

Editorial: Cities and the Global South

By Erika Arban*

A. Cities in Federal Theory

This special issue of VRÜ/WCL takes as its point of departure a workshop that I convened in June 2019 at Melbourne Law School titled ‘Cities in Federal Theory’ (‘2019 Workshop’). The main purpose of the workshop was to gather junior and senior scholars from all over the world to discuss a largely understudied subject in comparative (federal) constitutional law: the role and place of cities in federal constitutional theory. The lack of scholarly literature and attention on the topic is quite surprising, considering the increased role played by cities at national and international level. Being perhaps one of the first academic meetings focusing on cities as federal constitutional subjects, the workshop was very successful and thought-provoking. The overall message was that time had come for constitutional law scholars to look at cities from a fresh perspective: in fact, because of the political and economic visibility that they have gained especially over the past few decades, cities should no longer be seen as ‘creatures of their states’ but as autonomous legal entities. The lively and engaging conversation among speakers elicited several questions and spelled out avenues for future research. Among the most interesting issues raised in Melbourne, the following were considered particularly critical: what is the definition of ‘city’ for purposes of federal constitutional theory? which legal/constitutional role should cities enjoy, and how law could assist in this endeavour? would the constitutional entrenchment of cities be helpful to expand their role, powers, and visibility? what is the relationship between cities, local governance, federalism, and subsidiarity? is federalism good or bad for cities, considering that it neglects them as independent legal subjects but at the same time it encourages decentralization? how to deal with the rigidity of many federal constitutions, especially older ones, when it comes to changing the role and place of cities? how can cities deal with the challenges posed by new technologies and environmental changes? Most importantly, however, what emerged from the discussion was the need to develop a more robust theoretical framework for (federal) constitutional scholars in which to situate the discussion on the role and place of cities in federal constitutional theory.

As noted, the world is becoming more urbanized and cities are growing and expanding their visibility both domestically and internationally. As I have argued elsewhere,¹ such in-

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1 Erika Arban, Metropolitan cities, federalism and socio-economic challenges, *Rivista di Diritti Comparati* special issue, Economic Inequality as a Global Constitutional Challenge 1 (2019), p. 266.

creased prominence of urban areas is premised on a variety of factors. First, there is a demographic component, with the exponential growth of several cities around the world, particularly – but not exclusively – in the Global South. This has been favoured by increased natality rates and migratory patterns, among other things. In this regard, it is worth noting that the number of people living in some megacities significantly exceeds the number of people living in many smaller countries.² Furthermore, cities are becoming increasingly diverse from an ethno-linguistic-cultural standpoint: in fact, they continue to attract people of different wealth, culture, ethnic origins, language, religion and/or cultural backgrounds. Consequently, they have become places of conflict and innovation, solidarity and cohabitation of diverse people and, as such, they help valorise the potentialities and natural vocation of different territories. Diversity and demographic factors, however, favour also the emergence of tensions, with the sharpening of socio-economic divides and inequalities, social and ethnic conflicts, but also environmental and criminal problems, as well as health and housing concerns. Political factors have also shaped and changed the role of cities. For example, in federal or otherwise decentralized systems, cities are increasingly entrusted with new tasks and responsibilities transferred to them by upper levels of government. At international levels, certain larger cities are informally carving out for themselves new roles: in the US, the phenomenon of ‘sanctuary’ cities well illustrates this fact. More in general, however, urban areas tend to be more progressive than rural districts, and display more liberal and inclusive political agendas. As a result, people living in cities might think, behave and especially vote differently, to the point that scholars have identified a unique form of urban identity and citizenship that is parallel to (and sometimes in conflict with) national identity and citizenship. Finally, there is an economic and cultural component. In fact, cities are not only special types of human settlements with a unique history and sociology,³ but they are also the engines of development, innovation, cultural and social interaction and cohesion. In this sense, while providing basic, essential services to citizens, cities continue to be places of business relations, commerce, trade, as well as cultural, religious and educational centres.

