

BEYOND THE LEGAL STATUS OF CITIES: A FRAMEWORK FOR ANALYSING MULTI-LEVEL GOVERNANCE

—MARIANA VALVERDE* & ANIRUDH GOEL**

I. INTRODUCTION

Based on both the First Author's and other scholars' empirical and legal studies of local governance, mainly in Canada but also internationally, this article presents an argument to the effect that to better understand federalism or any other multi-level governance situation (such as municipal-state relations, the focus of this article) it would be useful to abandon the static organizational-chart approach usually embodied in lists of competences assigned to one or another level of government. Classic studies of bureaucratic institutions as well as recent literature on the anthropology of the state teach us that an organizational diagram or a list of competences does not reveal how things actually work.¹ Building on the anthropology of the state literature, as well as socio-legal studies of governance utilizing 'assemblage' and 'actor-network' insights,² we here suggest that a dynamic approach that sees jurisdiction as interactive rather than static can be utilized by researchers attempting to analyze the myriad, constant struggles for power and authority that constitute the "game" of jurisdiction in practice.

* Professor Emeritus at the University of Toronto and an Expert on Urban Law and City Governance as well as a Socio-Legal theorist. Recent books include Michel Foucault and Infrastructure: New Trajectories in Law (both with Routledge).

** A fifth-year law student at the WB National University of Juridical Sciences.

¹ Max Weber famously pioneered the empirical, legal and historical study of 'the state' by focusing on the rise of bureaucracies (see the works collected in *Economy and Society*, many editions). Robert Michels developed Weber's insights but undercut Weber's focus on historical specificity; Michels is mainly known for a grand sociological theory known as "the iron law of oligarchy". Recent work on the anthropology of the state tends to avoid generalizations and grand models. One especially influential work in this line is Matthew Hull, *Government of Paper: The Materiality of Bureaucracy in Urban Pakistan* (1st edn, University of California Press 2012). See also Nayanika Mathur, *Paper Tiger: Law, Bureaucracy and the Developmental State in Himalayan India* (Cambridge University Press 2016).

² A very influential work in this line is Bruno Latour, *The Making of Law: An Ethnography of the Conseil D'Etat* (Polity Press 2009). Also influential is Annelise Riles – her work and work by similar authors are found in 'Documents: Artifacts of Modern Knowledge' in Annelise Riles (eds) (Ann Arbor MI, University of Michigan 2006). See also Mariana Valverde, 'The Crown in a Multicultural Age: The Changing Epistemology of (Post) Colonial Sovereignty' (2012) 21,1 Social and Legal Studies 3-21.

A socio-legal approach, stressing the interactive and dynamic features of jurisdictional games, that benefits from current social-theory including Michel Foucault's influential work on governing practices can shed light on the constantly shifting political tensions and conflicts (both overt and covert or lingering) that in many cases could not have been predicted by a strictly legal analysis of 'lists' of competences.

The argument will proceed in three parts. The first presents a novel, interdisciplinary theorization of jurisdiction that is well suited to understanding the numerous non-sovereign jurisdictions that dominate both bureaucratic life and everyday life (including municipalities) but which tend to receive less attention from legal scholars than acts of sovereignty. The second provides an account of the sad state of municipal autonomy in Canada, especially in its largest province, Ontario, and adds a comparative dimension by considering the situation in India, especially the documented weaknesses of the implementation of the 73rd and 74th amendment to the Constitution. The third part reflects on the power of entities that in India are called "parastatals" and in Canada are constituted either as Crown corporations or as special-purpose 'agencies, boards and commissions' (ABC's). These entities lack constitutional status, being created, usually by statute, as one-off public corporations, normally governed by an appointed board. They are in theory accountable to a Ministry; but in practice they frequently act independently, sometimes exercising more power, on the ground, than any elected level of government, especially at the local level.³

The brief conclusion argues that the extensive powers of such entities (a world-wide phenomenon) is one reason why the Canadian civic activists may want to re-think whether their quest to have municipalities, or at least large cities, obtain constitutional status is the best approach towards local democracy.⁴ The Indian experience with the 74th Amendment is another reason to be sceptical about devoting much energy to obtaining constitutional status for cities.

II. JURISDICTION AS AN INTERACTIVE GAME

Disputes about sovereignty, such as those that make up most international law, are almost always zero-sum games. If one party wins, automatically the other party loses. The zero-sum game of sovereignty is also visible when in states with constitutionalized rights citizens, individually or on behalf of a group, take the

³ An excellent example of 'parastatals' is the Thatcher-era invention of 'urban development corporations' and 'urban regeneration' districts. In the city of London such bodies were created specifically to undermine elected Labour-dominated borough councils, but similar entities have long existed in US cities (see inter alia Susan Feinstein, *The City Builders: Property, Politics and Urban Development in London and New York* (1st edn, Wiley-Blackwell 1993).

⁴ A leading Canadian campaign to obtain constitutional status for cities is the "City Charter" movement based in Toronto (though some major cities in other provinces already have charters, such as Vancouver).

state to court. If those claiming unconstitutional discrimination win, the state or central government loses, and vice versa.

In general, political scientists focus on sovereignty, even when they seek to delineate its limits, as John Stuart Mill famously did in elaborating the 'harm principle'. In federal countries political scientists spend most of their time examining the tensions between the central government and the states or provinces, that is, the endless struggles about how sovereignty is to be divided in the federation. In Canada that is also the case for constitutional lawyers, only a handful of whom have taken an interest in local democracy.

