

FEDERALISM, EQUALITY BODIES AND NHRIS: A CRITICAL ANALYSIS OF THE BELGIAN DEBATE ON EQUALITY BODIES AND NHRIS

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1. INTRODUCTION

‘There can be only one!’ This tagline from the cult action film *Highlander*³ – depicting immortal warriors, only one of which can survive for some mystical reason – aptly describes the tenor of the Belgian debate concerning human rights institutions.

Belgium is a ‘federal state, composed of communities and regions’, as Article 1 of the Constitution proclaims. Legislative and executive powers are not the sole preserve of the federal level, but are shared – by way of exclusive powers along a number of subject matters – with the communities and the regions. The three communities⁴ are competent for issues related to culture, education and certain social issues. The three regions⁵ were historically inspired by aspirations of economic autonomy, and hold important powers in that field. The federal level, for its part, retains powers in areas such as foreign affairs, justice, finance and social security.

Importantly, in the Belgian federal system, legislation in the field of human rights is not an enumerated power, exclusively attributed to a single level of government. All federated levels hold important regulatory and enforcement powers in this domain. In order to determine which level of government has competence in any given situation or context, a link must always be established with a specific (enumerated or ancillary) power.⁶ The federal level, for instance, is competent in most matters of employment, while virtually all aspects of education fall under the competence of the communities.

As a result, both the federal level and the communities and regions created a number of (specialised or thematic) human rights institutions. At the federal level

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³ 1986, directed by Russell Mulcahy, and starring Christopher Lambert and Sean Connery. The initial movie inspired a franchise including two sequels (1991 and 1994), a television spin-off, and an upcoming remake.

⁴ The Flemish Community, the French Community and the German speaking Community.

⁵ The Flemish Region, the Brussels Capital Region and the Walloon Region.

⁶ See S. Van Drooghenbroeck and J. Velaers, ‘La répartition des compétences dans la lutte contre la discrimination’ [The division of powers in the fight against discrimination], in C. Bayart, S. Sottiaux and S. Van Drooghenbroeck (eds.), *De nieuwe federale antidiscriminatiewetten* [The new federal anti-discrimination laws], Bruges, die Keure, 2008, pp. 101-129; J. Vanpraet, *De latente staatshervorming. De bevoegdheidsverdeling in de rechtspraak van het Grondwettelijk Hof en de adviespraktijk van de Raad van State* [The latent state reform. The division of powers in the case-law of the Constitutional Court and the advisory opinions of the Council of State], Bruges, die Keure, 2011, pp. 250-253.

there are the equality bodies (i.e. the Centre for Equal Opportunities and Opposition to Racism (CEOOR) and the Institute for the Equality of Women and Men), the Federal Ombudsman, the National Commission for the Rights of the Child, the Commission for the Protection of Private Life, and the High Council of Justice. At the level of the Flemish Community and the Flemish Region, mention can be made of the Flemish Ombudsman Service and the Commissioner's Office for Children's Rights. The French Community has an Ombudswoman and the Delegate General for the Rights of the Child. Finally, the Walloon Region has its own Ombudsman as well.

Recent political debate concerning these institutions focused on two issues. The first is that the current bodies do not amount to a full implementation of all international obligations incumbent upon Belgium. More specifically, most levels of government have yet to assign or create equality bodies in the sense of the EU gender and racial equality directives.⁷ In this regard, there has been a predominant and virtually unquestioned consensus to arrive at one single institution, responsible for the enforcement of the combined body of discrimination legislation of both the federal and the federated levels. This body would be an 'interfederal' institution, created through a cooperation agreement between the federal state and the various regions and communities, and jointly run and financed by all entities. The main option, within this scenario, consisted in the transformation of the existing federal equality body – the CEOOR – into an inter-federal body. The CEOOR itself, summarised the arguments in favour of this solution as follows:

'[It will] provide every citizen of the country with one single contact point for reporting discrimination or violations of the fundamental rights of aliens. Opting for a single institution provides each resident with the guarantee of the highest quality treatment of his questions, in the national language of their choice. An interfederal Centre will benefit the international positions of each of our governments, and of course be much less costly than if each government were to establish its own separate institution.'⁸

A second issue in the political debate concerns the fact that the current institutions do not include a National Human Rights Institution (NHRI) that is in full compliance

⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive), Art. 13; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Art. 12; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Art. 20.

⁸ CEOOR, 'Het Centrum in 2011. Jaarverslag Algemene werking 2011' [The Centre in 2011. Annual Report 2011], Brussels, 2012, p. 7.

with the Paris Principles.⁹ The creation of a Belgian NHRI with an A-status,¹⁰ has been on the agenda for several years. In its 2003 declaration to Parliament, the federal government stated that it would establish a Commission on Human Rights.¹¹ To this aim, a working group was set up in the Office of the Prime Minister. This working group consulted civil society representatives,¹² and it led to several human rights NGOs submitting a proposal for the establishment of a Belgian Commission for Fundamental Rights.¹³ However, in the declarations to Parliament of the successive governments after the elections of June 2007, this proposal was never again mentioned.¹⁴ Subsequent governments also failed to undertake further action.¹⁵

The issue re-emerged during the discussion about the “interfederalisation” of the CEOOR. According to the federal government, the mandate of the CEOOR could be expanded at the occasion of its “interfederalisation”, thereby turning it into a full-fledged (and “interfederal”) NHRI. Proponents of this approach point to the fact that the CEOOR was already accorded a B-status by the ICC, and that the EU non-discrimination directives explicitly allow for equality bodies to ‘form part of agencies charged at national level with the defence of human rights or the safeguard of individuals’ rights’.¹⁶ Moreover, the CEOOR itself repeatedly expressed its wish to become a general NHRI.¹⁷ It sees its “interfederalisation” as a mere “interim step”, albe-

⁹ Nor do they together make up a composite body that can be considered as a NHRI. Principles relating to the Status of National Institutions, Adopted by UN General Assembly Resolution 48/134 of 20 December 1993, *UN Doc. A/RES/48/134*, Annex.

