution of Mexico until today.[67] In Honduras, a similar inviolability clause appeared in its 1982 Constitution, after the end of two decades of military rule marked by multiple coups.[68]

Another example occurred after the end of military rule in Paraguay. In 1954, military officer Alfredo Stroessner came to power through a coup and ruled the country until 1989. Most of his rule was under a state of siege characterised by the suspension of constitutional rights—a power carried over from the 1940 Constitution to the 1967 Constitution.[69] By the 1990s, as part of broader reforms to place the country on a democratic path after the long dictatorship of Stroessner, the National Constituent Assembly inserted an inviolability clause in the 1992 Constitution.[70]

The case of Argentina also demonstrates the use of inviolability clauses in the transition from authoritarianism to democracy. Argentina's 1853 Constitution is the country's third and the oldest Latin American constitution still in force.[71] For half a century, between 1930 and 1976, the country was repeatedly interrupted by military interventions and coup d'états. During this time, none of the democratically elected heads of state were able to complete their terms of office, and military officers often assumed the role of head of state; 11 of the 16 presidents were military generals.[72] So pervasive were coups in Argentina that

66 Constitution of Mexico 1857, art. 128.

67 Constitution of Mexico 1917, art .136.

68 Constitution of Honduras 1982, art 375; *Kristina Mani*, Honduras: All-Purpose Militarization, in: William R. Thompson / Hicham B. Nassif (eds.), The Oxford Encyclopedia of the Military in Politics, Oxford 2022.

69 *Daniel Mendonca / Juan Carlos Mendonca*, Paraguay, in: Conrado Hubner Mendes / Roberto Gargarella / Sebastian Guidi (eds.), The Oxford Handbook of Constitutional Law in Latin America, Oxford 2022, p. 228.

70 Constitution of Paraguay 1992, art. 137.

71 *Juan F. Gonzalez Bertomeu*, The Constitution of Argentina, in: Conrado Hubner Mendes / Roberto Gargarella / Sebastian Guidi (eds.), The Oxford Handbook of Constitutional Law in Latin America, Oxford 2022, p. 119; *David Pion-Berlin*, Argentina: The Journey from Military Intervention to Subordination, in: William R. Thompson / Hicham B. Nassif (eds.), The Oxford Encyclopedia of the Military in Politics, Oxford 2022.

72 Ibid, pp. 1-2.

the country was described as an "institutionalised coup model".[73] From 1976 to 1983, the country experienced a particularly violent period of state terror.

In 1983, military rule finally met its demise with the election of Alfonsín as president. Alfonsín instituted a range of democratic and human rights reforms and established the Council for the Consolidation of Democracy to consider constitutional reform.[74] From 1993, under the Menem government, the Council's work informed the efforts of a constitutional convention in 1994 to amend the Constitution. Three strong constitutional coup-proofing provisions were inserted: an inviolability clause, a prohibition from public office, and a right to resist.[75] The inviolability clause insists that the constitution remains in force despite any violent disruptions to the constitutional and democratic system and declares any such acts as "irrevocably void". In 1983, since the end of military rule, there have been no further coups notwithstanding a few revolts in the late 1980s. This uninterrupted period of democratic rule has been attributed to a new respect for democracy and the subordination of the military to civilian control, including trials of military officials, enacting laws that restrict the role of the military in internal security and strengthening the defence ministry.[76] The 1994 constitutional amendments, including its coup-proofing measures, are part of the wider consolidation of democratic civilian rule in Argentina.

The second feature of inviolability clauses, namely, to declare null and void any attempts to alter the constitutional order or to declare the acts of coup leaders or those who have usurped government as invalid, is also used in Latin American constitutions either as a stand-alone clause or in concert with the protective feature of inviolability. For instance, the Dominican Republic employed such a clause at least since the end of the three decades of military dictatorship of Rafael Trujillo (1930-1961), through four constitutions from 1963 to 2002.[77] The slightly expanded clause in the 2010 Constitution, carried over into the current 2015 Constitution, provides: "Acts that are issued from usurped authority, actions or decisions of public powers, institutions or persons that alter or subvert the constitutional order and any decision made by requisition of armed force are null of full right."[78] Several Latin American states have similar provisions in their constitutions declaring null and void acts by usurpers, including Honduras, Paraguay, Peru, Venezuela and the earlier mentioned case of Argentina.

Inviolability clauses also exist in many African constitutions. Faced with the unambiguous language of an inviolability clause, coup leaders may be unable to veil their action in constitutional legitimacy and instead be forced to suspend or abolish an existing constitu-

73 Ibid.

74 Ibid.

75 See Chapter II on New Rights and Guarantees, art. 36.

76 *Pion-Berlin*, note 71, pp. 13-14.

77 Constitution of the Dominican Republic 1963, art. 8; Constitutions of the Dominican Republic 1966, 1994 and 2002, art. 99.

78 Constitution of the Dominican Republic 2015, art. 73.

tion through unconstitutional means. One example is Burkina Faso (formerly Upper Volta until 1984), a country that has experienced alternating periods of coups and constitutional disorder after its independence from France in 1960. The fifth post-independence coup brought about the revolutionary rule of Captain Thomas Sankara (1983-1987).[79] In 1987, a coup was carried out by Captain Blaise Compaoré, removing Sankara from power and ultimately leading to Sankara's assassination. In the context of the end of the Cold War, Compaoré oversaw a political transition to civilian rule and multiparty elections.[80] The Commission tasked to draft the 1991 Constitution included the following inviolability clause: "The source of all legitimacy follows from this Constitution. All power which does not derive its source from this Constitution, notably that resulting from a coup d'état is illegal."[81] In 2014, Compaoré sought to alter the constitutional presidential term limits—considered a form of unconstitutional change of government by the African Union—and in response a popular insurrection ousted Compaoré from power.[82] In 2022, ongoing political instability culminated in two successive coups, with a junta led by Captain Ibrahim Traroré eventually taking charge and suspending the Constitution.[83] In 2024, Traroré, as interim president, introduced an extended transition period for another five years.

Compaoré's 27-year rule in Burkina Faso is indicative of another trend, namely that while inviolability clauses frequently emerge in regimes that seek to break cycles of military coups, they do not necessarily mean a break with authoritarian rule. Authoritarian leaders find it expedient to retain or adopt constitutional coup-proofing measures against an overthrow of government by force. For instance, in 1995, constitution-makers in Uganda aimed to break with a long history of coups, though not with authoritarian rule. From 1971 to 1979, Uganda was ruled under the notorious and violent coup regime of Idi Amin. In the late 1970s, Amin was finally removed by a Tanzanian-led military intervention. In 1986, a period of political instability ended with Yoweri Museveni taking over the government and several years later embarking on a constitution-making process.[84] The resulting 1995 Constitution included a comprehensive "Defence of Constitution" section—combining multiple coup-proofing measures and prevalent in many anglophone African

79 *Daniel Eizenga*, Burkina Faso: Military Responses to Popular Pressures, in: William R. Thompson / Hicham B. Nassif (eds.), The Oxford Encyclopedia of the Military in Politics, Oxford 2022.

80 Ibid.

81 Constitution of Burkina Faso 1991, art. 167.

82 *Eizenga*, note 79.

83 African Center for Strategic Studies, Understanding Burkina Faso's Latest Coup, Spotlight, 28 October 2022, https://africacenter.org/spotlight/understanding-burkina-faso-latest-coup/ (last accessed on 11 December 2025). At the time of writing, the junta was considering constitutional amendments.

84 *Chin / Carter / Wright*, note 1, p. 316.

countries—but the Constitution also further entrenched Museveni's one-party rule.[85] Even if a takeover of government by force occurs, the 1995 Constitution does not lose its "force and effect".[86] In addition, once the people regain their liberty after a coup, the Constitution is taken to be back in force and those who participated in the takeover of government will face criminal sanction.[87] Since the entry into force of this Constitution, there have been no further coups in Uganda, although Museveni remains as president.

Inviolability clauses attempt to reduce the space for post-coup constitutional legitimisation of coup regimes or other forms of constitutional manipulation. They may strengthen the hand of an independent judiciary where the constitutional order is put into question or when confronted with ruling on the constitutionality of coups. Inviolability clauses are frequently paired with other constitutional coup-proofing measures to strengthen their combined deterrent effect.

III. The Right to Resist

In former, or current, military regimes, the right to resist a military coup can be found in the constitutions across Latin America (Argentina, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, Venezuela) and Africa (Benin, Burkino Faso, Central African Republic, DRC, The Gambia, Ghana, Mozambique, Sierre Leone, South Sudan, Togo, Uganda, Zambia).

Our focus on military regimes or former military regimes draws our attention to the right to resist, also referred to as constitutional defence provisions, in constitutions of countries in Latin America and Africa.[88] In addition to military regimes, the constitutions of some former totalitarian and fascist regimes of Europe also contain such provisions.

Some states frame this coup-proofing strategy as a citizen's positive *right* to resist, others frame the strategy as a *duty* to resist, and some stress both a duty and a right. Other states use obligatory language by framing resistance also as a "duty" or "obligation". Togo's 1992 Constitution, introduced by the country's long-term ruler Eyadéma Gnassingbé (1967-2005) during Africa's period of democratisation in the early 1990s, provides "in case of coup d'état" that "for any Togolese, to disobey and to organize themselves to resist the illegitimate authority constitutes the most sacred of the rights and the most

85 See for example *Aili Mari Tripp*, The Politics of Constitution Making in Uganda, in: Laurel E Miller (ed.), Framing the State in Times of Transition: Case Studies in Constitution Making, Washington 2010, p. 158.

86 Constitution of Uganda 1995 (with amendments through 2017), art 3(3). See also *Hatchard / Ndulo / Slinn* note 37, p. 247.

87 Constitution of Uganda 1995, art. 3(3). The Constitutional Commission justified this provision with reference to the risk of coups: see Uganda Constitutional Commission, The Report of the Uganda Constitutional Commission (1993), p. 745 (Copy on file with the authors).

88 *Ginsburg / Lansberg-Rodriguez / Versteeg*, note 40, p. 1221.

imperative of the duties".[89] While there has been no military coup since, in 2024, the regime passed major constitutional amendments that were condemned by civil society and opposition groups as a constitutional coup. By mid-2025, the appointment of Faure Gnassingbe to the new role of president of the Council of Ministers, was seen as a move to perpetuate his family's rule (which dates back to 1967).[90]

Right to resist provisions come in a range of soft to hard expressions. On the soft end, some states permit a limited right to civil disobedience and qualify, restrict or limit the scope or circumstances of the exercise of this right. A constitution may only permit a right to (civil) disobedience, that is, forms of passive and non-violent resistance such as a refusal to obey orders. Burkina Faso's above-mentioned 1991 Constitution provides for a right to "civil disobedience" for citizens. In Mali, the 1992 Constitution contains a similar right that can be exercised "for the preservation of the republican form of the State"[91]. Mali's 1992 Constitution was introduced during a time of democratic transition after the 1991 coup and popular protests had ended the previous coup regime of General Moussa Traoré (1968-1991).[92] This clause was maintained in the more recent 2023 Constitution, adopted by referendum.[93] Other constitutions limit how the right is exercised, for example, the CAR's 2016 and 2023 Constitutions limit the right to being exercised "in a peaceful manner"[94]. Finally, the right may be qualified as a means of last resort, such as "to the extent reasonably justifiable in the circumstances" (The Gambia),[95] "if no other means are available" (Estonia)[96].

Conversely, other constitutions are a harder expression of coup-proofing against coup plotters by framing the scope of the right as proactive and in more permissive terms. The right to resist may be framed widely to allow citizens to do everything possible, which includes the use of force. Examples can be seen in Greece's 1975 Constitution ("by all possible means"),[97] introduced after the end of the military junta regime (1967-1974), and

89 Constitution of Togo (with amendments through 2007, subsequently amended), art. 150.

90 Reuters, Togo leader gets new role without term limits, opposition calls it a coup, 5 May 2025, https://www.reuters.com/world/africa/togo-leader-gets-new-role-without-term-limits-opposition-calls-it-coup-2025-05-05/ (last accessed on 11 December 2025).

91 Constitution of Mali 1992.art. 121.

92 *Florina Cristiana Matei*, Mali: The Hot and Cold Relationship Between Military Intervention and Democratic Consolidation, in: William R. Thompson / Hicham Bou Nassif (eds.), The Oxford Encyclopedia of the Military in Politics, Oxford 2022; Constitution of Burkina Faso 1991 (with amendments through 2015), art. 167; Constitution of Mali 1992. art. 121.

93 Constitution of Mali 2023., art. 186.

94 Constitution of the Central African Republic 2016, art. 29; Constitution of the Central African Republic 2023., art. 6.

95 Constitution of the Gambia 1996 (with amendments though 2018), art. 6(2).

96 Constitution of Estonia 1992 (with amendments through 2015), art. 54.

97 Constitution of Greece 1975 (with amendments through 2008), art. 120(4).

Paraguay's 1992 Constitution ("through every means at their reach").[98] The constitutions of other Latin American countries, such as El Salvador, Honduras and Peru, even grant a "right to insurrection" in defence of the constitutional order.[99]

Some constitutions in francophone Africa, such as those of Benin, the CAR and Togo, not only empower citizens with the right to resist but also allow recourse to existing military or defence cooperation agreements in cases of a coup d'état, presumably alluding to bilateral defence agreements with France or regional defence agreements such as with the Economic Community of West African States.[100]

As with other constitutional coup-proofing strategies, we find that right to resist provisions are frequently bundled with other anti-coup measures in mutually reinforcing ways. One of the most prominent examples are the earlier mentioned comprehensive "Defence of Constitution" sections in many anglophone African countries, widely employed during the push for democratisation in Africa following the end of the Cold War. Ghana is an example of a country that combines a right to resist provision with a wider defence of the constitution section. In 1966, after the first post-independence government under Kwame Nkrumah was disposed by a coup d'état, the country descended into a long period of political instability and military rule with a high frequency of military coups and coup attempts.[101] In the 1970s, after a coup by military officer Jerry Rawlings and a brief period of political reform, a right to resist was included in the 1979 Constitution.[102] After second coup by Rawlings in 1981, the government embarked on a process of military professionalisation and institutional reform to restore civilian control, culminating in the 1992 Constitution.[103] The 1992 Constitution provided an expanded "Defence of Constitution" section which outlawed coup d'états and included rights and duties for all citizens to defend the Constitution and to do all in their power to resist any attempt to overthrow the Constitution and to restore the Constitution after it has been abrogated unconstitutionally.[104] Despite its broad mandate, some scholars question whether the right to resist in Ghana's Constitution

98 Constitution of Paraguay 1992 (with amendments through 2011), art. 138.

99 Constitution of Peru 1993 (with amendments through 2021), art. 46; Constitution of Honduras 1982 (with amendments through 2013), art. 3; Constitution of El Salvador 1983 (with amendments through 2014), art. 87.

100 Constitution of Benin 1990, art. 66; Constitution of the Central African Republic 2016, art. 29 (maintained in art. 6 of the 2023 Constitution); Constitution of Togo (with amendments through 2007, subsequently amended), art 150.