What most legal scholarship and most political science neglects to take seriously is the fact that there are thousands of public bodies that wield governmental power in the absence of any share of sovereignty. Transit authorities; urban development corporations; conservation authorities and conservation land trusts; special districts defined by the scope of a particular public utility (privately or publicly owned). Thus, local governance can be described as the mainly accidental vector sum of the unpredictable interactions of whichever 'parastatals' wield power in a particular area, always in some relation to or cooperation with or conflict with, the governments (legislative and executive) of municipalities, provinces/states, and central governments. In turn, civil society organizations, such as professional associations, NGOs, or neighbourhood groups, while not usually wielding any formal legal power, are often important players in the political/legal game. Both legislative and executive branches of all levels of government often act either in response to or anticipating a response from such non-governmental groups.

In federal countries, different provinces/states have different laws and different governance habits, so that generalizations about that level of government—and hence the municipalities subject to them—are nearly impossible. To give an example from India: Most large Indian cities have an elected council headed by a mayor but the Chief Executive Officer of the corporation is a state-appointed commissioner. But unlike in these cities, Kolkata has a 'mayor in council' system whereby real power (though certainly not sovereign power) is exercised by the elected Mayor who acts as the Chief Executive Officer. The state appointed municipal commissioner in Kolkata serves as the 'Principal Executive Officer', and is subject to the control and supervision of the Mayor.⁵ An example from Canada that also underlines the dangers of generalizations about levels of government is that in relation to urban planning, the province of Ontario has a provincial 'expert' board, made up of provincial appointees, to which municipalities, developers, and even citizen groups can appeal not only particular municipal decisions but even whole official plans (sometimes successfully). Also in Ontario,

⁵ The information about Kolkata's uniquely democratic system is drawn from KC Sivaramakrishnan, 'Revisiting the 74th Amendment for Better Metropolitan Governance' (2013) vol 48, 13 *Economic and Political Weekly*, 89.

the Minister of Municipal Affairs has been issuing dozens of 'Ministerial Zoning Orders' in very recent years that override both local planning decisions and environmental norms and rules laid down by previous governments. Outside of Ontario such powers may exist in blackletter law, but they are very seldom exercised, and usually only to impose environmental or other rules protecting a larger public interest that do fall within provincial jurisdiction (e.g. the protection of agricultural land in areas near the city of Vancouver). In the Canadian case it is difficult –and probably not very useful at the practical level—to try to discern the dividing line between formal law (e.g. Ontario's Local Planning Appeals Tribunal, which is indeed a legal unicorn in the country) and governing habits and political traditions that are not enshrined in law but have almost the force of law.

If the political and legal game of jurisdiction often has many more than the two parties that generally appear in court cases, and the rules governing it are to some extent fuzzy at the edges given the lack of a sharp distinction between formal law and political tradition, it is also the case that the object of the game changes from one 'match' to another. At any one moment, the multiple authorities that share some or all of a geographic area and/or authority over a particular population may be fighting to claim turf - or they may be coexisting peacefully. They may also be engaged in a battle to see who can disavow responsibility for a problem area, a version of the game of jurisdiction that is seldom neglected in scholarly studies.

Given these dynamics it would not be wise to try to argue for a general theory of jurisdictional conflict. Peaceful coexistence, for instance, is usually the situation in the case of utilities and transit authorities, which generally have a monopoly over one type of service in a specific area, a way of dividing power that encourages peaceful coexistence since both function and geographic area are clearly delimited from the start.

Fights among entities whose jurisdiction overlaps, however, can be bitter and lengthy. For example, in Toronto today, the provincial transit agency Metrolinx has been heavily criticized for sidelining both residents' groups and elected municipal councils, with Toronto city council having passed motions that Metrolinx has completely ignored (which is not contrary to provincial law but is certainly contrary to Canadian political tradition). The city owns and runs the Toronto Transit Commission (TTC), but the province has superimposed its own plan for new subways though the territory over which the TTC used to have a monopoly, with the provincial government elected in June 2018 having at one fell swoop thrown out the subway expansion plan that the city had developed over some years. Metrolinx has much deeper pockets and a larger geographic area than the TTC, and in terms of legal power it has reaped much benefit from legislation passed in the provincial legislature since 2018 that gives it extraordinary powers (especially the "Building Transit Faster Act").

Such conflicts occur everywhere in the world, consuming a great deal of officials' energy and, often, considerable resources (e.g. the cost of specialized legal advice; the cost of consultants asked to produce reports; the time spent by senior officials strategizing internally and doing battle, openly or covertly, with other entities). But the theoretical point is that these everyday struggles among public entities that geographically overlap are rarely fights about sovereignty; federalism is not involved. If the struggles are amicably resolved, which is the case perhaps more often than not (although no quantitative data can be produced to confirm or deny this, since even deciding what counts as a struggle involves making judgements), the entities involved could see their power or influence increased simultaneously - or decreased simultaneously, if they share a desire to download responsibility for a problem area to a third entity. Such dynamics are in sharp contrast to the zero-sum quality of disputes about sovereignty.

To make this concrete: in Canada some branches of both federal and provincial governments have reached agreements with Indigenous nations to share jurisdiction either in certain geographic areas or in some functional fields, for instance with joint Indigenous-government management of some national parks. There are similar co-management arrangements at the local level, for example with volunteer citizens being granted the power to help make decisions regarding particular spaces (especially parks) or particular activities (e.g. in Toronto Business Improvement Areas or BIAs are routinely granted power over decisions that formally are within the jurisdiction either of city staff or city council). Civil society can be an important actor in urban development and in planning, and civil society groups can also be used as pawns by competing levels of government. Politicians at the state/provincial level can usually find some local group that will back their program or policy if another civil society group is opposing it: this happens particularly visibly during election campaigns but it is a routine feature of multi-level governance.