¹⁰ A-status NHRIs are NHRIs that are considered to be in compliance with the Paris Principles according to the accreditation of the International Coordinating Committee of National Human Rights Institutions (ICC). For a further analysis of the ICC accreditation, see G. de Beco, ‘Assessment of the Paris Principles and the ICC Sub-Committee on Accreditation’, Chapter 11 in this volume.

¹¹ Government declaration, Parliamentary Documents, House of Representatives, extraord. session 2003, no. 51-20/1, p. 77. See also the government agreement of 2003 (Government Verhofstadt II).

¹² Reply of G. Verhofstadt (Prime Minister) to H. Vautmans, Parliamentary Reports, House of Representatives, Commissions, 2006-07, no. 51-1195, 7 February 2007, p. 2.

¹³ The proposal provided for the creation of a national commission via a “cooperation agreement” between the federal State and the federated entities, which entailed that the agreement would have had to be adopted by the parliamentary assemblies and governments of the federal State, the Flemish Community, the Flemish Region, the French Community, the Walloon Region, the German speaking Community, the Region of Brussels-Capital, the French Community Commission of Brussels and the Common Community Commission of Brussels. The Commission would be composed of eleven members, all elected by the federal Senate, eight of which would be nominated by the federal government and the community and the regional governments, and the remaining three by the human rights NGOs.

¹⁴ See reply of the Minister of Justice to the written question of C. Nyssens, Parliamentary Questions and Answers, House of Representatives, 2007-08, no. 52-11, pp. 1757-1759.

¹⁵ The federal government agreement of 2011 did renew the federal government’s commitments.

¹⁶ Art. 13.1 Racial Equality Directive; Art. 12.1 Gender Goods and Services Directive; Art. 20.1 Gender Employment Equality Directive.

¹⁷ See i.a. CEOOR, ‘*Memorandum ter attentie van de formateur*’, Brussels, 2011, p. 3; CEOOR, ‘*Het Centrum in 2011. Jaarverslag Algemene werking 2011*’ [The Centre in 2011. Annual Report 2011], Brussels, 2012, p. 7; CEOOR, ‘*Discriminatie. Diversiteit. Jaarverslag 2011*’ [Discrimination. Diversity. Annual Report 2011], Brussels, 2012, p. 41 and p. 127.

it a necessary one, ‘in order to establish a general national human rights institution, in the near future [...]’.¹⁸

This chapter critically assesses the drive towards both federal and thematic centralisation within the landscape of Belgian human rights agencies. Is a single, ‘interfederal’ equality body really the only viable option, as its proponents would have us believe? (Section 2) And should the activities of this body also be expanded to those of a full-fledged NHRI? (Section 3) In short: can there really ‘be only one’, or are there perhaps reasons to be cautious about such a development?¹⁹

2. AN ‘INTERFEDERAL’ INSTITUTION VS FEDERATED INSTITUTIONS

Turning the existing, federal equality body into an “interfederal” institution was considered the obvious solution to the lack of equality bodies at the region and community levels. Looking at this solution from a comparative point of view leads to a number of striking conclusions.

As mentioned in the introduction, in the Belgian federal system, each level of government is not only competent for legislating in its proper domain, but also for the *enforcement* of the legislation it adopts. A first important observation is that in *other* human rights-related fields, this has resulted in the creation of separate institutions at the various governmental levels (cf. *supra*, section 1). For instance, there are ombudsmen at the federal level and at the level of the regions and the communities. And in addition to a children’s rights body at the federal level there are Flemish and French Community bodies as well. This raises the question as to why this should be different in the context of non-discrimination and equality.

Furthermore, a comparative analysis of other federal and regionalised countries demonstrates that none of them opt for a single “interfederal” equality body. This is the case both within and outside the European context. Countries as diverse as the United States, Canada, Australia, Germany, Italy, Spain and the United Kingdom, have all established equality (or human rights) bodies at multiple levels of government.²⁰ Moreover, even non-federal States – such as the Netherlands and France – tend to partially decentralise the enforcement of discrimination law by means of provincial, municipal or local institutions.

¹⁸ CEOOR, ‘*Het Centrum in 2011. Jaarverslag Algemene werking 2011*’ [The Centre in 2011. Annual Report 2011], Brussels, 2012, p. 7.

¹⁹ This chapter is based on research by the authors commissioned by the Flemish government: S. Sottiaux and J. Vrielink, ‘*Institutionalisering*’ van *gelijkheid en mensenrechten. Gelijkeheidsorganen en mensenrechteninstellingen in Vlaanderen en België* [‘Institutionalisation’ of equality and human rights. Equality bodies and human rights institutions in Flanders and Belgium], Antwerp/Cambridge, Intersentia, 2012, xii + 163p.

²⁰ See extensively S. Sottiaux and J. Vrielink, *ibidem.*, chapter IV.