Yet, in spite of the increased salience acquired by cities, two interlaced problems exist. First, constitutions remain mostly silent when it comes to defining the role and place of cities in constitutional law; and this is true also for federal or quasi-federal constitutions, although the multi-layered nature of federalism should more easily invite the inclusion of cities in the federal scheme. This means that they do not have powers or finances of their own, they lack representation at the centre, and mainly depend on upper levels for their functioning. Parallel to this, is the fact that constitutional law scholars and theorists continue to largely neglect the study of cities as independent subjects: in fact, cities continue to be

- 2 For example, the metropolitan area of Mexico City is home to about 20 million people. By contrast, many countries in Europe have a population of less than 15 million people (Belgium has approximately 12 million inhabitants; Switzerland about 8.5 million; Austria about 9 million; Sweden about 10 million; Finland about 5.5 million, etc.).
- 3 *Y. Blank*, *The City and the World*, *Columbia Journal of Transnational Law* 44 (2006), p. 881.

studied – if at all – as part of local government or urban law studies, or as part of international law. Only a very limited wave of scholarship has emerged particularly in North America (US and Canada), with constitutional law scholars and theorists devoting their attention to cities as independent subjects of scholarly investigation and claiming a more robust repositioning of the city at the centre of the general constitutional discourse.⁴ In general, however, the study of cities as constitutional subjects remains sporadic, with no solid theoretical foundation being established yet. This is sharply in contrast with the social sciences, where a wealth of academic work has been produced that explores cities from several different lenses, including the demographic, environmental, geographic, historic, anthropologic, or socio-economic angles.

In addition to this editorial, this special issue offers a preview of some of the discussions held at the 2019 Workshop in Melbourne by featuring three contributions from the Global South. The article by Yonatan Fessha discusses the so-called special interest clause in the Ethiopian Constitution (providing for the special interest of the State of Oromia in Addis Ababa) and arguing that it is not about ownership but rather about inter-governmental relations. This contribution is a powerful demonstration of the difficulties that might emerge in capital cities in divided and diverse societies when it comes to indigeneity and ownership of the capital territory. The article by Antonio Hernandez outlines the constitutional powers and role of the city of Buenos Aires and more generally the constitutional recognition of local governments in the Argentinian constitution. This contribution is an insightful illustration of what constitutions can do to enhance the role and place of cities and their constitutional space. By contrast, the article by Mathew Idiculla examines the legal authority of cities in India and the powers they exercise. Idiculla's paper is a compelling example of the drawbacks of the so-called 'constitutional silence' on cities. The papers presented in this special issue, however, are not exhaustive and do not cover all the problems and challenges that cities as legal entities are facing around the world that require some more robust legal/constitutional thinking and theorization. In the next sections of this editorial, I will address more in detail some of the entanglements between Global North and Global South when it comes to urban governance.

It shall be noted that the three case-studies illustrated in this special issue all refer to countries that are federal. This is partly because the 2019 Workshop focused on cities in federal theory. Beyond that, however, the more flexible nature of federal or otherwise decentralized multi-level systems of governance is perhaps more apt to carve out a legal space for cities. In fact, federalism is traditionally understood as an ideal mechanism to reconcile diversity and social cohesion through the implementation of a multi-tiered system of government and the combination of 'self-rule' and 'shared-rule': because of its natural articulation in different levels, it is easier to think of cities as an additional tier of governance.

4 See for example *Richard Schragger* with his *City Power*, Oxford 2016. But also, scholars such as Hoi Kong, Yishai Blank and Gerald Frug have extensively published on this topic.

However, this does not prevent having such conversation in unitary states or in constitutional law in general.

The 2019 Workshop was certainly a stepping-stone on the way to (re)thinking the role of cities in constitutional law and constitutional federalism, and this special issue thus offers a glimpse into some of the questions and themes discussed in Melbourne. However, such global intellectual conversation among academics is just at the beginning, and it would be desirable if more comparative constitutional law scholars would join the conversation and enrich the debate by rethinking their research agenda and incorporate a more systematic study of cities in constitutional law. In this sense, some of the themes that have emerged during the 2019 Workshop – as sketched above – coupled with the more specific topics discussed in this special issue, can represent preliminary lines of investigation. In encouraging such intellectual debate, the aim is to reflect more robustly on the common or specific challenges of cities, and how (constitutional) law and theory can help.

