National Human Rights Institutions and their Sub-National Counterparts: The Question of Decentralisation

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Abstract: In this article I outline and explore the arguments in favor of and in opposition to the establishment of sub-national human rights institutions (such as state and local human rights commissions, ombudsmen and the like) in nations that already possess national human rights institutions. This analysis will be based on an application of prior research findings in the broader field of administrative decentralisation as tailored to the particularities of human rights implementation. Where relevant I also examine the implications of institutional type for decentralisation, as well as the implication of different attributes of the relevant jurisdiction. As a conclusion, I lay out the circumstances under which the establishment of sub-national human rights institutions will be more or less advantageous.

Keywords: Decentralisation; federalism; subsidiarity; national human rights institutions; ombudsmen; human rights commissions

I. Introduction

For the past twenty-five years, one of the most important human rights questions facing countries around the world has been whether or not they should establish national human rights institutions ('NHRIs'). By and large, this is no longer an issue: the question has been answered in the affirmative. With a handful of (significant) exceptions, NHRIs are now considered as standard features of the modern democratic state.[1] As of August 2016, 117 NHRIs have been accredited by the Global Alliance of National Human Rights Institutions ('GANHRI'), of which 75 were deemed fully compliant with the UN-issued Paris Principles, the authoritative set of standards for the operation of NHRIs.[2]

Within these nations that now possess NHRIs, there has in many cases been an important follow-up question: should analogous human rights institutions also be established at sub-national governmental levels? Many jurisdictions, especially in Europe and the Americas, in fact have established what I term sub-national human rights institutions ('SNHRIs'), those human rights boards, human rights ombudsman, anti-discrimination commissions, and the like that can be defined as *independent non-judicial governmental institutions that possess a sub-national mandate, and whose mission includes the implementation of human rights norms*.[3] In part, this reflects a strong global trend toward decentralisation of government services in recent decades.[4]

[1] Julie Mertus, Human Rights Matters: Local Politics and National Human Rights Institutions (Stanford U Press 2009) 4; Brice Dickson, 'The Contribution of Human Rights Commissions to the Protection of Human Rights' (2003) Pub L 272, 285 ('a human rights commission is a *sine qua non* of a democratic society'). Major countries that still lack NHRIs include the USA, China, Japan, and Italy.

[2] GANHRI, ICC Sub-Committee on Accreditation, <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx> (accessed 25 October 2016).

[3] This definition is elaborated upon and justified elsewhere. See Andrew Wolman, 'Sub-National Human Rights Institutions: A Definition and Typology', forthcoming in (2017) Human Rights Review.

[4] Andrés Rodríguez-Pose and Roberto Ezcurra, 'Does decentralization matter for regional disparities? A cross-country analysis' (2010) 10 J Econ Geog 619, 619-21 ('Over the last 40 years a decentralizing wave

In Africa and Asia, SNHRIs remain exceptional, although they are rapidly proliferating in certain countries in those continents, as well.[5]

To date, there has been very little scholarly analysis of this question. Certain European trans-national institutions have recommended the establishment of SNHRIs (or, specifically, local ombudsmen).[6] A number of academics have made arguments that states should promote the implementation of human rights at the local government level,[7] and a few others have studied specific instances of NHRI decentralisation.[8] However, there has been little informed debate regarding the implications of NHRI decentralisation, and its advantages or disadvantages. This article will make a first step towards filling the gap in the literature.

Specifically, in this article I will outline and elaborate upon the arguments in favor of and in opposition to the establishment of SNHRIs in nations that already possess NHRIs and, based on these arguments, very briefly lay out the circumstances under which the establishment of SNHRIs will be more likely to be appropriate.[9] I will not attempt to provide a definitive answer to the general question of whether sub-national governments should establish SNHRIs (or the related questions of whether national governments should authorize or allow the establishment of SNHRIs). In this respect, I am in accord with Nicolaidis that 'only on an ad hoc basis is it possible to know whether a particular topic or area in a given time and place is more properly regulated at one level of governance'.[10] However, the arguments for and against SNHRI

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has swept the world'); Janne Nijmann, 'Renaissance of the City as Global Actor' ASSER Research Paper 2016-02 (February 2016), 15 ('Decentralisation – the transfer of authority and responsibility from a higher (more central) to a lower level of government – is a world-wide trend since the 1980s.')

[5] In Korea, for example, twenty jurisdictions have established SNHRIs since 2012. Korea Human Rights Foundation, *Report on Local Government and Human Rights* (Gwangju Dev Inst 2014) 218-19.

[6] See, eg, Council of Europe Congress of Local and Regional Authorities, Recommendation 61 (1999) 'On the Role of Local and Regional Mediators/ Ombudsmen in Defending Citizen's Rights', art 22; Council of Europe Congress of Local and Regional Authorities, Resolution 191 (2004) 'On Regional Ombudspersons: An Institution in the Service of Citizens' Rights', art 16. The Parliamentary Assembly of the Council of Europe has asserted that regional and local ombudsmen should be established 'as appropriate'. Parliamentary Assembly of the Council of Europe, Recommendation 1615/2003.

[7] See, e.g., Antoine Meyer, 'Local Governments & Human Rights Implementation: Taking Stock and a Closer Strategic Look' (2009) 3 Pace Diritti Humani 7; Michele Grigolo, 'Incorporating Cities into the EU Anti-Discrimination Policy: Between Race Discrimination and Migrant Rights' (2011) 34(10) Ethnic & Rac Stud 1751; Conrad Bosire, 'Local Government and Human Rights: Building Institutional Links for the Effective Protection and Realisation of Human Rights in Africa' (2011) 11 Afr Hum Rts L J 147.

[8] See, eg, Teresa Rees and Paul Chaney, 'Multilevel Governance, Equality and Human Rights: Evaluating the First Decade of Devolution in Wales' (2011) 10(2) Soc Poly & Socy 219; Predrag Dimitrijević, 'Do we need local ombudsmen?: Protector of Human Rights' (2005) 3(1) Facta Universitatis: Law and Politics 25.

[9] While this article will focus on situations where NHRIs already exist (which is the majority of countries), many of the arguments would also apply to decisions regarding whether or not to establish an SNHRI in jurisdictions that lack NHRIs.

[10] Kalypso Nicolaidis, 'Conclusion: The Federal Vision behind the Federal State' in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision* (OUP 2002) 446. See also Charles Hankla, 'When is fiscal Decentralization Good for Governance?' (2009) 39(4) Publius 632, 637 ('If there is an overarching theme

establishment should help inform the decision-makers at any level that are struggling with this question.

The arguments in this article are explicitly built upon the existing research detailing the general implications of decentralising administrative functions, some of which dates back several decades.[11] While the findings from this existing literature are the starting point for my arguments, however, they are not the end of the analysis. The application of findings from general decentralisation research to the question of SNHRIs requires further elaboration, both because human rights implementation differs in certain respects from ordinary service delivery, and because the implications of decentralisation of an independent government watchdog such as an SNHRI are difficult than those of an ordinary agency. I therefore supplement the decentralisation analysis with human rights-specific arguments, both conceptual and in some cases based on empirical observations of NHRI and SNHRI behavior. Where relevant I will also examine the implications of SNHRI type for decentralisation, as well as the implication of different attributes of the relevant jurisdiction.

II. Conceptual Background

As a preliminary to my analysis, this section will introduce the relevant aspects of the most important concepts discussed in this article: namely, decentralisation, deconcentration, and subsidiarity, and discuss how they are relevant to the question of whether or not to establish an SNHRI in a country that already possesses an NHRI.

A. Decentralisation

The term 'decentralisation' has been defined in a number of different ways over the years.[12] At its broadest, it has sometimes been defined to include the delegation of powers, divestment/privatization, deconcentration, and devolution to sub-national governments.[13] This paper, however, will use the narrower definition proposed by (among others) the International Center of Human Rights Policy, namely that decentralisation is the 'transfer of power and responsibility from national (or central) government to subsidiary levels, which may be regional, municipal or local'.[14] Decentralisation does not necessarily imply federalism, which commonly

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in the [decentralisation] literature, it is that the impact of strengthening subnational institutions, whether positive or negative, depends sensitively on case-specific details').

[11] See, eg, Charles Tiebout, 'A Pure Theory of Local Expenditures' (1956) 65 J Pol Econ 416; Richard Musgrave, 'Theories of Fiscal Federalism' (1969) 4(24) Pub Finances 521; Wallace Oates, *Fiscal Federalism* (Harcourt 1972).

