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Chapter 2

Homelessness, constitution and governance

Albertjan Tollenaar

1 Introduction

Homelessness is almost by definition a local problem, occurring in local communities, neighbourhoods or cities. It is therefore the local government that is the first to respond to the problems that accompany homelessness, including for example safety issues, maintaining public order and health care for homeless people. To solve these problems, especially when it comes to providing care, local governments use the civil society organisations such as churches, the Salvation Army and other NGOs, which are also locally based.

This local response takes place within a legal framework that is often organised at another (higher) level. Indeed, the rights and entitlements of people living on the streets are generally regulated in national legislation with due observance of the obligations developed within the human rights framework.¹

This regulatory framework is not exclusively confined to rights and entitlements.. Other aspects related to homelessness are also regulated in national legislation such as the (ir)regularity of immigrant, or the legal instruments that local authorities can use to combat the nuisance caused by homeless people.

This gives rise to an interesting problem. The rules and regulations that affect the homeless are formulated at a governmental level other than that at which the problems related to homelessness tend to be resolved in practice. This in turn gives rise to the risk that legislation does not truly reflect the reality faced by local governments. For example, legislation tends to be austere,² although in practice local governments might experience that this does not reduce homelessness and perhaps even has the opposite effect. The less access those in need have to public support (shelter, income), the higher the chance that they will end up on the streets. This is an example of policy choices at national level actually creating social problems at local level.

This problem leads us to two central questions. First of all: what is the constitutional framework of the regulation regarding the homeless? To answer

¹ See the contribution of Perrault in this volume.

² Loïc Wacquant, *Punishing the Poor, the Neoliberal Government of Insecurity*, Duke University Press 2009.

this question I will first give a brief overview of the constitutional framework as such (paragraph 2). What are the ingredients of the constitutional framework, and how does this vary from state to state? Section 3 discusses the key elements of the constitutional framework regarding the homeless.

The main conclusion is that the legal infrastructure regarding the homeless is based on a constitutional framework where central and local governments have to work together. Homelessness then becomes a problem of 'governance'. That brings us to the second research question: how does this constitutional framework actually function? This question will be addressed in section 4 based on three cases. Section 5 ends with some concluding remarks.

2 Ingredients for the constitutional framework

The constitutional framework affects many aspects of governmental institutions, from human rights to the horizontal and vertical separation of powers.³ The intergovernmental relationships between central and local government units are of particular relevance for the homelessness issue. This relationship focuses on one key question: who has what competence? The answer to this question includes at least four elements.

The first of these elements is the balance of power in the relationship between central and local governmental units. Is this a hierarchal relationship in which the national governmental body can instruct, correct or at least restrict the competences of the local governmental bodies, or is it a horizontal relationship in which all the governmental bodies are more or less 'equal'? In a horizontal relationship the competences of all governmental bodies are strictly regulated in the constitution. In a hierarchal relationship the competences of the lower governmental bodies are mainly based on the decisions made by the central government. It is the national legislator that calls upon the lower governmental bodies to administer or to implement the national legislation (co-administration). Only if the central government does not regulate a matter does the lower governmental body have the autonomy to promulgate rules itself. The first element of the relationship is thus how competences are regulated or restricted, whether in a constitution or in legislation.

The second element regards supervision. In co-administration in particular the constitutional framework often has elements of supervision. This supervision is intended to direct how the lower governmental body uses its competences. Supervision is mainly about acquiring information about how the lower governmental bodies implement legislation. Sometimes this information shows 'mismanagement'. In these circumstances supervision

³ M. Thushnet, 'Comparative constitutional law', in: M. Reimann & R. Zimmermann (eds.), *The Oxford handbook of comparative law*, Oxford University Press 2008, p. 1228.

ends up with some kind of intervention. This intervention can range from 'taking over competences' to 'giving an instruction' or 'declaring a decision void'.

It goes without saying that in intergovernmental relationships - as in any relationship - conflicts will occur. Conflicts about the scope of the competence or about the way competences are used. The third element in the constitutional framework refers to how disputes are settled between governmental bodies. In many states a special court (constitutional court) is charged with settling these disputes and in other countries it is up to the 'ordinary' courts to deal with these issues.

