

BUCHBESPRECHUNGEN / BOOK REVIEWS

Ran Hirschl, City, State. Constitutionalism and the Megacity, Oxford University Press, Oxford, 2020, 266 pages, GBP 25,99, ISBN 9780190922771

This is a book of bold claims. Ran Hirschl, one of the world's leading authorities of comparative constitutional law, draws attention to what he identifies as a widespread failure of both constitutional systems and scholarship: there would be a deafening "constitutional silence" when it comes to the status of cities and urban agglomerations, in particular megacities. Constitutional law scholarship would remain to be captured by a state-centric mindset, at least in the Global North and its associated centres of epistemic authority. At the same time, he identifies more constitutional innovations around the status of megacities in the Global South.

Hirschl's monograph is structured into an introduction and five main chapters. The introduction sets the scene by making the case for the dawn of an "urban era" (pp. 1 et seq.). Up-front, Hirschl notices that "cities have remained virtually absent from constitutional law, and from comparative constitutional studies generally" (p. 1). This era is characterized by an extensive urbanization trend across the world, which puts particular pressures on existing governance frameworks. The author identifies an imbalance between the conventional image of world cities like New York and London and "the harsher reality experienced by most residents of huge metropolises in the developing world" (p. 8). Non-attention for cities comes with a cost, Hirschl writes: "The normative problems that emerge from cities' constitutional non-status are obvious, including deficiencies in democracy, subsidiarity, and stakeholding. (...) (C)onstitutions continue to treat cities (...) as mere policy delivery agents, without constitutional voice or meaningful capacity to generate revenue independently." (p. 9).

Chapter 1 then turns more specifically to the "sound of constitutional silence" (pp. 17 et seq.). This chapter is the most conceptual part of the book and explores the issue of constitutional statism, a theme that Hirschl has also explored in related and co-authored contributions.¹ After taking the reader from Plato to Le Corbusier and dealing with Machiavelli, Marx, Engels, Rousseau, Herder, Emerson, Benjamin, More, Campanella, Bacon, Fourier along the way within the range of half a page (p. 20), the chapter slows down a bit to introduce the writing of Henri Lefebvre and how his idea of a right to the city has been received in the literature. But this is a mere interlude before a tour d'horizon of various strands of urban scholarship kicks in again. This very condensed form of literature review might neither be interesting to those who are familiar with the books portrayed nor helpful

1 See, in particular, *Ran Hirschl/Ayelet Schacher*, Spatial statism, *International Journal of Constitutional Law* 17 (2019), p. 387; *Ran Hirschl*, Constitutions and the Metropolis, *Annual Review of Law and Social Science* 16 (2020), p. 59.

for the unacquainted, as they will not get a sense of the works of Saskia Sassen, Richard Florida or Jane Jacobs beyond short one-sentence captions. However, the showcasing of the breadth of literature on which Hirschl's thesis rests serves the purpose to contrast an "intellectual richness" in other disciplines – and as I am happy to note, also in international law! (p. 28) – with the apparent paucity of contributions in comparative constitutional law. As Hirschl notes, "(w)ith the partial exception of a few American legal academics (e.g. Gerald Frug, Hendrik Hartog, Richard Schragger) whose work focuses on American cities' legal and constitutional focus, there are no book-length comparative accounts of the challenges to constitutional governance posed by extensive urbanization, the rise of the metropolis, or by consequent tensions along a center/periphery demographic and geopolitical axis" (p. 29). We will get back to this assessment at a later point in this review, but it should be flagged already here that this is maybe too bold a claim and one that is informed solely by an analysis of the English-language literature on the topic. The chapter is rounded off by a section on the "boundaries between the 'local' and 'us'" which revolves around the juxtaposition between "globalists" and "post-nationalists" (p. 40), without ever explaining what sets these alleged ideological standpoints apart. What is more, the reader is also left to make up her or his own mind on what to make of the fairly scattered discussions of issues ranging from Catalonia's bid for independence, the question of statehood for Puerto Rico and secessionist movements in California, all ostensibly related to some form of localism. It is a bit odd when the *Maastricht* decision of the German Federal Constitutional Court is portrayed as the normative starting point of a "post-national, multifocal constitutional order" (p. 47) – rather than the beginning for the extremely well-known case law of the Court in which the disputed notion of national constitutional identity has been developed. While the legacy of the *Maastricht* decision remains controversial, it is fair to say that very few scholars would categorize this judgment as an expression of post-nationalism and multi-focalism, not least because of the Court's emphasis on homogeneity of the demos as a condition for the realization of proper democracy.²