What are the benefits and disadvantages of having multiple equality bodies within federal States, and – more generally – of a centralised versus a decentralised enforcement of discrimination legislation?

From the outset, it should be noted that research (and empirical research in particular) on this topic is scarce. In most federal States virtually no political or academic debate exists about this issue. Rather, and in stark contrast to the Belgian approach, the coexistence of federal and state agencies is simply regarded as a logical consequence of the federal state structure and the division of powers.

The only exception to this lack of research is the United States of America, where there have been attempts to empirically investigate the combined functioning of federal, state and local equality bodies. However, given the USA's different system of division of powers, the relevance of this research for Belgium is limited. Nevertheless, it seems interesting to briefly discuss this research. Unlike in Belgium, non-discrimination and equal opportunities are largely shared competences in the USA. In the area of enforcement this has led to an advanced form of cooperative federalism. The enforcement of federal anti-discrimination laws is partially left to state and local (municipal) equality bodies. To this end, the federal agencies (like the Equal Employment Opportunity Commission (EEOC))²¹ conclude cooperation agreements with their local partners. Empirical research on the enforcement of the federal Civil Rights Act in the housing market, has demonstrated the advantages and efficacy of this model.²² It turns out that the local and state equality bodies boast better results, and that they are able to function more efficiently than their federal level counterparts. Especially mediation and arriving at settlements tends to consume more time on the federal level than on the state and local levels.²³ Furthermore, this research reveals that there are no significant differences between northern and southern States, and between States with a Democratic governor and those with a Republican governor.²⁴ The studies resulted in the recommendation that the federal government should delegate more powers and responsibilities to state and local authorities in the enforcement of federal legislation.²⁵

Apart from this American research, little empirical evidence exists of the advantages and disadvantages of a centralised as opposed to a decentralised approach to the or-

²¹ For more information on the EEOC, see: <http://www.eeoc.gov/>.

²² See, for example, L.R. Dodge, 'Intergovernmental relations and the administrative enforcement of equal employment opportunity laws', *Public Administration Review*, vol. 57, 1997, pp. 431-440; C.M. Lamb and E.M. Wilk, 'Civil rights, federalism, and the administrative process: favourable outcomes by federal, state, and local agencies in housing discrimination complaints', *Public Administration Review*, 2010, pp. 412-421; E.M. Wilk and C.H. Lamb, 'Federalism, efficiency, and civil rights enforcement', *Political Research Quarterly*, 2011, vol. 64, pp. 392-404.

²³ *Ibidem*, p. 393.

²⁴ L.R. Dodge, loc. cit. *supra* note 22, p. 436.

²⁵ E.M. Wilk and C.H. Lamb, 'Federalism, efficiency, and civil rights enforcement', *Political Research Quarterly*, vol. 64, 2011, p. 402.

ganisation and operation of equality bodies. However, this does not imply that nothing sensible can be said about this subject. In the remainder of this section, we will list a number of pros and cons concerning the coexistence of equality bodies on both the federal and the state (and local) level, drawing not only on the legal literature but also on arguments derived from the general theory of federalism, regulation and governance.²⁶

2.1 Innovation, Autonomy and Policy Responsiveness

‘It is one of the happy accidents of the federal system that a single courageous State may, if the citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.’²⁷

These are the famous words of US Supreme Court Justice Brandeis, which capture one of the beneficial effects of a federal system: States may function as ‘laboratories of democracy’, and can experiment with novel forms of regulation and policy. The literature on federalism and anti-discrimination policies frequently employs this image.²⁸ Several authors suggest that federalism allows and encourages the various levels of government to develop new means to tackle discrimination. This applies both to the content of the norms (e.g. new grounds of discrimination or affirmative action obligations), and to the sanctions and enforcement by independent bodies (e.g. new powers). As one author notes: ‘State agencies provide a unique forum where new and creative approaches can be designed to eliminate discrimination and meet the needs of the particular State.’²⁹

The next point is closely connected to this. Enforcement of discrimination law by means of independent bodies follows naturally from the power to legislate in these domains: it is a logical consequence of a federal system with autonomous regions that the legislation and policies within those areas may vary. When politically independent polities have a diverging approach concerning equal opportunities policies and when they entertain different priorities in this regard, it may also lead them to have different expectations of equality bodies. This is the case not only for the body’s duties, tasks and powers, but also for the budget allocated to it. Not every level of government will necessarily be prepared to invest the same amount of budgetary resources to finance equality bodies. Indeed, in practice, discrimination legislation and, as a corollary of

²⁶ For a useful overview, see O. Lobel, ‘The renew deal: the fall of regulation and the rise of governance in contemporary legal thought’, *Minnesota Law Review*, vol. 89, 2004, p. 342.

²⁷ *New York Ice Co. v. Lieberman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²⁸ S.L. Buhai, ‘In the meantime: state protection of disability civil rights’, *Loyola of Los Angeles Law Review*, vol. 37, 2004, p. 1065.