101 *Eboe Hutchful / Humphrey Asamoah Agyekum / Ben Kunbour*, Ghana: The Military in Transition from Praetorianism to Democratic Control, in: William R. Thompson / Hicham Bou Nassif (eds.), The Oxford Encyclopedia of the Military in Politics, Oxford 2022.

102 Ghana's 1979 Constitution stated under Article 1(3).

103 *Ernest Lartey / Kwesi Aning*, Constitutional Reform and Security Sector Reform in Ghana, in: Zoltan Barany / *Sumit Bisarya / Sujit Choudhry / Richard Stacey* (eds.), Considerations in Security Sector Reform during Constitutional Transition, Oxford 2019.

104 Constitution of Ghana 1992, art. 3(4).

can protect a person who exercises their right against an abusive government.[105] Yet, the combination of broader political and institutional reforms with constitutional coup-proofing in Ghana have produced one of the more stable and robust political systems in West Africa, with no coups recorded since the early 1980s.[106]

The right to resist provision also appears as part of the defence of the constitution section of the Ugandan Constitution. In the early 1990s, around the time Ghana passed its constitution, the Uganda Constitutional Commission considered a similarly comprehensive "Defence of Constitution" section during its constitutional reform process.[107] The Commission commented on the duty to defend the constitution by noting that the people "…should be encouraged to do all in their power to prevent its undemocratic overthrow and its violation in other ways."[108] As a result, the 1995 Constitution of Uganda features an almost identical provision on the right and duty to resist.[109]

Further bolstering the right to resist, the constitutions of Uganda, as well as Ghana and The Gambia, provide that a person who resists the overthrow of the constitution is deemed to have committed no offence.[110] Uganda's Constitutional Commission explained that if the constitution reserves a right to resist, "it follows that whoever takes part in any activities for resisting any person or group attempting to overthrow the Constitution should be absolved of any guilt and may be compensated for any punishment he or she may have suffered"[111]. Such a provision provides constitutional reassurance to citizens that their actions will not be punished. The constitutions of Ghana and Uganda also declare that if a regime hands down a punishment for someone who resists a coup, the punishment is in fact void and they are absolved from all liabilities arising from the punishment. Ghana's Constitution goes one step further allowing a person to apply for compensation to the Supreme Court for any harm or loss incurred because of punishment under a coup regime.[112]

The widespread use of disobedience or resistance clauses in constitutions is a coup-proofing strategy and acts as a bulwark against an unconstitutional overthrow of government or the constitutional order.[113] A constitutional right or duty of citizens, or specifically of civil servants, not to cooperate with or serve under a coup regime is a potential deterrent

105 *Lydia A Nkansah*, The Right to Resistance and the Defence of Ghana's Fourth Republic Constitution, KNUST Law Journal 6 (2014); *Lydia A Nkansah*, The Call to Citizens of Ghana to Defend Ghana's Fourth Republican Constitution: A Death Trap?, Commonwealth Law Bulletin 41 (2015), p. 618.

106 *Hutchful / Agyekum / Kunbor*, note 101, pp. 18-23.

107 *Tripp*, note 85.

108 Uganda Constitutional Commission n. 106, 731, 737.

109 Constitution of Uganda 1995., art. 3(4).

110 Constitution of The Gambia 1996 (with amendments through 2018), art. 6(3); Constitution of Ghana 1992 (with amendments through 1996), art. 3(5); Constitution of Uganda 1995, art. 3(5).

111 Uganda Constitutional Commission n. 106, 737.

112 Constitution of Ghana 1992 (with amendments through 1996), art. 3(7).

113 See also *Hatchard / Ndulo / Slinn*, note 37, pp. 259-261.

to would-be coup leaders. Such clauses enable, encourage and legitimise the mobilisation of civil society against a coup or other unconstitutional change of government, thereby denying coup leaders the semblance of popular support. The right to resist is often employed in concert with other constitutional coup-proofing measures, especially inviolability clauses, with non-cooperation, disobedience or even outright resistance being a logical consequence.

IV. Prohibitions on Public Office

Prohibitions against coup leaders or their supporters from serving in public office is a constitutional coup-proofing strategy evident in the constitutions of Argentina, Guatemala, Paraguay, Central African Republic and Nicaragua.

An example of a soft expression of constitutional coup-proofing that prohibits coup leaders from becoming president or vice-president is Guatemala. In 1921 there was a civil uprising and military coup, leading to a period of great political instability. In 1927, amendments were made to the 1879 Constitution, including the prohibition on holding the office of president.[114] Until the early 1990s, military coups remained a persistent feature in Guatemalan politics. Despite this, the prohibition on coup leaders assuming the role of president or vice president was retained in various constitutions.[115] Guatemala's prohibition not only bars coup leaders from the presidency who have taken over the country, but also bars relatives of coup leaders, and military officers, unless they resigned at least five years prior to the election.[116] For example, in 2019, Zury Ríos was barred from running for elections on the grounds that she was the daughter of former dictator (and coup leader) Efraín Ríos Montt, although she later contested this in court.[117] In June 2023, she again ran for president and when she lost, she filed a case arguing that the elections were fraudulent.

Also in Latin America, Nicaragua is an example of how such provisions can also be introduced as part of authoritarian constitution-making. In 1936, during the early years of Somoza's rule, a Constituent Assembly was convened to consolidate his dictatorial rule and give the appearance of constitutional legitimacy.[118] The 1939 Constitution introduced the prohibition on coup leaders becoming president or vice president, written in identical

114 Constitution of Guatemala 1879 (amended 1927). art. 65(1) and (2).

115 Constitution of Guatemala 1945; art. 131(1) and (2); Constitution of Guatemala 1956, art. 161(1) and (2),. Constitution of Guatemala 1965, art, 184(1) and (2); Constitution of Guatemala 1985, art. 186(a) and (b).

116 Constitution of Guatemala, art. 186 (a), (c) and (e).

117 *Pamela Ruiz*, Barred Candidates Cast a Shadow over Guatemala's Polls, International Crisis Group, 21 June 2023, https://www.crisisgroup.org/latin-america-caribbean/central-america/guatemala/barred-candidates-cast-shadow-over-guatemalas-polls (last accessed on 11 December 2025).

118 *Kai M. Thaler / Eric Mosinger*, Nicaragua: Doubling Down on Dictatorship, Journal of Democracy 33 (2022).

terms to that of Guatemala.[119] Unlike Guatemala, constitution-makers wrote the provisions in and out of the Nicaraguan constitutions depending on who oversaw the constitutional amendments. The prohibition was written out of the Nicaraguan Constitution of 1948, reintroduced in 1950, written out in 1987 and then re-introduced in 1990.[120] The prohibition on holding public office requires military officers to have retired at least one year prior to the election; however, a coup leader or anyone who finances a coup is ineligible for the office of president or vice-president. In 2025, in the most recent rewriting of the Constitution which firmly embedded authoritarian rule under the Ortega regime, a similar provision was maintained.[121]

Other regimes have developed hard expressions of coup-proofing that expand the prohibition on coup leaders holding public office to any public office, not just the office of president or vice-president. For example, the 1992 Constitution of Paraguay introduced a prohibition on coup leaders (either civilian or military) holding any public office, although ineligibility is limited to two consecutive constitutional periods.[122] Paraguay's prohibition is therefore wider in scope than Guatemala and Nicaragua but limited in time.

Another hard expression of coup-proofing is found in Argentina. In 1994, Argentina introduced its prohibition on coup leaders holding public office through an amendment to the 1853 Constitution with the earlier mentioned article 36. Similar to Paraguay, the prohibition extends to all positions of public office. Coup instigators are permanently banned from public offence, a person can be convicted for their role in a coup at any point in time in the future, and the person is rendered ineligible for a pardon or commutation of sentence.[123] Such an absolute and permanent prohibition on holding public office with no time limit, allowing for the endless possibility of prosecution without hope of pardon, is intended as a hard deterrent to would-be coup leaders and has to be seen in the context of Argentina's long-history of military coups pre-1990s.

Overall, prohibitions on holding public office come in a variety of soft to hard expressions, with stronger expressions coup-proofing applying to all public office at any time in the future, with the ongoing risk of prosecution and no hope of pardon.

119 Constitution of Nicaragua 1939, art. 205(6) and (7); Constitution of Guatemala 1879 (amended 1927), art. 65(1) and (2); Constitution of Nicaragua 1987 (with amendments through 2017), art. 147(b).

120 Constitution of Nicaragua 1948, art. 171(2) and (3); Constitution of Nicaragua 1950, art. 186(6) and (7); Constitution of Nicaragua 1974, art 185(6) and (7); Constitution of Nicaragua 1986, art. 147.

121 Constitution of Nicaragua 2025, art. 134.

122 Constitution of Paraguay 1992 (with amendments through 2011), art. 236.

123 Constitution of Argentina 1853 (reinstated in 1983, with amendments through 1994), art. 36.

V. Coup Crimes

Constitutional coup-crimes are found in 15 constitutions with a history of military rule, including Bangladesh, Benin, Brazil, Burkino Faso, Cuba, Costa Rica, Central African Republic, DRC, Fiji, Ghana, Honduras, South Sudan, Uganda, Togo, Pakistan.

A contemporary example of the use of constitutional coup crimes to prosecute would-be coup leaders is in Brazil. Brazil's Constitution declares that "actions of civilian or military armed groups against the constitutional order and the Democratic State are non-bailable crimes for which the statute of limitations never runs".[124] From 2010s, a group of generals worked proactively to enhance the political role of the military,[125] contrary to the prevailing assumption by scholars that the military was a reactive force. In 2022, President Bolsonaro lost the presidential race, although only narrowly. On 8 January 2023, when his rival Lula was sworn in as president a week later, supporters of Bolsonaro took to the streets calling for the military to reinstate Bolsonaro and vandalising numerous government institutions in the capital, including the Congress, the presidential palace and the Supreme Court.[126] Since then, numerous people, including Bolsonaro's relatives, have been investigated. In September 2025, the Brazilian Supreme Court found Bolsonaro guilty of plotting a military coup and not only sentenced him to jail but prohibited him from holding public office for the next 35 years, or until 2060.[127] This landmark case constitutes the first conviction for an attempted coup. A number of Latin American countries also have constitutional provisions criminalising the usurpation of power or unconstitutional overthrow of government, including Argentina, Honduras, Mexico and Paraguay.

Other states frame constitutional coup crimes in the language of treason and/or sedition as a hard expression of coup-proofing. Pakistan has a constitutional treason clause, although it has been amended and expanded over time.[128] In 1947, the violence of partition was the impetus for the military taking a leading role in the post-colonial state. Pakistan experienced successive periods of military rule under the 1956 Constitution and the 1962 Constitution, combined with periods of martial law without a constitution from 1958-62,

124 Constitution of Brazil 1988 (with amendments through 2017). art. 5 (XLIV).

125 *Karabekir Akkoyunlu / Jose Antonio Lima*, Brazil's Stealth Military Intervention, Journal of Politics in Latin America 14 (2022).

126 Al Jazeera, Bolsonaro supporters storm key government buildings in Brazil, 8 January 2023, https://www.aljazeera.com/news/2023/1/8/bolsonaro-supporters-storm-government-buildings-in-brazil (last accessed on 11 December 2025).

127 *Emilio Peluso Neder Meyer / Thomas da Rosa de Bustamante*, The Bolsonaro Trial Has Far-Reaching Consequences for Democracy, Lawfare, 26 September 2025, https://www.lawfaremedia.org/article/the-bolsonaro-trial-has-far-reaching-consequences-for-democracy (last accessed on 11 December 2025); The case rested upon articles 359-L and 359-M of Brazil's Criminal Code, which had been revised in 2021.

128 See *Tayyab Mahmud*, Praetorianism and Common Law in Post-Conflict Settings: Judicial Responses to Constitutional Breakdowns in Pakistan, Utah Law Review 1225 (1993).

and again from 1969 to 1973.[129] The National Assembly convened in April 1972, electing Zulfikar Ali Bhutto as president and paving the way for a new Constitution, which came into force in August 1973. According to the report of the Constitution Committee presented on 31 December 1972, the National Assembly introduced a provision on high treason into the Constitution "to eliminate any possibility, in the future, of the Constitution being abrogated"[130]. The Parliament has amended the Constitution of 1973 fourteen times since its entry into force.[131] Many of these amendments took place in the context of military rule, first in 1977 under General Zia-ul-Haq who led a military coup, and then in 1999 under General Musharraf who led a coup.[132] The courts subsequently validated the military take-over and had granted legislative powers to the military leaders to amend the constitution.[133] In 2005, an attempt to prosecute General Musharraf under the high treason clause was dismissed.[134] In 2010, the Parliamentary Committee on Constitution Reform sought to strengthen constitutional safeguards to prevent future military takeovers and coups.[135] In response to the past complicity of the courts in coups, the Committee constitutionally prohibited the courts from validating constitutional changes brought about by use of force or other unconstitutional means.[136] In 2022, after a series of political and constitutional crisis, the National Assembly voted to remove the president from office, which was said to have averted a civilian coup by the president. There have, however, been no coups nor cases of article 6 since 2010.

Some anglophone African countries with "defence of constitution" provisions also contain elaborate provisions on the crime of treason that amount to a hard expression of coup-proofing. For instance, the Constitution of Uganda in article 3(2) provides

> *"Any person who, singly or in concert with others, by any violent or other unlawful means, suspends, overthrows, abrogates or amends this Constitution or any part of it or attempts to do any such act, commits the offence of treason and shall be punished according to law."*

129 See generally *Maryam S. Khan*, What's in a Founding? Founding Moments and Pakistan's Permanent Constitution' of 1973, in: Richard Albert / Menaka Guruswamy / Nischchal Basnyat (eds.), Founding Moments in Constitutionalism, Oxford 2019, p. 201.

130 *Faisal Siddiqi*, Much Ado about Article 6, Dawn, 2 July 2022, https://www.dawn.com/news/1700983; Constitution of Pakistan 1973.

131 *Sadaf Aziz*, The Constitution of Pakistan: A Contextual Analysis, Oxford 2018.

132 *Chin / Carter / Wright*, note 1, pp. 82, 88-89.

133 Pakistan Lawyers Forum v Federation of Pakistan – CP No 13/2004 [2005] PKSC 2 [16] ('the Syed Zafar Ali Shah case').

134 Ibid [92].

135 Constitution of Pakistan 1973 (reinstated 2002, with amendments through 2018), art. 6; *Farhan Hanif Siddiqi*, Rescuing the Agency and Resilience of Civilian Political Actors, in: Tarunabh Khaitan / Swati Jhaveri / Dinesha Samararatne (eds.), Constitutional Resilience in South Asia, Oxford 2023.

136 Constitution of Pakistan 1973, art. 6(2A).

Similar provisions on high treason exist in the constitutions of Ghana, which attracts a mandatory death penalty, as well as The Gambia and South Sudan.[137] The constitutions of Ghana and The Gambia also criminalise not just coup leaders but the actions of people who aid and abet a coup. In some countries, coups are deemed an "imprescriptible" crime, that is, it cannot be removed or revoked in any way, to be sanctioned in accordance with the law, including in the Democratic Republic of Congo, the CAR, Mali, Mauritania and Togo.