The book continues with a second chapter which focuses specifically on "the metropolis in 'old world' constitutional law" (pp. 51 et seq.). The "old world" categorization is used here for the constitutional frameworks of the United States (pp. 52 et seq.), Canada (pp. 65 et seq.), Australia (pp. 82 et seq.) as well as "The European scene" (pp. 87 et seq.) with shortish sub-sections on Germany, Austria, Italy, Spain, Madrid as well as two vignettes on London and Paris. The arguments developed in this chapter all revolve around the alleged constitutional absence of cities and urban agglomerations in the legal systems portrayed. In general, and as far as I can tell, the reader is well-informed about the constitutional set-up in these respective legal systems.

This account is put into sharp relief by the contrast of constitutional innovations which Hirschl identifies in jurisdictions of the Global South and/or "new world" constitutions

2 As identified early on by *Joseph H.H. Weiler*, Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision, *European Law Journal* 1 (1995), p. 219.

(pp. 103 et seq.). The range of examples is eclectic here – and arguments at times a bit anecdotal (“Every visitor to Tokyo can attest to the city’s enormous size as well as its cleanliness, efficient transportation system, and low crime rates when compared to large cities in North America”, p. 105). Discussion of recent practice from China, India and Brazil takes up significant room of the chapter. With respect to China, for instance, Hirschl notes how a formally unitary state has practically evolved into an “intricate quasi-federal system” (p. 113). Noting that China’s urban policies are far from uncontroversial, they have won, Hirschl writes, “appreciation from international think tanks and consulting firms for its approach to megacity constitutional empowerment” (p. 115). This state of affairs is contrasted with India, where a substantial deference to the individual states would make urban improvement dependent on state authorities being so inclined (p. 122). The trajectory of urban development in Brazil is characterized by the campaign for the “right to the city” (p. 125). Also here, the effects of urban reforms would depend on political alignment between national, state and urban leaders (p. 127). Whereas Hirschl identifies many positive attempts at reform in these cases as well shortcomings when it comes to practical implementation, South Africa is given particular prominence in the chapter, where the empowerment of local governments “was a direct response to the apartheid policy of excluding certain neighborhoods (notably Soweto in Johannesburg) from city boundaries and administration” (p. 129). Although the chapter notes the “daunting challenges” that South African cities continue to face (p. 131), it paints a very positive picture of the constitutional framework as it has evolved. This is different in cases of “blatant politics” where the needs of cities and urban agglomerations are not taken into account (pp. 131 et seq.), with a particular focus on Russia, Ukraine and Turkey. In summary, the chapter argues that most constitutional innovation in thinking about megacities comes from the “new world of constitutionalism” and not the Global North (p. 149). Shifting the focus of attention is very welcome, of course. Hirschl goes on to note: “(w)hile most leading political theory and social science accounts of cities and urbanization have been written by scholars from and of the Global North, when it comes to actual constitutional innovation in those areas, it is the world beyond Europe and North America that has taken the lead.” (ibid.). This is probably not meant to suggest that these constitutional locations merely implement ideas from social science from the North, but it would have been worthwhile to account also more for non-Western voices in the academic context, of which there are aplenty.³ In the context of international law, James Thuo Gathii has recently made a powerful call for a greater consideration of knowledge production emanating from the Global South, in order to appreciate more clearly the role that legal processes deriving from non-Western sources

3 See, for instance, *Susan Parnell/Sophie Oldfield* (eds.), *The Routledge Handbook on Cities of the Global South*, London/New York 2014; *Luis Esvala*, *Local Space, Global Life. The Everyday Operation of International Law and Development*, Cambridge 2015.

of authority play.⁴ To a certain extent, Hirschl contributes to this critical endeavour through his focus on constitutional innovation in the Global South. But the distinction between leading social science and political theory works from the West and the North and practical innovation in the South risks to unwittingly stabilize a conventional division of labour that his avowed turn to the South wishes to overcome.