Such dynamics stand in sharp contrast with the win-or-lose logic of sovereignty disputes. And the arrangements and constantly shifting power arrangements that both effect struggles and result from them can encompass a variable number of entities, both formally constituted and not. This stands in sharp contrast with the common law's insistence on formatting disputes as between two parties, with other stakeholders reduced to 'intervenor' (to use Canadian legal terminology) who have to construct their own arguments to support one side or the other, hence precluding the possibility of a self-mediated compromise as well as the expression of a distinct third or fourth interest.⁶

⁶ The First Author has been an expert witness in numerous Canadian court cases and human rights tribunals cases, sometimes for one of the parties but at other times on behalf of an 'intervenor'. This comment draws on that experience as a whole.

Of course, as hinted at already, non-sovereign jurisdictions are not necessarily wanting to claim more power or a greater scope in every dispute and every multi-player conflictual situation. They can also work hard to abdicate jurisdiction, just like sovereign entities. For instance: the COVID pandemic saw many local authorities attempt to disavow responsibility for unpopular lockdowns and mandatory measures, to the extent of sometimes failing to exercise the public health jurisdiction they do legally have. In Toronto, Mayor John Tory initially tried to claim that only the provincial government could impose emergency measures limiting people's liberty of movement and freedom to make health choices. This legally dubious claim ignored the fact that public health officials—who in the province of Ontario are primarily local, with cities or less urban regions having their own Medical Officers of Health—possess extensive powers, which are not visible most of the time but are certainly highly coercive. Children can be denied access to school if they fail to show proof of being vaccinated against a number of specified diseases, for example; and public health inspectors have the power to enter any licenced establishment at will and can order the immediate closing of a restaurant, despite the fact this latter act would set aside provincial employment law and possibly upend property and corporate law.

In situations such as the ones mentioned as examples, actors, even if they are focused on a single 'enemy' or opponent, are in fact engaged in a multi-player game of jurisdiction in which claiming jurisdiction and disavowing or abdicating it are the main two moves, but with the moves being chosen not *de novo* but always in relation to what other players are doing or might do. Hence the description of the game of jurisdiction as interactive or relational. An example from India illustrates the interactive nature of actually existing games of jurisdiction. In their extensive analysis of the weak effects of the 'decentralization' of power sought by the Government of India through the 73rd and 74th Amendments, legal scholars Shamila Murthy and Maya Mahin state that although the amendments appeared as a two-player game in which the central government empowered municipalities, the states, which were hardly bystanders since only they could enact changes to municipal powers, worried that granting powers to municipalities would weaken their own position vis-à-vis the central government.⁷

This worry was wholly predictable. Research shows that the states' concerns led to any number of creative workarounds whereby states appeared to boost local democracy but undermined it at the same time. For example, some states did go ahead with calling municipal elections every 5 years and reserving at least a third of the council seats for women and instituting other 'reservations' for lower-caste and Indigenous groups, but then failed to provide municipalities with the

⁷ Shamila Murthy and Maya J Mahin, 'Constitutional Impediments to Decentralization in the World's Largest Federal Country' (2015) 26, 1 *Duke J of Comparative and International Law*, 113. The authors also note "the centralized manner in which decentralization has been pursued in India" (page 121).

demographic data needed to implement the reservations for scheduled castes and scheduled tribes.⁸ Thus some municipalities were unable to hold elections according to the new rules because the local level is not where census data is collected, and the states would not share the information.

If the Government of India had acted, in 1992, with a more sophisticated or simply more empirically informed model of the game of jurisdiction, one that recognized the multiple actors involved and foresaw some of the counter-moves that state governments—very powerful actors in the Indian federation—were likely to make, perhaps some of the subsequent failures and undemocratic workarounds might have been avoided or at least mitigated.⁹

Further, the 1992 Government that was so keen to join the then globalized chorus about the virtues of decentralization¹⁰ could have considered that municipalities could hardly be expected to exercise more responsibilities in the absence of a radical revision of the fiscal division of powers¹¹. That lack of legislative attention to the key issue of revenue tools and fiscal powers was a problematic narrowing of the scope of the ‘decentralization’ that the central government stated it was seeking.

The province of Ontario experienced a similar deficiency in the game of provincial-municipal jurisdiction played by a Conservative government in the mid-1990s: the legislature passed laws transferring responsibility for public transit and public housing to municipalities, but without transferring concomitant revenue tools.¹² This generated a situation whereby Canada’s largest and wealthiest city,

⁸ *Inter alia*, Ravindra Prasad and Y Pardhasaradhi, ‘Twenty-five Years of the Constitution’s 74th Amendment Act 1992: Promise and Performance’ (2020) 66, 2 *Indian J of Public Administration*, 159-178.

⁹ Another flaw of the game of jurisdiction enacted in 1992 was that democratic metropolitan governance was weakened rather than strengthened. KC Sivaramakrishnan, ‘Revisiting the 74th Constitutional Amendment for Better Metropolitan Governance’ (2013) 48, 3 *Economic and Political Weekly*, 86-94.

¹⁰ Colombia is another middle-income country where decentralization was very popular in government discourse in the early 1990s, but where the centralized manner in which decentralization was pursued also had negative consequences. See Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge University Press 2015).

¹¹ Prasad and Pardhasaradhi (n 8) 171-3, and PK Chaune, ‘Urban Local Bodies in India: Quest for Making them Self-Reliant’, [2003] *Indian Institute of Public Administration*. Chaune’s report is unusual in the literature in highlighting the fact that villages were nearly forgotten in the 1992 reform, and their status was not codified in the Seventh Schedule along with that of Urban Local Bodies (a term that includes both municipal corporations and urban municipalities that are not incorporated).