Finally the last element of the constitutional framework regards the budget. In all states there is some kind of re-allocation of means from the centre towards the lower governmental bodies. But the amount of this budget and more especially the percentage compared to the means that these lower governmental bodies can levy themselves, varies. There is also a wide variation in the strings attached to the budget provided by central government.

The constitutional framework of a particular state varies in relation to these aspects.⁴ Exploring the constitutional framework of a particular state shows that no two states are similar. Despite the differences one could divide states into three different categories: unitary states, federal states and confederations. It is important to observe that these qualifications are only devices to help us understand a specific constitutional system. After all, constructional systems vary over time and shift from a federal towards a more unitary state (e.g. New Zealand in 1879) or from a unitary towards a more federal state (e.g. the UK where Scotland and Wales have their own legislatures).⁵

In unitary governmental systems the main power is centralised, based on national legislation. Subnational entities, such as local governments, have limited legislative powers and are restricted by the national legislation. In unitary states the fiscal regime aims to reallocate means from the richer areas to the poorer. This is often done implicitly through national taxation and the budgetary relationship between the national and subnational entities. Unitary states often face the problems of being distanced from their regions and a lack of national identity.

⁴ H.A. Molle & A. Tollenaar, 'Decentralization in Tanzania: Design and application in planning decisions', *International Journal of Public Administration* 2013 (36), p. 344–353; V. Venugopal & S. Yilmaz, 'Decentralization in Tanzania: An assessment of local government discretion and accountability', *Public Administration and Development* 2010 (30), p. 215–231.

⁵ Jay M. Shafritz, E.W. Russel & Ch.P. Borick, *Introducing public administration*, 8th edition, Pearson 2012, p. 133.

Federal government systems have a greater scope for diversity in policy.⁶ The subnational governments are in principle free to draft rules and legislation on any topic. The fiscal strings are weaker, and the power from the centre is often challenged since these powers are based on the constitution that needs to be interpreted over and over again. Examples of federal states are the United States of America and Germany. The heated discussion in Germany on the intention of the Government of Bayern to introduce some kind of toll on the highways and the way the central government responded to this shows how federal states have to repeatedly explore the boundaries of their jurisdiction.

In confederal states central power is almost absent. Often the central government does not have the power to levy taxes. It mainly acts as a means for the subnational entities to regulate certain matters at a higher level. These matters might be the army or an economic community. Confederal states are actually states in denial and often face the question 'how should we proceed?' The European Union is an example of a confederal state. In the present campaigns for the European Parliament elections this existential question is raised by both the parties in favour and against a European community.

3 Constitutional framework for the homeless

3.1 *Positive and negative state action*

How is the constitutional framework structured in relation to the problems faced by the homeless? In answering this question it is first of all important to realize that homelessness is a multifaceted legal problem. Many aspects of the law either contribute to homelessness or might aim to solve this problem.⁷ The law regulates who has access to public protection for example in the form of shelter, health care or social security. The law regulates the degree of protection and the conditions subject to which this protection is provided. The law also regulates the instruments that governments can use to combat the consequences of homelessness, such as nuisance or disturbance of public order (begging).

In this amalgam of instruments it is necessary to make a rough distinction between legal instruments that have a *positive* effect and those with a *negative* effect. Positive legal instruments have in common that they increase the freedom or property of the citizens. Negative legal instruments restrict this freedom or property.

This distinction between positive and negative state action is relevant for two reasons. First, instruments with a negative effect will need a sound

⁶ Shafritz, Russel & Borick 2012, p. 133.

⁷ The following chapters in this volume provide an overview of all these aspects.

legal basis.⁸ From a continental point of view this is the application of the 'legality principle' (Legalitätsprinzip). But also in common law countries the administrative governmental powers are restricted by law and legislation; a requirement that is far more restricting when it comes to *negative* state action.⁹ Positive instruments on the contrary, do not have this characteristic. Public authorities do not have to have a sound legal basis in legislation to increase an individual's freedom or property.

