THE DANISH INSTITUTE FOR HUMAN RIGHTS

INTERROGATING FORM AND FUNCTION:
DESIGNING EFFECTIVE NATIONAL HUMAN RIGHTS INSTITUTIONS

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NO. 2015/8

MATTERS OF CONCERN
HUMAN RIGHTS RESEARCH PAPERS

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Matters Of Concern Human Rights Research Paper Series
No. 2015/8

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CONTENT

ABSTRACT

National human rights institutions (NHRIs) constitute one of the most prolific institutional developments of recent years. Their codification in the Paris Principles and subsequent endorsement by the UN General Assembly in 1993 has precipitated a norm cascade on a global scale. The Paris Principles constitute a concrete – if imperfect – template for NHRI design, with guidelines governing the independence, jurisdiction, mandate and composition. This international standard has had the positive effect of introducing and even strengthening NHRIs. The challenge now confronting local advocates of these new structures is to ensure that they are actually enabled to improve human rights practices. Relatively little is known about those factors that underlie NHRI effectiveness. A principal objective of this paper is to address this empirical deficit. This research examines the key question: what institutional features make NHRIs effective? It departs from the conventional assumption that formal design matters and speaks directly to the issue of how to design an NHRI that works as intended. In turn, is it possible to promote a formal model which has universal application? To generate some empirical pathways into answering these questions we draw on expert survey data, case study analysis, and extensive human subject work with key stakeholders to develop a series of theoretical conjectures linking particular design attributes to intended and unintended organizational effects.

INTRODUCTION

Designing effective institutions is challenging. Notwithstanding the best efforts of the designer, formal political institutions often defy functionalist expectations. This conundrum has motivated a vast institutional literature across law, political science, sociology and economics. A shared concern for the compliance gap between formal rules and their instantiation in practice, in particular has served to anchor inquiry (Moe 1984; Kingsbury et al. 2005; Pierson 2000). Institutional design matters because it determines the content of the rules of the game. However, institutions clearly function in very different ways across diverse settings. It is crucial then, to go into depth on the causal linkage between formal rules and their effect on actor behaviour and practice.

This study explores this general insight by drawing on a rich empirical public administration and administrative law scholarship focused on the relationship between agency design and performance (Lewis 2003; Hyman and Kovacic 2014). This literature provides various rationales for why, subject to qualification, we would want independent accountability agents: from protecting politically disadvantaged groups, to stabilising or 'locking-in' in politics, to ensuring expert and nonpartisan decision-making (Kaufman 1997; McCubbins et al. 1989; Freeman and Rossi 2012).

If institutional analysis has emphasised calculated design choices on the part of utility-maximising designers, public administration scholarship's concern for the distributional implications of design rules for resource allocation among social actors is particularly pertinent to this study's focus on a human rights regulatory domain (Barkow 2010). Basic assumptions in the rationalist institutional literature on organisational design and effects require modification in light of the unusual problem structure posed by human rights governance. Human rights regulatory governance poses a distinct problem structure, introducing a high probability of 'principal's moral hazard' (Miller 2005). Unlike other regulatory and market reforms, human rights institutions do not privilege the interests of the authorising principal, but rather the individuals at risk of abuse by those same principals. A mandate to promote and protect the interests of politically disadvantaged groups in society has important implications for understanding the interplay of formal design choice and institutional effectiveness.

To interrogate this claim, we focus on one of the most prolific institutional developments of recent years: national human rights institutions (NHRIs). NHRIs are bodies created by government and specifically empowered to protect and promote human rights. There are two NHRI archetypes: the Human Rights Commission model, which principally serves an advisory function and is composed of a multi-member

council, and the Human Rights Ombudsman model, which focuses on individual complaints and typically has a single head and more robust powers of investigation. Their endorsement by the UN General Assembly in 1993 has precipitated a sweeping global norm convergence.[1]

NHRIs can now be found in a wide range of political regimes – from Bahrain to Colombia, to Ireland – their numbers climbing from 21 NHRIs in 1991 to approximately 120 active NHRIs in 2015, with more on the way (Linos and Pegram 2015). Once an institutional oddity, NHRIs are now a mainstay of multi-level human rights governance.

Although the adoption of these human rights agencies by some states may be motivated by sincere intent, many instances of NHRI creation conform to what Simmons (2009) calls 'false positives' – commitments made without any intention to comply (Human Rights Watch 2000). This has important implications for design. Conventional understandings that tend to view institutions as the product of rational design to overcome collective action dilemmas are less applicable to a non-cooperative regulatory domain defined by power differentials as opposed to absolute gains, and conflict rather than Pareto-optimal frontiers (Abbott and Snidal 2000). In turn, NHRI adoption bears the hallmarks of largely exogenously-driven diffusion across very diverse political, institutional and social settings (Pegram 2010). Indeed, far from being set up to protect and promote human rights, as this study illustrates, many NHRIs have subsequently been dismantled or undermined by hostile coalitions precisely because they were (too) effective in fulfilling their mandate.

Employing an 'emergent analytics' approach (Nourse and Shaffer 2014), we depart from the assumption that formal design does matter.[2] We draw on public administration and administrative law scholarship to develop a series of theoretical conjectures on how particular design choices inform NHRI effectiveness. To generate empirical pathways to explore this proposition, we also draw on original survey data conducted among NHRI experts. Such information will always exhibit some bias and thus be imperfect. This study is therefore engaged in a critical assessment of the relative problems and possibilities raised by different NHRI design choices. Given the paucity of systematic scholarship on NHRIs, this article is best viewed as an exercise in theory-building based on informed conjecture.

A note on methodology. The study does not offer robust claims about variation in design choice or their causal effect. The approach adopted is one of careful descriptive interference, employing a cross-national case study methodology to survey the plausibility of various causal propositions and probe deductively the impact of specific

[1] Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights, adopted by the UN Human Rights Commission, Res. 1992/54, 3 March 1992 and the UN General Assembly, Res. 48/134, 20 December 1993.

[2] By 'emergent analytics' we follow Nourse and Shaffer's (2014: 111) understanding 'that the researchers have not themselves brought to the project on account of their analytic priors, but which emerge from the investigation in terms of both revealed facts and new concepts necessary to explain and respond to those facts'.

design mechanisms on NHRI behaviour and outcomes (George and Bennett 2005). To substantiate its claims, the paper draws on a range of original documentary sources and qualitative evidence, including extensive interviews with key stakeholders.

This article proceeds as follows. It begins by developing an account of organisational design and effectiveness, grounded in a public administration and administrative law scholarship. The study then turns to a reflexive evaluation of NHRI design and effectiveness in light of this debate. The core of the article follows, with a comparative analysis of design provisions categorised as generalisable and context-specific across settings. The article concludes by examining what the analysis means for NHRIs and public administration scholarship more generally.

SECTION 1

ORGANISATIONAL EFFECTIVENESS (BEYOND DESIGN COMPLIANCE)

How much does formal design choice affect organisational effectiveness? Some rational-instrumental theories imply that institutional effects will follow design choices, given their alignment with the preferences of enacting coalitions. Influential theories derived from institutional economics suggest that formal design is highly consequential, even determinative on outcomes. This follows a functionalist reasoning which claims institutional form reflects rational design premised on means-end instrumentality. Often founded on the desire to reduce transaction costs, such functionalist arguments are based on a cooperative logic (Moe 1984). Other rational choice perspectives foreground the analysis in power over cooperation, emphasising design choice and effect as a function of powerful winning coalitions (McCubbins et al. 1987; Knight 1992).

Other scholars (and many practitioners) expect formal design to have some impact on institutional effects, but regard strictly rational choice models as over-determined (Steinmo 2008). In these accounts, institutional analysis is directed to questions of agency, distributional effects, and the dynamic nature of institutional development. They do not subscribe to the predictive assumptions that treat institutional structures as instrumentally autonomous from social conditions. However, neither do they reject formal design effects out of hand. Instead, they argue that 'evolved functionalism' must be treated as a variable, not as a predetermined conclusion (Pierson 2000: 490). In other words, researchers must be attentive to the conditions under which we would expect design compliance to have its intended effect. As Raustiala (2000: 398) notes, 'compliance as a concept draws no causal linkage between a rule and behaviour'.

A concern with *when and why* formal design features matter is of central concern to an empirically-driven public administration and administrative law scholarship. This research agenda has explored the effects of a range of standard design principles, principally focused on US and developed world bureaucratic structures. For instance, Hyman and Kovacic (2014) examine the logic underlying assignment of regulatory duties to diverse bureaucratic agencies and its impact on inter-agency competition. They further develop the complexity and contingency of agency design for effectiveness in a case study of the US Consumer Financial Protection Bureau (Hyman and Kovacic 2014), concluding that functional success of agency design largely corresponds to three key factors: coherence, capacity and capability, and political implications. Gersen (2010) focuses on the impact of agency design and the benefits of jurisdictional overlap among administrative structures. Bradley (2011) details how auxiliary design provisions can ameliorate coordination problems within complex regulatory domains characterised by jurisdictional overlap.