¹² Numerous research reports by the Institute of Municipal Finance and Governance at the University of Toronto discuss this point; see research paper number 34, Enid Slack and Almos T Tassonyi ‘Financing Urban Infrastructure in Canada: Who Should Pay?’ [2017] IMFG. IMFG papers are very informative, and are open access. Due to the federal government’s lack of jurisdiction over municipalities, there is no central Ministry of Housing and Urban Affairs (there was one fleetingly, but long since abolished) and hence very scarce policy capacity on urban and other

which like other Ontario municipalities has to present a balanced budget each year (as if deficit financing were a power that only ‘higher’ levels of government ought to utilize, even though some provinces in Canada have smaller economies than the largest cities) has to be constantly asking the higher levels of government, which have more than adequate fiscal powers, for one-time only grants to prevent catastrophic failures in service provision. One-time only grants, by the federal as well as the provincial government, can be vote-getters, if timed right, and can simultaneously further municipal goals: but obviously they provide no basis for long-term or even medium-term planning and budgeting.

We see then, based on both Indian research and Canadian research, that when upper levels of government simply re-assign some new responsibilities to municipalities, that is not decentralization: municipalities are placed in the position of eternal beggars, with the central government, which in India as in Canada has greater fiscal powers and capacity than any other government, being empowered and indeed structurally encouraged to make municipalities compete with one another for federal grants.¹³

III. THE “CREATURES OF THE PROVINCE” DOCTRINE AND THE PERSISTENT WEAKNESS OF DEMOCRACY AT THE LOCAL LEVEL IN CANADA

Many Canadians active in civic affairs believe that the phrase “municipalities are creatures of the province” is in the original Constitution, the 1867 British North America Act, whose division of sovereignty between the federal (central) government and the provinces remains current today. However, that is incorrect. The phrase has certainly been repeated in both judicial decisions and in political writing as if it were indeed part of the Constitution, just like other much-quoted legally powerful phrases such as “security of the person” or “peace, order and good government”; but that is not the case.

When four British colonies in the northern part of North America decided or were encouraged to join together in a federation, with the result that the Dominion of Canada was created in July 1867, the only issues on the table were two: first, whether the British government would still have a governing role

local issues within the extensive federal bureaucracy. The Ministry of Infrastructure provides much funding for local projects but stays away from any public pronouncements or even research reports that might be seen as impinging on provincial jurisdiction over municipal government.

¹³ One instance of this logic of forcing municipalities to compete for discretionary resources is the Government of India’s ‘100 smart cities mission’, launched in 2016. See Mariana Valverde and others, ‘Local Governance, National Agendas, and Transnational Corporations: India’s 100 Smart Cities Mission’ [2022] National Law School Review (forthcoming). The government of Canada also launched a ‘smart cities challenge’, about the same time, but only four prizes were awarded, and unlike in India the prizes did not come with radically new governance demands.

(which it did not, except for the Judicial Committee of the Privy Council, which remained the highest court of appeal for constitutional cases in Canada until the mid-twentieth century) and, secondly, how the powers being devolved to the entity then known as ‘the Dominion’¹⁴ of Canada were to be divided between the provinces and the new federal government in Ottawa.¹⁵

Provinces, which for the most part had been separate colonies, sometimes for more than a century, were granted considerable powers, in part because of the recurring threat of the province of Quebec – which had already seen an anti-British uprising in the 1830s—refusing to participate in the particular jurisdictional game created in 1867 (indeed, when the Constitution, formerly known as the British North America Act, was “patriated” in 1982, Quebec did not sign on, though this did not stop the process). Thus, education, which in Quebec was largely controlled by Roman Catholic religious orders for centuries, was wholly assigned to the provinces. This had the long-term consequence of making Canada one of the few modern nation-states without a central Ministry of Education. (It also had the probably unintended effect of turning the universities and tertiary education colleges, which barely existed in 1867, into wholly provincial entities, such that there is no national system for governing, or monitoring and auditing university education; there are federal research funds that take the form of grants for professors and scholarships for students, but the federal government does nothing to govern higher or elementary education, and could not do so without political upheaval).

The provinces were also given sole jurisdiction over what the BNA Act describes as “municipal institutions”.¹⁶ Some Canadian scholars including the present author have argued that local governments, which along with school boards had been popularly elected for decades before 1867, that is before any elections for provincial or federal governments took place, are more than mere

¹⁴ The term ‘Dominion’ has slowly gone out of existence; it was used during the British Empire to distinguish white settler colonies that were granted some self-government from colonies ruled directly by imperial authorities.

¹⁵ British North America Act 1867, ss 92 & 93.

¹⁶ See *inter alia* Kristin Good, ‘The Fallacy of the Creatures of the Province Doctrine’ [2019] Institute for Municipal Finance and Governance (paper #46); Ron Levi and Mariana Valverde, ‘Freedom of the City? Canadian Cities and the Quest for Governmental Status’ (2006) 44, 3 Osgoode Hall Law Journal 409-459; and the special issue of the ‘Toronto vs. Ontario: implications of the case for local democracy in Canada’ Osgoode Journal of Law and Social Policy (2021)34. The first author’s argument about distinguishing elected municipal councils from mere administrative ‘institutions’ was made in her expert witness affidavit on behalf of the city of Toronto’s constitutional challenge to the 2018 provincial interference with the in-progress Toronto municipal election (the final Supreme Court decision, which contains a good summary of the previous lower-court decisions, is *Toronto (City) v Ontario (Attorney General)* 2021 SCC 34, 38921.