The second reason why this distinction is relevant regards the constitutional design of these instruments. This will be addressed in this paragraph in relation to the instruments available for addressing homelessness issues.

3.2 *Negative state action*

The most obvious *negative* state action is found in the many restrictions that apply to everyone but that harm the homeless most. Consider the prohibition on begging, exclusion orders that ban an individual from entering a specific neighbourhood or mall or any other obligation that mainly affects homeless people.¹⁰ The regulation of immigration is a special 'branch' of negative state action since it principally centres upon preventing foreign nationals from gaining access to the country and its social services and is often combined with sanctions.

The fact that negative state action requires a sound legal basis makes the constitutional framework rather clear. There has to be an act or statutory law that explicitly states the prohibition and allows an administration or a prosecutor to enforce this prohibition. Where this act or statutory law can be found depends on the governmental structure. But nevertheless there is one main characteristic that all governmental bodies seem to adhere to: a tendency for negative state action to be increasingly centralised at the higher governmental bodies in the governmental system.¹¹ One could take the European Union as an example. After the development towards one single market with similar 'values', European co-operation is now continuing towards developing a common European criminal law, with a European public prosecutor.¹² Equal treatment and effectiveness are the driving arguments for this centralisation of austerity.¹³

⁸ A. Tollenaar & J. de Ridder, 'Administrative Justice from a Continental European Perspective', in: M. Adler (ed.), *Administrative justice in context*, Oxford: Hart, 2010, p. 309.

⁹ See John S. Bell, 'Comparative administrative law', in: M. Reimann & R. Zimmermann (eds.), *The Oxford handbook of comparative law*, Oxford University Press, 2008, p. 1272.

¹⁰ See the contributions of Vols & Duran and Bandsma in this volume.

¹¹ See: Danny MacKinnon, 'Devolution, state restructuring and policy divergence in the UK', *The Geographical Journal* 2013 <DOI: 10.1111/geoj.12057> and for a Dutch case: G.J. Vonk, 'Repressieve verzorgingsstaat', *NJB* 2014 (2), p. 95-102.

¹² Based on 'The Stockholm Programme - An open and secure Europe serving and protecting citizens', C 115 of 4 May 2010

¹³ E. Preteceille, 'Decentralisation in France: new citizenship or restructuring

3.3 Positive state action

Positive state action relating to the problem of homelessness regards the regulation of protection such as shelter or any other social protection that might help the homeless to improve their situation. The instruments regulate how this protection is accessed, the conditions that apply and the form of protection to be granted. Since a sound legal basis is not required the local governments are able to formulate rules or provide protection even if this is in the form of a subsidy to a non-governmental organisation that provides the support in practice. Local governments have large discretion in this and formulate their own rules on how to use this discretion.¹⁴

This does not mean that higher governmental bodies are irrelevant. On the contrary, it is the central state and therefore the national legislator that is responsible for the implementation of social rights. This is even the case in federal or to a certain extent in confederal states.¹⁵ In unitary states the solution is easy: the national legislator will formulate legislation laying down a fundamental level of support that all citizens can apply for.

But central government will also have some involvement in federal or confederal states. If not by judicial means, then by budgetary means. The centrally formulated level of protection inevitably results in a re-allocation of means, from the 'richer' areas to the 'poorer'. This opens the door to a budgetary relationship from the centre towards the local governments.¹⁶ The ambition of this re-allocation does vary. In unitary states this re-allocation is already part of the constitutional framework, and is therefore mainly non-debatable, whereas in confederal states such a re-allocation will always be subject to political discussion and negotiation.¹⁷ To complete the constitutional framework some kind of supervision is attached to make sure that the budget is spent correctly and the legal instruments are implemented according to the higher rules.

hegemony?', *European Journal of Political Research* 1988(16), p. 409–424. See Paul D. Hutchcroft, 'Centralisation and decentralisation in administration and politics: assessing territorial dimensions of authority and power', *Governance* 2001 (1), p. 23–53 for an overview of the argumentations on centralisation and decentralisation.

¹⁴ Tollenaar & De Ridder 2010, p. 301–320.