[12] For an overview of various definitions, see UNDP, Decentralization: A Sampling of Definitions (1999) <http://web.undp.org/evaluation/evaluations/documents/decentralization_working_report.PDF> (accessed 23 October 23, 2016).

[13] UNDP, Decentralized Governance Programme: Strengthening Capacity for People-Centered Development, Management Development and Governance Division, Bureau for Development Policy (1997) 5-6.

[14] International Council on Human Rights Policy, 'Local Rule: Decentralisation and Human Rights' (2002) 5. The term 'decentralisation' will be therefore used as functionally synonymous with the term 'devolution'. UNDP (n 13) 5-6 ('The transfer of authorities to [autonomous lower-level] units is often referred to as devolution and is the most common understanding of genuine decentralization').

refers to 'a constitutionally guaranteed division of competences between territorially defined governmental levels', although there is significant overlap in the research studying decentralisation and the research explicitly focused on federalism.[15] Rather, decentralisation can occur in every nation that has sub-national administrative divisions, which is to say virtually every nation in the world.[16]

In this context, the establishment of SNHRIs where there is already an existing NHRI can be seen as a form of decentralisation, as powers and responsibilities (for human rights implementation by an independent body) that once existed only at the national level will now exist at the sub-national level as well. It is important to emphasize that decentralisation and centralization are not incompatible concepts, in the sense that expanding powers at the sub-national level necessarily implies a reduction or absence of powers at the national level.[17] Indeed, for countries with NHRIs, it is very unlikely that those NHRIs will be fully replaced by SNHRIs, because engagement with the national government and with supra-national bodies are important tasks that at this point are clearly better undertaken by national bodies (and sub-national bodies are in fact actively prevented from full access to the international system by GANHRI rules).[18] Rather, it is more likely that the NHRI and SNHRI will share responsibilities for human rights promotion, monitoring and education in the sub-national jurisdiction, and possibly share jurisdiction for complaint-handling as well. In some cases, however, an SNHRI will be established in an autonomous region where the NHRI previously lacked jurisdiction, or an SNHRI will focus exclusively on handling complaints that the NHRI is not mandated to handle.[19] This would correspond to a non-overlapping jurisdictional arrangement (often called dual federalism, in the context of federal states), but this type of arrangement is relatively rare, both for SNHRIs and for other types of government service providers.[20]

Decentralisation can, in general, be categorized as either a top-down or a bottom-up phenomenon.[21] Top-down decentralisation is initiated by the national government, and normally pursues national-level objectives, such as shifting fiscal constraints to a lower level or increasing national well-being. Bottom-up decentralisation is initiated by local actors, and pursues local

[15] Jan Biela et al, *Policy-Making in Multi-Level Systems* (ECPR Press 2013) 7.

[16] Edward Rubin, 'Puppy Federalism and the Blessings of America' (2001) 574 Annals Am Acad Pol & Soc Sci 37, 39 ('With the possible exception of some postage-stamp states … every nation is decentralized to some extent; they all have territorial subunits exercising some degree of governmental authority').

[17] UNDP (n 13) 1.

[18] See, Andrew Wolman, 'Welcoming a New International Human Rights Actor? The Participation of Subnational Human Rights Institutions at the United Nations' (2014) 20 Global Governance 437, 440.

[19] In Austria, for example, the Länder governments may choose to establish an ombudsman (as two have done) or alternatively to delegate the federal ombudsman the authority to address complaints about administration in that Länder (as seven have done). Linda Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff 2004) 150.

[20] Andrew Wolman, 'The Relationship Between National and Sub-National Human Rights Institutions in Federal States' (2013) 17 Intl J Hum Rts 445, 447-48.

[21] Bernard Dafflon and Thiery Madlès, 'Decentralization: A Few Principles from the Theory of Fiscal Federalism' (2011) Agence Française de Développement Notes and Documents No 42, 4-8.

objectives such as increasing local innovation or catering to local preferences in government service delivery. Each of these types of decentralisation can be seen with the establishment of SNHRIs. Top-down decentralisation can be seen in the establishment of SNHRIs by national governments in some post-conflict zones, such as Northern Ireland or Mindanao.[22] The SNHRIs established in some so-called 'human rights cities', on the other hand, are typically bottom-up initiatives, as (in general) are the human rights and anti-discrimination commissions of the United States.[23] Other SNHRIs require initiative from both above and below, as is the case in India and Russia, where SNHRIs were first authorized by a central government, but later established by sub-national entities.[24] This paper is not tailored to address one or the other type of decentralisation. However, the strength of the various arguments outlined here will evidently vary according to whether one approaches the issue from a position of national or local power.

B. Deconcentration

Deconcentration can be defined as 'situations in which central government offices are moved to the regions but remain under the control of central government'.[25] In theory, it may be feasible to delineate a bright line between deconcentration and decentralisation. In practice, however, the two lie on either ends of a spectrum between total national control of a local office and total absence of control. In some systems, actual practice lies somewhere in the middle; this is certainly the case with many SNHRIs. To give some examples, in Morocco, the Regional Human Rights Commissions operate independently in responding to complaints, but commissioners are appointed by the National Council for Human Rights, the regional commissions follow national policies for human rights promotion, and the National Council supervises the regional commissions' development of human rights observatories.[26] In India and Russia, the SNHRIs operate independently, but implement a mandate determined by national-level legislation.[27] In Mexico, the SNHRIs operate independently, but their rulings can be appealed to the Mexican National Human Rights Commission.[28]

This paper does not address the question of whether (or when) NHRI deconcentration is beneficial. In fact, the international community has been quite clear in calling for

[22] Northern Ireland Act [UK] 1998, ch. 47; Republic Act 9054 [Philippines] (2001), sec 16.

[23] See, generally, Charlotte Berends et al (eds), *Human Rights Cities: Motivations, Mechanisms, Implications* (University College Roosevelt 2013); Kenneth Saunders K and Hyo Eun Bang, 'A Historical Perspective on US Human Rights Commissions' (John F. Kennedy School of Government 2007).

[24] Protection of Human Rights Act [India] 1993, as amended by the Protection of Human Rights (Amendment) Act 2006 – no. 43 of 2006, ch. V; Constitution of the Russian Federation (1993) art 72; Federal Constitutional Law [Russia] No. 1-FKZ of February 26, 1997.

[25] International Council on Human Rights Policy (n 14) 6.

[26] Conseil National des Droits de l'Homme, Présentation, Missions, et Mandat Territorial de Chaque Commission, <http://www.ccdh.org.ma/fr/commissions-regionales-des-droits-de-lhomme/presentation-missions-et-mandat-territorial-de-chaque> (accessed 25 October 2016).

[27] Protection of Human Rights Act [India] (n 24) ch. V; Constitution of the Russian Federation (n 24) art 72; Federal Constitutional Law [Russia] (n 24).

[28] Mónica Beltrán Gaos, La Comision Nacional de los Derechos Humanos de Mexico (Univ Politécnica de Valencia 2005) 249.

deconcentration of NHRIs where needed to ensure adequate public accessibility.[29] Thus the Paris Principles mandate that NHRIs shall 'set up local or regional sections'[30] and the GANHRI Sub-Committee on Accreditation has on many occasions suggested that NHRIs open up branch offices in order to comply with the Paris Principles' mandate of accessibility.[31] Amnesty International has likewise recommended that 'local and regional offices are vitally important to the effective functioning of NHRIs in a large country, or a country with isolated and inaccessible centres of population, or where transportation is difficult'.[32] Many NHRIs currently have large numbers of branch offices, while others have none, especially in small countries.[33]

C. Subsidiarity

The principle of subsidiarity also plays an important role in questions of decentralisation for many issue areas, including human rights.[34] There is no universally accepted definition for the concept, and in fact it is a notoriously vague and multi-faceted term.[35] In general, however, subsidiarity has been characterized as 'a presumption for local-level decisionmaking, which allows for the centralization of powers only for particular, good reasons'.[36] Beyond this broad definition, subsidiarity is sometimes divided up into weak or strong versions. Thus, according to Jachtenfuchs and Krisch, weak subsidiarity involves 'an easily rebuttable presumption—a presumption for the local that provides a low threshold and can be overcome by any reason that makes action on a higher level appear advantageous, be it for the sake of efficiency, efficacy, or justice', while a stronger version puts forth a higher threshold, namely 'a presumption in favor of

[29] According to Carver, the most important element of NHRI accessibility is 'having offices or other points of contact throughout the country, not only in the capital city.' Richard Carver, 'One NHRI or Many?: How Many Institutions does it Take to Protect Human Rights? Lessons from the European Experience' (2011) 3(1) J Hum Rts Practice 116.