Importantly, this scholarship zeros in on the impact of particular design attributes such as mandate scope (Macey 1992), insulation from powerful interest groups (Barkow 2010), and the impact of design choice not only on functionality, but also the legitimacy of bureaucratic agencies (Rothstein and Teorell 2008). In a large-scale study, Lewis (2002) finds that the survival of governmental organisations is largely a function of their institutional design. Carpenter (2001; 2010) exhaustively analyses how the design features of American bureaucratic agencies have fostered bureaucratic autonomy, with particular attention to organisational leadership, coalition-building and reputational gains. This research contrasts with prominent theories of public organisation which have tended to foreground analysis of organisational effects in a concern for resources, interest groups, constituencies, leadership and adaptive capacity (Kaufman 1976). In contrast, Boin et al. (2010) highlight how different design features matter in different ways depending upon the life phase of the organisation. They conclude that agency designers must *design for adaptation*, not survival. The notion that organisational effectiveness can be somehow 'hardwired' into the very design of public agencies is a provocative spur for detailed empirical research.

A concern for design impact on organisational effectiveness is reflected in NHRI research. An instructive practitioner literature has long-advocated that formal design, is a necessary, if not sufficient, precondition to the effective function of these organisations (Carver 2000; 2005; Burdekin with Naum 2007). Comparative legal and political research provides further clues as to how certain NHRI design features matter (Reif 2004; Okafor 2009; Elmendorf 2007; Pegram 2008; Goodman and Pegram 2012; J. Finkel 2012). However, the claim that structural uniformity will yield similar functional outcomes has come under sustained critique (Mertus 2012). A recent social scientific study concludes that the effectiveness of NHRIs depends not on specific design attributes, but rather the nature of the rights being targeted for improvement (Cole and Ramirez 2013). However, it is important to exercise caution in interpreting this finding. The notion that design is insignificant may be consistent with the observable implications which follow from Cole and Ramirez's theory, but we must be attentive to differentiating quantitative empirical findings from factual knowledge (Epstein and Martin 2010: 907).

SECTION 2

DESIGNING NATIONAL HUMAN RIGHTS INSTITUTIONS

If states want to establish an NHRI, they confront several major design questions. Is there an existing institution which could be reformed to perform this role? Under which branch of government should the new institutions fall? Should membership exclude members of the government and/or include civil society representatives? What issues will fall within its remit and what kinds of capabilities will be required to ensure its independent and effective function?

Within the broad designation of NHRIs across diverse local settings there exists considerable design variation across a range of dimensions. What explains this? We suggest that NHRI design differences are not random or inconsequential, but rather respond to strategic and often conflicting rationales among institutional architects. The spectre of principal moral hazard raises the likelihood of NHRIs being 'designed to fail', with design choices reflecting the machinations of those who stand to gain least from an independent and effective human rights watchdog. NHRI adoption has been characterised less by elite-driven governmental deliberation than vocal mobilisation on the part of third party actors – including IGOs and domestic constituencies – seeking to address the persistent gap between formal rights frameworks and their implementation (Kim 2013).

At the same time, it is important that a focus on arbitrary power does not result in us losing sight of the enabling properties of design. Even in highly dysfunctional settings, rules can exert an effect. Debate on NHRI performance has often veered between dismissive critique or excessive functionalism. The former realist critique highlights power asymmetries and subsumes NHRI effect as a function of powerful exogenous actor preferences (Knight 1992), often resulting in 'window-dressing' institutions. The latter position is the opposite. Focused on the formalities of NHRI design, functionalists argue (implicitly or not) that design maps relatively straightforwardly onto outcomes. Neither position is strongly established in evidence. Our principal goal is therefore to offer a more systematic account of a range of NHRI design features to evaluate – theoretically and empirically – the implications of our basic premise that design features matter, in so far as NHRIs can be designed to engender greater *de facto* independence and capability.

2. 1. Independence

Independence and capability are widely regarded as significant dimensions of institutional design, theoretically and substantively. They are both broad categories

which are given content by a range of sub-institutional features. Independence is perhaps the most contentious issue informing the design of NHRIs (Smith 2006). Who should belong to an NHRI? How important is the formal legal status of an NHRI for its public legitimacy? Should the executive have any role in leadership designation? How can recruitment procedures be designed to ensure an independent and professional staff body? According to Carver (2014: 22), NHRI independence incorporates nine factors: 'statutory basis, appointment process, criteria for membership, term of office, conflict of interest provisions, remuneration, immunities enjoyed by institution members, whether or not they can receive direct instruction from the government, and the procedure for removal of a member'.

The public administration and administrative law literature provides various reasons why, subject qualification, we would want independent agents. Scholars have highlighted how enacting coalitions can grant authority to independent agents to 'lock-in' politics and prevent undesirable policy drift (McCubbins et al. 1989). Echoing the desire to insulate agents from unwanted interference, Kaufman (1997) asserts that independence can ensure more expert and impartial decision-making. Particular attention has been paid to protection from political capture by organised interests (Olson 1971). This is of particular concern to this study, given its focus on a regulatory actor mandated to protect the rights of politically disadvantaged groups. In a particularly probing study, Barkow (2010) specifies a raft of design elements or 'equalising factors' which impact upon capture avoidance, including an agency's funding source, personnel restrictions, the rule relationships between the agency and other agencies, and political resources. Importantly, scholarship also highlights the hazards of insufficient oversight of public agencies (Boin and Goodin 2007), and the ambiguous virtues of a bureaucracy increasingly insulated from presidential control (Lewis 2004).

2.2. Capability

Capability refers to an NHRI's statutory powers, organisational structure and the range of mechanisms available to apply its authority effectively.[3] What issues should fall within the NHRI's remit? Should jurisdictional scope be clearly defined? What kind of investigative prerogatives should be afforded to an NHRI? What about complaint-handling powers and direct interface with the citizenry? Capability is distinct from capacity, which is not the focus of this study.[4] Importantly, for this study, a concern for capabilities invites inquiry into endogenous sources of change and feedback effects: which formal provisions of an institution foster change? How and why do enabling design configurations have the effect they do on political behaviour? A number of scholars provide valuable insight into these empirical questions. However, the focus has

[3] The definition follows Hyman and Kovacic (2014: 1475).

[4] Again, following Hyman and Kovacic (2014: 1474), capacity can be understood as 'the necessary critical mass of human talent and supporting resources to perform the assigned functions well'. The Paris Principles (Sec. 2(2)) refers to 'adequate funding' and ensuring that the NHRI 'not be subject to financial control which might affect its independence'. However, adequate funding is not in itself a design feature and the Principles offer little guidance on what 'adequate funding' actually means in practice.

been heavily weighted towards engineering design constraints over capability. This is likely to be due to principal-agent theory's preoccupation with negative behaviour contrary to the public interest. A few scholars have traced *the potential* for effective bureaucratic autonomy back to agency structure (Carpenter 2001). This study builds upon this research, to explore what design means for enabling institutional capability.

Engineering NHRI design, not only to ward off capture, but also to facilitate institutional capability, has featured prominently in debate among NHRI practitioners. A broad and unrestrictive human rights mandate, combined with an all-encompassing jurisdiction and complaint-handling powers are widely viewed as essential to NHRI effectiveness (Carver 2005). However, NHRI models which principally perform a research or advisory function may also serve an important role in domestic contexts defined by functional investigative and adjudicatory structures (Reif 2012). Perhaps curiously from a principal-agent perspective, NHRI enactors have generally paid little attention to specifying mandate scope. Almost all NHRIs are granted a broad and unrestrictive mandate to protect and promote human rights. Some offices are charged with regulatory duties regarding specific rights violations, for instance economic and social rights. But very few NHRIs are subject to restrictive mandates. This casts delegation in a distinct light, limiting the ability of the principal to exercise formal *ex ante* control over agency activities.

SECTION 3

IDENTIFYING NHRI INSTITUTIONAL DESIGN SAFEGUARDS

The UN defines an NHRI (very broadly) as 'a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights' (UN 1995: 4). Notwithstanding ongoing debate, discussion within UN circles has coalesced around two archetypal NHRI models: the quasi-judicial human rights commission and the human rights ombudsman. Advocates of these agencies are naturally focused on how they can be actually formally enabled to secure improvement of human rights practices. The UN endorsed Paris Principles provide a baseline for NHRI institutional design, but do not offer a yardstick for evaluating NHRI effectiveness (Sidoti 2012).[5] Notwithstanding a wealth of UN documentation (UN 1995), pioneering work by practitioners and NHRI experts (Carver 2001; 2005; Burdekin 2007), interventions by INGOs (Amnesty International 2001), recent scholarly contributions (Goodman and Pegram 2012), and careful case study work on individual cases (Okafor 2002; Uggla 2004; Domingo 2006; J. Finkel 2012), there is still little agreement on the impact of formal design choices on NHRI effectiveness.

In a parallel development, scholarship on human rights norm diffusion has begun to assess the influence of NHRIs on citizens' enjoyment of fundamental rights. In contrast to research which has examined NHRI adoption as a binary variable (Kim 2013; Cole and Ramirez 2013), this study follows Linos and Pegram (2015) in generating more fine-grained insight into the actual dimensions of NHRI design. We identify 22 institutional safeguards, displayed in Table 1, considered consequential for NHRI effectiveness. These features were selected based on exhaustive review of UN documentation, NHRI scholarly and practitioner literature, as well as consultation with leading NHRI practitioners. Many features we study protect NHRI independence, by limiting the power of the executive to disestablish the institution, fire its members, or pack it with pro-executive appointees. Other safeguards ensure that the agency has the capability to take protection actions that governments could have otherwise blocked.