Some constitutional coup crimes have expansive and serious ramifications, such as denying coup leaders and their associates any financial benefit from their actions, with any property or financial gains being appropriated by the state, as in Honduras.[138] Some constitutions exclude authors of coups from pardons and commutation of sentences, such as in Argentina.[139] In some countries, coup crimes are specified as non-bailable offences.[140]

Some constitutions limit coup crimes to acts committed prior the entry into force of its constitution, such as in Mauretania, which is arguably not a deterrent clause as its only role is to prosecute past offenders. Other constitutions only criminalise the role of the military or security forces (not civilians), as in Benin.[141] A similar provision also exists in the constitution of Togo, in addition to its general provision, highlighting the specific threat of coups posed by the military.[142]

The Central African Republic has one of the strongest constitutional coup crimes. The earlier mentioned 2016 Constitution also incorporated provisions criminalising coups. Kameldy Neldjingaya has argued that "the prohibition of *coups d'état* by the Constitution of March 2016 was an attempt to find a lasting solution to the problem of unconstitutional changes of government, which has characterised politics in the CAR since the early days of its independence"[143]. The 2016 Constitution declares usurping the state an inviolable crime amounting to a declaration of war against the people and the prohibition extends to any person who supports a coup attempt.[144] This clause was also maintained in the 2023 Constitution.[145]

Despite the stated severity of coup crimes, these clauses are challenging to implement, especially in times of transition when the goal is for the military to relinquish its powers peacefully. Coup crimes may be difficult to execute if the courts lack independence and because they generally require a new regime to be in place before prosecutions can

137 Constitution of Ghana 1992 (with amendments through 1996), art. 3(3); Constitution of The Gambia 1996 (with amendments through 2018), art. 6(1); Constitution of South Sudan 2011 (with amendments through 2013), art. 4(2).

138 Constitution of Honduras 1982, art. 375.

139 Constitution of Argentina 1853 (reinstated in 1983, with amendments through 1994), art. 36.

140 Constitution of Brazil 1988, art. 5.

141 Constitution of Benin 1990, art. 65.

142 Constitution of Togo 1992 (with amendments through 2007), art. 148.

143 *Neldjingaye*, note 52.

144 Constitution of the Central African Republic 2016, art. 28.

145 Constitution of the Central African Republic 2023, art. 6.

feasibly be brought. Judiciaries have a mixed track record in applying these provisions when confronted with power realities, as seen in the example of Pakistan.[146] In many countries, amnesties and presidential pardons are used to facilitate post-coup transitions, thereby potentially entrenching impunity for coups. In some countries, coup leaders have introduced coup crimes as forward-looking to preserve their rule while also including an immunity clause for coup leaders either in constitution or in law.[147] Such a combination is indicative of authoritarian use of constitutional coup-proofing.

E. Conclusion: A Future Agenda for Constitutional Coup-Proofing

In military authoritarian regimes, or democratic regimes that have transitioned (or are transitioning) from military authoritarian rule, constitution-makers seek to prevent the threat of a future coup by means of constitutional-coup proofing. The emergence and spread of constitutional coup-proofing has gained prominence over the past three to four decades.

We showed that the scholars of political science and security sector studies have developed the concept of coup-proofing as a set of political strategies that may impose internal or external reforms on the military. We added to this by arguing that coup-proofing should also be understood as a legal and constitutional strategy by both authoritarian regimes seeking to prolong their rule or by democratic regimes aiming to prevent future coups.

From our preliminary qualitative study, we found that constitutional coup-proofing is a common strategy of constitution-makers in countries with a history of coups and attempted coups, especially in Africa and Latin America. We find that most states or regimes that use constitutional coup-proofing include at least two or three varieties of constitutional coup-proofing. Regimes that include more than one type of coup-proofing frequently combine the right to resist with coup crimes, simultaneously empowering citizens to resist a coup and criminalising those who attempt a coup. Many regimes pair an inviolability clause with a right to resist in the constitution, declaring acts of usurpers unconstitutional and encouraging disobedience. The more frequent combinations of constitutional coup-proofing suggests that when a state does use constitutional coup-proofing, it almost always uses multiple strategies in mutually reinforcing ways, combining both soft and hard strategies. Longer histories of coups and repeated constitutional breakdown can also lead to a strengthening of constitutional coup-proofing over time, as observed in the cases of Ghana and the CAR.

Our study opens up a new research agenda for the study of constitutional coup-proofing. Building on the focus on the military in comparative constitutional law,[148] this study offers a preliminary analysis for an agenda for the study of constitutional coup-proofing.

146 See *Farooq Hassan*, A Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d'Etat in the Common Law, Stanford Journal of International Law 20 (1984); *Mahmud*, note 128.

147 Fiji Constitution of 2013, art. 155, 157.

148 *Crouch*, note 6.

This agenda requires country-specific studies of the constitution in action, including but not limited to how courts have interpreted and applied coup-proofing provisions. Scholars could also examine the ways that some regimes use legislation instead of, or in addition to, constitutions to introduce similar coup-proofing strategies.

Given that our case studies indicate intraregional learning and exchange, particularly in Latin America but also francophone and anglophone Africa, there is also a need for region-specific studies. Scholars could examine the ways in which regionalism and intra-regional exchanges influence constitution-makers in their coup-proofing efforts. Conversely, scholars could consider why countries across Asia with a history or contemporary period of military rule have not included coup-proofing provisions in their constitutions. Further, the phenomenon of coups raises urgent questions for scholars of comparative constitutional law in terms of when, why and how coups influence constitutional design. Specifically, there is a need to explore in more detail what happens when regimes adopt constitutional strategies to prevent, deter or resist a coup, not only for its impact and effect on politics but on society at large.

In sum, the persistence of military coups and the violent overthrow, or attempted overthrow, of an (un)elected government should capture the attention of legal scholars. We have drawn attention to constitutional coup-proofing in order to inform an agenda for understanding contemporary constitution-making efforts after coups or attempted coups, as we have seen in countries around the world, from Mali to Thailand. In doing so, we demonstrated that coup-proofing is not just a political strategy, but also often a legal and constitutional one.

Refining Political Insurance: The Indonesian Context

By *Wicaksana Dramanda**

Abstract: While the establishment of Indonesia's Constitutional Court is traditionally viewed as an altruistic milestone for institutionalizing democracy and constitutionalism, this narrative remains unsatisfactory when scrutinized through a political science lens. This article challenges this classical understanding by asking: what were the underlying strategic rationales of political elites in empowering a judicial body to check their own power? Adopting a normative approach combined with a historical analysis of the Court's formation, this study evaluates the applicability of "political insurance" and "preserving hegemony" theories within the Indonesian context. The analysis reveals that while the notion of "preserving hegemony" is insufficient, the "political insurance" theory provides a stronger explanatory framework, albeit with a necessary caveat. Unlike the standard theory where weakened incumbent elites seek judicial protection, the Indonesian scenario illustrates that new prevailing elites, legitimized by democratic elections, instigated this empowerment. Consequently, this article argues for a refinement of the political insurance concept to include "coverage insurance" that may be utilized by any political actor during the unpredictable phases of democratic transition. Ultimately, the pragmatic objectives of these actors shaped the Court's institutional framework, manifesting a distinct form of the judicialization of politics.

Keywords: Constitutional Court; Indonesia; Political Insurance; Political Elites; Constitutional Bargaining

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A. Introduction

Many legal scholars have posited theories justifying the empowerment of Constitutional Courts to check political institutions, notably through Tom Ginsburg's "political insu-

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rance"[1] or Ran Hirschl's "preserving hegemony"[2] models. However, Indonesian practices offer a distinct interpretation of these concepts. While these theories typically posit that weakened incumbent political elites strategically empower the Constitutional Court to safeguard their security or political influence from democratic rivalries,[3] the Indonesian experience demonstrates a different pattern: the mandate to create the Court following the 2001 constitutional amendment process illustrates how nascent political elites, compelled by power struggles after democratic elections, engaged in deliberate constitutional design. Through the Third Constitutional Amendment, these elites formalized their strategic maneuvering by explicitly vesting the Court with the authority to adjudicate impeachment proceedings, thereby rendering the process more procedurally complex to preserve their power.

This article aims to explore the theoretical concepts of Ginsburg and Hirschl and examine their relevance to the historical creation of the Constitutional Court in Indonesia. It will elucidate how political practices and other events preceding the establishment of the Constitutional Court in Indonesia shaped the divergent expressions of these two theories in practice. Additionally, it will examine the most pertinent theory of the circumstances leading to the establishment of the Constitutional Court and elucidate its influence on the Court's institutional design.

This article will also present a contrasting viewpoint on the establishment of the Constitutional Court in Indonesia, often portrayed within an altruistic narrative as a "triumph" of constitutional democracy resulting from the constitutional reform between 1999 and 2002. This article contends that the altruistic narrative does not sufficiently explain the tendency of dominant political elites to "tie their own hands" with a Constitutional Court. Empirical evidence indicates that forums for constitutional change in various countries are frequently influenced by competing political interests, encompassing both long-term battles over ideology and short-term objectives related to the consolidation or preservation of elite power.[4] In the Indonesian context, such "competing political interests" are manifested in the tripartite appointment mechanism for constitutional justices stipulated in Article 24C (3) of the 1945 Constitution. This framework empowers the legislative, executive, and judicial branches to each propose three justices, a division of power intended to preclude any single branch from dominating the Court. Consequently, this design is more indicative of transactional and accommodative politics rather than a primary commitment to ensuring the Court's institutional independence.

1 Tom Ginsburg, in a comparative analysis, examined South Korea, Mongolia, and Taiwan. *Tom Ginsburg*, Judicial Review in New Democracies: Constitutional Courts in Asian Cases, Cambridge 2003, p. 23.

2 Ran Hirschl, in a comparative analysis, examined Canada, South Africa, New Zealand, and Israel. *Ran Hirschl*, Towards Juristocracy: The Origin and Consequences of the New Constitutionalism, Cambridge MA and London 2004, p. 4.

3 Ibid., See also *Ginsburg*, note 1.

4 *Ginsburg,* note 1, p. 23.

This article will consist of three sections. The initial section will delineate the political circumstances that precipitated the formation of the Constitutional Court in Indonesia, explicitly focusing on the constitutional reform processes and amendment debates. This contextual analysis is essential for elucidating the rationale behind the skepticism regarding the altruistic narrative of the Constitutional Court's establishment and for presenting an alternative viewpoint on the strategic motivations of Indonesia's political elite in instituting a balancing authority through the Constitutional Court.

The second section will succinctly delineate the principal concepts of political insurance and hegemony preservation theories and examine them within the framework of the founding of the Constitutional Court in Indonesia. This section will argue that the establishment of the Constitutional Court in Indonesia aligns more closely with the theory of political insurance than with the theory of hegemony preservation, though it exhibits a unique manifestation pattern.

The concluding section will delineate the impact of political insurance on the institutional framework of Indonesia's Constitutional Court, which possesses the authority to perform judicial reviews as well as other powers that can be interpreted as a means of enhancing the Court's role in political matters, commonly referred to as the judicialization of politics.[5]

B. The Foundational Moment: Indonesia's Constitutional Catalyst

It is essential to delineate the notable political occurrences that transpired before and during 2001 to understand the internal circumstances that led to the establishment of the Constitutional Court through the third amendment of the 1945 Constitution in that year. The principal event is the downfall of Soeharto.[6] Following the economic crisis that impacted Indonesia in 1997, a series of student protests demanding Soeharto's resignation began. The intensification of protests provoked harsh measures from Soeharto's dictatorship, evidenced by the kidnapping of pro-democracy activists and the disproportionate use of force to quell student demonstrations, leading to fatalities.[7] Soeharto's repressive actions provoked public

5 Bjorn Dressel contends that judicialization of politics is not merely an expansion of "judge made law", but rather the broad incorporation of judicial processes into political and social life. This includes social actors employing the courts for their interests, political institutions adjusting to judicial actions, and the state constructing legitimacy through the rule of law. *Bjorn Dressel* (ed.), Judicialization of Politics in Asia, London 2012, p. 4.

6 Serving as the Republic of Indonesia's second president from 1967 to 1998, Soeharto established a 32-year authoritarian rule. His power, maintained through military-bureaucratic infrastructure, ceased due to mass public pressure during the "Reform" movement. *Marcus Mietzner*, Authoritarian elections, state capacity, and performance legitimacy: Phases of Regime Consolidation and Decline in Suharto's Indonesia, International Political Science Review 39 (2018), p. 87.

7 Kontras, Kasus Penculikan Dan Penghilangan Paksa Aktivis 1997-1998: Siapa Bertanggungjawab, https://www.kontras.org/backup/buletin/indo/kontras_OK_dng_RevHal4.pdf (last accessed on 13 Desember 2024). Wiranto, the former Commander of the Indonesian National Armed Forces (*Ten-*

outrage, leading to widespread riots and conflicts, during which over 1000 individuals were killed, around 400 ethnic Chinese women and girls were raped, and shops and homes belonging predominantly to Chinese Indonesians were looted and destroyed.[8]

When Soeharto stepped down, Habibie, who serves as Vice President, replaced Soeharto as President. This action was seen as a sign of the political elite's lack of seriousness in responding to demands for reform and democratization, causing waves of demonstrations and unrest to persist, with a high potential for disintegration. Subsequently, to reduce tensions following Soeharto's resignation, the political elite-initiated amendments to the 1945 Constitution, demonstrating their genuine commitment to constitutional reform.[9]

The subsequent event was the impeachment of President Abdurrahman Wahid in 2001. Jimly Asshiddiqie, the first chief justice of the Indonesian Constitutional Court, stated that the impeachment of Abdurrahman Wahid, who came into office in 1999, catalyzed the Constitutional Court in Indonesia.[10] The impeachment of Abdurrahman Wahid transpired because of at least three factors: *Initially*, changes in the constitutional framework. During Abdurrahman Wahid's presidency, amendments to the 1945 Constitution curtailed presidential authority while simultaneously enhancing legislative supervision.[11] Most notably, the Second Amendment in 2000 introduced Article 20A, which granted the House of Representatives (*Dewan Perwakilan Rakyat,* DPR) the rights of interpellation and inquiry (*hak angket*). These constitutional mechanisms allowed the DPR to formally investigate the President and issue censure memorandums, ultimately leading to the Special Session of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat,* MPR) that revoked his mandate.

Second, the aspect of a fragile coalition. After Soeharto's resignation in 1998, Indonesia promptly initiated preparations for democratic elections. As a result, President Habibie enacted Law Number 2 of 1999 regarding General Elections.[12] This legislation significantly transformed Indonesia's political landscape by permitting all citizens to form political parties, a practice that was prohibited during Soeharto's regime. This legislation enabled the

tara Nasional Indonesia, TNI) in 1998, claimed in this report that the kidnapping of pro-democracy activists was executed and orchestrated by General Prabowo Subianto, now the Indonesian President.

8 *Himawan Eunike Mutiara / Annie Pohlman / Winfred Louis*, Revisiting the May 1998 Riots in Indonesia: Civilians and Their Untold Memories, Journal of Current Southeast Asian Affairs 41 (2022), pp. 242-243.