institutions such as transit authorities or utilities boards¹⁷. It is by no means clear that in 1867 the ‘framers’ of the British North America Act intended to make local democracy into a privilege that the relevant province could abolish or radically transform, since the Act does not mention local elections at all, or even municipal corporations. However, since section 3 of the 1982 Charter of Rights and Freedoms (which supplemented rather than abolished the 1867 original BNA Act) only mentions that Canadians are guaranteed free and fair elections provincially and federally, many textualist-oriented judges have taken it upon themselves to interpret the two relevant texts – the section of the BNA Act on ‘municipal institutions’, and section 3 of the 1982 Charter—as jointly authorizing arbitrary moves, such as the numerous abolitions of existing municipalities that took place in Ontario in the late 1990s, as well as the more recent 2018 ‘Better government act’ passed by the newly elected Conservative majority ruling the province of Ontario. This latter law upended the Toronto municipal election in progress by ignoring the city’s evidence-based ward boundary review, which would have increased the number of council seats from 43 to 47: the province unilaterally and without prior consultation or expert advice decreed that Toronto would henceforth have only 25 wards. There was no evidence tendered by the province of Ontario to justify the radical change that frustrated the in-progress plans of many councillors and council candidates, as well as the work of campaign contributors and volunteers, and which left many voters quite confused about who was running and even what ward they were in.

Since political speech has a higher level of protection in Canadian law than other forms of speech (say commercial speech such as advertising), many scholars and jurists anticipated that the Supreme Court of Canada would say that an election in progress ought not to have the rules changed midstream. Such a move had never occurred in Canadian history, so it would have been easy for the judges to criticize it, especially years after the fact, when city functionaries would likely have refused to undo the rapid changes, they had to make in the summer of 2018 and return to the pre-2018 47-ward plan.

Scholars and knowledgeable lawyers also anticipated that the Supreme Court would punt many of the substantive issues about local democracy and municipal autonomy to the future,¹⁸ restricting themselves to the question of

¹⁷ A similar argument was made by the Federation of Canadian Municipalities in their intervenor brief in the *Toronto v. Ontario* case cited in the previous footnote. Interestingly, however, the Association of Municipalities of Ontario, which one would have thought would also intervene, did not.

¹⁸ For this claim the First Author is relying on many formal and informal conversations among Toronto-based scholars and lawyers, especially during the process by which the intervenors siding with the city discussed their interventions, and also on an invitation-only workshop on the issues organized by the first author at the University of Toronto in the fall of 2019. Special thanks to Alexandra Flynn and Simon Archer, a partner at Goldblatts in Toronto, and to Prabha Khosla and Adriel Weaver.

election interference (a possibility that the city's lawyers, when arguing at the Supreme Court, appeared to support). In the period from the late 1980s to around 2015 there were indeed many decisions of the Supreme Court of Canada that were unanimous or almost unanimous, with consensus often created by narrowing the scope of the decision. However, perhaps due to the fact that some unusually conservative judges had been named to the court, or perhaps due to the retirement of longstanding Chief Justice Beverly MacLachlin, a keen consensus-builder, the case brought by the city of Toronto against the provincial 'Better government' act generated a sharply split decision, 5 to 4 in favour of unfettered provincial sovereignty, one that surprised most knowledgeable observers. Surprise was also generated by the fact that both majority and minority judgments were unusually sharp, almost polemical, in their tone, more in keeping with US Supreme Court habits than with Canada's tradition, one in which 9-0 rulings are not unusual.¹⁹

It may be helpful here to provide a somewhat detailed summary of both the majority and the dissent decisions. Fortunately, that is provided by the Supreme Court itself in the 'headnote' of the case; we will here provide an extensive quotation that reproduces most of the official summaries of the background facts and most of the official summaries of the majority and dissenting decisions. The headnote begins, as is the custom in Canadian judicial decisions, with some uncontested facts.

On May 1, 2018, the City of Toronto municipal election campaign commenced and nominations opened in preparation for an election day on October 22, 2018. On July 27, 2018, the closing day for nominations, Ontario announced its intention to introduce legislation reducing the size of Toronto City Council. On August 14, 2018, the Better Local Government Act, 2018, came into force, reducing the number of wards from 47 to 25.

The City and two groups of private individuals challenged the constitutionality of the Act and applied for orders restoring the 47-ward structure. The application judge found that the Act limited the municipal candidates' right to freedom of expression under s. 2(b) of the Charter and municipal voters' s. 2(b) right to effective representation. He held that these limits could not be justified under s.1 of the Charter and set aside the impugned provisions of the Act. Ontario appealed and moved to stay the judgment pending appeal. The Court of Appeal granted the stay and, on October 22, 2018, the municipal election proceeded on the basis of the 25-ward structure created by the Act. The Court of Appeal later allowed the appeal, finding no

¹⁹ *Toronto (City) v Ontario (Attorney General)* 2021 SCC 34,38921.

limit on freedom of expression. The majority held that the City had advanced a positive rights claim, which was not properly grounded in s. 2(b) of the Charter, and concluded that the application judge had erred in finding that the Act substantially interfered with the candidates' freedom of expression and in finding that the right to effective representation applies to municipal elections and bears any influence over the s. 2(b) analysis. The majority also held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the Charter, nor do they limit provincial legislative authority over municipal institutions.

Per Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ.: Ontario acted constitutionally. The Act imposed no limit on freedom of expression. Further, unwritten constitutional principles cannot be used as bases for invalidating legislation, **nor can the unwritten constitutional principle of democracy be used to narrow provincial authority** under s. 92(8) of the Constitution Act, 1867, or to read municipalities into s. 3 of the Charter (emphasis added).

A purposive interpretation of Charter rights must begin with, and be rooted in, the text and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts. Section 2(b) of the Charter, which provides that everyone has the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and other media of communication, has been interpreted as generally imposing a negative obligation rather than a positive obligation of protection or assistance. A claim is properly characterized as negative where the claimant seeks freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage. Such claims of right under s. 2(b) are considered under the framework established in *Irwin Toy* [citations omitted] may, in certain circumstances, impose positive obligations on the government to facilitate expression. Many constitutional rights have both positive and negative dimensions and this is so for s. 2(b). Central to whether s. 2(b) has been limited is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right.