To generate some empirical pathways into NHRI design effects we also conducted an expert survey among NHRI heads and others with extensive knowledge of NHRIs. We asked whether they saw a particular provision as especially important to the functioning of an NHRI. These experts' responses offer us a new source of information on the

[5] Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights, adopted by the UN Human Rights Commission, Res. 1992/54, 3 March 1992 and the UN General Assembly, Res. 48/134, 20 December 1993.

importance of particular design features. The survey was piloted among two experienced NHRI practitioners prior to general circulation, with their feedback incorporated into the final document. Thirty-six of the sixty experts we contacted (60%), drawn from five continents (Africa, the Americas Asia-Pacific, Europe, and the Middle East and North Africa), completed the survey. It was also important to ensure a cross-section of regional expert representation to reduce referent group bias. An expert survey targeted at individuals with access to diverse sources of information is particularly appropriate to this study given the complexity of evaluating the relative importance of individual design features on NHRI effectiveness.

Table 1: Results of Expert Survey on Importance of Individual Design Features

Independence safeguards	**Rationale**	**Important (5=Very)**
Constitutional or legislative status	Establishment by constitution or legislation makes NHRI charter harder to amend, and NHRI more stable	**4.8**
		(0.5)
Civil society representation	Civil society representatives facilitate contact with diverse societal groups	*3.9*
		(1.1)
No government representation	Government representatives may compromise NHRI autonomy and independence	4.3
		(0.9)
Not designated by executive	NHRI officials appointed by the executive may have limited independence.	*4.1*
		(1.1)
Term limits	A very short mandate can impede organisational stability	*3.9*
		(1.0)
Possibility of reappointment	Possibility of reappointment facilitates continuity of leadership	*3.0*
		(1.2)
Immunity	Immunity from prosecution helps safeguard the independence of NHRI leaders	4.3
		(0.9)
Single Head	This feature allows NHRIs to have a recognisable public representative	*2.7*
		(1.3)
No Dismissal without Cause	Dismissal only for cause helps safeguard NHRI independence	4.7
		(0.6)

Capability safeguards	**Rationale**	**Important (5=Very)**
Broad Rights Mandate	Protects human rights broadly, including social, economic and cultural rights	**4.7**
		(0.5)
Power to Investigate	When NHRI can investigate on its own initiative, it can have proactive role, in contrast to reactive role of judiciary	**5.0**
		(0.2)
Harmonize IHRL	Allows NHRI to help harmonize domestic law with international human rights standards.	**4.8**
		(0.6)
Engage with IOs	Helps connect NHRI to international organisations	4.2
		(0.9)
Education and Promotion	Promotes human rights among government agencies, educational institutions, and civil society	4.3
		(0.9)
Advise on Legislation	Helps make domestic legislation consistent with human rights standards	4.6
		(0.8)
Individuals' Complaints	Power to hear individual complaints offers individuals direct access to NHRI	*4.1*
		(1.0)
Enforcement Powers	Enforceable remedies help speed up implementation of any NHRI decisions	*3.1*
		(1.4)
Can Refer Complaints	Facilitates access of vulnerable groups to courts	4.2
		(0.8)
Can Compel Evidence / Testimony	Strengthens investigation and complaint-handling powers	4.6
		(0.6)
Annual Report	Helps focus public opinion on country's human rights situation	4.4
		(0.8)
Amicus Curiae Powers	The power to provide the courts with amicus curiae briefs is a supplementary tool	4.3
		(0.8)
Security Facilities	The explicit power to oversee prisons allows NHRIs to monitor a site of potentially grave human rights violations	*4.4*
		(1.0)

A couple of strategies were employed to strengthen the validity of the data. Particular focus was paid to reducing ambiguity, as well as biased professional consensus. First, each design feature of the Paris Principles was accompanied by a generic explanation as opposed to a literal extract from UN documentation. Second, to ensure that respondents were not influenced by hierarchical presentation found elsewhere, principles were distributed at random in the survey. One area of concern regarding the validity of expert scores relates to standard deviations. Large standard deviations can sometimes be an indication that experts are 'judging different objects, on different dimensions, at different times' (Steenbergen and Marks 2007: 351). However, in this exercise, larger standard deviations are predictably large for those features which generate high levels of disagreement among experts regarding their importance as

opposed to indicating confusion over the object of measurement or insufficient information. This exercise therefore provides additional insight into the question of the determinants of NHRI effectiveness.

Strikingly, the survey findings indicate that there is general consensus that some formal features are very important across contexts, while others depend critically on context. Of those features highlighted in bold which returned very high scores and low variance, indicating a high degree of agreement, we can include a broad and unrestrictive rights mandate, constitutional or legislative enactment, harmonization of domestic frameworks with international human rights law, and the power to investigate *ex officio* (without instruction from a higher authority). A second category of features italicised in Table 1 displays very high variance (considerable expert disagreement) indicating that those features importance may be context-specific. This includes civil society representation, no designation by the executive, individual versus collective leadership, tenure of five years or more, possibility of reappointment, complaint-handling powers, access to security facilities, and enforcement authority. Notably, no design characteristic included in the survey returned both a low score and low variance, indicating that there is no formal feature which is clearly unimportant across contexts.

Building upon this data as well as case study analysis, this paper argues that the significance of certain formal safeguards for NHRI effectiveness is generalisable across settings, while others depend critically on context. In particular, we emphasise the following six substantively important features:

Generalisable across settings:

Broad rights mandate (MANDATE)
Constitutional or legislative status (STATUS)
Harmonization of international human rights law (HARMONIZATION)

Context-specific within settings:

Not designated by executive (EXECUTIVE)
Complaint-handling powers (COMPLAINT)
Enforcement powers (ENFORCEMENT)

SECTION 4

CONJECTURES ABOUT NHRI DESIGN EFFECTS

What explains variation in expert scores displayed in Table 1? The analysis is necessarily exploratory and we do not seek to be exhaustive. Rather, we develop three exemplars in both the generalisable and context-specific categories. We pay particular attention to connecting our dependent variables (independence and capability) to individual design mechanisms to probe their significance. The logic of each conjecture draws on public administration and administrative law scholarship. Where substantive assumptions are entailed, we have sought to make them explicit. Of course, not all conjectures will apply to all cases. There will always be exceptions. The objective here is to connect claims to empirics with a view to engaging in a reflexive critique. We explore the issue of complex design interactions and unintended consequences in the following section.

Space constraints also demand that we are economical in our coverage of the universe of cases or indeed change over time. In order to illustrate key arguments, we use a shadow case-study technique, matching on formal characteristics and controlling for other factors (Tarrow 2010). The logic underlying case selection is (loosely) a most different design for generalisable claims (matching NHRIs across most different settings) and most similar for context-specific design mechanisms (matching NHRIs in similar settings). It is important to be clear that this descriptive method is useful for the purpose of developing theory and probing the plausibility of various causal explanations, but less so for making robust causal inferences.

4.1. Generalisable across settings

There is general consensus that some formal characteristics are very important across contexts. Within this category, we include a broad and unrestrictive rights mandate, constitutional or legislative enactment, and harmonization of domestic frameworks with international human rights law.

4.1.1. Conjecture about broad rights mandate (mandate)

Setting the boundaries of an NHRI's substantive mandate is regarded as highly consequential, affecting both institutional independence and capabilities. It is widely held that the scope of an NHRIs mandate should be as broad as possible.

Conjecture: Restrictive mandate scope restricts policy functions derived from the full range of human rights standards

NHRI intervention on a particular rights violation is generally contingent upon assignment of that regulatory duty by statute. A non-restrictive promotion and protection mandate gives the NHRI a wide range of prerogatives with a view to prevention and response to the full gamut of human rights. As Gersen (2010: 334) observes, 'the optimal bureaucratic structure depends on the ends to be achieved'. The expansive objectives attributed to NHRIs contrasts with other specialised agencies (such as anti-discrimination bodies). Although a restricted mandate does not preclude a positive contribution to domestic human rights frameworks, specialisation may increase the risk of capture by single-interest constituencies, jurisdictional duplication and inefficiency, not realising cross-cutting rights synergies, and dilution of authority (Carver 2011). In addition, the assignment of expansive policy functions also conveys information about an NHRI's goals and can enhance the credibility of the institution across a wider range of external stakeholders (Hyman and Kovacic 2014: 1472).