B. Entanglements between urban governance in the Global North and in the Global South

Urban/city governance is a complex field of study, as it presents many variables and whose challenges and issues are often contingent to the specific locality. In other words, generalizations are not ideal. Some challenges are common to cities in the Global North and in the Global South, while others are unique to specific regions of the world. Legal/constitutional scholars have just started to scratch the surface of the role, powers, and place of cities in contemporary constitutional law, and much more work is needed. In this section, I will focus on two aspects only. First, I will briefly map some of the emerging issues that most cities all over the world are facing, although perhaps in different degrees and with different implications. The list is not intended to be exhaustive, as it does not capture all the challenges that exist. However, it offers a good point of departure for future scholarly engagement. Second, I will cursorily showcase the different approaches to constitutional entrenchment of cities in various regions of the world: again, this is not a comprehensive analysis (which would be impossible to conduct in this issue) but should nonetheless offer some useful comparative insights for further academic investigation. As noted, the overall purpose of this overview is to trigger the interest of scholars to reflect on a more robust way to conceive of cities as legal/constitutional law subjects, and how law can help them face some of the challenges they are called to address.

I. Emerging issues for cities in the Global North and in the Global South

A first, common issue to cities both in the Global North and in the Global South relates to the effects and consequences of increasing *economic inequalities* and *social divide*. The causes that have exacerbated these cleavages particularly in recent years are numerous and complex. In the Global North, a pivotal role has certainly been played by the grave econo-

mic crisis of 2008 which has started in the United States but has quickly engulfed many regions of the world, often with devastating effects. At city level, it has caused – among other things – job losses, increased unemployment, and overall lack of security for altered job and working conditions: this has also resulted in a thinning of the middle class and a deepening of the cleavage between the richest and the poorest. In the Global South, on the other hand, the increased socio-economic inequalities may be rooted in factors such as increased natality rates, labour exploitation, violence, corruption, but also climate change, as it often forces people to migrate. These rapid transformations have often been taxing particularly on larger cities.

Second, and linked to the above (and perhaps a consequence thereof), is the growing *urban/rural divide*, especially in terms of population density, access to services such as health or education, economic growth, etc. Again, this challenge affects both the North and the South of the world, although in different ways. In particular, urbanization and demographic increase are becoming particularly strenuous in the Global South – especially South Asia and Africa – with the rapid formation of megacities as a consequence of an uncontrolled raise in natality rates, the economic pull of cities or the loss of cultivated land. The explosion of megacities has contributed not only to an increase in urban density, but it has also triggered the need to quickly address problems related to infrastructures and services such as housing, sewage, food, health care, education etc. Although the phenomenon is perhaps more under control in the Global North, the richer areas of the world are not exempt from consequences: cities like Melbourne and Sydney, for example, have been called to rapidly respond to an always increasing demand for housing due to the skyrocketing number of people migrating to Australia from Asia and the rest of the world. To curb the escalation of such split, the *urban/rural divide* thus requires close monitoring and quick responses on the part of policymakers and legal experts.

Third, another challenge that is likely to have a severe impact on cities relates to the consequences of *climate change* and *global warming*. While all regions in the world are exposed to this risk, it is undeniable that cities in the Global South are the most vulnerable and thus most likely to be negatively impacted: elevated population density, coupled with a lack of adequate infrastructures or sanitation systems, can create dire risks. How can the law assist in this challenge?

Fourth, an emerging issue for cities both in the Global North and in the Global South is related to data protection and privacy: in fact, everyday cities collect a gigantic quantity of data, and privacy aspects and concern are intimately linked to the accumulation of data. This is one of the many new frontiers of cities, whose implications require specific study by legal scholars. In fact, as argued by Rubinstein and Petkova,

Cities are “data-rich environments” because their large populations generate vast amounts of data as they interact with IoT devices and sensors in public spaces; utilize city services that collect, analyze, and optimize personal data; and encounter the

*special-purpose technologies deployed by law enforcement to maintain public safety and safeguard citizens against terrorist attacks.*⁵

Finally, the impact of foreign investments – especially, but not exclusively, for cities in the Global South – is another concern for urban governance. An example in this sense is represented by the so-called BRI (Belt and Road Initiatives), a global development strategy initiated by the Chinese government and impacting several countries around the world. Foreign investments shape the economy not only of a country, but also of a city, its architectural landscape, its commercial activities, its very identity. While this is an effect of globalization, and is not necessarily a negative feature, the legal implications of these initiatives still need to be fully explored.