[30] United Nations General Assembly, Resolution 48/134, 'Principles Relating to the Status of National Institutions' (1993) sec 3(e).

[31] See, eg, GANHRI, 'GANHRI Sub-Committee on Accreditation Report – May 2016 (Geneva 2016) 13; 17; 21; 23; 31; 36; 39; 46; 49 ('where possible, accessibility should be further enhanced by establishing a permanent regional presence').

[32] Amnesty International, 'National Human Rights Institutions – Amnesty International's Recommendations for Effective Protection and Promotion of Human Rights' (2001) IOR 40/007/2001, §9.1.

[33] For example, the Ethiopian Human Rights Commission has nine branch offices, Venezuela's Defensoría del Pueblo has 33 branch offices, Nepal National Human Rights Commission has eight branch offices, and the South African Human Rights Commission has nine branch offices; one in each provincial capital. Wolman, 'The Relationship Between National and Sub-National Human Rights Institutions' (n 20) 448-50.

[34] See, generally, Paolo Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 Am J Intl L 38.

[35] Markus Jachtenfuchs and Nico Krisch, 'Subsidiarity in Global Governance' (2016) 79(2) Law & Contemp Prob 1, 5; Pierpaolo Donati, 'What Does "Subsidiarity" Mean? The Relational Perspective' (2009) 12 J Mkts & Morality 211, 211 (2009).

[36] Jachtenfuchs and Krisch, ibid, 1.

local governance that can be rebutted only by strong reasons in exceptional cases'.[37] At its strongest, subsidiarity has been said to signify that, in the words of Halberstam 'the central government should play only a supporting role in governance, acting only if the constituent units of government are incapable of acting on their own'.[38]

The arguments presented in this paper are relevant to a subsidiarity analysis in two distinct ways. First, to the extent that one finds the arguments in favor of SNHRI establishment to be generally convincing, then these arguments provide a justification for asserting an accordingly strong form of subsidiarity for independent human rights institutions (and conversely, if they do not seem like strong arguments, then only a weak form would be justified). Second, to the extent that one finds the arguments against SNHRI establishment to be convincing in a given concrete situation, this can provide the basis for overcoming the presumption for local governance that lies at the heart of the subsidiarity principle.

III. Arguments in Favor of SNHRI Establishment

In this section, I will outline five of the principal decentralisation arguments that can be used to justify the establishment of an SNHRI in a nation that already possesses an NHRI, namely arguments based on physical proximity, cultural proximity, autonomy, human rights innovation, and robustness.

A. Physical proximity

One obvious argument for the establishment of SNHRIs is that by being located in close proximity to the people that they serve, SNHRIs are able to implement human rights more effectively than centralized NHRIs. Physical proximity to the area being served has always been one of the primary arguments for decentralisation of government services.[39] Physical proximity to local populations conveys informational advantages to local administrators and decision-makers.[40] It also allows for more rapid responses to changing local conditions, and cheaper access to local sites. This general argument has been embraced in the realm of human rights implementation by many practitioners and advocates. For example the Council of Europe Commissioner for Human Rights stressed the importance of doing human rights work 'locally, close to the people', because 'geographical and personal proximity between inhabitants and local decision-makers … has obvious advantages'.[41]

There are a number of component claims to the argument that human rights implementation is benefited by physical proximity between the service provider and recipient. One potential claim is that SNHRIS will be more knowledgeable about the local environment

[37] Ibid, 8.

[38] Daniel Halberstam, 'Federal Powers and the Principle of Subsidiarity' in Vikram Amar and Mark Tushnet (eds), Global Perspectives on Constitutional Law (OUP 2009) 34.

[39] See, generally, Jesse Newmark, 'Legal Aid Affairs: Collaborating with Local Governments on the Side' (2012) 21 Boston U Public Interest L J 195, 204.

[40] Hayek, F.A., 1948. Individualism and Economic Order. University of Chicago Press, Chicago.

[41] Thomas Hammarberg, Commissioner for Human Rights, 'Bringing Human Rights Home: Human Rights Action at the Local Level', Statement before the Council of Europe Congress of Local and Regional Authorities, 22 March 2011, CE Doc CommDH/Speech(2011)3.

because they are physically based there.[42] Another is that human rights monitoring is facilitated by a local presence, because human rights institutions can receive consistent feedback from the local population.[43] A third is that local offices facilitate contact with grassroots NGOs, which in turn improves human rights implementation.[44] A fourth is that victims of human rights violations will be better able to access justice through nearby complaint mechanisms.[45] A final claim is that by having easier access to the local population, SNHRIs will find it easier to effectively engage in human rights promotion and training.[46]

In my view, it would be difficult to rebut this argument. That is to say, while one may certainly argue against SNHRI establishment on other grounds (i.e., cost, independence, effectiveness, etc.), there is no credible argument that human rights are better protected through a lack of proximity to a particular population. The one caveat, though, is that physical proximity provides an equally valid argument for decentralisation and deconcentration. In those jurisdictions that already have NHRI branch offices, the physical proximity argument is no longer a good reason to support the establishment of an SNHRI rather than the support of an existing NHRI.

B. Cultural proximity

Another argument in favor of decentralisation is that SNHRIs will have a closer socio-cultural proximity to local populations in pluralistic societies, which will improve their ability to promote and protect human rights, in at least three separate ways. First, human rights workers who come from the same socio-cultural background of the communities they serve will likely be more knowledgeable about the human rights issues facing their community. This should lead to human rights implementation that is targeted to those in society most in need.

Second, local populations may be more likely to accept human rights norms as legitimate (and local governments more likely to concede to human rights demands) if those norms are coming from their co-ethnics and social peers, rather than being imposed in a quasi-imperialist

[42] Enric Bartlett, 'National and/or Regional/Local Ombudsman', paper presented at the Regional Ombudsman Conference: The Ombudsman in Southeastern Europe (Sofia, Bulgaria, November 28–30, 2003).

[43] Kim Joong-Seop, 'Toward Human Rights in the Local Community: Multiple Approaches for Implementation' (2010) 39(1) Dev & Soc 119, 127; Axel Marx et al, 'Localizing Fundamental Human Rights in the European Union: What is the Role of Local and Regional Authorities, and How to Strengthen It?' (2015) 7(2) J Hum Rts Practice 246, 267.

[44] UN Human Rights Council, 'Role of local government in the promotion and protection of human rights – Final report of the Human Rights Council Advisory Committee' (7 August 2015), UN Doc A/HRC/30/49, para 55.

[45] Thomas Hammarberg, 'Recommendation on Systematic Work for Implementing Human Rights at the National Level', CE Doc CommDH(2009)3 (2009) ('[Regional ombudsmen's] geographical proximity to people makes them more available and accessible to people whose rights have been violated'); Bartlett (n 42); Marx et al (n 43) 266.

[46] Doris Ansari and Hans Martin Tschudi, 'Regional Ombudspersons: An Institution in the Service of Citizens' Rights,' Council of Europe Congress of Local and Regional Authorities Explanatory Memorandum CPR (11) 7 Part II.

manner from a distant capital (or New York or Geneva).[47] This may be especially true of socio-economic rights that involve income redistribution, given evidence that people are most willing to engage in acts of self-sacrifice with respect to people with whom they feel a cultural affinity.[48] A corollary of this argument is that local victims of human rights violations might feel more comfortable approaching SNHRIs when the victims speak the same language and share life experiences with the SNHRI officers.[49]

Third, with decentralisation, services and regulations can be tailored more efficiently and flexibly to community needs, rather than centrally administered in a 'one size fits all' fashion.[50] To the extent that accepted universal norms are being implemented in culturally specific ways so as to have a more beneficial impact on local populations, this would seem to be an unqualified advantage: human rights scholars generally agree that human rights may be legitimately implemented in different ways depending on local conditions, as long as the core content of those rights are respected.[51] The risk, however, it that by implementing human rights in a manner acceptable to the majority in a sub-national jurisdiction, an SNHRI might end up alienating or even oppressing a group that is in the minority; for this reason, tailoring human rights implementation to local needs is perhaps most effective in local jurisdictions that are not themselves heterogeneous (within countries that are heterogeneous).[52]

More controversially, SNHRIs that share a socio-cultural proximity to the people that they serve would seem to be better placed (relative to NHRIs) to engage in the normative development implicit in the localization of human rights norms, defined as the 'active construction of [new norms] through discourse, framing, grafting, and cultural selection of foreign ideas by local actors, which results in the former developing significant congruence with local beliefs and practices'.[53] As stated more concisely, local human rights implementation by

[47] Barbara Oomen, 'Rights and the City: Does the Localization of Human Rights Contribute to Equality?' in Marjolein van den Brink et al (eds), *Equality and human rights: nothing but trouble?, Liber amicorum Titia Loenen*, SIM Special no 38, SIM (2015) 407.