²⁹ P.J. Tierney, ‘Separate but equal – An analysis of state civil rights law enforcement and its interaction with federal law’, *Notre Dame Lawyer*, vol. 49, 1973, p. 140. See also E.M. Wilk and C.H. Lamn, ‘Federalism, efficiency, and civil rights enforcement’, *Political Research Quarterly*, vol. 64, 2011, p. 402.

this, the powers and tasks of the various equality bodies, not only vary from country to country, but also within one and the same country.³⁰

What does this imply for the Belgian debate on one or more enforcement agencies? Firstly, it would seem that the option of a single (“inter”)federal agency may fail to benefit from one of the advantages offered by having multiple bodies: healthy competition, leading to novel and innovative approaches and means. Furthermore, as a practical matter, opting for a single body will be especially difficult in a context of asymmetric regulation and policies. If norms and policies are more or less similar across the federal and state levels, “interfederal” cooperation will be more feasible. In situations in which norms and policies diverge, however, governments will have different expectations regarding enforcement bodies (e.g. in terms of deployment of resources, staff qualifications, policy priorities, etc.).

As far as the traditional anti-discrimination legislation is concerned, there exists - to date - a considerable degree of symmetry in Belgium. The main Flemish non-discrimination statute, for instance, was inspired in part by the federal legislation, which was in turn strongly influenced by the European non-discrimination directives. However, it is not clear that this situation will remain so in the future: several recent legislative initiatives indicate that the federal legislator is increasingly relying on penal measures.³¹ In the Flemish region and community, the criminal law approach to non-discrimination is traditionally perceived as ineffective, and is regarded with suspicion. Moreover, in certain areas, policies and legislation already clearly diverge today. Examples include several pro-active measures of achieving substantive equality (e.g. setting target quotas, requiring equality plans, and employing the open method of coordination) and the establishment of a system of low-threshold, local complaints offices. All these measures are developed to a much greater extent in Flanders.

2.2 Focus and Subsidiarity

A second set of arguments in the debate about centralisation versus decentralisation of equality bodies relates to focus and subsidiarity. Regional or local equality bodies are

³⁰ The latter is illustrated, for instance, by Canada (the Ontario Pay Equity Act) and the United Kingdom (where the Northern Irish institution is charged with specific tasks, that other (national) equality and human rights institutions do not possess).

³¹ Something which already was the case concerning racial and ethnic hate speech and discrimination, concerning which the federal legislation contains several additional criminal provisions (and the majority of cases in which the federal equality body undertakes legal action, is based on these provisions), compared to the Flemish legislation (which relies almost exclusively on civil provisions). Currently, legislative bills have been submitted on the federal level, seeking to expand the existing criminal provisions to include all protected grounds (e.g. sex, sexual orientation, religion, political conviction, physical characteristics, wealth, civil status, nationality, etc.). The federal equality body supports and actively advocates this development: Jdw, “CGKR: ‘Lid zijn van homohatende groepen moet strafbaar worden’ [CEOOR: ‘Being a member of anti-gay groups should become a criminal offense’], *Gazet van Antwerpen*, 29 June 2012.

often said to be better able to attune their work to specific regional and local problems.³² Several reasons are cited for this: decentralised agencies have superior access to information about regional and local problems, and are better able to develop partnerships with regional and local governments and civil society.³³ Regional and local equality bodies also tend to be more open to policies that focus on specific local and regional issues. For national bodies it is less obvious to devote scarce resources to investigating local and regional problems.³⁴

It is precisely this concern about local focus and subsidiarity that leads even *non-federal* States – particularly those experienced in dealing with discrimination – to decentralise their enforcement agencies. In the Netherlands, for instance, the government has allocated substantial funds for the establishment of municipal or regional equality bodies, alongside the national Equal Treatment Commission, thus establishing a network covering the entire country.³⁵ The *travaux préparatoires* of the act commissioning these institutions shows that the intent of the Dutch legislature was to enable a locally customised approach to tackling discrimination:

‘Discrimination manifests itself in the immediate social environment of people: in one’s district or neighbourhood, at work, where people do sports or spend their leisure time, et cetera. [...] The purpose of this bill is to provide the means for citizens to receive assistance in their immediate vicinity if they are discriminated against. [...] Easy accessibility is an absolute precondition here, since filing a complaint for discrimination is often already a big step for victims of discrimination.’³⁶

Moreover many national bodies have adopted the practice of opening offices in other major cities besides the head office.³⁷ This decentralised approach is welcomed by international bodies like the European Commission against Racism and Intolerance (ECRI).³⁸

³² See e.g. N.M. Modesitt, ‘Reinventing the EEOC’, *SMU Law Review*, vol. 63, 2010, p. 1257; E.M.H. Schill, ‘Local enforcement of laws prohibiting discrimination in housing: the New York City human rights commission’, *Fordham Urban Law Journal*, vol. 23, 1996, pp. 1027-1028; J.P. Witherspoon, ‘Civil rights policy in the federal system: proposals for a better use of administrative process’, *Yale Law Journal*, vol. 74, 1965, p. 1205 and following.

³³ See e.g. E.M.H. Schill, loc. cit *supra* note 32, pp. 1027-1028.

³⁴ *Ibidem*.

³⁵ Explanatory Memorandum, Parliamentary Papers II 2007/2008, 31 349, no. 3, p. 7. Since October 2012, the Equal Treatment Commission has been assimilated in the Netherlands Institute for Human Rights. For an extensive analysis, see Y. Donders and M.O. Monnikhof, ‘The newly established Netherlands Institute for Human Rights: integrating human rights and equal treatment’, Chapter 4 in this volume.

³⁶ Explanatory Memorandum, Parliamentary Papers II 2007/2008, no. 3, pp. 1-2.

³⁷ See the overview in J. Hathard, ‘The inter-relationship between Commonwealth human rights commissions and other national human rights institutions’, 2003, available at : http://www.britishcouncil.org/john_hathchard_inter_relation.pdf, p. 41.