In the context of positive claims under s. 2(b), where a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression,... a positive claim must satisfy the following three factors first set forth in *Dunmore v. Ontario* [citation omitted]: the claim should be grounded in freedom of expression, rather than in access

to a particular statutory regime; (2) the claimant must demonstrate that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression; and (3) the government must be responsible for the inability to exercise the fundamental freedom. These factors set an elevated threshold for positive claims and can usefully be distilled to a single core question: is the claim grounded in the fundamental Charter freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? ... Substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is effectively precluded. While meaningful expression need not be rendered absolutely impossible, effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases.

In the present case, the City has not established a limit on s. 2(b). The City's claim is a claim for access to a particular statutory platform, and is thus, in substance, a positive claim. ... the City had to show that the Act radically frustrated the expression of election participants such that meaningful expression was effectively precluded. The candidates and their supporters had 69 days to re-orient their messages and freely express themselves according to the new ward structure. The Act imposed no restrictions on the content or meaning of the messages that participants could convey. ... In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression may rise to the level of a substantial interference with freedom of expression. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

Furthermore, the unwritten constitutional principle of democracy cannot be used as a device for invalidating otherwise valid provincial legislation such as the impugned provisions of the Act. Unwritten principles are part of the law of the Constitution. ...

[U]nwritten constitutional principles, such as democracy, a principle by which the Constitution is to be understood and interpreted, strongly favour upholding the validity of legislation that conforms to the text of the Constitution. Subject to the Charter, a province, under s. 92(8) of the Constitution Act, 1867, has **absolute and unfettered**

legal power to legislate with respect to municipalities. This plenary jurisdiction is unrestricted by any constitutional principle. [emphasis added]

[Dissent:] Per Abella, Karakatsanis, Martin and Kasirer JJ. (dissenting): The appeal should be allowed and the application judge's declaration that the timing of the Act unjustifiably infringed s. 2(b) of the Charter restored.

When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the Charter. The right to disseminate and receive information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection.

A stable election period is crucial to electoral fairness and meaningful political discourse. As such, state interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including participation in social and political decision-making. ...

The distinction between positive and negative rights is an unhelpful lens for adjudicating Charter claims. All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus. They also have negative dimensions because they sometimes require the state not to intervene. A unified purposive approach has been adopted to rights claims, whether the claim is about freedom from government interference in order to exercise a right, or the right to governmental action in order to get access to it. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the Charter. There is therefore no reason to superimpose onto the constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes....

The big-picture political theory question of whether it is useful to try to draw a line separating 'positive' from 'negative' rights – a question that is by no means as settled as the 5 justices in the majority claim – was one that need not have been discussed by the Supreme Court judges at all. But once the conservative majority had decided that provinces have unfettered discretion to pass laws

reshaping municipal governance without providing evidence to justify the move, then the progressive minority of the court rose raised the legal and philosophical stakes even higher and sang a paean to local democracy, claiming that the unwritten constitutional principle of democracy cannot be limited to citizens' right to elect higher levels of government.

It is very difficult to envisage any kind of compromise between these two sharply divergent views, the kind of compromise by narrowing the scope of the decision that used to be traditional at the Supreme Court of Canada. The majority sticks with the letter of the law and declares that democracy is only guaranteed to Canadians at the provincial and federal levels, since that is what section 3 of the Charter states (a Charter written without any local government representation). The four justices placed in the situation of having to make a counter-move argue that local democracy, which in Canada predates federal and provincial elections, should be recognized in part because democracy is an unwritten but fundamental principle underlying the Canadian political system. The court itself is playing a zero-sum game of judicial authority, clearly, instead of the more cooperative game of conflict resolution (including resolving conflicts within the court) that had been traditional.

Despite the very narrowly divided situation amongst the Supreme Court justices –and the equally divided decision that preceded it, from the Ontario Court of Appeal, where the decision went 3-2 in favour of the province—both the city of Toronto and other municipalities affected by provincial mergers and abolitions and changes in electoral rules accepted the result. Probably given existing political habits, even if the Supreme Court's minority had managed to persuade one more judge and thus win the day, it is highly doubtful that the city of Toronto would have undone, years after the fact, the system rapidly put in place by the city clerk and her staff immediately after the Ontario Court of Appeal decision overturning the trial judge's original ruling. Indeed, the city clerk declared that the work of turning 47 wards into 25 in time for the election could not be undone without undue hardship.

The political context, in the years that followed 2018, was perhaps not the most favourable to an inclusive, nation-wide movement in favour of local democracy and against provincial arbitrary top-down rule –the kind of mass mobilizations that many countries, e.g. in Eastern Europe, have seen when a president or a legislature changes the rules of elections or makes other moves that are technically legal but are seen as anti-democratic. In Canada unlike in the US it has not been traditional for the media and legal commentators to be very critical of judicial pronouncements, especially decisions of the Supreme Court.

A key element in the political-cultural context is the legal fact that only the city of Toronto went all the way to the Supreme Court to make what emerged,

especially at the Supreme Court level, as a rather timid claim for local political autonomy. This meant that much of Canada saw the issue as a Toronto-specific one rather than one affecting the status of local democracy across the country. This was unfortunate: unlike in more culturally unified countries, where an attack on the largest city would be seen as an attack on the nation, in Canada it is a highly popular pastime for citizens as well as politicians across the country to decry or to criticize Toronto, which is the wealthiest city in the country and is also the cultural and scientific capital of English Canada.