[48] Leslie Wexler, 'The Promise and Limits of Local Human Rights Internationalism' (2010) 37 Fordham Urban L J 599, 625-26.

[49] Derrick McKoy and Yvonne Stone, 'The Ombudsman and Effective Local Public Administration: A Case Study', Report of the Meeting of the OAS Program of Cooperation in Decentralization, Local Government and Citizen Participation (Kingson, Jamaica 1998) ('The greatest advantage to be derived from localised politics and localised public administration, is that it reduces the alienation that people sometimes feel when they confront the state'.)

[50] Oates (n 11). The matching of public services to local needs is sometimes referred to as 'allocative efficiency'.

[51] Jack Donnelly, Universal Human Rights in Theory and Practice (2d edn Cornell Univ Press, 2003) 119; Morten Kjaerum, 'Universal human rights: between the local and the global' in Kirsten Hastrup (ed), *Human Rights on Common Grounds* (Kluwer 2001) 83-87.

[52] This situation, however, will rarely be fully realised. See Edward Rubin and Malcolm Feeley, 'Federalism: Some Notes on a National Neurosis' (1994) 41 UCLA L Rev 903, 939 ('Political communities can be coextensive with affective communities, but this is rarely the case in advanced societies').

[53] Amitav Acharya, *Whose Ideas Matter? Agency and Power in Asian Regionalism* (Cornell U Press, 2009) 15. In the human rights context, De Feyter characterizes localization as the process 'whereby local

SNHRIs 'gives meaning to human rights'.[54] Some scholars argue that by drawing upon local traditions, localization will enhance the legitimacy and effectiveness of the universal human rights regime.[55] Of course, the idea of localization is controversial; some see pluralism as dangerous to the human rights project.[56] This objection will be discussed in more depth below, in the section on human rights fragmentation.

To a certain extent, socio-cultural proximity between an NHRI and local populations can be arranged through deconcentration as well as decentralisation, for example where local offices are staffed with local hires. However, deconcentration will almost necessarily be less effective in this regard, as NHRI policy priorities and ultimate decisions will be made at a central level, even if local office hires reflect the cultural make-up of the community.[57]

C. Administrative Autonomy

Perhaps the strongest argument for the establishment of SNHRIs (rather than the mere deconcentration of NHRIs) is that SNHRIs are the best (or perhaps the only) way to influence local government policy in jurisdictions that have a significant level of administrative or legislative autonomy. This argument has been made at times by the Council of Regions and other actors with an interest in preserving sub-national political authority.[58] The argument progresses as follows. First, advocates for decentralisation will point out that local authorities are intimately involved in human rights protection and implementation, and in particular are generally heavily involved in developing and implementing policies that can impact social and economic rights, such as public health, housing, social welfare, education, employment, urban planning and

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human rights needs inspire the further interpretation and elaboration of human rights norms at levels ranging from the domestic to the global, and serve as a point of departure for human rights action.' Koen De Feyter, 'Localising Human Rights' in Wolfgang Benedek et al (eds), *Economic Globalisation and Human Rights* (CUP 2007) 89.

[54] Columbia Law School Human Rights Institute, 'State and Local Human Rights Agencies: Recommendations for Advancing Opportunity and Equality Through an International Human Rights Framework' (2009) 5.

[55] De Feyter, ibid 71-72; Emilie Hafner-Burton, *Making Human Rights a Reality* (Princeton U Press 2013) 175.

[56] Besselink argues that human rights pluralism would undermine universality, and 'is tantamount to positing that fundamental rights are not really fundamental rights'. Leonard Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 Common Mkt. L. Rev 629, 639.

[57] William Riker, Federalism: Origin, Operation, Significance (Little, Brown 1964) (arguing that appointed officials are likely to forsake the preferences of local populations in order to please their bosses in national government).

[58] See, eg, Ansari and Schudi (n 46) ('In cases of regional autonomy and self-government, the solution of appointing a regional ombudsman is preferable by far to the solution of extending the national ombudsman's competence to the regional authorities'); Bartlett (n 42) ('The Regional Ombudsman makes sense in federal or political decentralised states where its entities have legislative competence.'); Martin Haas, The Role of Mediators/Ombudsmen in Defending Citizens' Rights, Council of Europe Congress of Local and Regional Authorities Explanatory Memorandum CG (6) 9 part II, para 11.

environmental protection.[59] However, there is sometimes insufficient attention paid to local government's impact on human rights, due to a systematic bias among human rights advocates and scholars to monitor developments at the national or supra-national level.[60] Therefore, given the relevance of local government activities to human rights, and the relative lack of supervision, it is desirable for an HRI of some sort to monitor local government activities and provide appropriate recommendations when its laws or policies have violated or threaten to violate human rights. In countries where there is no NHRI, this means that an SNHRI should be established to fill the gap. Where there is an NHRI, the establishment of an SNHRI might still be necessary, because the NHRI might be legally prohibited from interfering with the actions of regional and municipal authorities when administration is divided into federal, autonomous, or highly decentralised jurisdictions.[61] Even where it would be legally permissible for a national-level body to pass judgment on the work of a lower-level autonomous governmental entity, it is worth bearing in mind that NHRI opinions are (in general) non-binding, and therefore only effective in as much as their addressee takes them into consideration and follows their recommendations.[62] If an autonomous entity would be systematically less likely to follow recommendations from a NHRI than from a local SNHRI due to autonomy concerns, then an SNHRI would end up as the more effective body for influencing local authorities.

The argument in favor of SNHRI establishment due to sub-national autonomy concerns is strong. There are a few other considerations, however. First, in many countries, lower administrative divisions are commonly subject to national oversight, and therefore autonomy concerns would be relatively muted.[63] Second, this argument is only valid to the extent that NHRIs focus their attention on influencing sub-national governments. Thus, for ombudsman-type institutions that are generally focused on offering citizens a venue for appealing government human rights (and other) abuses, the establishment of SNHRIs may offer the optimal solution, as has been noted by Council of Europe experts.[64] However, if a Commission-type NHRI is more interested in human rights promotion, research, training and the like (such as, arguably, the German Institute for Human Rights), then even strongly federal or autonomous administrative structures present little barrier to operation throughout the country.

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[59] See, eg, Klaus Starl, 'Human Rights and the City: Obligations, Commitments and Opportunities. Do Human Rights Cities Made a Difference for Citizens and Authorities? Two Case Studies on Freedom of Expression', in Barbara Oomen et al (eds), Global urban justice: The Rise of Human Rights Cities (CUP 2016) 215; International Council on Human Rights Policy (n 14) 1.

[60] International Council on Human Rights Policy (n 14) 2; James Tierney, 'Alternative Visions of Local, State and National Action, Papers Published from the Eleventh Annual Liman Colloquium at Yale Law School (2008) 169 ('As many contributors note, local government, in particular, is too often ignored [by activists]').

[61] Ansari and Schudi (n 46).

[62] See Carver (n 29) 19.

[63] Thus, in Azerbaijan, Ireland and Slovenia, for example, the national ombudsperson office can investigate complaints against local government authorities. UN Human Rights Council, 'Role of local government' (n 44) para 40.

[64] Ansari and Schudi (n 46).

Third, the appropriateness of SNHRI establishment in an autonomous or decentralised region will to some extent depend on the nature of the SNHRI's mandate, and specifically the sources of law which it draws from. Where SNHRIs implement human rights norms that have been either developed at the national level (in the form of constitutions or legislation) or accepted at the national level (by treaty ratification), then the SNHRIs are to some extent being delegated administrative authority, or the 'right to act' (in Braun and Keman's terminology), rather than political authority, or the 'right to decide'.[65] In fact, the sub-national entity's 'right to decide' in other policy areas may be limited by SNHRI pressure to comply with rights norms that were developed or accepted at the national level, leading to a de facto reduction in relative decision-making powers at the sub-national level. Of course, this de facto reduction in autonomy may be considered an advantage or a disadvantage, depending on the situation, and one's perspective.