³⁸ Principle 6 of General Policy Recommendation No. 2 on equality bodies reads as follows: ‘Specialised bodies should consider, where appropriate, setting up local offices in order to increase their acces-

2.3. Double Protection and Budgetary Issues

A recurring argument in the literature on federalism and fundamental rights is that federal States can serve to provide double protection for fundamental rights; both the federal government and the States can take measures to safeguard and enforce rights. This argument goes back to the Federalist No. 51 of James Madison.³⁹

Specifically with regard to discrimination legislation and enforcement agencies, it has been pointed out that problems at one level of government may be compensated by another level.⁴⁰ Thus, leadership issues, budgetary problems due to financial cutbacks, or problems caused by a backlog in the treatment of cases by a federal equality body, may be counterbalanced by increased reliance on the State bodies, and vice versa. As Tierney observes with respect to the situation in the USA:

‘Certainly the present case backlog at the federal level indicates that the need exists for state agencies to participate in the civil rights field. Experience has shown there is sufficient discrimination to support the existence of civil rights agencies at all levels, federal, state and local’.⁴¹

Furthermore, the literature shows that insufficient financial means for and overburdening of equality bodies may not only be the result of cutbacks, but can also result from expanding the mandate of these institutions without increasing their budget.⁴² Expanding the scope of equality laws – for instance by including new protected grounds or by extending the legislations’ reach – can result in a ‘net’ reduction of the budget for those grounds or contexts that were already protected. Experiences suggest that in such situations the new competences tend to suffer from a lack of attention, as institutions are generally prone to a significant degree of inertia, and are predisposed to (remain) focus(ed) on pre-existing tasks and competences. This risk should be taken into account in case the mandate of the current federal CEOOR is extended due to its “interfederalisation”.

2.4. Accountability and Independence

sibility and to improve the effectiveness of their education and training functions’. See: ECRI, General Policy Recommendation No. 2 of 13 June 1997, CRI(97)36.

³⁹ See, for example, E. Katz and G.A. Tarr, ‘Introduction’, in E. Katz and G.A. Tarr (eds.), *Federalism and rights*, Lanham, Rowman & Littlefield Publishers, 1996, xiv.

⁴⁰ This argument is most relevant however in federal systems based on concurrent powers rather than exclusive ones.

⁴¹ P.J. Tierney, loc. cit. *supra* note 29, p. 140.

⁴² See, for example, H.B. Clifford, ‘Discrimination and the efficiency of an equal opportunity agency’, *Policy Studies Journal*, vol. 15, 1986, p. 17; L.R. Dodge, loc. cit. *supra* note 22, p. 433; R.B. Howe and D. Johnson, *Restraining equality: human rights commissions in Canada*, Toronto, University of Toronto Press, 2000.

The independence of equality bodies should be ensured. However, *absolute* independence – in the sense of no oversight whatsoever – is both impossible and undesirable: as public institutions, funded by the State, equality bodies should always be held publicly and democratically accountable for the use of their resources, most obviously by means of parliamentary control.⁴³

The literature on federalism indicates that it will generally be much easier for regional or local authorities to organise effective democratic checks and balances vis-à-vis a regional or local equality body.⁴⁴ The democratic control that regional parliaments can exercise vis-à-vis federal or ‘interfederal’ agencies is necessarily limited. However, at the same time this can be viewed as a potential drawback or danger of decentralisation. Local or regional bodies run a greater risk of coming under pressure of or being influenced by local policy-makers or by local public opinion, which may endanger their independence.⁴⁵

2.5. Coordination and Efficiency

Other drawbacks of the coexistence of multiple equality bodies in federal States have to do with possible problems of coordination and efficiency (compare also *infra* section 3). Several problems of this kind are conceivable.⁴⁶ To begin with, multiple agencies lead to higher costs, as each institution will have certain overhead costs and will need to invest in similar types of knowledge and experience, which cannot be pooled in order to benefit from economies of scale.

Moreover, there is a danger of ‘reinventing the wheel’ and of double work, if different equality bodies work on the same cases or problems. Related to this is a danger of creating confusion among the public if different equality bodies develop (significantly) diverging or contradictory guidelines concerning comparable or even identical cases. More generally – especially in a federal system with exclusive powers, like that in Belgium – there is likely to be some uncertainty or confusion among the public as to which body is competent for dealing with their questions or complaints; the lack of a so-called ‘one stop shop’.

In most federal States, these problems are addressed by means of coordination and mutual agreements (either of a formal or informal nature). Uncertainties or diffi-

⁴³ G. Moon, ‘Chapter eight. Enforcement bodies’, in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, materials and texts on national, supranational and international non-discrimination law*, Oxford, Hart, 2007, p. 954. Also compare, in the context of independence versus democratic control of privacy commissions in relation to EU law: ECJ, *Commission v. Germany*, C-518/07, 9 March 2010.

⁴⁴ A.E.D. Howard, ‘Does federalism secure or undermine rights’, in E. Katz and G.A. Tarr, *Federalism and rights*, Lanham, Rowman & Littlefield Publishers, p. 19.

⁴⁵ E.M.H. Schill, loc. cit. *supra* note 32, n. 171.