9 *Jakob Tobing*, The Essence of the 1999-2002 Constitutional Reform in Indonesia: Remaking the Negara Hukum. A Socio-Legal Study, Doctoral Thesis Leiden University 2023, p. 165.

10 *Susi Dwi Harijanti / Tim Lindsey*, Indonesia: General Elections Test the Amended Constitution and the New Constitutional Court, International Journal of Constitutional Law 4 (2006), p. 147.

11 *Rosa Ristawati*, Modelling Executive Powers in the Indonesian Constitution: A Comparative Study of Constitutions*,* Doctoral Thesis Maastricht University 2017*,* p. 15.

12 Habibie, the serving Vice President during the Soeharto regime, assumed the Presidency following the latter's resignation.

active involvement of 48 political parties in the inaugural general election after President Soeharto's resignation.[13]

The first general election after the collapse of the Soeharto regime resulted in fragmentation among political parties within the DPR, leading to no single party obtaining a majority. The Indonesian Democratic Party of Struggle (*Partai Demokrasi Indonesia Perjuangan*, PDIP), led by Megawati Soekarnoputri and acknowledged as the main opposition to Soeharto, emerged victorious in the election by securing 154 out of 462 seats in the DPR, representing the highest seat count in the DPR.[14] The Golkar Party, linked to Soeharto, has successfully achieved the second position with 120 seats and is anticipated to nominate Habibie as its presidential candidate.[15] During this period, the President was elected by the MPR, which is primarily composed of members from the DPR, rather than by the general populace.[16] The absence of a single party commanding a majority in the MPR, coupled with the indirect presidential election mechanism, gave rise to significant constitutional implications: specifically, the necessity for political parties to build coalitions to secure the presidency. This dynamic meant that a party lacking a parliamentary majority could still capture the executive leadership, provided it could mobilize a coalition whose combined seat count surpassed that of the legislative election's plurality winner.

The political and constitutional context during that period positioned Megawati and Habibie as the most viable candidates for the presidency. To hinder Habibie and Megawati from securing victory in the presidential election within the MPR, Amien Rais, leader of the National Mandate Party (*Partai Amanat Nasional*, PAN), formed a central axis coalition of five Islamic parties including the National Awakening Party (*Partai Kebangkitan Bangsa*, PKB), the United Development Party (*Partai Persatuan Pembangunan*, PPP), the Justice Party (*Partai Keadilan*, PK), and the Crescent Moon and Star Party (*Partai Bulan Bintang*, PBB), to secure the presidency for Abdurrahman Wahid, a politician linked to the PKB.[17] As a result, the central axis secured 163 seats, surpassing the PDIP, which obtained only 154 seats, and successfully secured Abdurrahman Wahid's election as president. However, although it consisted of Islamic parties, the central axis coalition exhibited a pragmatic and fragile quality. The main aim was to impede the leading presidential

13 See General Election Commission, Pemilihan Umum Tahun 1999, https://www.kpu.go.id/page/read/11/pemilu-1999 (last accessed on 4 May 2025).

14 Ibid.

15 Ibid.

16 The original 1945 Constitution, Article 6(2), reads: "The President and Vice-President shall be elected by the People's Consultative Assembly by a majority vote."

17 PKB failed to achieve significant electoral success, obtaining a comparatively small number of 51 seats in the DPR. See General Election Commission, note 13. See also *Verelladevanka, Widya Lestari*, Poros Tengah: Latar Belakang, Tujuan, Hasil, dan Akibat, 7 March 2022, Kompas, https://www.kompas.com/stori/read/2022/03/07/100000079/poros-tengah-latar-belakang-tujuan-hasil-dan-akibat#, (last accessed on 4 May 2025).

contenders of that time: Habibie, linked to the Soeharto administration, and Megawati Soekarnoputri, the head of PDIP and a female candidate.[18]

Third, Abdurrahman Wahid's confrontational behavior often led to complications both with the opposition and among his own supporters at the central axis.[19] As a result, the emergence of two financial scandals involving his close associates prompted the opposition to call a Special Session of the MPR, which ultimately led to the removal of Abdurrahman Wahid from the presidency and his subsequent replacement by Megawati.[20]

During Megawati's administration, she and the PDIP voiced concern about the possibility of events similar to those faced by Abdurrahman Wahid, which affected governmental stability.[21] Consequently, PDIP proposed a mechanism to avert the recurrence of the Abdurrahman Wahid crisis by establishing a more stringent impeachment process and integrating a Constitutional Court into this framework.[22] Megawati and PDIP's concern is apparent in the third amendment to the 1945 Constitution, which stipulates that impeachment can no longer be executed solely for political motives but only in instances of legal transgressions by the president. Additionally, it includes provisions that underpin the formation of the Constitutional Court, which possesses the authority to adjudicate alleged legal infractions by the president in impeachment proceedings.[23]

C. Two Logics of the Establishment of Constitutional Court: Insurance vs. Hegemony

I. Competing Frameworks for Judicial Politics

Certain legal scholars have attempted to identify and analyze the factors that facilitate the formation of Constitutional Courts. Dixon and Ginsburg, who examined the establishment of constitutional courts in East Asia, argued that these courts' creation in countries undergoing democratic transitions served as "political insurance" for the incumbent elites, preparing them for future political uncertainties, including the risk of losing post-transition elections.[24] Political insurance refers to the notion that incumbent elites may employ con-

18 The central axis's formation was significantly influenced by gender, given that women were considered ineligible for the Presidential office during that period. See *Aryo Putranto*, Napak Tilas Poros Tengah Yang Usung Gus Dur di Pemilihan Presiden 1999, Kompas, 24 July 2022, https://nasional.kompas.com/read/2022/07/24/10000081/napak-tilas-poros-tengah-yang-usung-gus-dur-di-pemilihan-presiden-1999?page=all, (last accessed on 4 May 2025).

19 *Ristawati*, note 11, pp. 149–150.

20 Ibid.

21 *Blair King*, Empowering the Presidency: Interests and Perceptions in Indonesia's Constitutional Reforms, 1999-2002, Doctoral Thesis of The Ohio State University 2004, p. 116.

22 *Stefanus Hendrianto*, Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes: Comparative Constitutionalism in Muslim Majority States, New York 2018, p. 45.

23 See Article 7A and 7B of the 1945 Constitution

24 *Rosalind Dixon* / *Tom Ginsburg*, The Forms and Limits of Constitutions as Political Insurance, International Journal of Constitutional Law 15 (2017), p. 989.

stitutions, particularly constitutional judicial review, as a protective measure against the potential loss of office and influence in impending democratic elections.[25] Fundamentally, this perspective offers an alternative framework to explain the necessity of an independent judiciary within the constitutional architecture, moving beyond the traditional moral or normative understanding. The political insurance theory conceptualizes judicial independence as the outcome of a deliberate political strategy in institutional design, one intended to create a reliable mechanism for upholding constitutional norms during democratic transitions, even amidst the volatility of power turnovers.

Ginsburg elucidates the rationale for the reigning political elite's pursuit of "insurance" during a democratic transition. He contends that in nations experiencing the emergence of democracy, the incumbent elites may be apprehensive about the implications of constitutionalization.[26] This process is intended to restrict and allocate authority to avoid the concentration of power in a singular actor or institution. Moreover, as argued by Dixon and Ginsburg, the incumbent elites are concerned that the anti-democratic actions they previously enacted may provoke retribution from the newly elected ruling elites emerging from the democratic process. Consequently, their "insurance" can manifest in several forms, such as establishing independent agencies or augmenting judicial power to prevent political exclusion or the persecution of previous leaders, which may also arise from coups or popular uprisings.[27]

Dixon and Ginsburg delineate three categories of political risk that political actors endeavor to "insure" by institutionalizing judicial review within courts:[28]

1. the risk of losing or shrinking political power, especially the potential erosion of a strong political position;
2. the risk of declining political influence in the development of public policy;
3. the potential of individual persecution as retribution by the new rulers or the political elite against members of the former political elite.

In light of the three aforementioned risks, Dixon and Ginsburg elucidate that two insurance models are often institutionalized: *first*, is power and personal protection insurance.

25 Ibid.

26 Constitutionalization is the process of formulating norms, regulating institutional forms, mechanisms, and interactions into a constitution, thereby rendering these incorporated mechanisms justiciable (enforceable by courts). This process is applicable to various themes, including the constitutionalization of politics, democracy, or individual rights. See *Tom Ginsburg / Mila Versteeg*, The Constitutionalization of Democracy, Journal of Democracy 34 (2023), pp. 36-37. *Pawel Laidler / Dariusz Stolicki / Łukasz Jakubiak / Jacek Sokołowski (eds.)*, Constitutionalization of Politics in Comparative Perspectives, New York 2025, p. 2. See also *Ran Hirschl*, The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolution, Law and Social Inquiry 25 (2000), pp. 192-193.

27 *Dixon / Ginsburg*, note 24, p. 993.

28 Ibid., pp. 995–996.

They observe that in unstable democratic settings, authorities tend to manipulate electoral procedures to the degree that repressive tactics are utilized to marginalize and exclude rival groups. This manipulation, including electoral fraud, frequently relies on corrupt patron-client relationships. Incumbent elites perceive this repressive dynamic as a threat that emerging dominant elites may wield against them, particularly by exploiting criminal law to suppress the former and eliminate them from the competitive arena.[29]

Secondly, policy insurance. During the democratic transition, the incumbent elites typically express concerns regarding their potential erosion of power or defeat in legislative contests, as well as the loss of authority over the bureaucracy, local governance, or the courts. Consequently, they perceive a need for safeguards to challenge policy decisions made by newly emerging political elites, particularly those related to social democracy, market regulation, secularism, and religious law.[30] Therefore, to establish both models of insurance, incumbent elites typically delegate authority to the judiciary to conduct judicial reviews, safeguard human rights, and guarantee the democratic conduct of elections while preventing fraud.

In line with Ginsburg and Dixon, Hirschl proposed the "preserving hegemony" thesis, asserting that the institutionalization of judicial review and the enhancement of the judiciary arise from the incumbent political elite's awareness in a democratic regime of the potential for future resistance.[31] Hirschl posits that preserving hegemony, constitutionalization, and judicial review provide a cohesive framework that mitigates the diminishing power of dominant political entities.[32] During periods of weakening, incumbent elites attempt to entrench policies, values, or ideologies they consider significant within the Constitution, supplemented by the establishment of a constitutional court to safeguard these elements. This action will render future political figures incapable of readily altering the policies, beliefs, or ideologies enshrined in the Constitution.[33] This strategy seeks to compel the new dominant political elite to adhere to constitutional mandates. Furthermore, if the new elite fails to comply, the diminished political elite, now a minority, can challenge this noncompliance through judicial review in court.

Political insurance and the preservation of hegemony are conceptual frameworks derived from analyzing nations undergoing a constitutional moment, which leads to changes

29 Ibid., p. 995.

30 Ibid., p. 996.

31 Hirschl developed his theory based on a comparative analysis of political competition in four jurisdictions: Israel, Canada, New Zealand, and South Africa. See *Hirschl*, note 2, p. 4. See also *Ran Hirschl*, Preserving Hegemony? Assessing the Political Origins of the EU Constitution, International Journal of Constitutional Law 3 (2005), p. 281.

32 Constitutionalization, as conceptualized by Hirschl, involves the entrenchment of norms within a written constitution to achieve the dual goals of power limitation and the protection of human rights. Ibid., p. 269.

33 *Hirschl,* note 31, p. 282.

in the political landscape and constitutional amendments.[34] Both ideas suggest that weakened incumbent elites have strategically maneuvered to mitigate potential future political losses, given the uncertainties surrounding the fight for power dominance in the democratic era. This suspicion is grounded in actual evidence indicating that the creation of constitutions is consistently influenced by the immediate interests of political elites, rather than reflecting the long-term interests of the general populace.[35] Consequently, these two theories fundamentally view judicial review and constitutional courts as political entities serving the interests of the incumbent elite, while explaining why a Constitutional Court generally possesses additional powers with significant political implications. These two arguments form the basis for the intersection of these ideas.

Despite sharing the same argumentative ground, these two theories display substantial variations that influence their conceptualization of the Constitutional Court's institutional character. Ginsburg, through their political insurance theory, interprets judicial review and constitutional courts as mechanisms created by incumbent elites in authoritarian regimes to prevent retaliatory measures from newly dominant political elites following democratic elections. The greater the potential erosion of the incumbent elite's authority in an authoritarian government, the more likely it is to confer substantial independence to the court.[36] Ginsburg contend that an autonomous court will evolve into an institution less vulnerable to the sway of emerging dominant elites, thereby enhancing its capacity to safeguard the interests of incumbent political leaders equitably.[37] Despite its beginnings as a politically pragmatic movement, this theory offers an optimistic view of the role of constitutional courts in democratic consolidation due to Ginsburg's belief in the high potential of an independent judiciary.

Conversely, Hirschl, through his theory of hegemony preservation, posits that judicial review and constitutional courts emerge from elite struggles for influence and authority inside the democratic sphere.[38] Hirschl posits that the implementation of judicial review or the establishment of a Constitutional Court does not necessarily need to follow the collapse of authoritarian governments or concerns regarding the transition to democracy. He posits that democracy inherently contains uncertainty about the persistence of elite dominant positions. It is because democracy necessitates a contestation of ideas that facilitate regular

34 A constitutional moment is a catalytic condition marked by widespread public discussion of constitutional questions, which subsequently initiates constitutional change. *Bruce Ackerman*, We the People, Volume 3: The Civil Revolution, Cambridge MA; London 2014, p. 45.

35 Ginsburg rejects the notion that judicial review exclusively serves the broader societal interest, arguing instead that it results from an intersection of societal and elite political interests. See *Ginsburg,* note 1, p. 23.

36 Ibid., pp. 26-27.

37 Ginsburg argues that the character of constitutional court decisions is not static, such as consistently favoring a single group, but is continuously negotiated through dialogue with other branches of state power. Ibid., p. 30.

38 *Hirschl,* note 2, p. 99.

shifts in dominance, exemplified by elections, a phenomenon Hirschl refers to as electoral uncertainty.[39]

In the face of uncertainty, weakened incumbent elites will entrench their interests within the constitution, designating the constitutional court as the protector of such interests. Hirschl expresses skepticism over the constitutional court's potential to evolve into an autonomous institution. He asserts that, empirically, constitutional courts typically render decisions that safeguard the interests of the elites that constitute them for two reasons. *First*, constitutional court judges typically align with the political ideologies of the elites who appointed them.[40] This predicament reflects the procedure for appointing judges, which is unlikely to be devoid of the interests of the incumbent elites.[41] *Secondly*, institutionally, the constitutional court remains reliant on political entities, particularly over budgetary allocations and the enforcement of judicial rulings.[42] Hirschl posits that these two factors will lead the court to demonstrate "restraint" in rendering decisions that may provoke conflict with political institutions. Consequently, Hirschl contends that the existence of a constitutional court will not favorably influence the consolidation of democracy.[43]

In sum, the two theories mentioned above outline the rationale behind the establishment of a constitutional court. The political insurance thesis posits that a court is created by weakening incumbent elites during democratic transitions to safeguard their power, policy interests, and personal safety against future electoral loss. Thus, it views independent courts as an optimistic safeguard for democratization. Conversely, the preserving hegemony model argues that courts are empowered to maintain the dominant ideas and influence of the founding political actors, even in stable democracies, and see the constitutional process as a power struggle. Consequently, this theory holds a pessimistic view, expecting the institution to remain partisan and lack true independence, ultimately serving the interests of the political elites who shaped its creation.

