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ARTICLE

Urban Constitutionalism and the Rule of Law: Historical Perspectives and Contemporary Challenges

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Abstract

The 21st century may safely be called the 'urban era'. The year 2007 marked the moment when for the first time in modern history, over 50% of the world's population lived in urban areas. By the year 2050 almost 70% of humanity is projected to be urban, i.e., a human settlement with usually a high population density and an infrastructure of built environment. While the role of large cities, metropolitan areas and urban regions has been increasing, the political domain of the states, of which these cities or regions constitutionally form part, seems to be continuously shrinking. And although the rise of the urban is unlikely to lead to the disappearance of the sovereign-state model, the idea of states as having final authority is seriously challenged. This is caused by at least two simultaneously occurring trends: the transfer of tasks and responsibilities upwards, to the international and supranational level, through processes of globalization and a development downwards, to the local and regional level (or even the neighborhood or district), through processes of decentralization and regionalization. These combined trends have been called glocalization, a process exemplary for the complexity of modern society, in which authority shifts from hierarchy to networks, and the autonomy and unity of the central and sovereign state are under pressure. This special issue is the fruit of a workshop organized at Tilburg Law School on 25 November 2022, dedicated to the exploration of several constitutional and rule of law challenges posed by what we have dubbed urban constitutionalism.

1 The Urban Era

The twenty-first century may safely be called the 'urban era'. The year 2007 marked the moment when for the first time in modern history, over 50% of the world's population lived in urban areas. By the year 2050 almost 70% of humanity is projected to be urban,[1] i.e., a human settlement with usually a high population density and an infrastructure of built environment.

[1] United Nations (2018).

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Already, large cities, metropolitan areas, and urban regions–we use these terms interchangeably here; Geertjes, in his contribution, points to the unsettledness of what constitutes these entities–have become independent actors in global governance. They are the world's major economic hubs, home to big banks and other financial institutions, and large multinational companies. Moreover, these cities are more than ever before at the forefront in taking on the world's wicked challenges, such as climate change and the energy transition, mass migration, the health care and housing crises, water challenges, crime and various threats to security, and different forms of technological innovation, including 'smart' mobility and transport. As global cities, to use Saskia Sassen's words, they are the building blocks of an increasingly connected world.[2]

While the role of large cities, metropolitan areas and urban regions has been increasing, the political domain of the states, of which these cities or regions constitutionally form part, seems to be continuously shrinking. And although the rise of the urban is unlikely to lead to the disappearance of the sovereign-state model, the idea of states as having final authority is seriously challenged. This is caused by at least two simultaneously occurring trends: the transfer of tasks and responsibilities upwards, to the international and supranational level, through processes of globalization and a development downwards, to the local and regional level (or even the neighborhood or district), through processes of decentralization and regionalization.[3] These combined trends have been called *glocalization*, a process exemplary for the complexity of modern society, in which authority shifts from hierarchy to networks, and the autonomy and unity of the central and sovereign state are under pressure.[4]

Interestingly, the impact of these trends is not only integration (with the European Union as a prime example), and in some ways even uniformization, but also differentiation and asymmetry. Cities and regions are assigned or acquire different competences, in line with already existing variation in local or regional circumstances and characteristics or rising social and economic disparities.[5]

This special issue is the fruit of a workshop organized at Tilburg Law School on 25 November 2022, dedicated to the exploration of several constitutional and rule of law challenges posed by what we have dubbed urban constitutionalism. The contributions either take a historical or contemporary perspective.

[2] Sassen (2005), p. 27–43.

[3] Piattoni (2010). Here, we do not consider a simultaneously occurring third trend, the transfer of tasks and responsibilities *sideways*, to independent agencies, the private sector and societal organizations.

[4] See e.g.: Czarniawska (2002).

[5] Allain-Dupré et al. (2020).

2 Rule of Law in an Urban Context

Before presenting the different contributions to this special issue, we need to briefly clarify the two main concepts that play a central role in all the contributions. Firstly: what is our understanding of the *rule of law* in an urban context? And secondly: how do we define the *city*, or the *urban (region)*, in relation to this topic?

2.1 Rule of Law

Before setting out our exploration of the rule of law in an urban context, we should make clear that the concept has many definitions and characterizations. Even if one could roughly define a set of principles—such as legality, separation of powers, fundamental rights protection and democratic decision making—the balance between those principles may vary, and the principles themselves may take various concrete shapes depending on the context in which they are applied. Moreover, debates on the meaning of the rule of law traditionally relate to the context of the *nation state*. Questions regarding the meaning of the rule of law for cities then translate to a question of the vertical separation of powers, in terms of federalism or decentralization of state powers. Urban environments have hardly been regarded as a context in themselves in which rule of law questions as such need to be addressed. And finally, it would be an anachronism to use modern notions of the rule of law in relation to historical cases. The legal or constitutional position of medieval cities within early modern state structures may differ vastly from that of modern cities.