One example of an issue that, perhaps because of the widespread anti-Toronto sentiment, received very little attention politically, and none legally, can be given here. While Premier Doug Ford's *Better Government Act*, introduced mere weeks after the election, was aimed at Toronto, not cities in Ontario in general, there was nevertheless simultaneously a change in the rules governing the second-tier municipality of Peel Region, which is largely urban and quite populous. Instead of an elected regional chair, the large second-tier municipality of Peel would henceforth have an appointed chair.

This led the then frontrunner for the position of Peel regional chair, Patrick Brown, to pivot quickly and run instead for mayor of one of the large first-tier municipalities in Peel, Brampton. Brown, who was successful in the Brampton mayoral race and is currently (April 2022) running for leader of the federal Conservative party, had been the leader of the Ontario Conservatives before Doug Ford but is an old-fashioned conservative, the kind that in the UK would be called a 'One nation Tory' (instead of a Trump-style right-wing populist). Many saw little but personal spite behind that particular change to the Peel Region electoral rules, but this was not challenged in court.

Taking a comparative perspective, one might ask whether the two slim majorities in the Ontario Court of Appeal and the Supreme Court of Canada might have ruled differently if they had taken into account the Indian Supreme Court decision of 2018 in the case of *Champa Lal v State of Rajasthan* (16 Supreme Court Cases 356), which put some limits on the discretion of Indian states to govern the structure of municipal government, stating that there must be evidence for changing the political and legal status of a municipality beyond mere population size. While Indian municipal governance is within the sole jurisdiction of states, being assigned to states in the "lists" of central, state, and shared jurisdictions set out in the Indian Constitution,²⁰ the Court in the *Champa Lal* case stated that state discretion is not unfettered. Quoting Article 243Q(2) of the Indian Constitution, it mentioned parameters such as population, population density, revenue generated for local administration, and economic importance amongst others, that should be followed by the state government during the

²⁰ The Constitution of India 1950 sch 7.

constitution or upgradation of a municipality. The court also stated that municipalities within the same state should be treated similarly – a perhaps obvious claim, but one that was disregarded by the Supreme Court of Canada's majority, which took a strict black-letter law perspective and showed no regard for the fact that since the 1867 BNA Act Canada has changed from overwhelmingly rural to largely urban (as have many other countries in the world).

IV. QUASI-GOVERNMENT: 'PARA-STATALS' AND SPECIAL-PURPOSE AUTHORITIES

It has been noted by several scholars writing about the lack of success of the 74th Amendment that municipal government and local democracy in India have in recent years been undermined as much by "parastatals" created at the state level than by actual governments, state or central. The term "parastatals" is rather vague. It seems to encompass permanent bodies assigned certain important jurisdictions that could arguably be local, such as potable water delivered to households through pipes, or for that matter urban planning, but can also include less permanent bodies assigned a particular task, such as urban development corporations, or the 'Special Purpose Vehicles' that are supposed to not only initiate but even carry out and evaluate smart-city projects in the cities that successfully obtained a spot in the list of 100 'smart cities' created by the Government of India's '100 smart cities plan'.²¹

In Canadian administrative law there is a rather diffuse category known as "ABC's", meaning agencies, boards and commissions. These can be permanent, such as school boards or special purpose agencies (e.g. the Atomic Energy Commission of Canada, the Toronto Transit Commission) but, arguably, the term also include entities that go under a variety of names and are created by a statute that sets a time limit on them (e.g. Waterfront Toronto, a tri-government agency charged with redeveloping Toronto's waterfront –an entity that was supposed to last for only 25 years, although the 25 years have run their course and there is no sign of abolition.) Administrative law scholars and public administration textbooks generally express dismay at the fact that there is no census of these entities. In the United States these are often designated as "special districts" or "special district governments", and there they often serve to mitigate the inefficiencies caused by the extreme fragmentation of the municipal incorporation process.²² For example, the county of Los Angeles is far larger than the city proper, and there is a multi-municipality Los Angeles County water board which has considerable

²¹ See *inter alia* Housing and Land Rights Network, *India's 100 smart cities mission: smart for whom? Cities for whom?* (Delhi, 2017).

²² On municipal incorporation in the US and its negative effects on redistribution and equity, see Gerald Frug, *City Making: Building Cities without Building Walls* (Princeton University Press 1999).

powers both to levy fees and to take measures when drought is imminent or present. Urban development in the US has for many decades relied on quasi-governmental entities as well as the even more hybrid entities that urban studies scholars have dubbed “growth coalitions” whereby business interests and municipal leaders come together, whether in formal urban development corporations or in less formal arrangements.²³ Perhaps because of the longstanding tradition of private actors, both business owners and philanthropists, in US urban affairs, there seems to be very muted opposition among critical urban scholars and legal scholars to these somewhat shadowy organizations or groups. There it seems to be taken for granted that if one wants something innovative done by way of urban life, either business or philanthropists or both will play a role in decision-making and perhaps ongoing governance. An example of such a special-purpose entity that is not part of municipal government but performs some of the functions of municipal government would be New York’s Central Park Conservancy, which is not part of the city’s parks department, but is a stand-alone non-profit through which wealthy New Yorkers can donate specifically to Central Park, not to the many far less attractive parks in boroughs such as the Bronx.²⁴

Legal scholars and urban planning experts in the US have warned against the dangers of ‘contracting out’,²⁵ and some of these critiques apply to special districts and various agencies and boards. However, it is important to distinguish between contracting out to the private sector, even when that involves giving some decision-making power to corporations, and on the other hand setting up quasi-governmental agencies that function somewhat autonomously from government proper and may or may not have accountability mechanisms.