II. Indonesia's Case: Testing Insurance Against Hegemony

However, the Constitutional Court of Indonesia was established with insufficient representation of the aforementioned theories. Hirschl's idea of hegemony preservation is predominantly observed in consolidated democracies, such as Canada, South Africa, and Israel. This model requires two conditions: a stable democracy and the efforts of incumbent elites to maintain existing policies, values, or ideologies enshrined in the constitution, driven by their fear of potential future power diminishment. The establishment of the

39 Ibid., p. 41.

40 Ibid., p. 99.

41 *Adam Bonica / Maya Sen*, The Judicial Tug of War: How Lawyers, Politicians, and Ideological Incentives Shape the American Judiciary, Cambridge 2021, p. 27.

42 *Hirschl,* note 2, pp. 211-212.

43 Ibid., p. 218.

Constitutional Court in Indonesia failed to meet these two prerequisites. Upon its establishment in 2001, Indonesia's democratic state was not ideal, having recently emerged from Soeharto's authoritarian government and still striving to identify a suitable governance model for constitutional democracy. The notion of constitutional democracy, along with the diverse mechanisms and institutions effectively incorporated into the 1945 Constitution, did not originate from the awareness of contemporary political leaders within the legislative institution. Instead, it arose from the demands of the civil society movement to prevent the resurgence of authoritarianism.[44]

The transitional period to democracy during the establishment of the Constitutional Court in Indonesia is especially relevant when examined through Ginsburg's concept of political insurance. In his dissertation, Simon Butt gives an argument comparable to this one. He claimed that the considerable political uncertainty surrounding the 1945 Constitution amendment from 1999 to 2002 created a political environment favorable to establishing a constitutional court as a form of political insurance. Nevertheless, Simon Butt declines to claim that the political insurance theory sufficiently explains the establishment of Constitutional Courts in Indonesia, citing three deficiencies:

1. The political insurance theory necessitates that political elites comprehend the notion and ramifications of judicial review. This requirement is unmet in Indonesia because the political elites lack sufficient comprehension of judicial review and its ramifications, which stems from the absence of this institution in the Indonesian constitutional framework. While the Supreme Court possesses judicial review jurisdiction, this power is not designed to evaluate legislation, but rather to examine subordinate rules. The application of judicial review has been rare owing to the New Order regime's stringent control over the judiciary.[45]
2. The notion of political insurance necessitates the presence of competent judges within the state to safeguard the political interests of the incumbent elites. Delegating autonomous authority to institutions with inept judges may jeopardize the political interests of the incumbent elites. Butt argues that the circumstances in Indonesia at the time of the constitutional court's establishment did not fulfil these criteria. He asserted that the initial cohort of constitutional judges comprised "second-class" legal experts.

44 Denny Indrayana observes that initially, the MPR was uncertain about the direction of the 1945 Constitutional changes. This uncertainty led to the formulation of five guiding principles for the amendment: retaining the preamble, the unitary state, and the presidential system; formalizing the democratic rule of law (from the Elucidation) within the articles; and prioritizing amendment over new drafting. The MPR then appointed a Constitutional Commission of academics to conduct studies and identify necessary institutional changes. *Denny Indrayana*, In Search For A Democratic Constitution: Indonesian Constitutional Reform 1999 – 2002, Jurnal Media Hukum 17 (2010), p. 117.

45 *Simon Butt*, Judicial Review in Indonesia: Between Civil Law And Accountability? A Study of Constitutional Court Decisions 2003-2005, Doctoral Thesis of The Department of Law, University of Melbourne 2006, p. 44.

This claim arises from their lack of judicial experience, the absence of constitutional justices with academic credentials from leading state universities in Indonesia, and their limited scientific publications.[46]

3. Political insurance theory requires incumbent elites to comprehend and prepare for anticipated political losses due to the uncertainties inherent in the political landscape. Simon Butt asserts that, prior to June 2004, there were no decisions from the Constitutional Court that might be construed as beneficial to the political elites who created it. In the 465 cases concerning the execution of the 2004 general election, no decisions from the Constitutional Court advantageous to the founding political elites were noted, illustrating the court's significant autonomy.[47]

Simon Butt's three arguments are arguably reductive, in evaluating the understanding of Indonesian political elites and legal scholars regarding judicial review. They also indicate that his interpretation tends to underspecify the assurance that Indonesian political elites seek through the creation of the Constitutional Court. Three principal arguments can be articulated to counter Butt's assertions as follows: *First,* the political elite in Indonesia possesses a thorough comprehension of judicial review. The political elites of Indonesia have participated in discussions regarding judicial review since the establishment of the 1945 Constitution, within the Investigating Committee for Preparatory Work of Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan,* BPUPK) in 1945.[48] This discourse continued despite the limitations enforced by the authoritarian governments of Soekarno and Soeharto, ultimately leading to the formal acknowledgment of judicial review jurisdiction by the Supreme Court, albeit semantically, through Law No. 14 of 1970.[49]

The insufficiency of judicial review authority in the Supreme Court does not justify the claim that Indonesian political elites or intellectuals lack understanding of the concept and ramifications of judicial review. Conversely, the political elite, especially advocates of the authoritarian regime, understand the ramifications of judicial oversight, which could

46 Ibid., p. 45.

47 Among the cases examined by Simon Butt is the 2004 election dispute involving presidential candidate Wiranto (of the Golkar Party, a powerful faction when the Court was established). In this specific instance, the Constitutional Court dismissed Wiranto's petition. Ibid., p. 48.

48 BPUPK, known in Japanese as *Dokuritsu Junbi Chōsakai*, was a committee formed by the Japanese Occupation Army Government in the Dutch East Indies to formulate the constitution of independent Indonesia. The institution's establishment manifested Japan's promise to grant Indonesia independence in exchange for Indonesian assistance against the Allies in World War II. *Sutrisno Kutoyo*, Prof. H. Muhammad Yamin, S.H, Jakarta 1981, p. 71.

49 Judicial review by the Supreme Court is considered semantic because it involves reviewing subordinate regulations against existing laws, rather than assessing laws against the Constitution. Consequently, it lacks the ability to function as a political power-balancing mechanism. See Article 26 of Law Number 14 of 1970 Regarding the Basic Provisions of the Judiciary.

limit their power, and hence typically avoid it.[50] Similarly, when the third amendment to the 1945 Constitution addressed the establishment of a constitutional court. Political elites discussed where the power to review legislation should reside: in the MPR, which stands for popular sovereignty, or in the judiciary, either by establishing a constitutional court that is equal to the Supreme Court or by creating a specialized chamber under its jurisdiction.[51] A substantial discussion on this issue seems unlikely unless Indonesia's political elite understands the concept and implications of judicial review, particularly its impact on the branches of political power.

Secondly, while not all constitutional judges from the inaugural generation of the Constitutional Court were scholars affiliated with the top-tier public universities identified by Simon Butt, evaluating their expertise solely based on their teaching institutions appears to be an insufficient metric for assessment.[52] For example, Judge Laica Marzuki, although not affiliated with a prestigious public university, is clearly a constitutional law expert, having served as a Supreme Court Justice from 2000 to 2003, which underscores Marzuki's legal expertise.[53]

Assessing expertise through scientific publications may yield inaccurate conclusions, particularly because the Soeharto regime-imposed restrictions on academic freedom, including within the field of constitutional law. At that time, the Indonesian higher education system did not recognize scientific publications as a measure of expertise.[54] Academics from prominent public universities in Indonesia are given civil servant status. This status led to an increase in administrative responsibilities and the potential assignment to bureaucratic roles within government institutions beyond higher education.

Third, among 465 cases concerning the implementation of the 2004 general election, Butt identified no rulings that favored the political elite responsible for establishing the constitutional court.[55] This finding refutes the assertion that the constitutional court serves as a political safeguard for the elites who established it. A more nuanced reading of Ginsburg's theory might suggest a different conclusion than the one offered by Butt. The very absence of Constitutional Court decisions favoring the establishing elites in the 2004 election actually manifests the political insurance theory's tenets. This theory demands the constitutional court to be an insurance mechanism present in the form of an independent institution, particularly concerning the conduct of general elections to prevent manipulation, as was historically characteristic of the authoritarian era.[56] Consequently, the

50 *Sebastiaan Pompe*, The Indonesian Supreme Court: A Study of Institutional Collapse, New York 2005, pp. 78-79.

51 *Tobing*, note 9, p. 282.

52 Based on an interview with Prof. Bagir Manan (former Chief Justice, Indonesian Supreme Court), August 18, 2025.

53 Ibid.

54 Ibid.

55 *Butt,* note 45, p. 48.

56 See *Ginsburg,* note 1, p. 30. See also *Dixon* / *Ginsburg,* note 24, p. 995.

lack of Constitutional Court rulings that benefited its establishing political elites during the general election further reflects the close alignment of the court's establishment practice in Indonesia with the political insurance theory.

III. Refining Insurance: Indonesia's Empirical Contribution

Ginsburg's theory posits that the creation of the constitutional court is undertaken by "weakened" incumbent elites to avert further political losses during the democratic era. The assumption is not evident in the context of the establishment of the Constitutional Court in Indonesia. The elites of the Golkar Party and the Faction of Indonesian National Military Forces and Indonesian Police (*Fraksi Tentara Nasional Indonesia/Kepolisian Republik Indonesia*, F-TNI/Polri) within the MPR, who wielded power during Soeharto's regime and confronted potential political losses in the democratic era, consistently resisted the formation of the Constitutional Court.[57]

The Golkar Party and the F-TNI/Polri were two significant factions within the MPR that former President Soeharto utilized to sustain his authoritarian regime for more than 32 years.[58] Despite Soeharto's resignation in 1998, these factions retained considerable influence in 1999. In the 1999 general election, the Golkar Party obtained 120 seats, positioning it as the second-largest party following the PDIP, which achieved 154 seats. The F-TNI/Polri appointed by the President retained 38 seats during this period. The Golkar Party and F-TNI/Polri collectively held 158 seats, thereby providing "Soeharto's era political machines" with more seats than the PDIP, despite the latter's electoral success.

However, the rejection was executed not solely by the Golkar Party and the F-TNI/Polri, but also by the majority of MPR members, including the victorious party in the 1999 general election, the PDIP led by Megawati, which originated as an opposition movement against Soeharto's authoritarian regime.[59] The majority of MPR members seek to preserve the existing framework, wherein judicial review is conducted exclusively by the Supreme Court and applies only to administrative regulations that are subordinate to laws. This group opposes the concept of judicial review and the establishment of a Constitutional Court, arguing that Indonesia ought to maintain parliamentary supremacy.[60]

The shift in the stance of most MPR members on establishing the Constitutional Court occurred after the dismissal of President Abdurrahman Wahid in 2001. Megawati

57 *Hendrianto,* note 22, p. 50.

58 Soeharto effectively secured his political strength in the MPR by leveraging the support of F-Golkar and F-TNI/Polri, augmented by his control over the chamber's non-elected seats. These seats included Functional Group Representatives (representing community interests) appointed by him, and Regional Representatives elected by the Provincial Regional Representative Council (*Dewan Perwakilan Rakyat Daerah Tingkat I, DPRD I*), who functioned as an extension of the executive's local authority. See *Tobing,* note 9, p. 90.

59 *Hendrianto,* note 22, p. 46.

60 *Tobing,* note 9, p. 284.

Soekarnoputri, who succeeded Abdurrahman Wahid in the presidency, expressed apprehension about the possibility of a similar outcome.[61] Thus, Megawati sought to modify the procedure for presidential dismissal in the 1945 Constitution, substituting it with a more stringent mechanism. This interest is embedded in a comprehensive academic framework aimed at purifying the presidential system, where the president may only be removed from office during their term for legal violations, not for political reasons alone.[62]

In light of that story, the President's dismissal procedure was established with strict and restrictive conditions applicable only to treason against the state, corruption, bribery, other serious crimes, misdemeanors, or if it can be proven that the President or Vice President is no longer qualified.[63] As an expression of the rule of law, the MPR also included the Constitutional Court's engagement in the procedural side to decide on claims of legal infractions by the President.[64]

However, even if the Constitutional Court finds that the President or Vice President has committed legal violations, it cannot sanction them. The 1945 Constitution grants the MPR the power to administer such punishment. Consequently, the Constitutional Court's ruling must be presented to the DPR, which will commence the trial process in the MPR to determine whether the President or Vice President should be removed from office during their term. Thus, the Constitutional Court may find the President and/or the Vice President guilty of a legal breach, but the MPR may not remove them from office.[65] Political decisions in the MPR can override Constitutional Court decisions. The design of this impeachment procedure shows that, although the Constitutional Court serves as a judicial forum, impeachment remains a political process.[66] Thus, although the Constitutional Court's involvement in this matter can be interpreted as a manifestation of the idea of the rule of law, the final decision resting with the MPR also shows that the Constitutional Court's involvement, in this case, is merely to complicate the process of presidential dismissal as a form of political insurance.

Under this impeachment process, no President has been referred by the DPR to the Constitutional Court for purported legal infractions. Indeed, allegations of legal violations or corruption scandals involving the President or the President's family have occurred multiple times. For instance, such allegations include the alleged gratification involving President Susilo Bambang Yudhoyono's family,[67] or the scandal of the misuse of the

61 *Hendrianto,* note 22, p. 48.

62 *Indrayana,* note 44, p. 117.

63 Article 7A of the 1945 Constitution.

64 Article 7B of the 1945 Constitution.

65 *Bertus De Villiers / Saldi Isra / Pan Mohamad Faiz*, Courts and Diversity: Twenty Years of the Constitutional Court of Indonesia, Leiden 2024, p. 83.

66 *Pan Mohamad Faiz / Muhammad Erfa Redhani*, Analisis Perbandingan Peran Kamar Kedua Parlemen Dan Kekuasaan Kehakiman Dalam Proses Pemberhentian Presiden, Jurnal Konstitusi 15 (2018), p. 254.

67 *Simon Butt,* The Constitutional Court and Democracy in Indonesia, Leiden 2015, p. 105.

social assistance fund by President Joko Widodo to favor Prabowo Subianto's candidacy in 2024 presidential election.[68] However, in those cases, no political party initiated the impeachment process.

Further, reinforcing the notion that the establishment of the Constitutional Court constituted a form of political insurance is that the provision concerning the Constitutional Court's role in the impeachment mechanism resembles a blank cheque, as the relevant articles about the institutional design and the authority of the Constitutional Court itself were not discussed or approved during the drafting of the impeachment article.[69] The discourse on the institutional design and authority of the Constitutional Court was undertaken following the approval of the impeachment provision.