Restrictive mandate institutions are prevalent in European jurisdictions with long histories of equality and anti-discrimination protections. However, even in functional rule of law settings, a broad NHRI mandate is widely regard as desirable. In Britain, considerable debate surrounded the scope of the Equality and Human Rights Commission (EHRC) mandate. For NHRI advocates, a broad and unrestrictive human rights mandate was essential, particularly in a post-9/11 context of derogations from provisions about unlawful internment and, more recently, rising xenophobia against migrants, refugees and asylum seekers (Pegram 2012). However, this was less of a priority for a government focused on race relations and social cohesion (Spencer 2008: 14). Indeed, the UK had previously blocked NHRI establishment on the grounds that it would duplicate existing specialised agencies (Cardenas 2003: 16). Similarly, in the Nordic countries, NHRI establishment has been beset by disagreement over mandate scope. Sweden's Equality Ombudsman is granted B status by the ICCNI due to a limited discrimination mandate. The Swedish government is not disposed to establishing a broadly mandated NHRI (Brodie 2011: 182). This deficit is viewed as highly problematic by human rights advocates:

An essential difference between the well-established Swedish Ombudsman system and an independent national human rights institution is that the former lacks a holistic and critical approach to Swedish human rights legislation...This is of crucial importance as the broad discretion given to municipalities in implementing Sweden's international commitments leads to inconsistent fulfilment of human rights obligations (UNA Sweden 2014: 2).

The demand for an NHRI to have an inclusive broad mandate is similarly viewed as vital in opposing political and institutional settings. Among African NHRIs, the vast majority have an unrestrictive human rights mandate. The South African NHRI is notable for its work on economic and social rights within its broad-based mandate. This may be particularly important given the historical challenge of justiciability of rights claims within domestic legal systems. The South African office is mandated to report annually on the observance of economic and social rights. This has enhanced the convening

power of the NHRI, as well as amplified its national standing (HRW 2001; SAHRC 2010: 101). The Indian National Human Rights Commission also attests to the issue-linkage potential of a broad-based rights mandate, for instance, addressing the cognate issues of child labour and the right to compulsory education (Kjaerum 2003: 13). In contrast, the reform of the Mexican NHRI in 1992 has been widely viewed as detrimental, restricting the office's jurisdiction – prohibiting it from intervening on electoral or labour rights – and imposing a strict interpretation of its mandate with a focus on case reception (Ackerman 2007: 130).

We expect this mechanism to also work through another mechanism, with expansive mandate also guaranteeing the capability of the NHRI to develop its own interpretations of authority. Drawing on McCubbins et al's (1989) procedural political insights into the ability of politicians to control agents through *ex ante* constraints, it is important that an NHRI is not subject to restrictive statute specificity which may encroach upon the flexibility of the institution to expand its scope of activity. As Macey (1992) also observes, single-interest agencies allow political principals to exercise greater *ex ante* control over the outcomes generated. Hyman and Kovacic (2014: 1465) notes that a variety of processes may serve to allocate regulatory tasks to public agencies, including direct assignment by statute and deliberate expansion into unoccupied policy domains. It is important that an NHRI is able to respond of its own accord to changing circumstances and the most urgent human rights concerns (Rosenblum 2012). Related to this point, as Barkow (2010: 59) notes, one of the most powerful weapons policy-makers can give agencies is the ability to generate and disseminate information that is politically powerful.

The Australian National Human Rights Commission provides an emblematic example of an NHRI operating in a stable democratic setting which has proactively exposed rights violations occurring among the most marginalised in society. In particular, its interventions in defence of homeless children in 1989 and the mentally ill in 1993 have been widely acknowledged as changing the landscape in terms of the treatment of the mentally ill and children in Australia (ANHRC 1989; ANHRC 1993). The recommendations in the resulting reports have been credited with changing laws, policies, programmes and funding, as well as raising community awareness (Sidoti 1997). Importantly, an expansive human rights mandate also provided a gateway to activating a public inquiry power on both of these issues. The NHRI received over 1000 submissions in the course of both inquiries, engaging with a wide range of stakeholders and enhancing its accessibility in the process. As one observer notes, 'accessibility in all its dimensions is one of the most important determinants of NHRI effectiveness'.[6]

A broad rights mandate can then provide the basis for constituency engagement, as well as authority expansion. Similar narratives are observable in diverse country settings. For instance, the South African NHRI also flags the importance of public inquiry powers, underpinned by a broad human rights mandate, which has led to it becoming the first NHRI to develop a special focus on business and human rights (with early interventions

[6] We are grateful to Richard Carver for this observation.

on questions of price fixing and the human rights impact of mining in the Limpopo Province):

The way in which we have used public inquiries has been quite valuable as a tool in terms of looking at each separate aspect of our mandate, but how we bring them all together in one intervention – an educative role, a monitoring role, an accountability role.[7]

In perhaps one of the most visible examples of NHRI authority expansion, the Indonesian NHRI (Komnas HAM), established as a cynical ploy in 1993 by the autocratic Suharto government, defied the intentions of its designers and played a significant role in events which eventually led to the overthrow of the Suharto regime. The office is endowed with a broad human rights mandate which facilitated expansive interpretation of its authority. Komnas HAM quickly established a reputation for intervening on diverse and politically sensitive human rights concerns (land disputes, prison conditions, freedom of expression, torture and crimes perpetrated by the military, among others), as well as directly confronting the ruling government (Carver 2000: 21-36). This is not to downplay the significance of other factors (political opportunity and leadership, for example) or to overstate the impact or durability of such 'heroic' actions, but rather highlights the enabling properties of this formal design feature across diverse contexts.

4.1.2. Conjecture about constitutional or legislative status (status)

Constitutional or legislative entrenchment is widely held to be among the most significant structural guarantees of NHRI independence. This design feature serves not only as a *de jure* guarantee, but also as a safeguard of *de facto* autonomy in the performance of an NHRI's functions.

Conjecture: constitutional or legislative entrenchment raises the cost of political reversal and can insulate the NHRI from dissolution

Public administration scholarship suggests that legislative or constitutional entrenchment is a fundamental structural constraint on principal control of the agent. One course of action open to a political principal which wishes to rein in an independent agent is withdrawal of the original grant of authority and statutory reversal of the agency. However, the higher threshold and scrutiny required to secure reversal of legislation or constitutional amendment imposes significant costs. This does not preclude the possibility of reversal. However, the formal process of legislative or constitutional reversal provides an opportunity for agency support constituencies to mobilise. As McCubbins et al. (1989: 441) note, 'some members of the coalition giving rise to the original legislation may actually prefer the agency's decision and oppose [dissolution]'. As such, the likely political cost ensures that complete dissolution of an NHRI is almost impossible, except in situations where the agency has little or no supportive coalitional base. The probable outcome then is that political principals

[7] Interview with Jody Kollapen, Chairperson of the SAHRC (2002- 2009). Cited in SAHRC 2010: 98.

opposed to the agency's work will fall back onto other mechanisms of control, detailed in Barkow's (2010) examination of 'equalising factors'.

In practice, very few NHRIs have been dissolved following establishment. This is particularly the case in stable democratic settings. Proving the counterfactual, that in the absence of constitutional or legislative entrenchment an NHRI would have been dissolved, is inevitably challenging. NHRI advocates have long expressed concerns regarding the German Institute for Human Rights which was established by a Motion of the Bundestag, not by legislation or constitutional amendment (SCA 2008: 7). Legislation was tabled in 2012 to elevate the legal status of the body but it has been beset by political wrangling. The creation of the British Equality and Human Rights Commission (EHRC) as a generic executive non-departmental public body has been problematic, resulting in its subordination to government departments and Ministers. This arrangement has denied the body the special status and constitutional role commonly afforded to NHRIs, with important implications for its independence (Pegram 2012). Nevertheless, the EHRC's enactment in legislation is likely to have played a role in warding off credible threats of dissolution in 2012 by a government which viewed it as a quango and 'relic of the past'.[8] Notwithstanding government hostility, a statutory consultation process on EHRC reform ruled out wholesale repeal.[9]

Executive enactment may be particularly detrimental in highly vertical presidential systems where the agency can be dissolved at will by the president. This is the case with NHRIs in Sudan, Chad and Cameroon, as well as earlier incarnations in Zaire and Gabon which have since ceased operations. The highly respected Kenyan National Human Rights Commission has been subject to a campaign by a minority of legislators to have it dissolved.[10] However, the threshold for repealing constitutional amendment protects it from arbitrary actions by a partisan minority.[11] The effective Ghanaian office was also threatened with dissolution in 2003 (Chabane 2007: 32). Similarly, the Russian ombudsman was reportedly saved from abolition in 2000 by the high cost of seeking constitutional reform (E. Finkel 2012: 306). As Human Rights Watch (2001: 14) states in a comparative study of African NHRIs:

'...all of the more active or promising human rights commissions [have been constitutionally or legislatively created]...The human rights commissions formed by executive decree appear to be the most vulnerable to being disbanded or pressured by the executive branch.

