

Barbara Oomen

The Legal Battlefield

Comment on Homberger et al. (2022)

Local authorities are of increasing importance to migration governance. The Homberger et al. (2022) article forms an important theorization of whom these authorities protect, why they do so (motivations), who exactly are involved (actors), and how they go about this (in terms of strategies and frames). Out of the many elements to engage with, I would like to use some of the findings of the Cities of Refuge research team to highlight the legal dimension of these negotiations. This team worked specifically on the relevance of rights to refugee reception in Europe, offering insights on how and when rights can make up part of the motivation for inclusive practices, the consequences of such a rights-based approach (in terms of the promise of protection for the precarious migrants), and the interplay between actors in these particular negotiations.

The authors set out a number of factors motivating local authorities to diverge from national policies, including moral frames, ideas of deservingness, and pragmatic considerations. An additional motivation for many local authorities, such as human rights cities, is a local commitment to respect, protect, and fulfill the universal, indivisible, and inalienable human rights of every human being (Grigolo 2019; Oomen et al. 2016). The city of Utrecht, for instance, first developed a local human rights policy and subsequently invoked these human rights, with the support of UN and European (quasi-) legal bodies, to justify offering shelter to undocumented migrants (Baumgärtel and Oomen 2019). In Spain, a number of cities invoked the international right to health to support access to health care for irregular migrants, getting support from UN bodies but running into difficulties in front of the Constitutional Court (Peralta-Gallego et al. 2018). In Turkey, a local authority invoked the right to water with regards to precarious migrants, in France another municipality invoked human rights to be allowed to provide water and sani-

Prof. Dr. Barbara Oomen
Sociology of Human Rights, University College Roosevelt, Utrecht University

tation, and municipalities in Italy and Switzerland are involved in similar multilevel legal battles (Oomen et al. 2021).

Just as the categorization of migrants has consequences, so does the choice of frame. Miellel, for instance, shows how the framing of asylum as either »burden, benefit, gift or duty« opens up different forms of action and modes of protection (Miellel 2021). Sabchev, in a case study of the human rights city of Bologna, concludes that strategic mobilization of human rights in the field of migration governance can help local authorities to challenge restrictive national policies in front of courts, remedy the negative local effect of these policies, and provide justification for support to all migrants (Sabchev 2021a, p. 180). All this is related to the essential characteristics of rights-based discourse: that it establishes formal accountability for the protection of every human being in domains reaching from health care to participation with state actors.

One question that follows from the observation concerning the rise of rights-based frames is when local actors opt for this particular frame, with the consequences attached. In analyzing strategies of divergence as observed throughout Europe, we distinguished strategies that are either within or outside of the boundaries of national law, and either implicit or explicit. This resulted in the fourfold division into strategies of defiance (explicit and extra-legal), dodging (implicit and extra-legal), deviation (explicit and within the law), and dilution (implicit and within the law) (Oomen et al. 2021). Recognizing that law is indeterminate, constitutive, fragmented, and has important communicative potential explains why it plays such an important role in the efforts of local authorities to shape migration policies. What this role is differs, for instance, with city size: even if small municipalities can also develop rights-based policies (Miellel 2019), larger cities, with sufficient resources, political clout, and strong legal departments will be more likely to take an openly defiant position vis-à-vis national governance.

How does not only the desire to diverge but also the choice, for instance, of a rights-based frame get formed in negotiations between different actors? Here, the authors of this article do important work in setting out the vertical and horizontal aspects of the multilevel governance of inclusive policies. In terms of key actors, one element that we found over and over again is the crucial role of city leadership, in particular mayors (Sabchev 2021b; Sabchev et al. 2021). Also, there is the degree to which the negotiations are conducted by an amalgam of actors best labelled ›city society‹, as it transgresses the classic state/civil society divide and is more of a coalition of actors from inside and outside of government.

In the choice of strategies by these actors the legal battlefield, in which rights-based strategies get invoked and contested, is by far not the only one.

Nevertheless, given the potential of this frame in terms of inclusiveness and formal accountability, it, too, calls for further research and theorization.

References

- Baumgärtel, Moritz, and Barbara Oomen. 2019. Pulling Human Rights Back in? Local Authorities, International Law and the Reception of Undocumented Migrants. *The Journal of Legal Pluralism and Unofficial Law* 51 (2): 172–191.
- Grigolo, Michele. 2019. *The Human Rights City: New York, San Francisco, Barcelona*. New York: Routledge.
- Homburger, Adrienne, Maren Kirchhoff, Marie Mallet-Garcia, Ilker Ataç, Simon Güntner, and Sarah Spencer. 2022. Local Responses to Migrants with Precarious Legal Status: Negotiating Inclusive Practices in Cities Across Europe. *Zeitschrift für Migrationsforschung – Journal of Migration Studies* 2 (2): 93–116, DOI: <https://doi.org/10.48439/zmf.179>.
- Miellet, Sara. 2019. Human Rights Encounters in Small Places: the Contestation of Human Rights Responsibilities in three Dutch Municipalities. *Journal of Legal Pluralism* 51 (2): 213–232.
- Miellet, Sara. 2021. Burden, Benefit, Gift or Duty? Dutch Mayors Framing of the Multi-Level Governance of Asylum. *Territory, Politics, Governance*. <https://doi.org/10.1080/21622671.2021.1999314>
- Oomen, Barbara, Moritz Baumgärtel, and Elif Durmuş. 2021. Accelerating Cities, Constitutional Brakes? Local Authorities Between Global Challenges and Domestic Law. In *European Yearbook of Constitutional Law 2020: The City in Constitutional Law*, eds. Ernst Hirsch Ballin, Gerhard van der Schyff, Maarten Stremmer, and Maartje De Visser, 247–270. Den Haag: T.M.C. Asser Press.
- Oomen, Barbara, Moritz Baumgärtel, Sara Miellet, Elif Durmuş, and Tihomir Sabchev. 2021. Strategies of Divergence: Local Authorities, Law, and Discretionary Spaces in Migration Governance. *Journal of Refugee Studies* 34 (4): 3608–3628.
- Oomen, Barbara, Martha Davis, and Michele Grigolo, 2016. *Global Urban Justice: the Rise of Human Rights Cities*. Cambridge: Cambridge University Press.
- Peralta-Gallego, Lea, Joan Gené-Badia, and Pedro Gallo. 2018. Effects of Undocumented Immigrants Exclusion from Health Care Coverage in Spain. *Health Policy* 122 (11): 1155–1160.
- Sabchev, Tihomir. 2021a. Local Authorities, Human Rights and the Reception and Integration of Forced Migrants in Greece and Italy. PhD-thesis. Utrecht University.
- Sabchev, Tihomir. 2021b. The Role of Local Political Leadership in the Reception of Forced Migrants: Evidence from Greece. *Territory, Politics, Governance*, <https://doi.org/10.1080/21622671.2021.1927815>.
- Sabchev, Tihomir, Sara Miellet, and Elif Durmuş. 2021. Human Rights Localisation and Individual Agency: From ›Hobby of the Few‹ to the Few Behind the Hobby. In *Myth or Lived Reality: On the (In)Effectiveness of Human Rights*, eds. Claire Boost, Andrea Broderick, Fons Coomans, and Roland Moerland, 183–211. Berlin: Springer.