Thus, the establishment of the Constitutional Court in Indonesia was primarily motivated by the desire to ensure that Megawati could fulfill her presidential term without the risk of dismissal by the MPR, rather than by the intention to institutionalize judicial review. Consequently, the political insurance associated with the establishment of the Constitutional Court in Indonesia exhibits a distinct pattern compared to Ginsburg's argument. In Indonesia, political insurance was not instigated by incumbent elites prior to the democratic era; instead, it was shaped by those who emerged from elections during the democratic transition. Thus, Ginsburg's concept of political insurance manifests in Indonesia with unique characteristics and subtleties.

D. Beyond Review: Political Insurance and Indonesia's Expansive Mandate

The Constitutional Court was established not only to provide Megawati with political security for her presidency until the end of her term, but also to incorporate additional political safeguards within its jurisdiction. Several political actors within the MPR have effectively integrated alternative forms of political insurance, which consequently shaped the institutional design of the Constitutional Court. These forms include "policy insurance" via judicial review, which notably offered personal protection for the military faction against retroactive human rights laws, and "institutional insurance" for nascent democratic elites, secured through the Court's specific authorities to adjudicate political party dissolutions and election disputes.

On 8 November 2001, the MPR reached a consensus on the design of the Constitutional Court, which received approval from all factions within the MPR. The Constitutional Court's institutional framework comprises:[70]

68 See dissenting opinion from Judge Saldi Isra, Judge Eni Nurbaningsih, and Judge Arief Hidayat, in The Constitutional Court Decision Number 2/PHPU.PRES-XXII/2024, dated 17th April 2024.

69 *Hendrianto,* note 22, p. 49.

70 Mahkamah Konstitusi Republik Indonesia, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Jakarta 2010, pp. 588-589. See also *Tobing,* note 9, p. 298. The institutional framework for Indonesia's Constitutional Court is explicitly delineated in Article 24C of the 1945 Constitution.

1. The judicial power is exercised by the Supreme Court and the judicial bodies under it, which include general courts, religious courts, military courts, and administrative courts, as well as a Constitutional Court;
2. The Constitutional Court must be granted the authority as the first and final court whose decisions are final and binding to reviewing laws against the Constitution, resolve disputes over the authority of state institutions granted by the Constitution, decide on the dissolution of political parties, and resolve disputes over election results;
3. The Constitutional Court is obligated to provide an opinion at the request of the DPR regarding alleged constitutional violations committed by the President and/or Vice President as regulated in the Constitution;
4. The Constitutional Court has nine constitutional judges appointed by the President, with three proposed by the President, three by the Supreme Court, and three by the DPR;
5. The Chief Justice and Deputy Chief Justice of the Constitutional Court are elected by and from among the constitutional judges;
6. To be able to become a constitutional judge, every person must have a statesmanlike attitude who has a command of the Constitution, understand the constitution and state administration, be a person of integrity and impeccable character, and not currently hold a position as a state official;[71]
7. The appointment and dismissal, as well as the requirements to become a constitutional judge, will be further regulated by law.

The authority responsible for adjudicating laws against the constitution indicates that this represents a policy insurance mechanism proposed by political elites following democratic elections. This power will ensure that all legislation aligns with the values and programs articulated in the Constitution, reflecting the principle of constitutional supremacy. However, the existence of the judicial review authority also signifies personal insurance for the old political elite (Soeharto regime loyalists), including the military group in the MPR at the time. This faction initially opposed the establishment of a Constitutional Court. Subsequently, this position shifted when the military faction reportedly influenced the MPR leaders to incorporate provisions on human rights guarantees, particularly the right against prosecution under retroactive laws, as a non-derogable right. This aspiration was later approved for incorporation into Article 28I of the 1945 Constitution. This provision is deemed essential to safeguard the judicial process for military personnel accused of human

71 A statesmanlike attitude is characterized by a respected and experienced political or government figure who demonstrates wisdom in state management and prioritizes the public interest above personal or factional concerns. *Saldi Isra*, Upaya Menyelamatkan Mahkamah Konstitusi, 3 February 2017, https://www.saldiisra.web.id/index.php/tulisan/artikel-koran/11-artikelkompas/629-upaya-menyelamatkan-mk.html (last accessed on 6 May 2025).

rights violations during Soeharto's authoritarian regime, by enhancing the protection of these rights through the establishment of judicial review in the Constitutional Court.[72]

Meanwhile, the existence of political insurance for new political elites arising from democratic general elections manifest in two additional authorities of the Constitutional Court. *First*, the authority to adjudicate on the dissolution of political parties. Indonesia has a history of dissolving political parties without judicial scrutiny. Soekarno disbanded the Indonesian Socialist Party (*Partai Sosialis Indonesia*, PSI) and the Masyumi Party,[73] whereas Soeharto consolidated religious parties into the United Development Party (*Partai Persatuan Pembangunan*, PPP) and nationalist parties into the Indonesian Democratic Party (*Partai Demokrasi Indonesia*, PDI).[74] This history indicates a violation of the constitutional guarantee of freedom of association and assembly, which has been in place since the adoption of the first version of the 1945 Constitution. The involvement of the Constitutional Court is expected to complicate the dissolution of political parties, primarily to protect the political interests of the elite and to uphold the rights of freedom of association and assembly for all individuals.[75]

Second is the authority to resolve disputes regarding election outcomes. Soeharto's authoritarian regime did not conduct elections democratically. Soeharto employed multiple military-bureaucratic apparatuses to strengthen Golkar as his political machine to secure electoral victories and maintain the presidency for 32 years.[76] Consequently, although there were three participants in general elections (PPP, Golkar, and PDI), Golkar consistently secured victory.[77] This situation prompted the establishment of guaranteed principles for organizing democratic general elections, as outlined in Article 22E of the 1945 Constitution, and the empowerment of the Constitutional Court in adjudicating disputes regarding general election outcomes.[78]

72 Tim Lindsey and Simon Butt, however, contend that there is insufficient evidence to substantiate this claim, see *Butt,* note 44, p. 49.

73 See Presidential Decree No. 200 Year 1960 Regarding the Dissolution of Masyumi Party, and Presidential Decree No. 201 Year 1960 Regarding the Dissolution of Indonesian Sosialis Party. See https://peraturan.bpk.go.id/Details/150794/keppres-no-200-tahun-1960, and https://jdih.setkab.go.id/PUUdoc/11564/Keppres2011960.htm (last accessed on 1 December 2024).

74 *Andreas Ufen*, Party Presidentialization in Post-Suharto Indonesia, Contemporary Politics 24 (2018), p. 2.

75 See Article 28 of the 1945 Constitution: "Freedom of association and assembly, expressing thoughts verbally, in writing, and so on is determined by law."

76 *Mietzner,* note 7.

77 Although Golkar served as the primary electoral vehicle in general elections, it was not legally defined as a political party during this period. The Soeharto administration capitalized on this status by barring civil servants from party membership and requiring them both to join and cast their vote for Golkar, see Ibid, pp. 86-87.

78 Article 22E(1) of the 1945 Constitution states that elections must be conducted based on the principles of direct, general, free, secret, honest, and fair, held every five years.

Meanwhile, the 1945 Constitution restricts the Constitutional Court's jurisdiction to disputes regarding election results.[79] The word "result" implies a restricted grammatical interpretation, confining the Constitutional Court's authority to the quantitative assessment of errors in vote tallying by election officials. Consequently, this clause designates the Constitutional Court as the "Calculator Court".[80] The Constitutional Court addressed its limited authority in resolving electoral disputes through Decision Number 41/PHPU.D-VI/2008, which pertained to the regional head election results in East Java Province. The Constitutional Court ruled that a recount of the voting results will never alter the election outcome if there is a structured, systematic, and massive violation of democratic principles, as fraud can occur both before and during the vote-counting process. Therefore, the Constitutional Court asserted its jurisdiction to evaluate the procedure or quality of election administration, provided that such evaluation influences the final vote tally.[81] Following the decision, the Constitutional Court can review the election process.[82]

The aforementioned case illustrates the evolution of the Constitutional Court's authority, which transpires through its own rulings. This case, while necessitating additional evidence, implies that the Constitutional Court aligns with the interests of the political elite who established it, who were apprehensive about electoral manipulation reminiscent of the authoritarian era. The Constitutional Court's expansion of authority, as illustrated above, suggests a distinct agenda in shaping Indonesia's constitutional framework, indicating its independence in operation. Nonetheless, beyond that, the theory of political insurance can elucidate the reasons behind the Constitutional Court's significant authority concerning political issues (or what may be termed the judicialization of politics), in addition to its primary role in conducting judicial review.

E. Conclusion

While the establishment of constitutional courts is often hailed as a triumph of democratic principles and the rule of law during democratic transitions, this article demonstrates that the creation of Indonesia's Constitutional Court was driven primarily by pragmatic political calculations rather than altruistic or idealistic motives. The Indonesian experience reveals a more nuanced implementation of the "political insurance" theory. Contrary to the traditional framework where political insurance is established by incumbent elites from the authoritarian era to shield themselves from future retaliation, the Indonesian case exhibits a divergent pattern: this "insurance" was instigated by newly emerged political elites,

79 See Article 24C(1) of the 1945 Constitution.

80 *Harry Setya Nugraha*, Redesain Kewenangan Mahkamah Konstitusi Dalam Penyelesaian Sengketa Perselisihan Hasil Pemilihan Umum Presiden Dan Wakil Presiden Di Indonesia, Jurnal Hukum Ius Quia Iustum 22 (2015), p. 422.

81 See The Constitutional Court Decision No. 41/PHPU.D-VI/2008.

82 See The Constitutional Court Decision No. 2/PHPU.PRES-XXII/2024.

legitimized by democratic elections, as a strategy to navigate the political uncertainties inherent in a democratic transition.

Empirically, the institutional design of Indonesia's Constitutional Court represents a synthesis of the "political insurance" and "hegemonic preservation" theories. The "political insurance" element is evident in the Court's authority to adjudicate election result disputes and political party dissolutions, mechanisms that enable elites to contest political outcomes within the judicial realm. Meanwhile, the convergence of "political insurance" and "hegemonic preservation" is manifested in the stringent constitutionalization of presidential impeachment procedures. By mandating the Court's involvement to increase the procedural complexity of impeachment, this design explicitly aimed to prevent a recurrence of the political maneuvers that led to the dismissal of President Abdurrahman Wahid. This theoretical amalgamation underscores that the constitutional design was driven more by pragmatic motives to entrench power than by a commitment to safeguarding abstract constitutional values.

Ultimately, this study offers a critical assessment of the judicialization of politics in transitional democracies. While the Court has successfully functioned as a mechanism for democratic consolidation by resolving high-stakes disputes, its genesis as a product of elite negotiation creates inherent vulnerabilities regarding judicial independence. Specifically, Indonesia's tripartite appointment mechanism, while preventing the dominance of a single branch, underscores the transactional foundations of the Court's independence. Consequently, while the Constitutional Court stands as a guardian of the constitution, its institutional trajectory remains continuously shaped by the tension between its mandate for legal impartiality and the pragmatic political origins of its formation.

REPORTS / BERICHTE

A Constitution to the Rescue? The President of Madagascar in the Context of Recent Political Turmoil and Constitutional Practice

By *Dimitrios Parashu*[*]

Abstract: Madagascar experiences, once more, political unrest and military intervention in its political life. President Rajoelina, a major political figure especially since 2009, lost his power in October 2025, and it is presently still not clear towards which direction Madagascar will move in the upcoming weeks and months. The present, short report aims at analysing the application of Madagascar's Constitution of 2010 in regard to the head of state, as well as the role which said application may have played in the context of current political turmoil. A special section focusses on relevant case law of the Madagascar High Constitutional Court.
Keywords: President of Madagascar; Constitutional Practice; Political Turmoil

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A. Introduction

Madagascar's latest Constitution[1] dates back to 2010, and was legitimised through a referendum[2] that granted the institution of the President of Madagascar increased powers.[3] It marked the beginning of the Fourth Republic of Madagascar, following the actions of Andry Rajoelina, the former mayor of the capital city of Antananarivo, who in 2009—backed by military—overthrew the country's president Marc Ravalomanana.[4]

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1 The original text of the constitution can be accessed here https://mjp.univ-perp.fr/constit/mg2010.htm#3 (last accessed on 13 December 2025)

2 BBX Madagascar votes in controversial referendum, 17 November 2010, https://www.bbc.com/news/world-africa-11773177 (last accessed on 9 December 2025).

3 *Laszlo Trankovits,* Constitutional referendum passes in Madagascar, Mail & Guardian, 23 November 2010, https://mg.co.za/article/2010-11-23-constitutional-referendum-passes-in-madagascar/ (last accessed on 9 December 2025).

4 *Farouk Chothia / Wedaeli Chibelushi / Natasha Booty / Sammy Awami*, As it happened: Madagascar military says it has seized power, BBC, 13 October 2025, https://www.bbc.com/news/live/cqxr3y3788pt (last accessed on 9 December 2025).

Since then, Rajoelina had been the most powerful and prominent politician in Madagascar, first acceding to the country's presidency on an unelected, mere transitional basis from 2009 to 2014,[5] and later being elected as Madagascar's President in 2018[6] and again in 2023[7]. In October 2025, he was overthrown by the military, following several weeks of protest (partly also due to—unproved—allegations of electoral malpractice) by the population.[8] This followed a period of the population's growing dissatisfaction in regard to various areas of government—among others the serious issue of poverty.

Right now, the situation seems unclear, with the military exercising *de facto* control and Rajoelina apparently having left the country after unsuccessfully attempting to dissolve the lower parliamentary chamber which was about to (and in the end did) impeach him:[9] This impeachment took place since the President was considered by the vast majority of lawmakers to not having fulfilled his constitutional duties.[10]

Was that actually the case? And how was the relevant practice from 2010 onwards? A look into the Constitution might help us to evaluate the situation. The constitutional *status quo* is most probably subject to change, due to the depicted, ongoing developments in Madagascar.

B. General Constitutional Elements about the Presidency

Following Article 44 of the Constitution, the President belongs, together with the government, *expressis verbis* to the executive branch of Madagascar. The President as the head of state,[11] guarantees—through his or her consecutive, arbitrating role—not only the general functionality of public authorities but also maintains Madagascar's independence, unity and territorial integrity. The necessity of the general functionality of public authorities, as well

5 Madagascar Tribune, Brève biographie, 23 March 2009, https://www.madagascar-tribune.com/Breve-biographie,11482.html (last accessed on 9 December 2025).

6 BBC, Madagascar ex-leader Andry Rajoelina wins presidential run-off vote, 27 December 2018, https://www.bbc.com/news/world-africa-46694430 (last accessed on 9 December 2025).

7 *Gloria Aradi,* Andry Rajoelina re-elected as Madagascar president in contested poll, BBC, 25 November 2023, https://www.bbc.com/news/world-africa-67517143 (last accessed on 9 December 2025).

8 *Sammy Awami / Danai Nesta Kupemba,* Madagascar military says it has seized power as president moves to 'safe place', BBC, 14 October 2025, https://www.bbc.com/news/articles/cn8xjjdgl8vo (last accessed on 9 December 2025).