The issue of constitutional or legislative entrenchment can be particularly contentious in political settings where traditionally state agencies fall within the executive branch. This is particularly prevalent in Francophone countries. Autocratic and monarchical

[8] *The Guardian*, 'Equality and Human Rights Commission has workforce halved', 15 May 2012.
[9] See *Building a fairer Britain: Reform of the Equality and Human Rights Commission* (London: HM Government, 2012).
[10] Kenya Human Rights Commission, *Lest we forget: the faces of impunity in Kenya* (Nairobi: KHRC, 2011).
[11] See Article 59 of the Constitution of Kenya, promulgated August 2010.

countries in particular have resisted establishing NHRIs through a legislative or constitutional act. For instance, the Bahraini Human Rights Commission was established by monarchical decree in 2009 and is widely viewed as a 'non-independent government-backed organization'.[12] Similarly, the Saudi Arabian Human Rights Commission was also established by royal decree in 2005 and has been described as '[e]ssentially...a public relations gesture'.[13] The legal status of these institutions is most likely a reflection of government intentions to closely control the agency's actions, while seeking international credibility. It also leaves the agency open to abrupt termination. Dissolution of NHRIs established by executive decree can be found in a number of countries, including the Iranian Islamic Human Rights Commission dissolved in 2013, the Niger Human Rights Commission dissolved in 2010, and the Burkina Faso Human Rights Commission dissolved in 2012.[14]

Conjecture: codification in law or the constitution enhances the legitimate and functional authority of the NHRI

Constitutional or legislative status grants the agency enhanced stability due to the elevated cost of repeal. However, NHRIs also draw legitimacy from their standing as a national-level state body codified in law or the constitution. The head of the NHRI generally has equivalent status to a high court judge, with commensurate terms and conditions of office. Constitutional status confers recognition to an NHRI as an apex custodian of domestic human rights frameworks alongside other control institutions. This is often particularly salient in transitional democratic settings. However, more generally, in governance ecosystems of political status and hierarchy, constitutional entrenchment serves as an important asset in exercising oversight of elected officials and unelected state bureaucrats.

In highly stable rule of law settings, the risk of dissolution may be a remote prospect. However, statutory status also impacts negatively on the autonomous function of the office. Norway is a case in point. The Norwegian Centre for Human Rights (NCHR) was established by Royal Decree (executive order) in 2001. In the words of the Director:

The lack of legislation and the necessary status defined by parliament has had negative consequences for Norway's NHRI. We have limited political standing, ownership, and public profile. This reduces the effectiveness of our advisory and advocacy work on concrete issues, legislative proposals...[15]

Located initially within the University of Oslo, the lack of legislative status resulted in problematic lines of accountability to university authorities, as well as inadequate

[12] Bahrain Center for Human Rights, 'The King of Bahrain recently formed a governmental body under the name of "the National Human Rights Institution', 8 May 2010.
[13] Thomas W. Lippman, *Saudi Arabia on the Edge* (Washington D.C.: Council on Foreign Relations, 2012), p. 25.
[14] Information from ICCNI and interviews.
[15] Kristin Høgdahl, 'Strengthening NHRIs: The Paris Principles and the ICC accreditation system', ICCNI side event, Geneva, 21 March 2012.

allocation of resources to production of thematic reports or independent investigations (Norwegian Ministry of Foreign Affairs 2011). The Norwegian office has strongly advocated that international requirements for NHRI design should be consistently applied across all political settings.[16] However, Norwegian authorities appear reluctant to grant legislative status to the NHRI.[17] Another instructive case is Costa Rica. The only NHRI in Latin American to not be granted constitutional status, this omission may not pose an existential threat.[18] However, inferior status has been used as a pretext to undermine other structural attributes, with the Constitutional Tribunal declaring a range of independence safeguards in the original legislation to be unconstitutional.[19]

One of the most effective offices in Africa is also one of the few to have been established by constitutional entrenchment: the Ghanaian Commission for Human Rights and Justice. The highly-regarded Ghanaian office has been described as deriving its authority from the constitution 'which is the property of all Ghanaians – rather than from the government of the day' (Carver 2000: 20). It is, in other words, a formal source of legitimacy. This formal authority takes on more tangible form in many Latin American countries where NHRIs have been established in the context of fundamental rule of law reforms (Pegram 2012). Reflecting regional legal traditions for the protection of individual rights, Latin American NHRIs are widely regarded as auxiliary custodians of the Constitution (Domingo 2006). Lacking constitutional status at point of origin can have powerful negative consequences. The Honduran NHRI remained under executive auspices until its inclusion within the constitution in 1995. Its subordination limited the autonomy of the office, with wider ramifications for its activities.[20]

4.1.3. Harmonization of international human rights law (harmonization)

Although established in domestic legal processes, NHRIs are widely portrayed as being principally engaged in assuring states' compliance with their international human rights obligations (Carver 2010). Many NHRIs have a mandate to promote and ensure the harmonization of national legislation, regulations and practices with international human rights instruments to which the State is a party, and their effective implementation.

Conjecture: Harmonization enables substantive policy interventions when assessing consistency of domestic legal frameworks with international human rights law

[16] Kristin Høgdahl, 'Strengthening NHRIs: The Paris Principles and the ICC accreditation system', ICCNI side event, Geneva, 21 March 2012.
[17] Parallel report from the Norwegian Centre for Human Rights related to the fifth periodic report of Norway, 23 September 2013, 4.
[18] "It is very nice to have [constitutional rank] but it is not necessary. At least not in Costa Rica, where there is no fear that Congress will shut down the institution tomorrow". Rodrigo Alberto Carazo, Defensor 1993-1997, interview by author, San José, Costa Rica, 31 August 2007.
[19] This included designation of the Ombudsman by qualified majority and immunity from prosecution. See Constitutional Tribunal, vote no. 502-91, 7 March 1991.
[20] The first Commissioner, Leo Valladares, characterised the time leading up to 1995 as "years of preparation". Cited in Quesada 1996: 22).

Treaty commitments are directly available to NHRIs at the domestic level engaged in political strategies of protection and promotion of human rights. Following Simmons (2009), NHRIs may serve as domestic compliance constituencies, able to activate elite-initiated agendas, to support litigation and to spark political mobilisation. This insight corresponds with a positivist emphasis on commitment, 'the making of an explicit, public, and lawlike promise by public authorities to act within particular boundaries in their relationship with individual persons' (Simmons 2009: 7). However, what is particularly striking is the work of NHRIs in promoting harmonization beyond the bounds of those international instruments which have been domestically ratified. In effect, NHRIs are engaged in overriding the 'thin state consent' of conventional international law, for a 'thick stakeholder consensus' grounded in domestic political salience (Pauwelyn 2013).

The dualist system of Australia has no domestic Bill of Rights. As with other dualist legal systems, the justiciability of international human rights instruments is contingent upon their domestic ratification. However, significantly, the Australian Human Rights and Equality Opportunity Commission (HREOC) is assigned an expansive mandate which defines human rights as 'the rights and freedoms recognised in the Covenant [on Civil and Political Rights], declared by the Declarations or recognised or declared by a relevant international instrument'. One of the architects of the HREOC legislation recalls inserting the ICCPR as an addendum to the bill to facilitate referral of state authorities to international human rights standards "incorporated" into federal law.[21] A key concern for NHRI advocates generally has been to bypass state assertions of sovereignty through dualist legal procedures.

The definition of human rights in NHRI legislative projects is often contested. In Ireland, the NHRI is restricted to consideration of the Constitution, domestic equality legislation, and the European Convention on Human Rights (and even then as incorporated at a sub-constitutional level into Irish law).[22] A related concern, prevalent in Commonwealth countries, is the justiciability of economic, social and cultural rights which are often largely absent from the remit of Constitutional recognition and protection.[23] However, as one Australian NHRI official notes:

Critics often point to one of the big holes in the Commission's jurisdiction being that it doesn't cover ESCRs [economic, social and cultural rights]. I always think, well that's funny given what I've been doing around accessibility for the past 20 years. We've very successfully pulled off projects on accessible transport, housing, and all of these things that all look very ESCR but via the pathway of equality.

[21] Burdekin in interview, 30 March 2012

[22] See Head 29, Irish Human Rights and Equality Commission Act 2014.

[23] Although the ICESCR is not formally incorporated into Irish law, the NHRI has intervened on alleged ESCR violations (including discriminatory social assistance payments, travellers' rights to child benefits, and reproductive and sexual rights (IHREC 2014).

Emblematic of an expansive harmonization approach, the Indian NHRI has also pursued ESCRs, despite their secondary status as non-enforceable 'directive principles of state policy' (Carver 2010: 14). NHRI practitioners place particular importance on harmonisation in the context of those states in the Asia-Pacific region resistant to ratification of international human rights standards. For example, the Malaysian NHRI, SUHAKAM, was established in 1999 within a domestic human rights framework which has formally incorporated very few international human rights instruments.[24] Its formal mandate is restricted to human rights codified in the Constitution, although it is permitted to 'have regard' to the Universal Declaration of Human Rights.[25] However, SUHAKAM has nevertheless proceeded to invoke international standards frequently in its interventions on issues as diverse as the right to education, employment and recreation, health and shelter and the right to a safe environment (SUHAKAM 2001: 19). Indeed, the NHRI argued explicitly that '[g]iven the indivisibility of rights...it could address rights beyond those strictly defined in the Constitution (Whiting 2003: 81). It would appear that a harmonization mandate may have important unintended consequences. As one observer remarks of the Malaysian experience:

You do get these institutions, once they're established, and particularly if they're established fully or generally in compliance with the Paris Principles [international NHRI design standards] they start taking on a life of their own and the standards that they apply are international standards.[26]

Harmonization brings agency interpretation to the fore. As Deshazo (2006: 6) notes, debates over statutory interpretation focus almost exclusively on judicial approaches to interpretation, ignoring the process of agency interpretation. A formal mandate to ensure harmonization has an important policymaking component, empowering the NHRI to subject domestic legislation, laws and policy to authoritative interpretation in light of international human rights instruments – often irrespective of their domestic enforcement status. This may be most potent when coupled with a mandate to advise on legislation. This function enables the NHRI to issue policy judgments on both the substance of the law and the conduct of legal official and institutions at the domestic level. Legal authorities and the legislature may be under no obligation to defer to its judgement. However, they may find it difficult to ignore the views of the NHRI when it is grounded in expert legal analysis and reinforced by domestic and international supportive constituencies.