In the UK, the Thatcher era saw a great proliferation of ‘urban development corporations’ set up in part to take power away from local councils (in London, often dominated by elected Labour councillors, at the borough level). But within the central government itself there was also a process one might call the hollowing out of democracy, through the process known in British administrative law as “the boardization” of government.²⁶ Critical British scholars point out that even

²³ Bernard Frieden and Lynn Sagalyn, *Downtown Inc.: How America Rebuilds Cities* (MIT Press 1989), and David Perry, ed., *Building the Public City: The Politics, Governance and Finance of Public Infrastructure* (Thousand Oaks CA, Sage 1995). For an analysis of contemporary developments by an influential planning scholar see Lynn Sagalyn, ‘Public-Private Development: Lessons from History, Research, Practice’ (2007) 73, 1 *Journal of the American Planning Association*, 7-22.

²⁴ See <<http://www.centralparknyc.org>>.

²⁵ Jo Freeman was An Early Voice in this Debate – see Jo Freeman ‘The Contracting State’ (2011) 28 *Florida University Law Review*, 155-200.

²⁶ See Stephen Wilkes, ‘Boardization and corporate governance in the UK’ (2007) 22, 4 *Public Policy and Administration* 443-460 and Edward Barratt, ‘Liberal conservatism, ‘boardization’, and the government of civil servants’ (2015) 22, 1 *Organization*, 40-57. Since the UK is not federal, agencies of the ‘parastatal’ sort are often used as part of a larger-scale effort by the central government to regulate and often impose its will on local government, an effort going back to the

straightforwardly governmental functions, from health and safety inspections to the issuing of identification documents, have often been ‘outsourced’ to entities that receive little or no private funding or financing but that function as if they were for-profit corporations.

In Canada there has certainly been a 'boardization' of government functions, which should not be confused with the outright privatization of public entities (e.g. Canadian National railways, Air Canada, state-owned entities that were privatized by being sold to private sector). In the realm of urban infrastructure there is very limited outright privatization (for example, while drinking water services have been largely privatized in Latin America, in Canada that is not the case). But there are countless entities, including older ones such as harbour commissions and port authorities, that exercise a great deal of power over urban development and have very limited accountability even to the municipal government, much less the citizens. These Canadian 'parastatals' are often set up either as nonprofit corporations or as non-share capital corporations that are owned by a government, but with that government exercising limited governing power. At the federal level there's actually a kind of spectrum of governmental power, since many entities have been set up with government funding that are not even 'agencies, boards and commissions' or Crown corporations, but are considered private—and yet they are quite dependent on government funding and carry out much work that might otherwise be performed by municipal staff. (In the Toronto area one example would be Evergreen, which has been given much seed funding to stimulate 'green' businesses and has been assigned a large environmentally sensitive area, a former brickyard).

In Ontario specifically, two very powerful agencies that spend billions of dollars of public money but have no real mechanism of democratic accountability are Infrastructure Ontario and Metrolinx (the latter being an entity created in the early 2000's by the provincial government of the day to coordinate transit in the Greater Toronto and Hamilton Area [GTHA], but which does not include municipal representatives on its board and often rides roughshod over municipal council plans and ideas).²⁷

In India as well, state governments have constituted parastatals like metropolitan development authorities, urban development authorities, etc., to perform functions, which as per the 12th Schedule of the Constitution, ought to

New Poor Law of 1834. On the historic decline of British local democracy see Martin Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (Clarendon Press, 1996). British legal scholars such as Loughlin, however, rarely take a comparative look at countries that have similar common-law legal systems and similar political arrangements but are federal (India, Australia and Canada being notable examples).

²⁷ For details see Maria Valverde, ‘Arms-Length’ Infrastructure Agencies and Citizen Disempowerment’ (*Centre for Free Expression*, 2021) <<https://cfe.ryerson.ca/blog/2022/01/%E2%80%99%E2%80%99-infrastructure-agencies-and-citizen-disempowerment>>.

be performed by municipalities. These parastatals, unlike municipalities, are not directly answerable to the citizens and lack the provisions that are necessary for public participation in decision making. In this context, the Union Government's own premier Think Tank NITI Aayog had stated in a report that in urban planning by parastatals, "citizens hardly get an opportunity to participate in decision-making about the use of public money for city development".²⁸

V. CONCLUSION

The struggles of municipalities the world over to make the promise of decentralization and local democracy embedded in many high-level constitutional and other political documents a reality, which can only happen if structural governance reforms as well as fiscal reforms are implemented, are not dissimilar from the struggles of Canadian municipalities, which do not benefit from any constitutional support –and indeed have had their formal legal status diminished by a very recent decision of the Supreme Court of Canada.

But beyond encouraging further comparative research on municipal powers and municipal governance, research that looks beyond similarities and differences in formal constitutional arrangements and includes documentation about how the 'game of jurisdiction' is played in various contexts, this article has argued that to understand the many different issues huddling under the popular but vague phrase "multi-level governance" it is very useful to abandon the legalistic habit of simply listing competences assigned to this or that level of government, as if the formalist and static picture of who is supposed to have this or that power were an accurate representation of reality.

Jurisdiction is a game whose various matches can only be understood by taking up a dynamic and interactive analytical framework. Such a framework can help scholars and civic activists appreciate that what might look on the surface as a two-player zero-sum game (say because it is reflected in a lawsuit) may in fact be a multi-player game in which actors are pre-emptively anticipating counter-moves by a variety of actors, some of which may not be visible at the level of litigation or of constitutional disputes, as they make choices about how to proceed. The complex political, financial, legal and economic struggles of and within municipalities are themselves always changing, often in reaction to actual or anticipated moves by other actors, and hence require a dynamic and interactive analytical framework.

²⁸ NITI Aayog, *Reforms in Urban Planning Capacity in India, Final Report* (<<https://www.niti.gov.in/sites/default/files/2021-09/UrbanPlanningCapacity-in-India-16092021.pdf>> Government of India 2021).