9 *Nqobile Ntshangase / Brian Inganga / Sarah Tétaud / Gerald Imray,* Madagascar's president is ousted in a military coup after weeks of youth-led protests, AP, 14 October 2025, https://apnews.com/article/madagascar-protests-rajoelina-ab1e1eb1aca45fe7e80e81314ebdb0c6 (last accessed on 9 December 2025).

10 Reuters,) Madagascar President Rajoelina impeached by lawmakers - Reuters witness, 14 October 2025, https://www.reuters.com/world/africa/madagascar-president-rajoelina-impeached-by-lawmakers-reuters-witness-2025-10-14/ (last accessed on 9 December 2025).

11 Art. 45 of the Constitution.

as the country's unity, seemed to be in question for quite an amount of time now, and accelerated current developments.[12]

The President's duties are incompatible with any elected public office, any other professional activity, even with any possible activity within a political party.[13] The latter element appears to have been handled quite questionably in the case of President Rajoelina though. He has been—for quite a long time—a leading figure of the social democratic Tanora Malagasy Vonona (TGV) party, which since 2023 appeared in an even more personalised form as "Isika Rehetra Miaraka Amin'i Andry Rajoelina" (IRMAR).[14] That political party has also enjoyed an increasing share of votes since the general elections of 2013, securing first place in all three general elections under the *aegis* of the 2010 Constitution (2013, 2019, 2024).[15]

C. The Constitution and Presidential Elections

The President's election—temporary incapacities to fulfil such duties or respective vacancies of such office aside—[16], is conducted by direct universal suffrage for a five-year term, which may be renewed once.[17] It must take place at least thirty days and at most sixty days before the expiration of the term of office of an incumbent president.[18]

As Rajoelina had already served as a transitional unelected, merely *de facto* President between 2009 and 2014[19] and was elected to the presidency in 2018,[20] it seemed questionable whether he would have been constitutionally allowed to run again for the office in 2023.[21] Due to this, the opposition in Madagascar boycotted that election heavily,[22] and the absence of his major opponents obviously helped him to be re-elected.

Any successful presidential election in Madagascar requires an absolute majority of the votes cast in the first round. If such majority cannot be obtained, the President is elected

12 *Awami / Kupemba*, supra, note 8.

13 Art. 49 of the Constitution.

14 Madagascar Tribune, note 5.

15 *Dimitrios Parashu,* Geschichte der Parlamentswahlen der Welt; Teil IV. Afrika: 17. Madagaskar (unpublished)

16 Art. 50 et seqq. of the Constitution..

17 Art. 45 of the Constitution.; See also e.g. the Organic Law No. 2018-009 concerning the Election of the President of Republic of 10 April 2018; and generally regarding comparable office terms on the African continent, *Micha Wiebusch / Christina Murray,* Presidential Term Limits and the African Union, Journal of African Law 63 (2019), pp. 131-160.

18 Art. 47 of the Constitution..

19 Madagascar Tribune, note 5.

20 BBC; note 6.

21 *Basillioh Rukanga,* Madagascar court confirms Andry Rajoelina's election as president, BBC, 1 December 2023, https://www.bbc.com/news/world-africa-67586565 (last accessed on 9 December 2025).

22 Ibid.

in the second round—held no later than thirty days after the official announcement of the results of the first round—by a simple majority of the votes cast among the two candidates who received the highest number of votes in the first round.[23] A second round win occurred for Hery Rajaonarimampianina in 2013[24] and for Rajoelina in 2018[25]; the latter being re-elected in the first round in 2023.[26]

Furthermore, the Constitution provides for the general—which has so far not been of significant relevance in presidential elections—possibility of electoral procedure postponements in the event of a candidate's death before a round of voting, or in the event of *force majeure* (if certified by the High Constitutional Court).[27]

In terms of relevant eligibility, any such candidate must be of Malagasy nationality and must further enjoy full civil and political rights.[28] Some discussion took place following Rajoelina's acquisition of the French nationality in 2014,[29] which according to Art. 42 of the Ordonnance about the Code of Malagasy nationality, should have barred him from being a candidate.[30] Irrespective of this, the Constitutional Court did not bar him from participating in elections as a candidate.[31] It was only in late October 2025, after his political downfall, that the loss of Rajoelina's Malagasy nationality was officially declared.[32] In subsequent terms of *checks and balances*, there has been some criticism of constitutional judges (criticism which has to do with the very creation of constitutional judges and whether this creation allows for them to indeed act as a balancing institution between powers) by constitutional science.[33]

23 Art. 47 of the Constitution.

24 VOA News, Madagascar Court Confirms President-Elect, 17 January 2014, https://www.voanews.com/a/reu-madagascar-court-confirms-ex-finance-minister-rajaonarimampianina-president-elect/1832208.html (last accessed on 9 December 2025).

25 BBC, note 6.

26 *Aradi*, note 7.

27 Art. 47 of the Constitution, see further about the High Constitutional Court in this paper's context, part E.

28 Art. 46 of the Constitution, which is supplemented by Ordonnance n° 60-064 concerning the Code of Nationality of 22 July 1960.

29 Through the décret n°046/881 of 19 November 2014, published in the Journal officiel français on 21 November 2014; cf. further, for instance, Newsmada, Andry Rajoelina: perte de la nationalité malgache, 25 October 2025, https://newsmada.com/2025/10/25/andry-rajoelina-perte-de-la-nationalite-malgache/ (last accessed on 9 December 2025).

30 Ibid.

31 See especially *Ramalina Ranaivo Mikea Manitra*, Constitutional Fragility and Dual Nationality Disputes: Legal Implications of Madagascar 2023 Presidential Election, Constitution Journal 4 (2025), pp. 93-120 (96).

32 Newsmada, note 29.

33 See, for instance, *Éric M. Ngango Youmbi,* Le juge constitutionnel et la rationalisation du régime politique malgache sous la IV République, Revue du droit public 4 (2017), pp. 999-1027 (999 et seqq.).

Regarding age limitations, a presidential candidate must be at least thirty-five years old—the deadline being on the closing date for applications—and must have further resided within the territory of the Republic of Madagascar for at least six months prior to the deadline for applications.[34] Apparently, that was the case and these respective criteria were fulfilled by relevant candidates in the Madagascar presidential elections since 2013. But this requirement obviously excludes potential opposition politicians living in exile.

Electoral transparency *per se* (including financial aspects)[35] is emphasised quite extensively through the Constitution, which requires any incumbent president—who wishes to be re-elected—to resign from office sixty days before the date of the presidential election.[36] During this period he/she is being replaced either by the Senate's president or the government collectively (if the Senate's president should stand for election him-/herself).[37] Such resignations occurred in the case of President Hery Rajaonarimampianina in 2018, when he resigned in order to seek re-election[38] (which he lost, failing even to reach the second round),[39] as well as in the case of incumbent President Rajoelina, who resigned in 2023[40] in order to seek (eventually successfully in his case)[41] re-election in that year. Furthermore, presidential candidates holding public office are generally prohibited from using—for electoral propaganda purposes—any means or prerogatives available to them by virtue of their office.[42]

Transition of power from an outgoing to a newly elected President shall take place as smoothly as possible and is therefore also regulated by the Constitution. The Constitution obliges a sitting president who is not a candidate in the elections to remain in office until the inauguration of the successor.[43] This allows for the official transfer of power between the outgoing and the newly elected president, following the latter's oath of office.[44] Such

34 Art. 46 of the Constitution.

35 See generally *Miarintsoa Rasamoely,* Droit constitutionnel étranger. Le contrôle des comptes de campagne électorale à Madagascar : d'urgentes clarifications pour réduire les risques d'une crise politique, in: Revue française de droit constitutionnel 134 (2023), pp. 479-498.

36 Art. 46 of the Constitution.

37 Ibid.

38 *Rivonala Razafison,* Madagascar president resigns ahead of November poll, The East African, 8 September 2018, https://www.theeastafrican.co.ke/tea/news/southern-africa/madagascar-president-resigns-ahead-of-november-poll-1401984 (last accessed on 9 December 2025).

39 BBC, note 6.

40 Reuters, Madagascar president resigns ahead of polls in November, 10 September 2023, https://www.reuters.com/world/africa/madagascar-president-resigns-ahead-polls-november-2023-09-10/ (last accessed on 9 December 2025).

41 *Aradi*, note 7.

42 Art. 46 of the Constitution.

43 Art. 47 of the Constitution.

44 Art. 48 of the Constitution.

transfer of power took place following the 2013[45] as well as the 2018[46] presidential elections.

D. The Constitution and Presidential Powers

The presidential powers are constitutionally limited,[47] and most of the presidential acts need to be countersigned.[48] Typical presidential competences include exercising the right of pardon and conferring decorations of Madagascar;[49] accrediting and recalling ambassadors;[50] being the supreme commander of the Armed Forces (assisted by a High Council of National Defense);[51] and promulgating laws (within three weeks following the transmission by the National Assembly of a definitively adopted law), given a veto possibility.[52]

Politically crucial is the President's possibility to appoint, as Prime Minister, a person nominated as such by the majority party in the National Assembly—and, on the Prime Minister's proposal, the further government members.[53] The very same constitutional article allows for the president to also terminate the term of office of the Prime Minister in cases of the latter's resignation or misconduct. The President's cooperation with the council of ministers shall be a close one, e.g. leading to the ability to sign ordinances or decrees deliberated in the council.[54] This provision seems to have been fulfilled generally so far.

Constitutional practice during the Fourth Republic had shown that presidents used to appoint independent politicians as prime ministers (backed by parliamentary majority), like Roger Kolo (2014[55]-2015), Olivier Solonandrasana (2016-2018) and Christian Ntsay (2018-2025).[56] In autumn 2025, the President had announced that the office term of Ntsay would be terminated, in order to address the widespread protests against government[57]—but the military coup occurred and created its own realities. In the case of calamities during

45 *Rukanga*, note 21.

46 BBC, note 6.

47 Art. 45 of the Constitution.

48 Art. 62 of the Constitution.

49 Art. 58 of the Constitution.

50 Art. 57 of the Constitution.

51 Art. 56 of the Constitution.

52 Art. 59 of the Constitution.

53 Art. 54 of the Constitution.

54 Art. 55 of the Constitution.

55 BBC, Madagascar: Roger Kolo, nouveau Premier ministre, 11 April 2014, https://www.bbc.com/afrique/region/2014/04/140411_roger_kolo_premier_ministre_madagascar (last accessed on 9 December 2025).

56 *Parashu*, note 15.

57 Le Monde, Madagascar president sacks government over deadly protests, 29 September 2025, https://www.lemonde.fr/en/le-monde-africa/article/2025/09/29/madagascar-s-anti-government-protests-flare-up-as-police-respond-with-tear-gas_6745896_124.html (last accessed on 9 December 2025).

the Kolo government,[58] the Prime Minister may have been replaced by a military general—Jean Ravelonarivo—in 2015 due to political reasons of government stability, but President Rajaonarimampianina followed a relevant proposal by the parliamentary majority by his appointment.[59]

Interestingly, the President may dissolve the National Assembly, albeit the Constitution does not enumerate any relevant reasons or criteria which must be fulfilled. Only after informing the Prime Minister and consulting the presidents of both legislative chambers, general elections can be held at least sixty (and at most ninety) days after the declaration of dissolution.[60] The Constitution forbids any further dissolution within two years following such elections.[61] Such dissolution, before Rajoelina's recent unsuccessful attempt to dissolve the lower parliamentary chamber, which ultimately impeached him, [62] had not taken place in Madagascar under the aegis of the 2010 Constitution; Rajoelina had actually dissolved both chambers, without a relevant constitutional basis but he was backed mainly by the military in 2009 before the current Fourth Republic of Madagascar commenced.[63]

E. Conceptual Section: The Role of a Constitutional Court as *gardienne des institutions*—The Madagascar Case

Within the Constitution,[64] the High Constitutional Court (*Haute Cour Constitutionelle*, hereinafter HCC) is entrusted with a significant role in safeguarding, among other, the institutional provisions about the presidency—in order to help maintaining the rule of law as well as political stability: To fill, where necessary, constitutional *lacunae.*

Consecutively the HCC had to become particularly active in October 2025, in light of the aforementioned political developments.

I. Décision n°10-HCC/D3 of 14 October 2025

On 14 October 2025, the HCC declared the offices of President of the Republic (as well as the President of the Senate) vacant, according to the provisions of Art. 52 of the Constitution, in order to serve regular and continuous functioning of public authorities and national

58 BBC, Madagascar “corruption inacceptable”, BBC, 4 July 2014, https://www.bbc.com/afrique/region/2014/07/140704_madagascar_corruption (last accessed on 9 December 2025).

59 BBC, Madagascar a un nouveau Premier ministre, 15 January 2015, https://www.bbc.com/afrique/region/2015/01/150115_madagascar-premier-ministre (last accessed on 9 December 2025).

60 Art. 60 of the Constitution.

61 Ibid.

62 *Ntshangase / Inganga / Tétaud / Imray*, note 9.

63 BBC, Madagascar officers in coup claim, 17 November 2010, https://www.bbc.com/news/world-africa-11776570 (last accessed on 9 December 2025).

64 Art. 114 et seqq. / 46 et seqq. of the Constitution.

unity.[65] This was justified by the fact that president Rajoelina was deemed as not being able to fulfil the constitutional missions entrusted to him. After acts of repression carried out by law enforcement against demonstrators from 25 September until 11 October 2025, he was no longer present on the Republic's territory, and he was charged with passive abdication of power. The constitutional judges determined that such a power vacuum at the highest level of the State, which would effectively undermine the constitutional value of the President of the Republic' duties, could not be allowed to continue.

It was further decided that the current government was unable to fulfil the functions of President of the Republic and that it was necessary to entrust the competent military authority, represented by Colonel Michaël Randrianirina, with the functions of Head of State.

II. Décision n°11-HCC/D3 of 22 October 2025

The HCC declared in October 2025 that there was no further need to decide on a motion which it had received in order to impeach President Rajoelina, given the aforementioned case as well as Art. 52 (1) of the Constitution, which emphasises that any kind of presidential vacancy is declared by this very Court.[66]

III. Decision n°12-HCC/D3 of 22 October 2025

In another decision the HCC[67] declared that Rajoelina's request for the Court to reconsider its previous decisions and thereby restore "constitutional order" should be rejected, on the grounds that Art. 120(3) of the Constitution provides that HCC judgments and decisions must be reasoned and are not subject to appeal.

Seen altogether, the consecutive three decisions mentioned above are consequent to the letter of the Constitution (thereby not justifying certain general criticism[68] as well as a potentially perceivable[69] HCC partiality—otherwise Rajoelina would most probably have returned to office meanwhile) and they seemingly helped for an at first sight smooth

65 Décision n°10-HCC/D3 du 14 octobre 2025, HCC (published under the auspices of Samuel Ralison, Greffier en Chef).

66 Décision n°11-HCC/D3 du 2 octobre 2025, HCC published under the auspices of Samuel Ralison, Greffier en Chef).

67 Décision n°12-HCC/D3 du 22 octobre 2025, HCC (published under the auspices of Samuel Ralison, Greffier en Chef).

68 Midi Madagasikara, Pr Raymond Ranjeva : « La HCC n'applique pas à la lettre la Constitution », Midi Madgasikara, 11 November 2023, https://midi-madagasikara.mg/pr-raymond-ranjeva-la-hcc-napplique-pas-a-la-lettre-la-constitution/#google_vignette (last accessed on 9 December 2025).