Fourth, the establishment of an SNHRI in an autonomous region may serve as a symbolic indication of 'national' legitimacy, especially where it acts like an NHRI, for example by participating in UN mechanisms. The Scottish National Human Rights Commission, Somaliland National Human Rights Commission, and Kurdistan Human Rights Commission (none of which are based in recognized 'nations' in the international law sense) are good examples of this dynamic. Evidently, observers will differ as to whether these elements of symbolic nationhood are normatively desirable or not, but it is an element that should be considered in some cases.

D. Human rights innovation

One classic argument in favor of decentralisation is that it promotes innovation at the sub-national level, as sub-national actors face an incentive to adopt best practices and invest in policy innovation in the face of mobile citizens who have an ability to choose which jurisdiction to live and work in.[66] A corollary of this argument that is often cited in the US is Judge Brandeis' famous claim that states are 'laboratories of democracy' that can experiment with policies that, if successful, can then be adopted in other states or even at the national level.[67] These innovations also come with decreased risk, as failure would be limited to a relatively small area rather than the entire nation.[68] The innovation argument is also a product of sub-national heterogeneity, as discussed in the previous section, however in this case it is dependent not on cultural or ethnic differences, but rather in a variability in willingness to accept human rights norms and structures.

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[65] See Keman, H. (2000). Federalism and policy performance: A conceptual and empirical inquiry. In U. Wachendorfer-Schmidt (Ed.), *Federalism and political performance* (pp. 196-227). London, UK: Routledge and Braun, D. (2000). *Public policy and federalism*. Aldershot, UK: Ashgate. Of course, this distinction is never complete, acting always involves decision-making.

[66] Charles Tiebout, 'A Pure Theory of Local Expenditures' (1956) 65 J Pol Econ 416. This reasoning can be taken farther to argue that decentralisation to municipal levels of government is optimal, because it offers 'more realistic options for voting with one's feet'. Heather Gerken, 'Federalism All the Way Down (2010) 124 Harvard L J 4, 23.

[67] New State Ice Co v Liebmann, 285 US 262, 311 (1932) (Brandeis, J, dissenting). The argument evidently holds true for cities and towns, as well, which Joshua Douglas has recently called 'test tubes of democracy'. Joshua Douglas, 'The Right to Vote under Local Law', forthcoming at 2017 (85) GW Univ L Rev.

[68] Brandeis, ibid.

In the realm of human rights implementation, proponents of decentralisation have highlighted the importance of states and localities as laboratories for rights innovation.[69] According to Chaney, 'international literature suggests that regional governance may foster policy divergence and instances of innovation in equality and human rights practice'.[70] In some cases, especially in 'human rights cities', much of this innovation has been structural or procedural in nature, involving the establishment of new committees, requirements of human rights budgeting or assessment, or public consultation processes.[71] Elsewhere, sub-national entities, including SNHRIs, have engaged in more substantive human rights innovation, by embracing and, at times, attempting to operationalize rights norms that were not yet accepted at the national level. In perhaps the best-known example of this phenomenon, dozens of US cities have passed resolutions in support of the Convention on the Elimination of all forms of Discrimination Against Women ('CEDAW') and the Convention on the Rights of the Child, despite the US not being a party to either treaty, with San Francisco, Berkeley and Los Angeles going a step further to actually enact CEDAW principles into law.[72] At times, SNHRIs have encouraged such policies.[73] Another example has been the gradual sub-national embrace of LGBT rights in recent decades.[74] While national jurisdictions and supra-national bodies have in many cases been slow in embracing LGBT rights protections, some SNHRIs have been speaking out on the issue for many years, even in areas that are not normally thought of as socially progressive, such as Michigan or the Basque Country.[75]

There are different potential reasons why SNHRIs may desire to go beyond what an NHRI might undertake in the field of rights. In part, they may represent particularly progressive polities with broader conceptions of human rights. They may also be involved in 'branding' their jurisdictions as human rights-friendly, as a way of standing out from their peers or in order to attract new inhabitants. They may simply be more nimble and creative because they are smaller or less bound by detailed legislative mandates or oversight. From a human rights perspective, a stronger sub-national human rights commitment has been lauded as a way not only to improve

[69] Risa Kaufman, '"By Some Other Means": Considering the Executive's Role in Fostering Subnational Human Rights Compliance' (2012) 33 Cardozo L Rev 1971, 2000.

[70] Paul Chaney, 'Quasi-Federalism and the Administration of Equality and Human Rights: Recent Developments and Future Prospects – A Preliminary Analysis from the UK's Devolution Program' (2011) 27 Pub Pol and Admin 69, 70.

[71] See, Charlotte Berends et al (eds), *Human Rights Cities: Motivations, Mechanisms, Implications* (University College Roosevelt 2013).

[72] Risa Kaufman, 'State and Local Commissions as Sites for Domestic Human Rights Implementation', in Shareen Hertel and Kathryn Libal (eds), *Human Rights in the United States: Beyond Exceptionalism* (CUP 2011) 101.

[73] ibid

[74] Ernest Young, 'A Research Agenda for Uncooperative Federalists' (2013) 48 Tulsa L Rev 427, 429.

[75] Michigan Department of Civil Rights, 'Report on LGBT Inclusion under Michigan Law' (28 January 2013) 5 (discussing statements as far back as 1983 promoting legal protections against LGBT discrimination); Marx et al (n 43) 257 (discussing Ararteko actions regarding discrimination on the grounds of sexual orientation and gender identity).

conditions at the local level, but potentially also to place pressure on national governments or sub-national peers to improve their rights practices.[76]

There are a few qualifications to this argument, however. Some would argue that human rights protections should be equal for every person throughout a country; this claim will be discussed in detail below. Second, it is in theory possible that the opposite dynamic could also occur, and SNHRIs could choose to interpret human rights norms more restrictively than they are interpreted by NHRIs.[77] Third, the development of stronger human rights norms at the sub-national level is of course not dependent on the establishment of an SNHRI. Many sub-national entities have legislatively embraced rights norms that go beyond those at the national level, obvious examples being the constitutional rights enacted by US states and Canadian provinces, or the municipal human rights laws or human rights declarations passed by cities and town councils around the world. However, while SNHRIs are not the only venue for normative development, they do provide certain advantages in that respect. Namely, SNHRIs are normally composed of human rights experts, are able to progressively develop norms through continuous attention to an issue (rather than the necessarily episodic law-making process), and are arguably able to go farther in their advocacy of rights norms because their independence acts as a shield from political backlash.

E. Robustness

A final general argument in favor of decentralisation is that it is a way of providing robustness and resiliency in national and sub-national service provision.[78] In the current context, this means that the establishment of SNHRIs can provide for greater robustness in human rights service delivery, in particular by introducing a hedge against situations where the local population lacks sufficient human rights protection because the NHRI is ineffective or lacks independence. As Ghai notes, 'if government at one level is not supportive of rights, citizens can go to the other level for protection.'[79]

In fact, there are a number of situations where the establishment of a SNHRI has been justified (before or after the fact) with reference to the deficiencies of a relevant NHRI. I have elsewhere demonstrated how the establishment of Korean SNHRIs coincides with (and arguably results from) a period of decreased independence at Korea's National Human Rights

[76] Oomen, 'Rights and the City' (n 47) 407.

[77] In 1964, the political scientist William Riker famously stated that "if in the United States one disapproves of racism, one should disapprove of federalism." William Riker, Federalism: Origin, Operation, Significance (Little, Brown 1964) 155.

[78] See, eg, Robert Cover, 'The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation' (1981) 22 William & Mary L Rev 639; Jenna Bednar, 'Subsidiarity and Robustness: Building the Adaptive Efficiency of Federal Systems' in James Fleming and Jacob Levy (eds) NOMOS LV: Federalism and Subsidiarity (NYU Press 2014).

[79] Yash Ghai, 'The Structure of Human Rights in Federations' in Kamal Hossain et al (eds) *Human Rights Commissions and Ombudsman Offices: National Experiences* (Kluwer 2000) 51. See, also, Robert Schapiro, Polyphonic Federalism: Toward the Protection of Fundamental Rights (U Chicago Press 2009) 167-68.

