

# Urban Pandemic: Federalism, the Right of Cities, and the Judiciary

**James Holston**  
Professor of Anthropology  
University of California, Berkeley

The pandemic crisis we are living in Brazil, unimaginable less than a year ago, has the head of Medusa: its many snakes strike simultaneously at the nation's health, economy, and state. While clearly a juggernaut of national scale beyond anyone's estimation or experience, it is a crisis most intensely lived in cities. The density and precarity of Brazilian cities makes for a terrible and terrifying multiplier of crisis. It is not only that Covid-19 hosts itself most effectively in the dense networks of urban life, destroying individual lives, community life, and economic livelihood. It is also that the pandemic has unleashed the dogs of political strife, as the federal government, itself divided by vectors of intrigue and (in)competence, wars with states and cities over questions of science and quackery that are symptoms of yet more fundamental conflicts of security, authority, and liberty at the core of the current configuration of the Brazilian polity. These are primary issues of Brazilian federalism and municipalism. That is, they concern the basic organization and distribution of power and responsibility between central government, constituent states, and component municipalities.<sup>1</sup>

Brazil is not alone in finding that the Covid-19 pandemic has revealed the fault lines of current configurations of constitutional federalism. Like Brazil, both India and the United States, also federated republics, confront pandemic conditions without strong and unified leadership from their central governments – indeed, without leadership that

many consider minimally competent. What has saved countless lives in all three is that mayors and governors have taken action often in outright defiance of federal government. The failures at the center have forced Brazilian, Indian, and American city mayors and state governors to take command by exerting their democratically constituted authority over their jurisdictions to make decisions and impose regulations about security and liberty in matters of public health. They have emerged not only as the most important field commanders on the front lines of crisis but also as the most vital proponents of democratic government. Often in direct confrontation with the dictates of central authorities, moreover, they have consolidated their force through alliances with other governors and mayors. In effect, they have reduced the assault of the virus by seizing the resources of federalism and pushing them to their limits.

Yet cities remain especially vulnerable to these limits in current conceptions of federalism. This is because they are subordinated not only to central but also to individual state authorities in many of the most vital areas on which their wellbeing depends, including public health, enforcement, immigration, and citizenship itself. This subjection is not primarily a matter of funding as many states and indeed nations depend on the wealth of cities. It is rather the result of a specific conceptualization of national federation that decisively weakened the powers of cities and that became dominant with the emergence of the modern nation-state centuries ago. The coronavirus pandemic makes the case that this conceptualization of “nested sovereignties” of nation, states, and cities must be rethought. It presents an opportunity, no doubt exceptional and even singular, to reconfigure the organization of polity.

What can the judiciary do at this moment to contribute productively? Squarely within its *métier*, it can recognize the problem

and promote reasoned responses through courses of study and debate. Even while they are themselves in pandemic lockdown, judges can engage the comparative study of constitutions to find better solutions for the structures of federalism. They can address the principles of “nested sovereignties” of central government and constituent components. They can examine the organization of regional alliances among states and cities that would have the autonomy and authority of confederations. These formations would necessarily entail trade-offs in terms of powers and expectations in relation to central government and to each other, which would vary regionally and which would have to be developed constitutionally. Judges can also investigate the foundations of municipal power and of the relations between regions, states, and cities both as individual entities and as leagues.

Fortunately, Brazil’s current constitution (1988) and enabling legislation, such as the City Statute (2001), provide important measures as well as clues for how to construct this comprehensive rethinking. This is a time for redesign and invention, in which judges can make a significant contribution not by waiting for problems to appear in their courts but by recognizing that the problems are already there and by investigating possible solutions outside the current constitutional box.

Moreover, when problems of federalism and its competing authorities do appear in their courts, they can decide in favor of already established local rights and obligations, in favor of the rights of states and especially of the rights of cities. There are many resources in existing law that judges can use to defend the local. In the 1988 Federal Constitution, Chapter III of Title III, especially Article 25, paragraph 3, establishes the principle of federalism, giving constituent units of the federation both general and explicit powers. Article 30 of Chapter IV does the same for municipalities. Articles 182 and 183 of Title VII

are pioneering initiatives of Urban Policy, creating unprecedented opportunities for urban residents to claim rights and find justice. Most important, the City Statute (2001) gives cities a comprehensive legal foundation to claim *their* rights and enforce the many powers it attributes to them. This statute is world-renowned for establishing Brazil's pioneering vision of a *de jure* – and not only politically *de facto* – “right to the city” for residents. There is indeed a global movement of “municipalism” – at times directly inspired by Brazilian innovations in municipal democracy embodied in the City Statute. It is now time for the Brazilian courts to use these legal resources to further the right *of* cities to more robust powers to decide issues of security and liberty that affect its inhabitants decisively, including those of policing, planning and redevelopment, property, the environment, and public health, and that are today in part or whole imposed by state and federal governments.

For example, conflicts between federal and local governments frequently arise over matters of public health in large measure because the national Minister of Health determines and coordinates the general policies and financial resources of SUS while municipalities implement the actual services. However inefficient, the center requires that local demand be funneled through it. The local purchase of ventilators in the state of Maranhão is a case in point. The national government attempted to block the purchase because, although efficient, it “sidestepped” central authority. Such intervention makes little sense. Judges can help reverse this unproductive logic by establishing decisions that allow cities to determine policy, precisely because they know their needs best, with financial assistance from central

government. The judicial grounding of such decentralization would amount to a material enactment of the principle of “democratic experimentalism,” already recognized by the Supreme Court (ADI 5253) as an important initiative to generate innovation but nevertheless vastly underutilized. It would allow mayors to set policy to solve the problems they understand best with support but not interference from central government.

The Covid-19 pandemic has made the project of advancing a new organization of rights to the city, of the city, and of the states an urgent challenge. It was there before, but coronavirus has exposed its fault lines disastrously. Even though its enactment belongs ultimately to the political will and resourcefulness of the Brazilian people, judges have both competence and authority to develop the jurisprudence on which the necessary leaps in political imagination must be built. The reinvention of federalism's nested sovereignties is now beginning, by force of circumstance, in India, the United States, and other federations. A different conceptualization of municipal rights and federal organization may well emerge on the other side of pandemic. Brazilian judges need to engage this rethinking, before the union derails into yet another coup, impeachment, or anarchic rebellion, none of which offers longer-term solutions. The judiciary can contribute with vision and direction to the reconfiguration of the federated union that could come after the pandemic, one which consolidates the rights of cities and metropolitan regions to safeguard their welfare with greater independence from either enlightened or idiotic central authorities. The alternative of inaction leaves cities as vulnerable as they are today to the next pandemic in whatever form it is sure to come.

## Note

1 The first version of this text resulted from an invitation by the President of the Permanent Forum for Constitutional, Administrative and Public Policy Studies, Judge Dr. Cristina Tereza Gaulia, and by the School for Magistrates of the State of Rio de Janeiro. The author also thanks Prof. Dra. Rafaela Selem for her translation of the text into Portuguese.