¹⁵ That this does not work out always is shown in the contribution of Perreault in this volume.

¹⁶ See the cases discussed in J.A. Rodden, G.S. Eskeland & I Litvack (eds.), *Fiscal Decentralization and the Challenge of Hard Budget Constraints*, Cambridge, MA: MIT press 2003.

¹⁷ This is illustrated by the continuous debates in the European Union on the measures needed to resolve the credit crisis or Euro-crisis. This debate is about the extent of European solidarity or - as some politicians put it - on how much money is transferred from the North to the South.

4 Governance of homeless issues

4.1 Governance of the constitutional framework in general

How does this constitutional framework affect the way local governments respond to the problems related to homelessness? The conclusion of the previous section is that the local governments are confronted with the actual problems and might respond either with positive (enlarging) instruments or negative (restricting) instruments. In both situations the rules and regulations are mainly formulated elsewhere, at a different (higher) level. In other words the actor that formulates the rules is not the actor that actually has to implement them. This is a problem of *governance*.¹⁸ Governance is a 'catch all' term that boils down to one central question: how can one influence the other to do things he or she did not think of before.¹⁹ From the perspective of the lower governmental body the governance issue deals with gathering support for the problems they envisage. This support ranges from legal instruments that 'fit' the situation, to sufficient budget.

From the perspective of the central governmental bodies it is a question of implementation. How can they ensure that local bodies adhere to the norms written down in the central acts?²⁰ To achieve this goal the central government has various instruments available, varying from supervisory competences (setting aside decisions, issuing directions). These judicial means will often cause conflicts in the constitutional relationship, and are therefore very costly. In general it can be said that if the supervisor intervenes too often the supervisee will stop co-operating at all, making this intervention even less effective.²¹ Other instruments will therefore be more attractive as a means of to 'governing' this problem. Regulating through budget is a frequently used mechanism.²² With 'grant programmes' central governmental bodies might be able to 'buy' alignment. One could debate the effectiveness of these instruments. If there are too many grant programmes it is likely that some of them will interfere. And furthermore, grant programmes create a new oversight arrangement, with the problem of effectiveness referred to above.

The last category of instruments for 'governing' the relationship between

¹⁸ Shafritz, Russel & Borick 2012, p. 141 call it 'intergovernmental management'. Paul D. Hutchcroft 2001 refers to it as a matter of governance.

¹⁹ See for a review of this literature: Johannes M. Bauer & Jonathan A. Obar, 'Reconciling Political and Economic Goals in the Net Neutrality Debate', *The Information Society: An International Journal* 2014 (1), p. 1-19.

²⁰ Michael Hill & Peter Hupe, *Implementing public policy*, London: Sage 2002, p. 41.

²¹ See: J. de Ridder, *Een goede raad voor toezicht*, The Hague: Boom juridische uitgevers 2004, p. 42; and H.A. Brasz, *Toezicht op gemeentebesturen*, Alphen aan den Rijn 1964. The 'educated guess' is that if the supervisor intervenes in more than between 5 - 15% supervision will lose its effectiveness.

²² Shafritz, Russel & Borick 2012, p. 147.

the governmental bodies is that of instruction, conviction and nudging. These are three instruments in the same branch. They all deal with sharing information. The distinction is that this information sometimes finds solid ground (instruction).²³ On other occasions the information will meet counterarguments. In such case the sharing of information will be aimed at convincing the other party. Nudging is a bit in the middle. It is the strategic use of information that more or less forces the other to align.²⁴

Given this variation what does this 'governance' look like in reality? Below are three examples of homeless issues in three different countries. These examples are derived from a case study looking at three rather different cases. Two in a unitary state (France and the Netherlands) and one in a federal state (USA). Further the cases vary with regard to the type of problem that is tackled, from combating the nuisance caused by homelessness, to finding shelter for an individual or making sure that all the relevant agencies work together. This case study is based on various sources. The aim of this case study is to show the practical functioning of the constitutional framework related to homelessness.