Commission.[80] In Indonesia, the Yogyakarta Ombudsman's effectiveness has been contrasted with the declining effectiveness of that country's national ombudsman.[81] In a somewhat different context, Carver too noted that an argument in favor of multiple issue-specific human rights institutions in the UK was that 'poor leadership of a single institution can have deleterious consequences on the human rights protection system as whole'.[82]

A similar argument can be made in favor of establishing SNHRIs in jurisdictions where NHRIs do not hear complaints, in which case sub-national outlets may be the only non-judicial recourse. Even when NHRIs do hear complaints, they may be slow, ineffective or overly conservative in their rulings. SNHRIs can in these cases provide access to a better quality of justice. For example, a comparison of fair housing complaints handled by the US federal government with complaints handled by state and local human rights commissions found that southern commissions were more likely to provide an outcome favorable to the complainant, thus providing a justification for SNHRI complaint-handling (and perhaps countering expectations concerning local reluctance to enforce anti-discrimination laws in the southern US).[83]

IV. Arguments against the Establishment of SNHRIs

Next, I will outline five principal arguments against the establishment of SNHRIs in countries that already possess NHRIs, based on general arguments against decentralisation. As is the case with the arguments in favor, these arguments will be more or less convincing depending on the circumstances in a particular jurisdiction, the normative preferences of the decision maker, the type of SNHRI in question, and many other factors.

A. Redundancy

Oftentimes, the first argument against decentralisation leading to shared jurisdiction over the same tasks is that the ensuing redundancy would be wasteful and overly complex in practice. As Warner noted almost a century ago, 'the existence of two independent systems of governmental activity causes expensive duplication and endless conflicts.'[84] This argument may apply to the establishment of SNHRIs in countries that already possess NHRIs, because an SNHRI's functions are, at least in large part, often already carried out by an existing NHRI.[85]

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[80] Andrew Wolman, 'Human Rights between the Local and Global: A Case Study of the Seoul Human Rights Ombudsperson' forthcoming in (2017) Asia Pac J Hum Rts & L.

[81] Melissa Crouch, 'The Yogyakarta Local Ombudsman: Promoting Good Governance through Local Support' (2007) 2 Asian J Comp L 1, 2.

[82] Carver (n 29) 9.

[83] Charles Bullock III et al, 'Fair Housing Enforcement in the South and Non-South' (2015) 96(4) Soc Sci Q 941, 951.

[84] Kenneth Warner, 'Australian Federalism at the Crossroads' (1931) 4(2) Pac Aff 120, 120. See also Gough Whitlam, 'The Cost of Federalism' in Allen Patience and Jeffrey Scott (eds), *Australian Federalism Future Tense* (OUP 1983).

[85] In formal terms, a concurrently operating NHRI and SNHRIs could lead, depending on the situation, to cases of 'overlap', meaning a situation of more than one level of government operating in the same policy domain or of 'duplication', meaning 'a situation where more than one level of government provides the *same* goods and services to the *same* clients'. Robyn Hollander, 'Rethinking Overlap and Duplication:

Furthermore, proponents of this argument would claim that the redundant nature of SNHRIs where NHRIs already exist has real costs. Creating SNHRIs could take away (often local) funding that could be better used on education, parks, or other social programs. SNHRIs could draw public attention away from an NHRI that may already be struggling to closely engage with local populations. The existence of SNHRIs and an NHRI could also cause confusion in the complaint-handling process, as victims of human rights abuses will be uncertain which venue to approach, and other societal actors will be unsure of how to act in the event of divergence between an NHRI and SNHRI.[86]

There are a few possible replies to this argument. First, in some cases (as noted above), there will be little if any overlap or redundancy between SNHRIs or NHRIs, as the NHRI will be prevented from intervening with sub-national governments due to autonomy concerns.[87] Where overlapping mandates do exist, they can be managed through coordination, as already occurs in several countries. This can involve regular meetings between the NHRI and SNHRIs, as occurs in Russia, India and Mexico; an annual conference including NHRI and SNHRIS as occurs in Spain; NHRI and SNHRI membership in a common networking association, as in Australia, Canada and Argentina, formal MOUs between an NHRI and SNHRIs, as occurs in Spain and Mexico, or informal consultations, as occurs in Korea.[88]

Second, there are also scholars who view redundancy as a desirable feature of decentralisation.[89] It can promote reliability, because (as discussed above with respect to inefficient or non-independent NHRIs) if one part of government fails, another can step in to provide services.[90] Martin Landau asserts that 'redundancy serves many vital functions ... it provides safety factors, permits flexible responses to anomalous situations and provides a creative potential'.[91] At least in the US context, there is empirical evidence that the existence of a sub-national human rights complaint procedure alongside a national one has a beneficial effect from an access to justice perspective, by increasing the total number of human rights complaints as compared with a solely national complaint system, even when the legal mandate is identical at both levels. In a 2008 analysis of anti-discrimination complaints in Kentucky, researchers compared the number of housing discrimination complaints filed in counties that had human

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Federalism and Environmental Assessment in Australia' (2009) 40(1) Publius 136, 138 (citing Gordon Brown, 'Canadian Federal-Provincial Overlap and Presumed Government Inefficiency' (1994) 24(1) Publius 21).

[86] According to Bartlett, this includes the risk that citizens will use a complaint to the national ombudsman as a de facto second bite at the apple if they disagree with a decision of the local ombudsman. Bartlett (n 42).

[87] Ibid ('if every administration only has relations with a single Ombudsman for specific matters, as for example in the Belgian and Dutch systems, the problem is more theoretical than real.')

[88] Wolman, 'The Relationship Between National and Sub-National Human Rights Institutions' (n 20) 456; Interview with Lee Eun Sang, Seoul City Human Rights Ombudsperson (Seoul, Korea, 18 November 2015).

[89] See, Cover (n 78).

[90] Hollander (n 85) 139.

[91] Martin Landau, 'Redundancy, Rationality, and the Problem of Duplication and Overlap' (1969) 29(4) Pub Admin Rev 346, 356.

rights commissions (and thus, the option of filing complaints either at the local or federal level) with the number of complaints in counties that lacked local human rights commissions (and thus could only file such complaints at the federal level).[92] The study found that counties with local human rights commissions saw a significant increase in the number of disability discrimination complaints filed, with the odds of complainant success being identical at the local and federal levels. A similar study in North Carolina found that the presence of local commissions significantly increases the total number of rental housing complaints.[93]

Finally, it should be noted that the strength of the redundancy argument will depend to a certain extent on the level of NHRI deconcentration. If an NHRI is highly centralized, it may have relatively few promotional, monitoring and protective activities in localities far from the capital, and there would thus be relatively little overlap with the activities of local SNHRIs.

B. Economies of scale

One common argument in favor of administrative centralization is that it is cheaper due to the benefits of economies of scale. According to proponents of this argument, central service delivery is normally more efficient due to savings arising from reduced bureaucratic spending on policy design and implementation, as well as overhead, bulk purchasing, and other types of cost savings.[94] This general argument has also been made with respect to SNHRIs in particular. According to Bartlett, 'A single institution can be, at least in theory, cheaper for the public budget than ten of them, with their corresponding ombudsmen and deputies'.[95] While arguing for one NHRI instead of several focused on different rights issues, Carver claims that 'a single human rights institution is able to make economies that allow it to be considerably more cost-effective than multiple institutions', in part because 'the overwhelming majority of the budget of these institutions thus goes on staff costs and office and information technology infrastructure, and only a very small proportion on projects or programme activity'.[96]

The main rebuttal to this argument is that as an empirical matter, it is unclear whether economies of scale can really result from any given centralization experience; some doubt whether this is normally the case. As Prud'homme notes, 'the prevailing view is that there are few local public services for which economies of scale imply nationwide supply'.[97] There are other countervailing considerations that might make SNHRIs more affordable, such as NHRIs' 'elongated chains of command/supervision, [and] remoteness from the scene of action'. [98]

[92] Kentucky Advisory Committee to the United States Commission on Civil Rights, 'Fair Housing Enforcement in Kentucky' (August 2008).

[93] North Carolina Advisory Committee to the United States Commission on Civil Rights, 'Fair Housing Enforcement in North Carolina' (November 2008).

[94] Iwan Barankay and Ben Lockwood, Decentralization and the Productive Efficiency of Government: Evidence from Swiss Cantons (2007) 91 J Pub Econ 1197, 1212.

[95] Bartlett (n 42).

[96] Carver (n 29) 13.

[97] Rémy Prud'homme, 'The Dangers of Decentralization' (1995) 10(2) World Bank Res Obs 201, 209.