Whereas the book so far focused on the state legal framework for the activities and status of cities and urban agglomerations, the fourth chapter shifts gear to a certain extent and assesses “attempts at city self-empowerment” (pp. 151 et seq.). Here, the author describes at some length various efforts of cities to connect via international networks, adopt human rights charters or develop other socially progressive forms of policies. While Hirschl welcomes efforts like the climate change-related networks of “ICLEI – Local Governments for Sustainability”⁵ or “C40 – Climate Leadership Group”⁶, he is sceptical with respect to their impact on the structures of international and constitutional law – these initiatives would “fly under the radar of public law” (p. 157). While it can be disputed whether the capability to bring claims to the International Court of Justice (ibid.) is really that important, Hirschl is certainly correct in his assessment of the limited impact that these efforts have had so far in the established formal categories of constitutional (and international) law. This begs the question, however, whether Hirschl himself is caught up in a statist mindset – which he laments, of course. A more interesting question than thinking about the recognition of cities and urban agglomerations in the established categories of the law would be to enquire whether there is something new developing in parallel. This “something new” arguably cannot be captured in the established categories, at least if the scholarly agenda is to move beyond the statist framework. In other parts of the chapter, the discussion is sometimes imprecise when it comes to the law. When discussing the “European Charter for the Safeguarding of Human Rights in the City” it is noted that this would be the first attempt to “legally formalize the right to the city” (p. 159). It is unclear against what standards of legal formality this claim is made. Originally adopted by a conference of Mayors and shaped by the influence of the city network “United Cities and Local Governments”, this instrument has no binding legal force in either international, European or domestic law.⁷ While Hirschl seems to hold otherwise, this claim would stand in tension with his previous finding that all the efforts of the city networks have left no imprint in the formal worlds of international and constitutional law. It must be one or the other here. The discussion on urban citizenship in the chapter is robust and insightful, yet I wonder about the conclusion that ideas of urban citizenship would ultimately project a

4 *James Thuo Gathii*, Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996-2019 as an Appendix), Proceedings of the Annual Meeting of the American Society of International Law 114 (2020), p. 165.

5 www.iclei.org (last accessed on 4 May 2021).

6 www.c40.org (last accessed on 4 May 2021).

7 See further on the drafting of the Charter *Michele Grigolo*, The Human Rights City – New York, San Francisco, Barcelona, Abingdon/New York 2019, pp. 49 et seq.

“New York, Paris, or San Francisco political and demographic reality on fundamentally dissimilar urban settings in the Global South” (p. 170). I certainly concur that not every lofty idea developed in the Global North calls for application in the Global South. But it is another question whether the idea of urban citizenship is indeed so West- and North-centric as Hirschl puts it. Questions of belonging and citizenship are as pressing in many cities in the Global South as they are in the Global North.⁸ In particular, this discussion strikes me as a missed opportunity to connect the issue of the right to the city with urban citizenship. Could it be that the two notions are interrelated and that their substance overlaps? In the previous parts of the book on constitutional innovation in the “new world” constitutions, attempts at legislating a “right to the city” in Mexico City or in Brazil played an important role. To connect them with the urban citizenship debate in the “empowerment” chapter would have secured a transnational impact of these initiatives stemming from the Global South. As it stands, the book treats them like experiments in the Global South. This translates into the way that the author engages with the literature. For example, instead of engaging with the substance of an excellent work on “The Right to Joburg”⁹, it is referred to in passing as “a recent account” and only relied on for a rather embellishing quotation on the diversity of Johannesburg (p. 226 with footnote 162). Taking the postcolonial and Southern turn seriously would have demanded more here, at least if a book is replete with references to the undoubtedly interesting experiments in the Global South.