⁴⁶ See e.g. C.H. Lamb, ‘Administrative coordination in civil rights enforcement: a regional approach’, *Vanderbilt Law Review*, vol. 31, 1978, p. 858.

culties citizens may experience in finding the competent institution are usually resolved by a system of referral between agencies. In Belgium such a referral system seems to be developing already. In Flanders, victims of discrimination can turn to both the federal CEOOR and to locally organised complaints offices (see *supra* section 2.1). Complainants are free to choose the body to which they submit their complaints. The local complaints offices and the CEOOR have concluded agreements for the joint treatment and mutual referral of complaints.⁴⁷ These agreements start from the principle of subsidiarity, and are aimed at having a complaint dealt with by the local complaints office in the regional area in which the (allegedly) discriminatory incident took place. Complaints that transcend local circumstances or that are unconnected to such circumstances, are transferred to the CEOOR. In the first evaluation of the local complaints offices, in 2010, this referral system was positively evaluated.⁴⁸

2.6. Conclusion

Before drawing any conclusions from the foregoing for the Belgian debate, a note of caution is in order. Comparative analysis on federalism always entails a risk.⁴⁹ The federal structures and institutions of a country are highly dependent on factors such as history, culture and geography. For instance, a comparison between a large but (officially) monolingual country like the United States and a small but trilingual country like Belgium, always falls short to some extent. Nevertheless, the foregoing makes clear that the dominant Belgian discourse favouring the centralised solution is one-sided, both from a comparative point of view and on the basis of the available arguments. In practice, the coexistence of multiple equality bodies within federal States tends to be accepted as a logical consequence of the division of powers in federal States. Interestingly, the Belgian approach is at variance with this ‘federal default’, and while some strong and coherent arguments are brought forward for this approach, all counter-arguments have been largely ignored. Moreover, while coherent, all arguments brought to bear *against* having multiple regional and federal bodies are – in essence – arguments against the very idea of federalism.

3. A SEPARATE EQUALITY BODY VS AN INTEGRATED NATIONAL HUMAN RIGHTS INSTITUTION

Much like the dominant vision on the “interfederalisation” of the federal equality body, so too the federal government and many stakeholders advocated the simultane-

⁴⁷ Gelijke Kansen in Vlaanderen [Equal Opportunities in Flanders], *Non-discriminatiebeleid in Vlaanderen, Evaluatierapport 2010* [Non-discrimination policy in Flanders, Evaluation report 2010], p. 36.

⁴⁸ *Ibidem*.

⁴⁹ See V.C. Jackson, ‘Comparative constitutional federalism and transnational judicial discourse’, *International Journal of Constitutional Law*, 2004, p. 91.

ous transformation of that institution into an all-encompassing national human rights institution (NHRI).

Comparatively speaking, there are an increasing number of institutions that combine the functions of an equality body with additional competences in the wider field of human rights. Examples include the United Kingdom, the Netherlands and Australia. In the UK, the Equality and Human Rights Commission (EHRC) – an agency with a broad human rights mandate – came into being in 2007, taking over the responsibilities of the three former equality commissions (the Commission for Racial Equality (CRE), the Equal Opportunities Commission (EOC -which dealt with gender equality) and the Disability Rights Commission (DRC)). In a similar vein, already in the 1980s, Australia saw the merger of its various anti-discrimination bodies into a single human rights commission. More recently, in 2012, the Dutch Equal Treatment Commission was reformed to constitute a national human rights institute.⁵⁰

However, this is by no means a general trend. In many countries equality bodies (and other institutions safeguarding specific human rights) remain separate from general human rights institutions.⁵¹ Is this an historical coincidence or a conscious choice, based on arguments which tip the balance in favour of keeping equality bodies and general human rights institutions separate? In this section we will take a look at the advantages (3.1) and disadvantages (3.2.) of the integration of both types of bodies, in order to assess the Belgian approach.

3.1 Advantages

Some of the arguments for integration and against (retaining) a separate equality body are analogous to the arguments for a single “interfederal” equality body and against multiple regional or state bodies. To begin with, these arguments relate to a more efficient use of limited resources, both in financial terms (through a joint overhead, economies of scale, shared library, etc.),⁵² and in terms of shared cognitive resources, knowledge, and experience.⁵³ In addition, it is argued that an integrated institution allows for ‘cross-pollination’: the equality agenda may gain in strength from being

⁵⁰ For an extensive analysis, see Y. Donders and M.O. Monnikhof, ‘The newly established Netherlands Institute for Human Rights: integrating human rights and equal treatment’, Chapter 4 in this volume.

⁵¹ R. Carver, ‘One NHRI or many? How many institutions does it take to protect human rights? Lessons from the European experience’, *Journal of Human Rights Practice*, no. 1, 2011, p. 2. Although nearly all general human rights commissions in other countries do tend to be responsible for equality issues as well.

⁵² *Ibidem*, p. 3 and pp. 14-15; Equinet, ‘Equality bodies and national human rights institutions making the link to maximise impact’, Brussels, Equinet, 2011, p. 7; J. Hatchard, loc. cit. *supra* note 37, p. 34; S. Spencer and I. Bynoe, *A human rights commission: the options for Britain and Northern Ireland*, London, Institute for Public Policy Research, 1998, p. 111.