As Corkery (2011: 4) observes, '[w]hat is unique about NHRIs is that their functions can feed into the policy cycle at various points'. A harmonization mandate provides NHRIs with a formal prerogative to monitor the conformity of legislation with international human rights standards. A few NHRIs have a statutory duty to report on particular rights sets, such as the South African NHRI which is obliged under Section 184(3) of the Constitution to report annually on economic and social rights (Newman 2003).

[24] Malaysia has still only ratified three of the nine core human rights treaties, including CEDAW, CRC and the CRPD.
[25] See Human Rights Commission of Malaysia Act, No. 597, (1999), 2; 4(4).
[26] Chris Sidoti in interview, 26 July 2012

Nevertheless, many NHRIs exercise an expansive monitoring function with a clear policymaking component. For instance, the Northern Ireland Human Rights Commission has been active in examining UK counter-terrorism legislation. In submissions to the UN Human Rights Committee, it has drawn attention to a series of concerns regarding the compatibility of many proposals in the Counter-Terrorism Bill of 2008 with the UK's obligations under international human rights law.[27] The Georgian NHRI has frequently invoked international human rights standards, resulting in successful procedural interventions (for example, securing the freedom of wrongfully imprisoned individuals) as well as statutory reforms (Carver 2012: 195-6).

4.2. Context-specific within settings

We now turn to a selection of design features which indicate that their effect depends critically on context. In contrast to the above, this category of design provision has provoked a lot disagreement among experts regarding no designation by the executive, complaint-handling and enforcement powers.

4.2.1. Conjectures regarding no designation by executive (designation)

McCubbins et al. (1989) highlight a principal avenue of control as being *ex ante* constraints on decision-making. Designation by the executive may well serve this function, providing a channel to check agency deviation prior to the implementation of unwanted policies. UN directives state government representatives to NHRIs should only participate in an advisory capacity (SCA 2013). However, as the following conjectures explore, under certain conditions this design feature may not have its intended effect.

Conjecture: Designation by the legislature does not necessarily protect the NHRI from political capture

Appointments constitute a key battleground for political actors competing to shape the activities of an NHRI. Formal safeguards, including appointment by the legislature rather than by the executive, are widespread. It is widely held that insulation from presidential oversight is desirable given the vulnerability of the executive and, by extension, executive branch agencies to targeted interest group pressure. Guidelines issued by the OHCHR on the relationship between NHRIs and parliaments call on the latter to 'develop a legal framework for the NHRI which secures its...direct accountability to parliament'.[28] A recent project calls on parliament to fully realise 'their effectiveness as human rights actors', with particular emphasis on oversight mechanisms (Webb and Roberts 2014). However, this relationship is not straightforward. As Barkow (2010: 26) notes, removing agencies from presidential oversight 'will ultimately do little to protect agencies if interest groups use congressional pressure...to achieve the same ends'. We might add

[27] See NIHRC Submission to the UN HRCttee, 93rd Session, May 2008.
[28] Belgrade Principles on the relationship between national human rights institutions and parliaments adopted in Belgrade, 22-23 February 2012, A2.

that – especially in contexts of unified or autocratic government – legislators may simply serve as vectors for executive authority.

A first degree of variation on this design feature confirms the intended effect: insulation from executive overreach and capture. The Georgian Public Defender's Office is widely considered effective in the protection and promotion of human rights (Carver 2012) Consecutive credible appointees have been designated through majority vote in the legislature. Once in office, the Public Defender enjoys an extensive set of protections from arbitrary dismissal. The stability of the office contrasts with the mass dismissal of public servants for alleged political affiliations in 2012.[29] The NHRI is regarded as independent in practice, with observers noting in 2011 that 'the ruling National Movement party's dominance in parliament...has had no bearing on [the Public Defender's] work so far'.[30] As in other cases, designation of the Public Defender is not immune from horse-trading among political blocs within the legislature. However, the present incumbent, Ucha Nanuashvili, is regarded as credible and his appointment by an overwhelming majority (82 to 18 votes) has cemented his authority.[31] It may be significant that civil society organisations informally participate at various stages of the designation process (Carver 2012: 187).

However, in comparable settings, we encounter a quite different dynamic. In Croatia, we find a human rights ombudsman which has appeared to be subject to partisan pressure within parliament. From 2009 to 2011 Croatia's parliament examined but then failed to adopt the NHRIs annual report, offering no explanation. Notably, the legislature has wide discretion to remove the Croatian ombudsman. As one observer notes, this action 'may function as a form of pressure on the ombudsman' (Carver 2012: 187). Of further concern, in 2012, the parliament passed a law dissolving and merging the NHRI with four other bodies citing cost-saving and efficiency concerns (HRW 2012). The office is reported to be labouring under insufficient funds to fulfil its functions.[32] As we tilt towards more hostile political contexts, this second degree of variation on the design feature becomes further apparent: overreach and capture by the legislature. In Kyrgyzstan, a 2007 amendment to the NHRI's governing law grants parliament the right of dismissal if the office's annual report is not approved.[33] This is widely viewed as a partisan attempt to control the agency.[34] An independent and effective Russian ombudsman was summarily dismissed by the Russian Duma in 1995 after confronting

[29] Georgia Public Defender, Annual Report 2013, p. 214.
[30] Manana Kobakhidze, Georgian lawyer and politician, quoted in TI Report 2011. Available at: http://transparency.ge/nis/2011/ombudsman
[31] See Democracy & Freedom, 'Ucha Nanuashvili is Georgia's new ombudsman', available at: http://dfwatch.net/ucha-nanuashvili-is-georgias-new-ombudsman-49555
[32] Universal Periodic Review on Human Rights in the Republic of Croatia – NHRI Report, September 2014. Available at: http://www.ombudsman.hr/attachments/article/411/15%209%20UPR%20final%20-%20NHRI.pdf
[33] Law no. 97, 'On Amendments and Additions to the Law of the Kyrgyz Republic On Akyikatchy (Ombudsman) of the Kyrgyz Republic', 6 July 2007.
[34] Moritz Birk in conversation with author

the government over violations in Chechnya (E. Finkel 2012: 304). In Mexico, appointment by the Senate is viewed as the fundamental design flaw, explaining the failure of this office (J. Finkel 2012).

Conjecture: In adverse political and security settings, executive patronage is paramount for effective NHRI operations

Contexts defined by high levels of political conflict, power asymmetries and only a loose adherence to the constitution pose a formidable challenge to this design assumption. A number of NHRIs have been activated under autocratic conditions or in the midst of armed conflict. Under such conditions, no designation by the executive may do little to safeguard, let alone guarantee, independence. In fact, it may even serve to disadvantage the new agency. This is particularly evident in the historically highly vertical political structures of presidential regimes in Latin America and Africa (Shugart and Carey 1992). As Hatchard observed in Africa almost three decades ago, '...unless the ombudsman is seen to have the blessing of the head of state it may well be very difficult for him to operate effectively' (Hatchard 1986). However, this observation does not diminish the dangers of an NHRI being fatally compromised by the designation of an executive proxy.

At one degree of variation, even under hostile conditions, no designation by the executive can insulate an NHRI from executive control – up to a point. From its creation in 1996 by the authoritarian regime of Alberto Fujimori (1990-2000) until the transition to democracy in 2000, the Peruvian Ombudsman operated, practically, as the sole democratic agent of accountability within the state (Pegram 2008). Designation by the legislature, under heightened international scrutiny, led to the appointment of a credible individual as Ombudsman. In turn, the office was able to advance a human rights protection mandate, within limits. Avoiding direct confrontation with the regime on core interests, such as re-election, military corruption, and terrorism suspects was crucial to the institution's survival. Similarly, the Colombian NHRI exercised a surprising degree of autonomy and effective operation in its early years, despite a vertically structured presidential regime and a context of *de facto* civil war.[35] However, under the draconian government of Alvaro Uribe (2002-2010), following a failed attempt to merge the NHRI with the General Attorney's Office, the executive facilitated the premature exit of its independent appointee in 2003, following a campaign by the NHRI on the legality of US government-backed coca crop eradication. [36]

The Ombudsman's successor garnered a reputation for silence in the face of serious human rights violations, countering "I do not intervene in political debates".[37] This sentiment was echoed by the Russian Ombudsman as political conditions deteriorated