The rule of law is thus not a fixed set of rules or principles, but may consist of different principles and conceptions, depending on the socio-political context and on a particular time frame. The rule of law from that point of view is not a static idea, but a constantly developing concept.[6] As Tamanaha points out, throughout history, the rule of law has progressed from thinner to thicker accounts, both in terms of formal and substantive types of requirements, accumulating more elements along the way. In a formal sense, the rule of law has developed from what we may call 'rule *by* law', a mostly instrumental approach of law, to the acceptance of a formal notion of legality as legal certainty and the generality of laws and to the requirement of democratic legitimacy of laws. In a more substantive sense, the rule of law first centered around rights related to property and contracts, then accepted the pre-existence of political rights and freedoms and ultimately encompassed socio-economic and collective rights.

Tamanaha focuses mostly on legality and legitimacy as formal notions and on rights as substantive elements of rule of law. He pays little attention to *institutional* elements, such as separation of powers and the functioning of justices and courts. Halberstam, on the other hand, uses a distinction between three dimensions along which legal systems develop: rights, expertise and voice.[7] Taken together, these

[6] Tamanaha (2004, p. 91 ff).

[7] Halberstam (2009, p. 327); and Halberstam (2012, p. 171).

elements in fact also constitute what we could call a rule of law framework. The dimension of *rights* is about protection of individual and collective rights and freedoms; the dimension of *expertise* is about institutions and powers for effective governance, which may include questions regarding legality and separation of powers; the dimension of *voice* is about expressing the will of the community, in terms of representation, democratic decision making and participation. The historical development of the rule of law shows a gradual thickening of legal frameworks along all three dimensions.

2.2 Defining the Urban

This special issue wants to contribute to an understanding of the rule of law from an *urban perspective*. Urbanism with regard to the rule of law can be understood from a combined sociological and legal-institutional perspective. Since the early nineteenth century, cities have legally been considered as municipalities: the municipal level was a level of government that was of a lower rank than the nation-state; its competences were mainly based on a concept of subsidiarity. This originated in the early nineteenth century, when the modern nation state was built. The agency and power of cities was in those days reduced because of their inclination towards autonomous behavior. In this regard the state and the city were, at least to some extent, opposite levels of government.

To be sure, when we speak about the urban in this volume, we are not primarily thinking of municipalities, a term widely used for the administrative structures of local government. Rather, we focus on those areas facing a complex set of challenges but which in most countries, from a legal perspective, usually have the same competencies to meet these challenges as smaller cities or rural regions. Often, these will be cities or urban regions with the hub character of a metropolis, but not exclusively so. In several countries, including the United Kingdom, France and the Netherlands, officials in and of such cities and regions have therefore called for an expansion of their autonomy and an increase in their administrative power. An important consequence of greater autonomy and power at local and regional levels could be that the uniformity in the way most sovereign states are traditionally organized decreases, while pluralism increases.

In the 1800s, from a legal perspective cities and villages–non-urban or rural, usually smaller communities –were largely alike from an administrative point of view. They were both municipal entities. When talking about present-day changes in urban governance, this clearly also refers to the growing specificness of cities as compared to other municipal entities. In contemporary large cities, this growing specificness is foremost legal and institutional. This comes from a growing adjustment of legal rules to urban realities, and these realities are changing.

The political and administrative challenges posed by the current rise of the city and the growing importance of the urban region, lead, among other things, to a new need for administrative capacity and action, also beyond the territorial boundaries of the municipality. These challenges cut across the traditional demarcations between local, regional, and national authorities on which the law of subnational government

is based. As a result, these challenges have a special constitutional and rule of law relevance. Nevertheless, the modern, highly globalized city, whose problems are increasingly related to developments on a global scale (and vice versa), has received hardly any attention from a constitutional and rule of law perspective.[8]

3 Rule of Law and Urbanism: Five Contributions

This special issue includes five articles. The first set of three articles are legal-historical. They detail whether rule-of-law approaches existed in urban areas in the past, in periods in which more specifically cities had more autonomy than nowadays. The articles cover the period from the twelfth until the seventeenth century.

In his article Dave De ruysscher demonstrates that in medieval cities a conception of a rule of law applied, although that does not entirely correspond with present-day categories. The symbolic qualities of law and government in medieval cities made that administrators were considered as ruling for the common good. This symbolism was set up to compensate for the actual differences existing among members of the city community. De ruysscher argues that definitions of cities as being legal communities emerged when their unity was challenged. The symbolic approaches that came after were so strong that there were no fixed rules to which the urban governments had to abide. Urban administrators could change rules and the novel solutions could nonetheless be deemed in line with the urban legal traditions. Within this symbolism, one can find early precursors of checks-and-balances. In the second half of the thirteenth century the idea emerged that the *communitas* of the city was a body of itself, which had to be protected. The older view that cities were corporations, of both rulers and ruled, was left; the burgomaster was a central figure in this development. This official watched over the interest of the commune.