⁵³ B.D. Jacobsen and E.O. Rosenberg Khawaja, ‘Legal assistance to individuals. Powers and procedures of effective and strategic individual enforcement’, in S. Obura and F. Palmer (eds.), *Report by Equinet working group 2 on strategic enforcement*, Equinet, 2006, p. 11; J. Hatchard, loc. cit. *supra* note 37, p. 35.

associated with other human rights agendas, and vice versa, and both may mutually benefit from good practices developed in other fields. In this connection, the “indivisibility” of human rights, as well as the enhanced possibility of tackling simultaneous violations of multiple rights are advanced in favour of a single human rights and equality agency.⁵⁴ Equinet, the European network of Equality bodies, more specifically lists the following advantages of an integrated institution:

‘Enabling the equality mandate to benefit from the protection of international standards that have been developed for national human rights instruments and institutions. Moving beyond the limitations of equality legislation with its defined grounds and its requirement for a comparator to prove discrimination (...) Enabling situations that involve an interaction of both discrimination and human rights violations to be effectively addressed.’⁵⁵

Likewise, arguments related to visibility, familiarity and accessibility are put forward in favour of an integrated human rights institution. A single agency would benefit both victims and other stakeholders (‘one stop shop’) and the institution itself (greater impact and authority, greater visibility, unlikely to be marginalised as representing a ‘mere’ sectional interest, etc.).⁵⁶

Closely connected to the latter is the argument that a single institution precludes the risk of multiple agencies duplicating the same work or developing contradictory practices and policies, and it avoids confusion about which agency is competent⁵⁷ (as well as preventing ‘forum shopping’ by complainants).⁵⁸

Finally, integration would also make for a more powerful institution, strengthening it and thereby rendering it better able to safeguard and protect its de facto independence. As Hatchard puts it: ‘An integrated body can better counter executive attempts to weaken or undermine its operation.’⁵⁹

3.2 Disadvantages

Against the arguments in favour of integrating equality bodies and general human rights institutions, there are several considerations that argue for keeping these institutions separate.

⁵⁴ J. Hatchard, loc. cit. *supra* note 37, p. 26, p. 32 and p. 34; R. Carver, loc. cit. *supra* note 51, p. 13; C. O’Cinneide, *A single equality body: lessons from abroad*, Working paper 4, EOC, 2002, 42-43; S. Spencer and I. Bynoe, *A human rights commission: the options for Britain and Northern Ireland*, London, Institute for Public Policy Research, 1998, 111; Equinet, loc. cit. *supra* note 52, p. 8 and p. 11.

⁵⁵ *Ibidem*, p. 11.

⁵⁶ *Ibidem*, p. 26 and p. 35; R. Carver, loc. cit. *supra* note 51, pp. 15-16 and pp. 18-19.

⁵⁷ J. Hatchard, loc. cit. *supra* note 37, p. 26, p. 32, p. 34 and p. 35; Equinet, loc. cit. *supra* note 52, p. 8.

⁵⁸ D. Juma, “Lost (or found) in transition? The anatomy of the new African court of Justice and Human Rights”, in A. von Bogdandy and R. Wolfrum (eds.), *Max Planck yearbook of United Nations law*, Brill, 2009, 278; J. Hatchard, loc. cit. *supra* note 37, p. 35.

⁵⁹ *Ibidem*, p. 35.

To begin with, there is the argument that the visibility of equality and non-discrimination (and of other specific human rights interests) decrease in a general human rights institution.⁶⁰ The same is argued in relation to an agency's ability to relate to target groups and specialised civil society bodies: separate equality bodies are said to offer a detailed understanding and to relate to civil society bodies in ways that will be harder to achieve for a single institution. Closely linked to this is the fact that a general human rights institution is likely to devote (relatively) less financial resources and priority to its equality and non-discrimination tasks.⁶¹ Advocates of multiple institutions fear that the priority that they can give to the rights of their constituency cannot be reproduced by a single, non-specialised institution.

Also, a general institution entails the risk of ignoring the specific skill-sets required for distinct areas of human rights. This is particularly salient in the field of non-discrimination, which distinguishes itself from many other human rights issues by its high degree of technicality, a significant body of specialised legislation, and a complex set of evidentiary rules.⁶² Within an overall, general institution, the room for achieving or maintaining the required levels of specialisation may be limited.

Closely related to this are arguments concerning the specificity of the required approach and focus. Critics of merging equality bodies and general human rights institutions point out that discrimination requires a set of very specific measures that are not always suitable for the promotion and protection of other human rights (and vice versa). Authors refer, for instance, to the greater need for 'different legal, promotional and outreach approaches in the equality field than in the broader human rights field'.⁶³ Furthermore, (private) employment issues are only of limited importance from the viewpoint of a general human rights agenda, while they are absolutely crucial to the equality agenda.⁶⁴ More generally, horizontal relations (amongst citizens) have traditionally been less central to human rights law, with the exception of the principle of non-discrimination. This has important consequences for the focus of equality bodies on the one hand, and general human rights institutions on the other hand:

'Human rights primarily govern the relationship between the state and private persons and not between individuals or between individuals and private sector institutions, although the latter are key areas for equality commissions.'⁶⁵

⁶⁰ Equinet, loc. cit. *supra* note 52, p. 8-9; R. Carver, loc. cit. *supra* note 51, p. 3 and 9-10.

⁶¹ J. Hatchard, loc. cit. *supra* note 37, p. 35. See also: Equinet, loc. cit. *supra* note 52, p. 2.

⁶² J. Hatchard, loc. cit. *supra* note 37, p. 25; Equinet, loc. cit. *supra* note 52, p. 8-9; R. Carver, loc. cit. *supra* note 51, p. 3.