[35] Designation in Colombia involves the executive presenting a short list of candidates for designation to the legislature.
[36] See Center for International Policy, 'CIP memo: Colombia's Álvaro Uribe – The first 100 days,' 18 November 2002.
[37] Quoted in El Colombiano, 'Arrecian las críticas a Vólmar Pérez', 5 February 2012, available at: http://www.elcolombiano.com/arrecian_las_criticas_a_volmar_perez-ECEC_168729

in the country during the early 2000s.[38] A second degree of variation suggests that under hostile and increasingly dangerous conditions, the patronage of the executive may become an important asset to both effectiveness and survival. This is certainly not an optimal outcome, but executive designation in such circumstance may mean that the NHRI can fulfil a partial protection function, within circumscribed political boundaries. Executive patronage may protect NHRI personnel from political and personal security threat. In Guatemala a fragile democracy co-exists with strikingly high levels of impunity, placing severe limitations on the NHRI.[39] Notably, President Ramiro Leon de Carpio (1993-1996), a former NHRI head himself, upon entering office established the Presidential Coordinating Commission for Executive Policy on Human Rights (COPREDEH). This act drew criticism for duplicating the function of the NHRI, diverting resources, and undercutting its authority (Quesada 1996: 9). However, as one observer recalls, "Given the level of police impunity, [COPREDEH] has probably been able to make a bigger contribution thanks to executive cover from attack".[40]

4.2.2. Conjectures about complaint-handling powers (COMPLAINT)

Few design features provoke as much debate as complaint-handling powers. The UN Paris Principles on NHRI design leave complaint-handling as an option. However, many of the practitioners we surveyed argue that this provision should be mandatory. It is widely held to enhance accessible and effective remedy (especially for those most vulnerable), ability to uncover structural or systematic rights violations and to facilitate complaints by third parties on behalf of vulnerable groups. It also provides for direct (and gratis) interface between the NHRI and the citizen, enhancing accessibility and potentially creating positive reputational feedback effects. Such an attribute is likely to be highly significant in settings where state structures are widely viewed as ineffective, dysfunctional and accessible. Where an NHRI does have complaint-handling powers, restrictions are robustly challenged.[41]

Nevertheless, we also encounter respondents who question the prevalent orthodoxy. Where citizen grievances are channelled effectively via existing investigative and adjudicatory structures, an NHRI may be better deployed in an educational and promotional role. This echoes differentiation theory which emphasises (functional) differentiation as a rational response to the increasing complexity of modern society (Luhmann 1995). Another line of analysis highlights the risks incumbent to complaint-

[38] Vladimir Lukin, elected Russian Ombudsman in 2003 and re-elected to a second term in office, is quoted as saying: "The law forbids me to be in conflict with the government. The Commissioner does not engage in politics." See E. Finkel (2012: 306).
[39] 'Guatemala is a good place to commit a murder, because you will almost certainly get away with it'. See Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Guatemala, UN Doc.: A/HRC/4/20/Add.2, February 19, 2007, p. 17.
[40] Philip Alston in interview. See http://www.copredeh.gob.gt/
[41] For instance, the Argentinean NHRI does not have jurisdiction over state military and security agencies. The Indian NHRI is also prevented from directly investigating complaints against the armed forces. Complaints to the Indian office are also subject to a restrictive one-year time limit.

handling, including capacity overload and loss of strategic focus on priority human rights issues (Carver 2005). Each of these conjectures is evaluated in turn.

Conjecture: In contexts of functional, effective and accessible investigative and adjudicatory structure an NHRI is best deployed in a promotional role

The majority of offices which do not possess complaint-handling powers are located in Europe, reflecting a strong regional paradigm (the French advisory model), a civil law tradition, and a long history of specialised agencies dedicated to anti-discrimination, equality and advocating on behalf of protected groups. NHRIs in Denmark, Germany, and Norway are notable for their lack of complaint-handling powers. The French and Danish NHRIs may come closest to the notion of functional differentiation within domestic rights frameworks. The French Commission has no powers to deal with complaints. Instead, it is focused principally on monitoring compliance of France with international obligations. It works in conjunction with the Defender of the Peoples' (*Defenseur des Droit*) office, which does possesses a broad mandate, a raft of investigative faculties, and complaint-handling powers. In contrast to the French office, the principal focus of the Danish Institute is on research and rights promotion, both domestic and international.[42] Notably, it is the Danish Parliamentary Ombudsman office which is the National Preventive Mechanism under the Optional Protocol to the Convention Against Torture. It is not just *domestic* jurisdictional differentiation which informs this debate. Representatives of the Danish office have justified the absence of complaint-handling powers by also pointing to the complaints mechanism under the EU Charter of Fundamental Rights.[43]

However, an important counterpoint is offered by the Chilean National Institute of Human Rights (INDH). The office is a regional outlier, emulating the Danish model. The removal of complaint-handling powers was the source of considerable controversy.[44] Notwithstanding the INDHs robust promotion of human rights, the absence of investigative powers is acknowledged as a limitation, prominent among them the inability to receive complaints (UDP 2010: 453; INDH 2010: 71). The Chilean government is currently assessing a number of institutional reforms, including the creation of a human rights ombudsman.[45]

Conjecture: Complaint-handling leads to NHRI over-capacity and a loss of strategic focus

Notwithstanding the importance many observers attribute to complaint-handling, there are dissenting voices. In particular, they point to NHRIs which have struggled to balance a statutory obligation to process all complaints received with a more purposive strategic focus on the most urgent human rights issues (Carver 2005). Resource concentration on

[42] See http://www.humanrights.dk/
[43] Former NHRI Commissioner, in interview, 7 May 2012.
[44] See 'Historia de Ley, No. 20.405 Del Instituto Nacional de Derechos Humanos', Chilean National Congress Library, p. 57.
[45] See 'Compromiso del Gobierno de Chile con la creación del Ombudsman o Defensor del Pueblo', Annual FIO Assembly, Mexico City, 3 October 2014.

complaint-handling may divert capacity away from effective monitoring of agencies and government operations that would reveal other important issues. Complaints received by NHRIs are not necessarily the most serious human rights violations. The inundation of complaints to the Peruvian NHRI from public servants leads one official to concede "we have not yet resolved the matter of how to be the Ombudsman of the most vulnerable".[46] Similarly, most of the complaints received by the Ghanaian office are employment-related (Parlevliet et al. 2005: 80). Focusing on complaint-handling may also have substitution effects, leading NHRIs to systematically underperform on other goals which are harder to measure (Dixit 2002). Many NHRIs in Central and Eastern Europe (Moldova, Lithuania and Georgia) can receive complaints against both public and private bodies and have struggled to manage 'a creative tension between the complaints they receive and a systemic approach to human rights issues' (Carver 2102: 183). Notably, however, there is no general rule. The Georgian NHRI – which is also one of the better resourced in the region – in particular, has proven adept at managing this tension.

However, it is notable that this expert concludes that [t]he ombudsman model, driven as it is by individual complaints from members of the public, may not be the most effective way of tackling systemic human rights problems' (Carver 2012: 200). Other experts suggest restricting jurisdiction to the public sector (as in Poland), as well as specifying a minimum number of petitioners to encourage investigation of collective and potential systemic rights violations.[47]

Nevertheless, NHRI's investigatory functions are a powerful resource for uncovering structural violations. For some observers, complaint-handling is the crucial protection element (if not legal remedy), embodying "the real intention of NHRIs".[48] A former Australian Commissioner attributes the NHRI's landmark report on mental illness, not to complaints received but rather to investigation into the mental health system and the realisation that "they weren't problems the courts were going to address".[49] However, in contrast, the South African NHRI links complaint-handling to opening a door to securing redress, advancing constitutional jurisprudence, and serving as *amicus* in groundbreaking cases, including *Grootboom* (SAHRC 2010: 4). Notably, the first generation of Commissioners in the South African NHRI rejected a complaints-driven agenda. However, this view was revised following a series of high profile public inquiries into farming, health and racism which all had their roots in complaints received (SAHRC 2010: 32). Finally, the inevitable resource cost of handling complaints may pay dividends in terms of legitimate authority. As one observer comments on the Peruvian NHRI:

[46] Luque in interview
[47] Response to expert survey
[48] UN official in interview
[49] Burdekin 30 March 2012.

The Ombudsman gained public support above all because it listened to the people. In a country where nobody has ever listened to the people, the very fact that someone could go to their offices and be heard was very important.[50]

4.2.3. Conjectures about enforcement powers (enforcement)

The majority of NHRIs do not have the capacity to enforce their decisions. The prevailing consensus is that assigning binding authority to an NHRI is either undesirable or infeasible (Carver 2000: 109). NHRIs are thus framed as auxiliary to a functional judicial system, in light of concerns that assigning court-like functions would risk duplication, administrative overload, and subvert the unique persuasive authority often attributed to the agency. However, observers also note that 'one of the biggest factors leading to a loss of credibility and public legitimacy by [NHRIs] is an inability to give their recommendations the force of law' (Carver 2000: 92). The experience of NHRIs with judicial or quasi-judicial authority does suggest such claims have merit. We observe among a small group of NHRIs a sliding scale of judicial authority, from agencies with court-like authority[51] to those with quasi-judicial functions such as standing as litigants, subpoena powers, and court referral authority.[52]

As such, the effect of this design choice is likely to be context-specific. Specifically, the auxiliary function of an NHRI depends critically on which agencies are sharing authority and the nature of that relationship. An auxiliary NHRI can serve as a potential mechanism for counter-balancing private influence over other control institutions. This observation also alludes to another factor. The ability to present political principals with a *fait accompli* is also likely to make the agency a target for capture, obstruction and/or dissolution (McCubbins 1989). The following conjecture serves to illustrate the divergent effects of this design mechanism.