In his article, Niels Fieremans discusses the situation in fifteenth-century Flanders and Bruges in particular. His findings partially correspond with the ones of De ruysscher. Fieremans stresses that fundamental inequalities between groups of citizens existed: privileges were part and parcel of medieval communities. And as does De ruysscher, he states that this did not prevent rule-of-law-like approaches. Fieremans considers the rule of law in Bruges as thin. The administrators of Bruges held onto certain principles such as protection of property rights and equal access to the urban court. This was the case even though privileges were granted to foreign merchants. Fieremans highlights the interactions between the Bruges administrators, the count of Flanders and groups of foreign merchants. The latter tried to force the Bruges city government into conceding extensive privileges, which were exemptions from urban rules. However, they generally failed. There was even a trend towards granting similar privileges to the different merchant groups. In this regard, Fieremans' conclusions are different from De ruysscher's, which point to the symbolic nature of rules as projecting an ideal of unity-in-diversity. Fieremans detects a policy to factually impose generalizing rules, for example onto individual merchants who had committed crimes, even when the privileges of their nations allowed for

[8] But see Hirschl 2020 and Hirsch Ballin et al. 2021.

exceptions. Quite remarkably, a standard of legality, which is a minimal requirement for any rule of law, existed more in the unwritten case law of the Bruges aldermen than in legislation and charters of privileges.

Marco in't Veld analyzes seventeenth-century Amsterdam and raises the question whether the city had a rule of law. With reference to Raz, he distinguishes between a bureaucratic and a traditional rule of law. In't Veld describes how municipal institutions developed and how general rules were imposed. Customs were subjected to a rule of recognition, pointing towards the bureaucratic notion. At the same time, he detects an opposition from guilds against uniformly applied rules. Also, the law of Amsterdam not only included rules but also principles. These principles were broad categories that allowed for leeway for legal practitioners, and which could be used for arguments building on perceived morality and tradition. In't Veld concludes that bureaucratization did not per definition exclude 'traditional' approaches. As does De ruysscher, In't Veld detects no opposition between institutions that imposed general rules on the one hand and particularism on the other. Merchants, for example, could function in either system.

The second set of articles focuses on modern-day legal contexts and constitutional systems. These articles are no longer about if or how cities can be perceived through a rule of law lens, but instead what type of lens is employed in understanding reality and debating change.

In this regard Gert Jan Geertjes points to the potential of cities in addressing global challenges when compared to nation states. Modern constitutional law, he points out, is geared towards the nation state, which raises the question of how to give cities a proper constitutional status befitting of their importance in the 'urban age'. This question is addressed in the context of the constitutional orders of the United Kingdom and the Netherlands. Their notions of the rule of law could be summarized as thick and formal, based as they are on democratic decision-making combined with the protection of legality, even if they do not aim exclusively to be just that. Both these orders leave considerable leeway to political rather than judicial institutions in protecting constitutional values, thereby giving priority to considerations of, to Use Halberstam's terminology, 'voice' over 'expertise' in such matters. Constitutional development is according to Geertjes highly circumstantial rather than a matter of conscious legal design. This context leads Geertjes to doubt whether the constitutional position of cities in these two orders can be entrenched easily. He also questions the urgency of constitutionally entrenching the position of cities in the constitutions of the United Kingdom or the Netherlands. Given their politically enforced constitutions, he points out that the constitutional autonomy of cities is unlikely to be granted; rather it will evolve and develop organically. In this context, Geertjes highlights the potential of cities to create their own urban autonomy by setting their own policy goals in cooperation with NGO's and the private sector.

Finally, the contribution of Marius Pieterse turns the attention to a thick and substantive version of the rule of law in realizing urban constitutionalism in South Africa. Moving from the emphasis on democratic consent in determining the content and legitimacy of law in the contributions of Geertjes and Van Karnenbeek, the focus now rests on the potential of judicial review in the context of urban autonomy. This denotes a shift from issues of democratic 'voice' to that of judicial 'expertise' coupled with

the protection of entrenched 'rights', employing again Halberstam's paradigm. Pieterse illustrates how the current constitutional dispensation in South Africa moved from treating local government as a creature of statute to an autonomous constitutional actor. The justiciability of the country's Constitution has also meant that the courts are the ultimate guardians of the rule of law and elucidate the concept's substantive content when interpreting constitutional provisions. This has entailed various consequences for local government. In this context, the Constitutional Court has played a key role in protecting urban autonomy from being preempted, usurped, or overturned by provincial or national attempts in demarcation disputes, while also holding local government to the rule of law. For instance, the Court held that local government must show 'good constitutional citizenship' in the context of intergovernmental relations. The thickness of the rule of law as understood in South Africa has come to enrich this concept, as local government is obliged to respect the Bill of Rights when exercising their constitutionally guaranteed autonomy and heed legal and constitutional obligations for community participation when formulating and implementing local policies.

In moving beyond conventional understandings of the rule of law which emphasize the values of predictability and uniformity, Pieterse further illustrates how the courts construct flexible and context-specific rights-based evaluative paradigms for local government decisions. He also explains how the large overlap between realizing the socio-economic rights in the Bill of Rights and the developmental duties of local government has meant that the country's case law on these rights has mainly been focused on the accountability of local government. In this regard, the courts primarily evaluate the protection of such rights by reviewing the reasonableness of the legislative and executive measures which local government takes in enforcing them. Looking at these examples together, it becomes clear that the 'urban turn' under the country's current constitutional order is characterized by a thick and substantive conception of the rule of law.

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