I will end this brief survey with two final examples particularly disturbing for the Global South. The first is represented by the issue of *reconstruction in post-conflict processes* and the intersection of *violent conflict and urbanization*. This specific challenge – like many of the other challenges listed above – creates problems of various nature that call for an interdisciplinary approach including various disciplines such as urban studies, architecture, international relations: yet, also the legal/constitutional sphere may have a say. Although this is not a new phenomenon, the past decade has seen a more drastic focus in urban warfare, with higher levels of casualties and scale of ruin. One consequence of long-term war is the wanton destruction of cities. As the global trend of urbanization continues, and more people depend on life in cities for economic and social reasons, there is an urgent need to rebuild cities in post-conflict transitions, physically and as a space of reconciliation. Architecture, urban planning, the distribution of communal spaces, physical infrastructure, the protection and commemoration of the past are foundational to war-to-peace transitions that (constitutional) law and other disciplines can play a fundamental role in shaping.⁶

Finally, I would like to mention the issue represented by *ethnicity/indigeneity*, very problematic for the Global South. In fact, more than in the Global North, countries in the Global South are by definition multi-ethnic: as an example, Ethiopia and Nigeria are home to more than 80 and 200 ethnic groups, respectively. Ethnicity affects the way cities operate and function and has an influence on urban policies. Linked to ethnicity is the problem of indigeneity, and both have to do with power, especially when construed in a legal sense. Fessha's contribution in this special issue offers a clear illustration of the entanglements of ethnicity/indigeneity in a city like Addis Ababa in Ethiopia. In the Global North, on the other hand, issues related to ethnicity are more limited and therefore less contested, although countries are in fact becoming more diverse and multicultural because of increased migration. The closest example in this sense may be represented by bi- or multilingualism

5 I. Rubinstein and B. Petkova, *Governing Privacy in the Datafied City*, *Fordham Urban Law Journal* forthcoming. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3578199&fbclid=IwAR1dM20N9kO8OCN0mi7xmY0UbyLLz4ocMJyWC00nDSv5dxeFQh9NprmoJX0. The acronym 'IoT' stands for 'Internet of Things'.

6 I am indebted to Dr. Jenna Sapiano for sharing and discussing these specific challenges with me.

in cities that are by definition bi- or multinational. For example, in Brussels or Ottawa – which are capital cities of multi-lingual and multi-national federations such as Belgium and Canada, public institutions exist that reflect the rich cultural and linguistic diversity of the territory. Likewise, the presence of *aboriginal/indigenous* communities within certain urban territories in countries such as Canada or Australia triggers significant questions for the legal experts to address on a more local/urban scale.

II. Constitutional silence and cities

As noted *supra*, in spite of the changed role of cities and the several challenges they are called to face, most constitutions remain silent on cities and do not entrench cities or city powers. However, even when local governments have been in fact entrenched, cities largely lack representation at central institutions, proper legislative powers, substantive financial autonomy: they continue to depend almost entirely on higher levels of government for their functioning and performance of tasks. In most cases, cities are not viewed as constitutional subjects.

Yet, although most constitutions are silent on this matter, the attitude towards urban governance is not identical everywhere: differences exist depending on the specific legal/constitutional tradition of each region. In this sense, the North American/Anglo-Saxon and the European federal constitutional experiences are quite opposite. As an example, the federal constitutions of the United States (1787), Canada (1867) and Australia (1901) are all the product of the older school of constitutionalism and reflect a classic understanding of federalism. In fact, these constitutions were drafted at the dawn of urbanization and industrialization, at a time when the economy of these countries was still mostly rural; therefore, cities were not yet perceived as the engines of development, so all federal-local relations were a matter for the centre and the constituent units (states and/or provinces), thus leaving no space to cities or local governments in the constitution. In other words, cities were nothing more than ‘creatures of the states’ and stripped of any constitutional protection, their powers and finances depending entirely on upper levels of governments. To further complicate the scenario, these constitutions are extremely rigid, and almost impossible to amend.

In Europe, on the other hand, the landscape provides more fertile ground for reflection. Historically speaking, cities all over Europe have since time immemorial played a more dominant role as centres of trade, commerce, military and political powers, arts, culture, religion, with Athens and Rome leading the way in ancient times. In political (and later legal) terms, this historical importance has been reflected by a broad resort to the principle of subsidiarity. A wealth of articles and books have been penned on this subject, so it is not my intention to revisit it.⁷ I will just reiterate that, simply speaking, subsidiarity entails that (legislative or administrative) action should be taken at the level of government closer to citi-

7 The literature on subsidiarity, especially in the context of EU law, is truly gigantic. Without aspiring to be exhaustive, the following is a list of prominent examples: *N.W. Barber*, *The Principles of Constitutionalism*, Oxford 2018, Chapter 7 on Subsidiarity; *G. A. Bermann*, *Taking subsidiarity serious-*

zens, with upper levels of government coming into play only when the lower levels cannot efficiently act. Subsidiarity is almost an intrinsic value in European political and legal culture, unambiguously ingrained in all EU Treaties since Maastricht, but embedded – more or less explicitly – also in several states constitutions. To this end, various European federal and regional constitutions have included cities or local governments as part of their multi-tiered systems.⁸