Conjecture: Enforcement powers enhance the credibility and public legitimacy of the NHRI

The Ghanaian Commission on Human Rights and Justice (CHRAJ) is one of the most robust NHRIs in existence; it is also widely hailed as one of the most successful (HRW 2001; Okafor 2012). The CHRAJ has an unusually broad mandate, encompassing human rights, unfair treatment and corruption. It also has the power to pursue enforcement, able to bring an action before any court in Ghana and seek any remedy available. In practice, few cases have been brought before the courts. The threat of enforcement has generally been deemed sufficient to induce compliance. This is underpinned by a powerful precedent whereby the courts merely enforce the CHRAJ's recommendation, without reopening the case (Khan 2005). This latent adjudicative power may also have a bearing on the CHRAJ's successful record in alternative dispute resolution (Crook and

[50] Marcial Rubio, 7 September 2005.
[51] The most prominent example of judicial NHRIs are the Ghanaian, Kenyan, Ugandan and Sierra Leone offices which, to varying degrees, have court-like powers.
[52] This category includes NHRIs in Australia, Canada, India, New Zealand, Nigeria, South African, Spain, Tanzania, and the majority of human rights ombudsmen in CEE and Latin America.

Asante 2014). The accessibility of the office, coupled with its robust powers, has made it a popular recourse to Ghanaians seeking redress. It has also made it one of the most popular state institutions in Ghana.[53] The CHRAJ has successfully offset the potential dangers of bureaucratic legalism by emphasising a sliding scale of enforcement which begins with mediation (Carver 2000: 13). Some observers express concern that there been a dip in CHRAJ follow-through on enforcement action, jeopardising its credibility (Chabane 2007: 15).

The Ugandan Human Rights Commission (UHRC) is possibly the most powerful NHRI globally. It can order the release of detainees, pay compensation and order any other legal remedy or redress. The internal Legal and Tribunal Department determines whether a matter shall be heard by tribunal. The legal powers vested in the Ugandan office initially led to an inundation of complaints and growing public confidence following highly-publicised awarding of compensation to victims of torture and other serious abuses (Mottiar 2005: 114). However, in contrast to Ghana, the NHRI has faced obstruction from state officials. In particular, complaints are subject to lengthy delays and it is reported that the Attorney General has not honoured 90 percent of compensation awards issued by the UHRC (Mottiar 2005: 115).

This compliance failure has resulted in a loss of public confidence in the ability of the UHRC to offer effective redress and the NHRIs public legitimacy has suffered as a result. In 2009, the UHRC reported that the government owed torture and detention victims US$ 1,030,000 (Rosenblum 2012: 312). Falling public confidence in the NHRI has been compounded by statements by some Commissioners suggesting victims should seek lower compensation (Chabane 2007: 31). According to some observers, a legal complaint focus has resulted in the UHRC neglecting more urgent human rights issues afflicting the country (Rosenblum 2012: 313). In this case, legal enforcement powers may have actually led to a loss of organisational credibility.

[53] In a poll conducted in July 2014, 60% of Ghanaian responded that they trust the CHRAJ, second only to the National Peace Council. See Governance and Peace Poll in Ghana, July 2014, available here: http://www.gh.undp.org/content/dam/ghana/docs/Doc/Demgov/UNDP_GH_GAP%20Poll%20Findings-Final%20Report%20%28July%2030%29.PDF

SECTION 5

DISCUSSION AND IMPLICATIONS

The range of conjectures (summarised in Table 2) represent an attempt to drive forward our understanding of the connection between formal NHRI design and effect, drawing on insights from comparative political and empirical legal studies. The objective of this framework is to evaluate the hypothesis that while some formal features are significant across diverse countries, the impact of other characteristics is context-dependent. To this end, conjectures have been evaluated in light of cases which conform (loosely) to a most different and most similar research design. We need to be critical of the idea that design choice is determinative. However, institutional design can constrain or enable choice among a range of means towards the same ends – promotion and protection of human rights. In this sense, the purpose of this conjectural exercise is not to reify a 'theory of NHRIs', but rather to contribute to efforts to systematise and deepen our knowledge of these institutions and their prospects for effecting change.

Table 2: Summary of NHRI design-effect conjectures

Conjecture – general significance	*Case A*	*Case B*
Restrictive mandate scope restricts policy functions derived from the full range of human rights standards	Sweden	India
	Australia	Indonesia
Constitutional or legislative entrenchment raises the cost of political reversal and can insulate the NHRI from dissolution	Britain	Russia
Codification in law or the constitution enhances the legitimate and functional authority of the NHRI	Norway	Ghana
Harmonization enables substantive policy interventions when assessing consistency of domestic legal frameworks with international human rights law	Australia	Malaysia
	Northern Ireland	Peru
Conjecture – context specific	*Case A*	*Case B*
Designation by the legislature does not necessarily protect the NHRI from political capture	Georgia	Croatia
In adverse political and security settings, executive patronage is paramount for effective NHRI operations	Colombia	Guatemala
In contexts of functional, effective and accessible investigative and adjudicatory structure an NHRI is best deployed in a promotional role	Denmark	Chile
Complaint-handling powers lead to NHRI over-capacity and a loss of strategic focus	Peru	South Africa
Enforcement powers enhance the credibility and public legitimacy of the NHRI	Ghana	Uganda

In general, the results support the plausibility of the various conjectures. Perhaps the biggest difficulty inherent to this exercise is elaborating theoretical reasons for why certain design features are significant across contexts. However, we found little contrary evidence to the conjectures advanced under this heading. It may be assumed that a broad rights mandate would not necessarily matter in democracies with a strong rule of law, but we find evidence to the contrary. This does not mean that there are not counter-examples. Rather that, all else being equal, these design features are likely to facilitate NHRI independence and/or capability. Turning to those design context-specific features, a number of insights stand out. Not least, it is apparent that while black letter law is often important in terms of enabling an NHRI – it also showcases the tension between independence and powers as we see in the case of Guatemala and others. As one observer wryly notes, "the [NHRI] has no power. If it were to have power, it would

have no autonomy".[54] Designation by the executive may be a red line issue for many NHRI practitioners. However, under certain conditions, it may be the only viable option, it may also be desirable.

The research design adopted in this study has the advantage of clarity around particular conjectures, but it also has limitations. In particular, they do not capture more complex design interactions. Many of these features may be interdependent and it is important to also examine these linkages and their effects. Can an NHRI offset sub-optimal design in one area with strength in another? Does an NHRI need to meet a minimum formal design threshold to get underway? Configurations of design features are likely to be important. For instance, if an NHRI is undertaking an *ex officio* investigation into an issue of high political sensitivity, it will be important that the office enjoys credibility across the political spectrum. This asset may be reinforced by constitutional entrenchment or indeed civil society representation. In turn, it may be that there is no single design choice which determines NHRI failure. However, key design choices heighten the vulnerability of an NHRI to interest group capture and may raise the probability of failure. The Mexican NHRI does not lack for funding, but is widely viewed as having failed in its mandate to promote and protect human rights. This failure is attributed here, in part, to the agency's designation procedure.

The broader point is that more detailed conceptual work is required to fully understand differences across these institutions and their impact of effectiveness. The empirical illustrations are a first-cut towards advancing conditional theorising on NHRI design effects. The next step may be to develop further the interaction of their effects, which may be highly significant. As the above examples indicate, it is possible to envisage design features interacting in a number of ways: complementary, competing, accommodating or substitutive. For instance, broad mandate scope is widely regarded as a *sine qua non* of good NHRI design. However, an expansive mandate may also degrade the capability of the agency to articulate a clear strategic plan and vision, especially when coupled with a statutory duty to receive and resolve individual complaints. Alternative arrangements might limit the NHRIs mandate to investigating only the public sector or specifying a minimum number of petitioners. We also need to be attentive to the intervention of powerful background norms. For example, while the Irish NHRI does have formal public inquiry powers, they have rarely been used due to the lack of formal protection against libel prosecution.[55]

We tentatively propose that our findings can shed light on key debates in human rights scholarship and practice. In particular, how do you promote a model which has universal application given that institutional effects are generally highly context-specific? The aspirational claim of universal human rights is imprinted in a raft of international standards which increasingly seeking to intrude upon a domestic politics of implementation. In turn, this examination of design effects can also contribute to major

[54] Marcial Rubio, 7 September 2005.

[55] National inquiry powers in Ireland are sub-constitutional and do not entail the same authority or protections afforded to the exercise of such powers in other jurisdictions such as Australia. See Pegram 2012: 48.

debates on designing independent accountability agencies in adverse settings defined by highly unstable rights frameworks to robust rule of law settings where new agencies must insert into dense pre-existing accountability arrangements. A next step will be investigate further the survey response results and examine variance in more detail.

Formal design features matter. However, as Barkow (2010: 61) observes, 'the question becomes how to hardwire [positive] connections into the very design of an agency, instead of relying on the fortuity that these links will emerge because of the particular actors involved'. The particular problem structure thrown up by human rights promotion and protection requires analysts to be particularly attentive to the strategic environment in which such agencies operate. It also focuses our attention on how institutional design may catalyse a structural tilt in favour of some interests over others.

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