[98] Keith Miller, 'Advantages and Disadvantages of Local Government Decentralization', Speech to Caribbean Conference on Local Government and Decentralization, Georgetown, Guyana (June 2002), 12,

Among other factors, the precise activities undertaken by a particular SNHRI and NHRI will impact whether economies of scale potentially apply. While human rights research, the development of human rights training modules, and engagement with international mechanisms (among other tasks) may be more affordable when conducted by a single large NHRI rather than many small SNHRIs, human rights monitoring and complaint investigation necessarily involve significant periods on the ground in local areas (when done well), and, for these functions, the costs of travel back and forth from a distant capital may outweigh any savings from economies of scale.

C. Administrative Ineffectiveness

A third general argument against decentralisation is that sub-national administration tends to be less effective than administration at the national level due to inferior human, financial or technical resources at the sub-national level.[99] According to this line of thought, SNHRIs are likely to be systematically less effective than NHRIs (or NHRI branch offices). There are different elements of this claim. One problem could be that SNHRIs may be unable to attract employees with human rights education or expertise, especially in small or poorer jurisdictions. Staffing challenges has been generally claimed as a potential downside of decentralisation by some scholars, both because lower tiers of government may pay relatively lower salaries, but also because national governments may offer more desirable careers, with 'greater diversity of tasks, more possibilities of promotion, less political intervention, and a longer view of issues.'[100] In the human rights field, SNHRI staffing concerns may be even more pronounced, in part because many SNHRIs operate on shoestring budgets or with volunteer personnel, and in part because human rights law often requires an advanced education and is studied by relatively few people in some regions. As an empirical matter, adequate staffing has been noted as a problem for SNHRIs in India and Serbia.[101]

Another issue could be that a lack of sufficient funding at the sub-national level could harm the effective administrative functioning of an SNHRI.[102] This has arguably been the case in

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<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.134.5990&rep=rep1&type=pdf> accessed 17 October 2016.

[99] See, eg, James Manor, *The Political Economy of Democratic Decentralization* (World Bank 1999); Anwar Shah, 'Fiscal Decentralization in Transition Economies and Developing Countries'in Raoul Blindenbacker and Arnold Koller (eds), *Federalism in a Changing World: Learning From Each Other* (McGill-Queens Univ Press 2003). Others counter this argument by claiming that because of their small size and resulting lack of bureaucratic inertia, local governments can in fact have greater administrative effectiveness. Newmark (n 39) 207.

[100] Prud'homme (n 97) 209-10.

[101] Predrag Dimitrijević, 'Do we need local ombudsmen?: Protector of Human Rights' (2005) 3(1) Facta Universitatis: Law and Politics 25, 29 ('In small and poorer municipalities it is very difficult to find the suitable specialist personnel, since the role of ombudsman supposes, first of all competence, work experience, reputation etc.'); Preeti Mehra, 'Commission and their Omissions' The Hindu (4 March 2014) <http://www.thehindu.com/opinion/op-ed/commissions-and-their-omissions/article5747146.ece> accessed 17 October 2016 (describing staffing challenges of Indian State Human Rights Commissions).

[102] UN Human Rights Council, 'Role of local government' (n 44) para 22 ('It should be particularly emphasized that, whatever powers that are conferred upon local authorities, they would not be effective if

locations as disparate as India and Michigan.[103] Lack of resources has also been used to argue against the establishment of local ombudsmen in Jamaica, where there is an ombudsman institution at the national level.[104] Of course, this issue could be overcome if sufficient funding is provided by national-level sources to sustain adequate offices, and may not be a major issue in relatively wealthy jurisdictions.

Finally, one common argument against decentralisation holds that local levels of government may be less effective because they are more likely to be corrupt[105] or come under the control of local private interests.[106] An analogous argument has also been made regarding SNHRIs; namely, that they are more susceptible to pressure from local elites, and therefore are less likely than national-level institutions to be fully independent.[107] There are, however, many opponents to the general claim of greater corruption and co-option by local elites.[108] Empirical research on the issue (as is so often the case in the decentralisation debate) is inconclusive.[109] Presumably, outright corruption would be somewhat less of an issue with SNHRIs than with many other government offices, though, because SNHRIs would not normally be in charge of the distribution of expensive goods and services.

D. Spillover effects

Another well-known risk of decentralisation is that sub-national decision-making could lead to spillovers, or negative effects outside of a particular jurisdiction, because sub-national officials (unlike national officials) will not have an incentive to take into account the desires of the rest of the country.[110] Spillovers are common in some issue areas, and far less common in others. In general, human rights implementation is likely to be an area with relatively few

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no financial resources were available to carry them out'); Bartlett (n 42) (in small towns with minimal administrative structures, 'the lack of technical resources can be a handicap in exercising functions.')

[103] National Human Rights Commission of India, 'NHRC Convenes a Meeting of State Human Rights Commissions', <http://www.nhrc.nic.in/disparchive.asp?fno=2138> accessed 17 October 2016; Michigan Department of Civil Rights (n 75) 55-56 (describing local agencies that are 'ill-equipped to investigate complaints').

[104] McKoy and Stone (n 49).

[105] Prud'homme (n 97) 211

[106] Pranab Bardhan, 'Decentralization of Governance and Development' (2002) 16(4) J Econ Persp 185, 202; Olivier Blanchard and Andrei Shleifer, 'Federalism With and Without Political Centralization: China versus Russia' (2001) IMF Staff Papers 171.

[107] Bartlett (n 42) ('The last point that I can think of in which a National Ombudsman would be an advantage is that distance makes him/her less vulnerable to pressure').

[108] For example, Parlow argues that 'because citizens are closer to and more in touch with their local governments, they can better … mitigate against the capture of their local government by special interest groups." Matthew Parlow, 'Progressive Policy-Making at the Local Level: Rethinking Traditional Notions of Federalism (2008) 17 Temple Pol & Civ Rts L Rev 371, 374.

[109] Ruben Enikolopov and Ekaterina Zhuravskaya, 'Decentralization and Political Institutions' (2007) 91 J Pub Econ 2261, 2263.

[110] See Richard Musgrave, 'Theories of Fiscal Federalism' (1969) 4(24) Pub Finances 521; Oates (n 11).

negative spillover effects, but there are (arguably) still some issues that could arise, which could be used as arguments against SNHRI establishment.

For example, an SNHRI in a largely indigenous area could press for greater indigenous rights to control or use certain territories or goods. This would inevitably imply a reduction in power for external actors over such territory or goods. Or, to give another example, an autonomous region could argue that the right to self-determination implies greater local control over resources (or even secession), either of which would inevitably have significant effects on the rest of the country, effects that many would consider negative. Perhaps most controversially, an SNHRI could provide greater rights for undocumented immigrants, leading to (some would argue) the spillover effect of weakening a nationwide policy of deporting undocumented workers, and acting as a pull factor for irregular immigration.[111]

Of course, in most circumstances, none of these spillover effects would be seen as particularly likely to occur, and at any rate SNHRIs might have limited influence to affect the debate with such high-profile political issues. In contrast, positive spillover effects would arguably be more likely to stem from SNHRI's work to implement greater human rights protections. Free speech in one jurisdiction can be enjoyed across the country; due process rights are enjoyed by defendants regardless of their origin, and affordable tertiary educational opportunities are not usually restricted to the residents of a sub-national jurisdiction, to give just three examples of human rights issues with beneficial extra-jurisdictional effects.

E. Fragmentation

One of the classic arguments against decentralisation is that it can lead to greater inequalities or disparities among sub-national units.[112] As Besley and Ghatak state, 'there is clearly a tension between pursuing goals of equality in service provision and greater decentralisation and choice'.[113] In general, the focus of criticism in this regard has been that wealthier (or more administratively capable) sub-national jurisdictions will deliver a given service better than their peers, as for example with locally run schools.[114] Disparities in the quality of human rights service delivery may be an issue for SNHRIs, at least to the extent that it contributes to other disparate outcomes; as Oomen notes, 'a movement in which some cities become human rights cities and others do not runs the risk of contributing to inequality *between* cities'.[115] However, there are two somewhat different aspects of fragmented human rights implementation that are more relevant for the decision on whether to establish SNHRIs.

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[111] See, generally, Rose Cuison Villazor, '"Sanctuary Cities" and Local Citizenship' (2010) 37 Fordham Urb L J 573; Corrie Bilke, 'Divided We Stand, United We Fall: A Public Policy Analysis of Sanctuary Cities' Role in the "Illegal Immigration" Debate' (2009) 42 Indiana L Rev 65.