4.2 France: encampments of Roma

A specific problem regarding homelessness is found in relation to the Roma in Western European countries such as France. Roma are regarded as less assimilated since they maintain their own habits and culture. Roma are often associated with criminality and therefore discriminated against. In many European countries there are special social programmes aiming to assimilate this group. In practice these programmes have hardly any effect, since the Roma is not a uniform group.

The problem local governments in France face is that Roma often live in camps in barely humane conditions. In the whole of France there are about 400 camps, of which 153 are in the surroundings of Paris.²⁵ These camps are located on ground that is either the property of the local government or not intended to be used as a camp site. Local government was therefore under pressure to end these illegal encampments.

In July 2010 the situation of the Roma escalated in the village of Saint-Aignan, in central France. A fatal incident resulted in the death of a young French Romani, shot down by the police. In the following weeks there

²³ In their book Pressman & Wildavsky show that implementation often fails due to contradictory criteria. See: Jeffrey L. Pressman & Aaron B. Wildavsky, *Implementation. How great expectations in Washington are dashed in Oakland*, Berkely: University of California Press 1973, p. 90.

²⁴ Richard H. Thaler & Cass R. Sunstein, *Nudge*, New York: Penguin 2009..

²⁵ 'Nieuwsuur', *NOS/NTR*, 31 oktober 2013.

were riots and disturbances. The local mayor of Saint-Aignan described these disturbances as ‘a settling of scores between the travellers and the gendarmerie’.²⁶ Very soon riots erupted elsewhere, for example in the city of Grenoble.

In this situation the French president Sarkozy announced that his government would end the illegal encampments within three months. Since then many camps have been demolished and inhabitants with a Romanian or Bulgarian passport deported.

What does this case show? First of all, it is a local problem that receives national attention because the president wishes to show his power with a new strict policy. It is clear that the local communities were not happy with the illegal encampments but lacked the means or the instruments to effectively end them. The problem was solved when a policy was introduced that ended with the deportation of groups of Roma.

This is actually only half the story. Many Roma could not be deported to their country of origin. They either had French nationality or European legislation made it impossible to force them to go to Bulgaria or Romania. The expulsion was accompanied with a programme in which Romanian and Bulgarian citizens were given € 300 in exchange for their cooperation in the return process.²⁷ So apparently the constitutional framework here presents a central government that interferes with a local problem, providing a new instrument (expulsion) accompanied with some extra budget. The main question however is where are the Roma that did not return to Romania or Bulgaria? According to Amnesty International in 2013 still a record number of 10,000 Roma are living on the streets in France.²⁸

4.3 Netherlands: the case of the illegal immigrant

The second case deals with an immigrant from Iraq who applied for a residence permit in the Netherlands.²⁹ After having exhausted all procedures to receive the permit, he was supposed to leave the country. Instead he wandered the streets as one of the many undocumented migrants.³⁰ He became depressed and used all kinds of medicine. He became so depressed that his lawyer advised him to start a new procedure to receive permission to stay in the Netherlands on humanitarian grounds. During the procedure

²⁶ ‘Troops patrol French village of Saint-Aignan after riot’, *BBC* 19 July 2010.

²⁷ ‘Brussels blinks in legal row with Sarkozy over Roma expulsion’, *The Independent* 30 September 2010.

²⁸ ‘Franse crimefighter neemt Roma op de korrel’, *NRC Handelsblad* 28 september 2013.

²⁹ This is an actual case that ended up in a law suit: *Rechtbank Zwolle* 2 January 2014, Awb 13/1299.

³⁰ E.M.Th. Beenackers, M.H.C. Kromhout & H. Wubs, *Illegaal verblijf in Nederland. Een literatuuronderzoek*, The Hague: WODC 2008 p. 13-14.

the immigrant would be entitled to shelter offered by the Immigration Office, but it took some time for this application to be officially being considered. In the meantime this illegal immigrant was still without shelter. He therefore he applied for support (shelter) at the municipality.

The municipality is responsible for municipal assistance under the *Wet maatschappelijke ondersteuning* (Municipal Assistance Act (Wmo)). Due to the strict legislation the immigrant would not qualify for any benefits or social services.³¹ So the municipality was therefore confronted with a dilemma. On the one hand the legislation is clear: no right to shelter, not even temporary. On the other hand this person was desperate and depressed and shelter would only be temporary.