69 Art. 114 of the Constitution asks for three of the (in total nine) HCC members being appointed by the President of the Republic, as well as two being elected by each of the two legislative chambers, (which in recent past usually mirrored presidential majorities), only further two of the members being elected by the Supreme Council of the Magistrature.

political transition without further victims. The fact that the military was given power is *per se* problematic; given the recent political history of Madagascar it will likely evolve into a democratic, constitutional system—as happened after 2009/10. The HCC could be seen as a safeguard for this system.

F. Summing Up

In total, the 2010 Constitution enhanced presidential powers in Madagascar, giving the head of state a certain edge in its relationship with the government. It seems that the country's presidents have not taken advantage of the highly political, constitutional possibilities to dissolve the parliament prematurely, and they respected parliamentary majorities whenever appointing prime ministers.

Questions of constitutionality have to be addressed in regard to the number of President Rajoelina's office terms, his obtainment of the French nationality in 2014 as well as his close connection—*in praxis*—to a political party. Besides, the ever-growing poverty and popular dissatisfaction have led Madagascar to the current turmoil. The Constitution, as safeguarded by the HCC, provided for a solution of calm political transition at first sight. But the overall outcome, and possible new developments in regard to creating a new Constitution, remain unclear. Despite this, the country's suspension by the African Union (AU) from all its bodies needs to be recalled.[70] 2025 has a strong resemblance to 2009, and Rajoelina has lost political power in the very way he had gained it.

70 Africanews, African Union suspends Madagascar from the bloc following military coup, 16 October 2025 ,https://www.africanews.com/2025/10/16/african-union-suspends-madagascar-from-the-bloc-following-military-coup/ (last accessed on 9 December 2025).

BOOK REVIEWS / BUCHBESPRECHUNGEN

Sabrina Ragone and Guido Smorto (eds.), **Comparative Law: A Very Short Introduction**, Oxford University Press 2023, 176 pages, £9.99, ISBN 9780192893390

The foreign—whether it comes "in" laws or cases, legal doctrines or practices, legal orders or cultures, or appears in any other form—does not turn to scholars and maybe even less to students, an easily readable face they merely have to decipher.[1] In the symbolic space of legal comparison, comparatists are confronted and have to deal with the other one might tentatively address as a "phenomenon", which, by definition, is unfamiliar, elusive, often a puzzle or an enigma. Therefore, whatever one believes to see and studies "out there", in a comparative perspective or not, calls for an open mind, a willingness to unsettle settled knowledges, a modicum of humility, and, in the encounter with the law beyond one's ken, tolerance of diversity. As one approaches the foreign—taking Clifford Geertz's advice and adopting his method[2] to "bring it very close" and "keep it far away"—one is well-advised to neither walk on linguistic stilts nor demonstrate an abundance of pixilated eruditeness, which only betrays an excessive love for "the own", if not the self, and condescension towards what appears to be foreign, unfamiliar or strange—and may be more interesting.

Where erudition splashes in the jacuzzi of acquired knowledge hoping for depth, and the treatise and quite-long article promise detail and context, albeit not always with success,[3] a "Very Short Introduction" (VSI) is meant to—and as a matter of fact: the one here under review does—provide basic information without being partisan to a "school" or "tradition" nor tied to an acquired and settled "body of knowledge" or the self. And the authors of Oxford's "Comparative Law. A Very Short Introduction" achieve just that, which is no small feat in the world of lengthy, at times narcissistic, academic publications.

The series of VSI follows a concept, which Sabrina Ragone and Guido Smorto had to accept and comply with, for better or for worse: "very short" and "introduction". Accordingly, they bent over their task—not to write a fancy monography or comprehensive textbook, if somewhat smaller in size, or a two-hundred-page article with a thousand and five hundred footnotes aimed like bullets at the guileless readers—but to write a succinct study book for the hands, eyes and the (not to be criticized) attention span of students. And that is exactly what the authors did—implement, within the range of their discretion and choice, the publisher's parameters and meet the legitimate expectations of their collegiate readers. Being sensitive comparative law teachers themselves, they were obviously aware

1 *Michael Foucault*, L'ordre du discours, Paris 1970, pp. 36 ff.

2 *Clifford Geertz,* Local Knowledge: Fact and Law in Comparative Perspective, in: Clifford Geertz (ed.), Local Knowledge: Further Essays in Interpretive Anthropology, New York 1983, pp. 17–234.

3 E.g. *Uwe Kischel*, Comparative Law, Oxford 2019. For a critical view see *Günter Frankenberg,* Rechtsvergleichung – A New Gold Standard?, ZaöRV 76 (2019), pp. 1001–1009.

of the classroom setting and framing. No wonder their book found a market. The fact that a magisterial mind might be disappointed with the result, should be of no concern to the authors. The former needs not be ever so briefly instructed about "What is comparative law?" (Ch.1), "Classifying legal systems" (Ch. 2), "Legal traditions" (Ch. 3), "Methods and approaches" (Ch. 4), "Sameness and difference" (Ch. 5), "The uses of comparative law" (Ch. 6) and comparative law as "an evolving field" (Ch. 7). Because the authorities of the discipline can be expected to know already and a lot more than what an inevitably cursory "Very Short Introduction" is designed to offer.

It goes without saying that the "Very Short" has its price. Quite different from the realm of academic elaboration, scientific in-depth analysis and layered narratives, authors of VSI have to make do with fewer words and to remain simple and more understandable for a large public. As a matter of fact, they are called upon to take shortcuts to and through problems and deal with gaps, while remaining humble. All of this for the sake of teachability and learnability in the classroom. On the bright side, Ragone and Smorto's "Introduction"—their mostly narrative style, their short presentations and frequent references to a more critical or non-mainstream reading of comparative law's methods, theories and histories—avoids the display (so common in academia) and arrogance (that goes along with it) of knowledge accumulated in a long and lettered career.

On the inevitably darker side of these virtues, more advanced readers might miss one or the other excursion to anthropology; a more detailed discussion of "cognitive control"[4] — the quite orthodox technique of legal comparison associated with the dominant schools of legal taxonomy and functionalism[5]—; a more skeptical review of the "rigorous standards" and "proper methodology" (referred to in chapter 4) and, more generally, and a critical appreciation of the concepts of the "universal" and "universalism". The latter tends to be invoked, for example, to generate common principles, if not ideal legal forms, that are believed to constitute something like the "common core"[6] of different, yet converging legal systems.[7]

While such side trips beyond the palisade of mainstream comparative law would certainly be enlightening (if not more), the authors of the "Introduction" can plausibly argue that they are expected to pay attention to and discuss the very mainstream approaches and their tools first and lead students to and familiarize them with the prevailing mindset and

4 Cognitive control is discussed in *Günter Frankenberg*, Critical Comparisons – Re-thinking Comparative Law, Harvard International Law Journal 26 (1985), pp. 411-456; and *Günter Frankenberg*, Comparative Law as Critique, Cheltenham 2016, pp. 86 – 96.

5 Especially in the chapters 2 and 4. See, e.g., the classical texts written by *René David / John E.C. Brierly*, Major Legal Systems of the World Today, Mytholmroyd 1985; and *Konrad Zweigert / Hein Kötz*, Introduction to Comparative Law, Oxford 1998.

6 See Rudolf Schlesinger, Formation of Contracts. A Study of the Common Core of Legal Systems, New York 1968, and the project of his disciples, see *Mauro Bussani / Ugo Mattei* (eds.), Making European Law. Essays on the Common Core Project, Trento 2000.

7 See *Frankenberg*, Critical Comparisons, note 4; and Comparative Law as Critique, note 4, pp. 86 – 96.

techniques. Their task, in other words, is to lead students through the topography of the field before inviting them to mount the high horse and ride toward the horizons of critical comparison—and beyond.

Ragone and Smorto succeed on both counts: "very short" and "introduction". They present an informative tableau of mainstream thoughts and practices while also leading the horse of criticism, if not yet fully saddled, into the classroom. *Ergo*, they guide their readers from what is often taken to be the founding moment of the discipline, disputably at the (Franco-Allemand) Paris *Congrès* in 1900—Montesquieu, Maine and others permitting—to some of today's academic centers of comparative legal practice, their obsessions and the field's claimed "evolution".

Accordingly, they make students aware of the various legal "traditions"; and it is particularly commendable that they explain not only in passing the "chtonic" tradition, which is the key to the understanding of Glenn's theory and differentiates his work from conventional accounts of legal traditions.[8] Likewise, the chapter on the "uses of comparative law" complements the landscape of the practical dimensions of comparison, providing examples also from "non-usual-suspects" jurisdictions.

While no one approaching the discipline can easily overlook or bypass the mainstream preoccupation with similarity, Ragone and Smorto gently, yet convincingly tone down this obsession by casually referring to "integrative and contrastive attitudes toward comparison" (p. 97) and, now in passing, turn Zweigert and Kötz's categorical imperative—the phenomena under comparative review *must* be similar, that is, legal solutions *must* reach the same or similar results—into a more pragmatic and context-sensitive rule of thumb. Establishing also difference/diversity as centers of comparative attention enables them to open up the perspective to comparative law's colonialist practices, lift the veil from the discipline's supposedly "innocence of method", and begin to deconstruct its implied, if not professed, political agnosticism.

These examples are meant to illustrate that, throughout the book, the authors allow their readers to look into the toolbox of mainstream comparative law, with its crucial, and often questionable, concepts and categories, methods and approaches—such as *tertium comparationis* and function, classification and taxonomy, the search for universals or "common cores", and more. Importantly, most chapters, once the table of the mainstream has been set, the authors then turn to critical insights[9] for dessert—introducing references to, or detailed descriptions of, ideas and practices that deviate from or directly confront mainstream modes of legal comparison.

8 Still impressive, if contested: *H. Patrick Glenn*, Legal Traditions of the World, Oxford 2004. Chtonic is a tradition developing through experience, orality and memory, an ancestral tradition or culture.

9 Chapter 4 falls outside this scope with a presentation, unfortunately not guided by an organizing "red thread", a random assortment of "approaches", which are not clearly distinguished from methods, and an unconcern for the many critical voices and projects that brighten—and bring to life—the state of the (comparative legal) art today.

For example, they call into question the widely adopted concept of "legal transplant" (rebaptized as "legal transfer") and subject the functional method to analytical scrutiny. More importantly, they unmask the familiar ethnocentric bias that drives especially the taxonomies of mainstream of comparative law. The dichotomy of the West v. the Rest (of the world) and the perspective of the Global North v. Global South, they argue, invariably lend themselves to establishing the supremacy of "Western law".[10]

A VSI can hardly be expected to do more than familiarize readers with a field and kindle their interest—in comparative law (rather than in its intra-disciplinary battles). Writing with a light touch, Sabrina Ragone and Guido Smorto, achieve precisely this, without ever losing sight of their pedagogical task. As a result, they present a first "take"—and one that invites further exploration. The favorable appraisal reported from the market and in classrooms attest to the authors' success. As a next step, this VSI encourages the readers to continue the study of comparative law—and, in due course, to "rethink"[11] the ways and means, as well as the masters of legal comparison;[12] try out "critical" comparative projects;[13] and, on a sunny day, to venture toward the "dark side" of comparative law, or even carry light into the darkroom of "negative comparative law".[14]

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10 Quite instructive and embarrassing: *René David*, On the Concept of 'Western' Law, Cincinnati Law Review 52 (1983), pp. 126–135.

11 On rethinking see *Saul Levmore*, Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law, Tulane Law Review 61 (1986), pp. 235-287; *Annelise Riles* (ed.), Rethinking the Masters of Comparative Law, Oxford 2001; *Simone Glanert / Alexandra Mercescu*, Rethinking Comparative Law, Cheltenham 2021; *Jaakko Husa*, Rethinking Comparative Law, Amicus Curiae (2022), pp. 381–387; *David Nelken / Claire Hamilton*, Rethinking Comparative Criminal Justice, Cheltenham 2022, and more rethinking exercises.

12 See *Riles*, note 11.

13 See only *Jorge González-Jácome*, The Critical Project in Comparative Law, 24 October 2025, I•CONnect, http://www.iconnectblog.com/the-critical-project-in-comparative-law/ (last accessed on 17 December 2025); *Mathilde Cohen*, A Critical Critique of Comparative Law, Jotwell (2025); *Wendy Brown / Janet Halley*, Left Legalism/Left Critique, Durham 2002; *John Bowen / Roger Petersen*, Critical Comparison in Politics and Culture, Cambridge 2010; *John Cairns / Olivia F. Robinson* (eds). Critical Studies in Ancient Law, Comparative Law and Legal History, Berlin 2013; *Pierre Schlag,* Critical Legal Studies, Oxford International Encyclopedia of Legal History, Oxford 2009; and *Frankenberg*, note 4 and 7; and a variety of other critical approaches.

14 See *Jedidiah Kroncke*, Orientalism, Occidentalism, and the Control of Law: The Dark Side of Comparative Law, Ancilla Iuris (2021), pp. 172 – 188; *Pierre Legrand*, Negative Comparative Law, Cambridge 2022.

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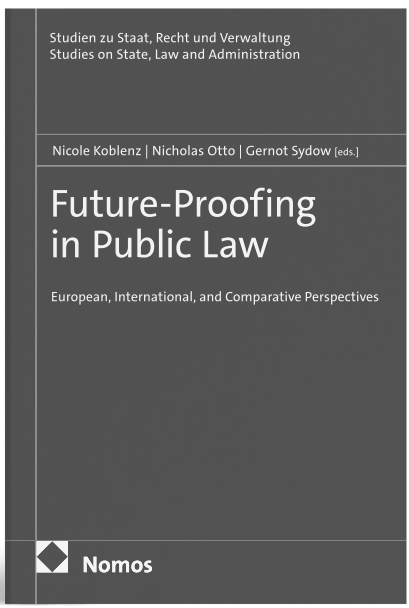

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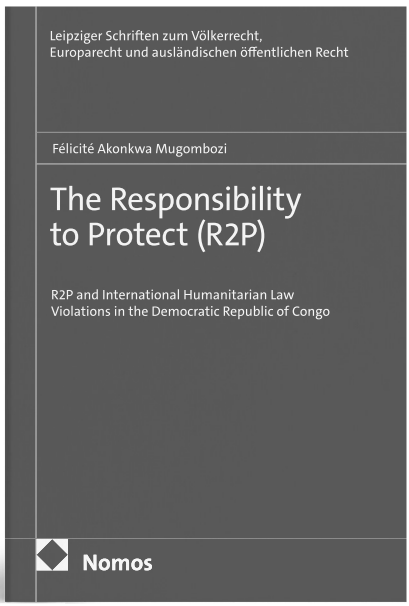

Félicité Akonkwa Mugombozi

The Responsibility to Protect (R2P)

R2P and International Humanitarian Law Violations in the Democratic Republic of Congo

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