The fifth and final chapter offers a panorama of normative considerations as to why city constitutional status should be enhanced and made more robust (pp. 173 et seq.). This chapter rehearses a number of issues, ranging from constitutional underrepresentation of cities in many polities, the dependence of cities on big business, the crucial role of cities to address inequality and climate change, aspects of the density of cities and various issues pertaining to the fiscal side of urban governance. All this culminates in a part on democratic legitimacy and representation with a call to rethink “orthodox” federalism theory. Taken together, the different parts of this chapter set out to make the case for greater constitutional status and autonomy of cities and urban agglomerations. But again, there is a lot of surface-scratching here, particularly evident in a discussion of subsidiarity which exhausts itself in well-worn clichés about EU law. Evidence for the success of greater city autonomy is sketchy – and in places normatively questionable. I was wondering, in particular, how the praise for Singapore’s effective forms of city governance (p. 192) goes together with the emphasis on more democracy through subsidiarity and an emphasis on the local level. For one, Singapore is a very special case as a city state. Then, its governance is decidedly authoritarian and managerialist.

Taken together, the book is a much needed contribution to an only emerging debate on the role of cities, urban agglomerations and local governments in comparative consti-

8 See *Eslava*, note 3, at pp. 187-89, 209-10.

9 *Marius Pieterse*, *Rights-based Litigation, Urban Governance and Social Justice in South Africa: The Right to Joburg*, New York/London 2017.

tutional law. I would like to close with three additional critical points, however, which have caught my attention, and which build in part on my previous observations on the development of the book's arguments.

First, it is not difficult to identify that Hirschl makes a case for greater sensitivity towards urban issues in constitutional thought. Throughout the book, however, the reader is not offered a serious engagement with what concepts like democracy or subsidiarity actually mean in constitutional terms. Cities can be more democratic because they are closer to the people, this is the nutshell of the "concept" of democracy offered in the book (p. 219). Maybe in some cases. But as Hirschl notes, many of the world's megacities have a bigger population than many middle-sized states. How does this affect the "closer to the people" argument? At the very least, I would expect some serious engagement with this conundrum in a book like this. Or take the treatment of subsidiarity. There is a strange fascination in constitutional scholarship with this concept, which sometimes appears like a panacea in order to make decision-making more responsive by bringing issues again closer to the people. It is as predictable as of limited import to then point to the role of subsidiarity in EU law (p. 223). In this context, subsidiarity plays a very specific role when it comes to attributing competences for lawmaking in the field of shared competences between the EU and its member states. Subsidiarity is very far from being a general principle of EU law. What is more, its concrete application has been a source of disappointment for most EU lawyers. A passing reference to subsidiarity in German constitutional law does not help either (*ibid.*), as its treatment again rests on a misunderstanding of the very limited role that this principle plays in German constitutional thinking.

Second, as Hirschl duly notes, the debate on the constitutional status of cities can take its cue from ongoing discussions in other fields, both external and internal to the legal sphere. It is obvious that urban studies, sociology, history and political science have embraced 'the city' much earlier than constitutional law. But this is also true, as Hirschl points out, for international law where, maybe paradoxically, there has been more awareness of this return of the local than in the field of constitutional law.¹⁰ It probably has not helped that local government law is not always a legal sub-field which occupies the higher echelons of the ladder of academic prestige within national communities of public law. At the same time, it can be noted that Hirschl writes almost exclusively on the basis of English-language literature. This is not a problem in and of itself and I readily admit my own limitations when it comes to making use of sources in languages which I sadly do not master. But the overall boldness of the claim, i.e. that constitutional law scholarship

10 Early seminal contributions include *Yishai Blank*, *The City and the World*, *Columbia Journal of Transnational Law* 44 (2006), p. 868; *Ileana M. Porras*, *The City and International Law: In Pursuit of Sustainable Development*, *Fordham Urban Law Journal* 36 (2009), p. 537; *Janne E. Nijman*, *The Future of the City and the International Law of the Future*, in: Sam Muller et al (eds.), *The Law of the Future and the Future of Law*, Oslo 2011, p. 213; for an overview of the state of the art in this field see now also the contributions in *Helmut Philipp Aust/Janne E. Nijman* (eds.), *Research Handbook on International Law and Cities*, Cheltenham 2021.

has not given sufficient attention to cities and urban agglomerations and that the book is “the first of its kind in comparative constitutional studies” (p. 11), becomes a bit risky when significant work from the French, German and Spanish literatures are not taken into account¹¹ – not to mention other languages which might offer even more here. Flagging it as the first comparative constitutional law monograph in English language would have done the trick, too.