The solution that the municipality came up with was to reject the application on formal grounds, but in the meantime to refer the undocumented migrant to a civil society organisation that offers temporary shelter for those in need. The municipality subsidises this. So instead of officially offering shelter, the municipality caused others to offer this shelter.

What happened in this case? This Dutch case shows at least three things. In the first place, national legislation seems to increase the problems of homelessness. And in the second place, local governmental bodies appear to be able to find means to solve the problems they face - even if it is more or less against the law. The third observation is that the bill stays at local level. In this case the local government was kind enough to organise shelter provided elsewhere, but this was only possible due to the fact that the civil society organisation was depending on municipal subsidy.

4.4 America: Opening Doors

In the USA a new federal policy programme was launched in 2010 to combat homelessness. This programme, called 'Opening Doors' had one main goal: to prevent and end homelessness.³² The means to achieve this goal: make sure that all 19 agencies that are involved work together. These agencies vary from the department of labour to the department of interior and even transportation. The United States Interagency Council on Homelessness (USICH) is responsible for the implementation of this programme. The programme involves many 'objectives', such as increasing access to stable and affordable housing. These goals break down into objectives and strategies.

From the plan it is hard to derive what each partner is supposed to do. What is interesting though is that the plan does provide an overview of the funds available to achieve the goals that are in the plan.

³¹ See the contribution of Koopmans in this volume.

³² See: <usich.gov/opening_doors>.

4.5 Comparison: the governance of homelessness

The three cases deal with similar problems of homelessness. The involvement of the central and local governments is completely different in each case. In the French case the local government is unable to solve the problem of the encampments, the central government interferes and with strict regulation and money the problem seems to evaporate - though it might also be true that the problem actually shifted towards even more homelessness. The Dutch case shows how national rules do not reflect the problems local governments have to solve. This is an example of positive action by the local government that actually disobeyed the strict rules, or at least found a way to solve the problem in a different manner. The American case shows how the federal government intervenes by trying to coordinate the different governmental bodies. This involvement does not result in individual claims, rights or benefits, but mainly in funds and direction to all the governmental bodies involved.

What all the cases do show is that the central government does not provide a basic level of care and seems not able or not willing to fully solve the problem of homelessness. And if the central government does interfere it is debatable how much this actually contributes to solving the problems of the homeless.

5 Conclusion: fertile ground for social dumping

The constitutional framework constructs a relationship between governmental bodies. Regarding the homelessness this relation is rather complex. If local government wishes to act to end nuisance caused by homelessness it is often bound by (national) legislation. And if the local government wishes to provide shelter or protection, the budget involved is also attached to national strings.

The three cases show that local governments often simply lack the instruments they need to solve the problems at hand. If the central government takes the initiative this is hardly a guarantee that the local governments will have more support in their struggle with the problems they face.

Problems such as these are mainly solved through receiving extra funding or organizing shelter or more sustainable social housing. It is nevertheless understandable that local governments try to avoid generous social programmes. After all, this is not an attractive policy area for ambitious politicians. On the contrary, it could be argued that generous social programmes would indeed attract more homeless people and the problems that accompany this (unsafe situations etc.). This ultimately could become a 'run to the bottom'. The problems would be solved as they arise without any general policy being formulated with a view to resolving these problems at their source.

The result is 'local dumping' in which local governments limit their involvement to the necessary basics and call upon the 'civil society' as much as possible. These civil society organisations are in the end the organisations that provide shelter to the homeless. This model has some major side effects. First of all the financial support from local governments is often non-regulated. Meaning that it depends on the whims of the local council to what extent this support is provided. In the current era of scarcity and budget cutbacks that makes it a harsh situation.

Secondly, there is a risk that the support provided depends on vague or irrelevant criterion, such as sex, religion or ethnic group. Especially this risk is important from the constitutional perspective because the (central) state is responsible for guaranteeing equal treatment in which protection is not denied on irrelevant grounds.