[112] See, eg, Prud'homme (n 97). Some go further to argue that decentralisation can undermine the unity of diverse nations and lead to political instability. See, eg, Daniel Treisman, 'Political Decentralization and Economic Reform: A Game-Theoretic Analysis' (1999) 43(2) Amer J Pol Sci 488.

[113] Timothy Besley and Maitressh Ghatak, 'Incentives, Choice and Accountability in the Provision of Public Services' (2003) 19 (2) Oxf Rev Econ Policy 235, 245.

[114] See OECD Secretariat, 'Governance, complexity and futures' (2006) 5; Andrés Rodríguez-Pose and Roberto Ezcurra, 'Does decentralization matter for regional disparities? A cross-country analysis' (2010) 10 J Econ Geog 619, 622.

[115] Oomen, 'Rights and the City' (n 47) 407.

First, there is the desire to avoid individuals within a single nation enjoying different types of human rights implementation. There is already evidence of distinctive sub-national human rights development in the context of UK devolution.[116] While differences in the nature (as opposed to the quality) of services delivered may be of little concern (or even desirable) in certain issue areas, some would argue that human rights are different, and that it is important that all persons within a country enjoy the same human rights, in order to ensure that all citizens are treated as equals. In the Australian context, for example, one argument has been that 'within a federation, the principle of equality between polities and the importance of consent suggest that matters such as rights protection, which lie at the heart of arrangements for the governance of the federation, ought to be dealt with on a national uniform standard'. [117] Carver has also argued that the existence of a consistent standard for all individuals is a reason to favor the establishment of one NHRI instead of multiple issue-specific human rights institutions.[118]

Second, there is the broader concern that the proliferation of rights interpreting institutions implied by the establishment of SNHRIs could increase the fragmentation of an international human rights regime that depends on its universalism for it normative power. According to this argument, as the number of authoritative interpreters of human rights increases, the chances of divergences and even contradictions among them will naturally increase, as well, to the point that it will be difficult to say there is one corpus of international human rights law that apply to all humans.[119] This is arguably an even greater risk with regards to sub-national actors, who may tend to have more particularistic perspectives on some rights issues, or engage in localization. As Parrish states, a 'universalistic outlook is in tension with the idea of states as laboratories, each developing its own novel version of human rights', and the greater the number of sub-national actors interpreting human rights, the greater the fragmentation of human rights law.[120]

Each of these arguments would be heavily contested, however, for a variety of reasons. In the domestic context, many would deny that human rights protection need be the same everywhere in a given country. Every nation's political culture is different with regard to what is considered fundamental to citizenship, and in many autonomous or semi-autonomous jurisdictions, different rights are seen as important to a particular sub-national identity.[121] At the global level, some legal pluralists would deny the existence of a universal body of human rights

[116] Chaney (n 70) 84.

[117] Justin Gleeson, 'A Federal Human Rights Act: What Implications for the States and Territories?' (2010) 33(1) Univ New South Wales L J 110, 111 (citing Cheryl Saunders, 'Protecting Rights in the Australian Federation' (2004) 25 Adelaide Law Review 177, 209-10).

[118] Carver (n 29) 13.

[119] William Burke-White, 'International Legal Pluralism' (2004) 25 Mich J Intl L 963, 967 ('Some have viewed this expansion of international tribunals and the increasing frequency of international claims in national courts as indicative of the fragmentation of the international legal system.')

[120] Austen Parrish, 'State Court International Human Rights Litigation: A Concerning Trend?' (2013) 3 UC Irvine L Rev 25, 42

[121] Examples would include the right to speak French in public spaces in Quebec or the right to engage in whaling in some indigenous communities.

norms.[122] Others would accept that universal standards exists but deny that local interpretations pose a threat, arguing instead that universal norms allow for some variation in content so as to make those norms locally relevant,[123] or that it is possible to establish a compatibility between different interpretations due to the existence of networks or interpretative structures.[124] Others might even accept that fragmentation due to a proliferation of authoritative institutions is a threat to universal norms, but deny that SNHRIs are likely to be authoritative enough to make a real difference, given that their judgments are normally non-binding, and their jurisprudence is (with a few possible exceptions) usually little-noted, even within a given jurisdiction.

It is also worth noting that to the extent that one considers fragmentation to be a real danger, either at the domestic or international levels, there are ways that SNHRIs can be established so as to minimize the risk. For example, there can be appeals permitted of SNHRI decisions, either in the ordinary court system or to a particular NHRI. This would provide at least one mechanism for ensuring a level of conformity within a given nation. In addition, the degree to which fragmentation would be an issue may depend somewhat on the SNHRI's normative mandate; a mandate that specifies the implementation of certain treaties or national constitutional rights would presumably lead to somewhat fewer jurisprudential divergences from international or national norms than a mandate that simply directed an SNHRI to implement 'human rights' without further guidance. Lastly, an SNHRI that focuses on human rights promotion or monitoring rather than complaint-handling may have fewer opportunities to issue authoritative opinions on issues of human rights interpretation.

V. Conclusion

Based on the arguments outlined above, it would of course be impossible to make a general conclusion that the establishment of an SNHRI is always desirable or never desirable in a jurisdiction that already contain an NHRI. One can, however, come to certain conclusions about the circumstances under which SNHRIs would be more desirable, and, presumably, more likely to be established, as follows.

First, where the NHRI in a given country is presently weak or ineffective, then the robustness argument in favor of NHRIs becomes much stronger, as the human rights system in a given country is evidently not functioning appropriately. Conversely, the arguments that an SNHRI would be redundant or less effective than the NHRI would be less convincing if an NHRI has already demonstrated that it is not doing its job effectively.

Second, in federal countries, or autonomous regions where there is an NHRI that lacks legal authority to engage with sub-national governments, then the establishment of SNHRIs would also seem more appropriate. In fact, as I have elsewhere described, this seems borne out

[122] Calos Iván Fuentes, René Provost and Samuel Walker, 'E Pluribus Unum – Bhinneka Tunggal Ika? Universal Human Rights and the Fragmentation of International Law' in René Provost and Colleen Sheppard (eds) *Dialogues on Human Rights and Legal Pluralism* (Springer 2013) 67 (human rights law is 'composed of fragmented, multiple, overlapping sets of norms').

[123] Koen De Feyter, 'Localising Human Rights' in Wolfgang Benedek et al (eds), *Economic Globalisation and Human Rights* (CUP 2007) 71. See also Carozza (n 34) 73 ('in principle the idea of fundamental and universal human rights is compatible with local decisions over their scope and application).

[124] Achille Skordas, 'Treaty Interpretation and Global Governance' in Helmut Aust and Georg Nolte (eds), The Interpretation of International Law by Domestic Courts (OUP 2016) 299-301.

empirically, as nine out of sixteen federal nations with NHRIs also have established SNHRIs at the highest sub-national level.[125] To a certain extent, however, this conclusion depends on the justifications for a federal system in a given country; in nations such as Austria and Germany that utilize federalism primarily as a means of promoting administrative efficiency (rather than as a way to encourage locally appropriate responses to a heterogeneous population), then the autonomy-based argument for SNHRIs may be somewhat weaker.[126]

Third, in countries that are particularly large or lack rapid transportation links with the capital, the physical proximity argument in favor of the establishment of SNHRIs becomes more convincing (with the caveat that this argument applies to deconcentration as well).

Fourth, the establishment of SNHRIs is more likely to be appropriate in large or prosperous sub-national jurisdictions, because SNHRIs in such jurisdictions are more likely to be large enough that they will be able to themselves take advantage of certain economies of scale, and they will be less likely to suffer from administrative ineffectiveness due to financial or technical deficiencies.

Fifth, in heterogeneous countries with locally distinct communities, the establishment of SNHRIs will make sense if one values the benefits of local innovation and cultural affinity more than the dangers of negative spillover and fragmentation. This will normally be the case where the initiative to establish the SNHRI starts at the sub-national level, as spillover and fragmentation (by their nature) are largely externalized costs, while innovation and localization are benefits enjoyed by the sub-national entity itself.

[125] Wolman, 'The Relationship Between National and Sub-National Human Rights Institutions' (n 20) 452.

[126] Michael Burgess and G Alan Tarr, 'Introduction: Sub-National Constitutionalism and Constitutional Development' in Michael Burgess and G Alan Tarr (eds), *Constitutional Dynamics in Federal Systems: Sub-National Perspectives* (McGill-Queens U Press 2012) 13-14.