Finally, the book is suffering from its overbroad ambition in some places. It is a comparative law endeavour which is avowedly global in its aspiration. This is first of all an asset. The reader learns an enviable amount of details about the legal position of cities and urban agglomerations across the globe. Hirschl has managed to weave together a huge amount of information. But this does not always translate into a context-sensitive treatment of the legal questions which he discusses. Take for instance the respective discussion of the status of urban agglomerations in Germany and Japan. Hirschl describes the German legal framework as an example for excessive statism and a non-regard for the needs of large urban agglomerations (pp. 88-89). The Japanese framework is in turn praised for its capability to accommodate urban issues and demands. What does not transpire from this treatment, however, is that the Japanese legal framework in this regard is highly similar to the German one (cf. pp. 105-06).¹² There could be various explanations for this state of affairs, but Hirschl does not discuss this any further. What the reader learns is that one domestic legal framework is somehow deficient for urban empowerment whereas another one is apt for dealing with future challenges. I am not giving this example in order to be defensive of the German legal framework. As a legal scholar, I am rather agnostic whether the constitutional set-up in Germany is progressive or not. But as a reader with uneven knowledge about the constitutional specificities when it comes to the constitutional status of cities and urban agglomerations in the world, I could not help but notice a somewhat uneven attention to the level of legal details.

When reading the book I wondered at times how nuanced and context-sensitive other passages of the book will be which are outside of my main field of expertise. Compared to Germany and the EU context, I am of course less of an expert when it comes to the legal state of play in jurisdictions in the Global South. But from what I know about specific contexts that Hirschl writes about, further doubts arise. Take for instance his treatment of the role of cities and local governments in South Africa. Their constitutional protection and mandate is painted as one big success story. While this is certainly true in parts, a closer engagement with the extremely rich and vibrant literature on local government law in South Africa would have painted a more variegated picture than the one that Hirschl

11 Examples from other languages include: *Jean-Bernard Auby*, *Droit de la ville – Du fonctionnement juridique des villes au droit à la Ville*, Paris 2013; *Gustavo Manuel Díaz Gonzalez*, *La Acción Exterior Local: Bases constitucionales*, Madrid 2019.

12 On the origins of this influence see *Bernd Martin*, *The German Role in the Modernization of Japan – The Pitfall of Blind Acculturation*, *Oriens Extremus* 33 (1990), p. 77, at pp. 79-80.

portrays.¹³ I am also not entirely convinced whether the 1997 Hong Kong Basic Law is a good example of “joint governance models” and successful constitutional experimentation in the Global South (p. 39). At the time of writing, the situation in Hong Kong might not yet have reached the current very difficult status, but even so its constitutional status rather strikes me as a particular consequence of a given post-colonial constellation. The allegedly context-sensitive but all-encompassing approach of *City, State* has been difficult to achieve. It is an embrace of the contexts of the Global South, but from a very global take. How could it have been done differently? Comparing across a wide range of jurisdictions is of course a very ambitious endeavour. But one possibility would have been to make better use of the critical literatures from urban studies that Hirschl also cites. In the book, the impact of these critical literatures remains marginal, and in any case does not translate to the treatment of the various case studies or rather examples he gives.

In summary, *City, State* has a lot to offer and will surely encourage many scholars in comparative constitutional law that it is time to pay more attention to the city and urban agglomerations. At the same time, *City, State* leaves enough space for future work. For young and emerging researchers, it will hopefully also send the signal that many exciting doctoral theses and papers can be written in this area. After the broad brush of this book, the field of comparative constitutional law would benefit most from more specific studies which pay closer attention to both the legal and non-legal local contexts.

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13 See, for instance, the contributions in *Anél du Plessis* (ed.), *Environmental Law and Local Governance in South Africa*, 2nd edn., Cape Town 2021 [a first edition was published in 2015]; *Jaap de Visser*, *City Regions in Pursuit of SDG 11: Institutionalising Multilevel Cooperation in Gauteng*, in: Helmut Philipp Aust/Anél du Plessis (eds.), *The Globalisation of Urban Governance – Legal Perspectives on Sustainable Development Goal 11*, New York 2019, p. 186.

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