Federal and quasi-federal systems in the Global South have embraced somehow a mixed approach. For example, some African constitutions have followed the European model and entrenched local governments. A pioneering example in this sense has been the South African constitution, whose article 40(1) provides that the government is composed of the national, provincial and local spheres of government, all of which are ‘distinctive, interdependent and interrelated.’ The Ethiopian federal constitution only discusses federal and state levels of government, but article 50(4) posits that

ly: federalism in the European Community and the United States, *Columbia Law Review* 94 (1994), p. 331-456; *Y. Blank*, Federalism, subsidiarity, and the role of local governments in an age of global multilevel governance, *Fordham Urban Law Journal* 37 (2010), p. 509-558; *H. Cyr*, Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism, *Constitutional Forum constitutionnel* 23 (2014), p. 20-40; *C. Henkel*, The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity, *Berkeley Journal of International Law* 20 (2002), p. 359-386; *T. Hueglin*, The Principle of Subsidiarity: Tradition – Practice – Relevance, in: Ian Peach (ed.), *New Perspectives on Canadian Governance*, Winnipeg 2007; *P. D. Marquardt*, Subsidiarity and sovereignty in the European Union, *Fordham International Law Journal* 18 (1994-1995), p. 616-640; *G. Martinico*, Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union, *European Public Law* 17 (2011), p. 649-660; *R. Schütze*, From Dual to Cooperative Federalism. The Changing Structure of European Law, Oxford 2009; *A. G. Toth*, The Principle of Subsidiarity in the Maastricht Treaty, *Common Market Law Review* 29 (1992), p. 1979-1105; *K. Van Kersbergen and B. Verbeek*, The Politics of Subsidiarity in the European Union, *Journal of Common Market Studies* 32 (1994), p. 215-234; *G. W. Vause*, The Subsidiarity Principle in European Union Law – American Federalism Compared, *Case Western Reserve Journal of International Law* (1995) 27, p. 61-82.

- 8 For example, the Swiss constitution includes communes (municipalities) as constituting elements of the Swiss federation. In guaranteeing their autonomy, article 50 mandates that the activities of the federal government shall take into account the consequences not only for communes (para 2) but also for cities and urban areas (para 3). In Spain, article 137 Const. posits that the State is ‘organized territorially into municipalities, provinces and self-governing communities, these bodies enjoying ‘self-government for the management of their respective interests’ with article 140 guaranteeing municipal autonomy. Similar provisions are echoed in the Italian Constitution, where article 114 mandates that the Republic is composed of municipalities, provinces, metropolitan cities, regions and the state. In Germany, article 28(2) of the Basic Law provides that ‘[m]unicipalities must be guaranteed the right to regulate all local affairs on their own responsibility’ including in the fiscal ambit. It shall be noted that subsidiarity has been more and more invoked also outside of Europe in relation to city governance, but the exact legal contours of this principle, that has very strong European roots, still need to be clarified.

[s]tate government shall be established at State and other administrative levels that they find necessary. Adequate power shall be granted to the lowest units of government to enable the People to participate directly in the administration of such units.

Article 2(2) of the Federal Constitution of Nigeria posits that the federation consists of states and the federal capital territory. However, article 3(6) also indicates that '[t]here shall be 768 Local Government Areas in Nigeria ... and six area councils ...'.

More innovative examples can be found in South America, with federations like Argentina and Mexico that have amended their constitutions to entrench their capital cities of Buenos Aires and Mexico City. The contribution by Antonio Hernandez in this issue well illustrates the Argentinian model.

However, it shall be noted that, even where they are entrenched as a general rule, cities still remain significantly dependent on upper levels of government for finances and powers and have no representation at central level.

To conclude this succinct editorial, cities are increasingly faced with important challenges, but they are not always adequately equipped with the appropriate legal tools. This special issue focuses entirely on federal systems by offering a useful array of situations in which more robust action is perhaps needed by legal scholars. Constitutional entrenchment of cities represents one avenue to explore, but it is often not enough. A more substantive engagement of legal scholars to explore how multilevel governance could better assist the unique issues and challenges of cities shall be encouraged.