⁶³ C. O'Cinneide, 'A single equality body: lessons from abroad', Working paper 4, EOC, 2002, p. 44. See also J. Hatchard, loc. cit. *supra* note 37, p. 25.

⁶⁴ *Ibidem*, p. 25.

⁶⁵ *Ibidem*, p. 25. Other commentators point to the risk of a 'potential emphasis in a human rights commission on civil and political rights (in particular given the importance of the ECHR) rather than equality rights'. See: C. O'Cinneide, loc. cit. *supra* note 63, p. 44.

In short, although there is a certain overlap between the equality agenda and the human rights agenda, there are important differences that some believe justify multiple institutions. Moreover, critics of merging specialised human rights institutions even point to tensions and outright conflicts between the two agendas, which would render a separate institutional approach desirable. Conflicts between equality and other human rights are plentiful. An obvious example is the regulation of hate speech:⁶⁶ while the right to freedom of expression is invoked to argue for restraint on the side of government intervention, advocates of government action often base themselves on the importance of equality. Numerous other examples are conceivable, such as tensions between equality and the right to freedom of religion (public officials refusing to perform same-sex marriages; wearing the face-veil; anti-gay speech by clergy, etc.) and the protection of privacy (e.g. situational testing). More generally, tensions can develop from the collectivist pursuit of (substantive) equality, and the more individual-oriented focus of many other human rights:

‘These tensions can build on perceptions of equality as related to the group and solidarity and of human rights as related to the individual and freedom. Such tensions can also manifest themselves in the manner in which the dual mandate body seeks to present itself to the public. Communication narratives can be competing due to the different cases that can be made for equality and for human rights.’⁶⁷

All these tensions may either paralyse a human rights institution or provide for internal schisms.⁶⁸ Even *if* a single institution succeeds in developing a clear policy line, the appearance of a hierarchy of rights can easily be created.⁶⁹

It should also be noted that a general human rights institution may, by virtue of the sensitive issues that it inevitably has to deal with (migration, terrorism, abortion, euthanasia, privacy, prisoners, etc.), play a controversial role in public debate.⁷⁰ The work of equality bodies is generally of a less controversial nature. As a consequence, in a general human rights institution, the equality function runs the risk of being com-

⁶⁶ J. Hatchard, *The inter-relationship between Commonwealth human rights commissions and other national human rights institutions*, 2003, 25.

⁶⁷ Equinet, loc. cit. *supra* note 52, p. 12. McCrudden characterises both agendas as follows: ‘[I]f human rights is thought to be predominantly about liberty from government, and equality is thought to be in part about redistribution by government, then the two agendas may be on a collision course, and status equality may be undermined by an overly libertarian, negative conception of human rights’ (C. McCrudden, ‘The contribution of the EU Fundamental Rights Agency to combating discrimination and promoting equality’, in P. Alston and O. De Schutter (eds.), *Monitoring fundamental rights in Europe. The contribution of the Fundamental Rights Agency*, Oxford, Hart, 2005, p. 152).

⁶⁸ Equinet, loc. cit. *supra* note 52, p. 12.

⁶⁹ In part, the latter risk is compounded by international obligations that cause considerable differences and imbalances between the tasks and responsibilities vis-à-vis various human rights. For instance, an integrated human rights institution – which also includes the tasks of an equality body – will have to provide assistance to victims of discrimination, but not for victims of other human rights violations.

⁷⁰ C. O’Cinneide, loc. cit. *supra* note 63, p. 44; J. Hatchard, loc. cit. *supra* note 37, p. 27.

promised or ‘contaminated’ by controversies in which the institution is engaged in other matters:

‘[A] potential difficulty in combining human rights and equality in a single institution [is] (...) that a combined commission could by virtue of its functions be dragged into controversial terrain such as surveillance powers and bioethical issues.’⁷¹

A final set of arguments against integrating equality bodies and general human rights institutions is that this option, while offering economies of scale, may render the institution less manageable; the expansion may even lead to a large and unwieldy bureaucratic organisation.⁷² An additional, related argument is that poor leadership of a single institution will have negative consequences for the human rights protection and enforcement system as whole.⁷³

3.3 Influencing Factors

In addition to the somewhat deceptive simplicity of the benefits and disadvantages mentioned in the two preceding sections, the literature points to several influencing factors that may increase the weight of the arguments on one side of the equation or the other.

Firstly, a successful merger of equality bodies and general human rights institutions strongly depends on the quality of the leadership of the institution (the director or the board of the institution) (cf. *supra* section 3.2). Secondly, a sufficiently long time scale is generally considered to be vital for successful integration.⁷⁴ Both these issues are evidenced by the British experience. According to critics, the transformation of the various equality bodies in the UK (the EOC, the CRE and the DRC) into one single Equality and Human Rights Commission resulted in a situation in which the previously well-functioning equality bodies currently lack vision and operational effectiveness.⁷⁵ Most critiques have focused on the chair's leadership, though

⁷¹ C. O’Cinneide, loc. cit. *supra* note 63, p. 44. See also J. Hatchard, loc. cit. *supra* note 37, p. 27.

⁷² *Ibidem*, 25. Meanwhile, it should be kept in mind that there are – in countries where multiple institutions exist – relatively few problems seem to arise in ensuring minimal overlap between their respective activities and responsibilities, and a good working arrangement between them (*ibidem*, p. 35; referring to the example of the Office of the Commonwealth Ombudsman in Australia, that simply refers persons to the authorised body if it receives a complaint for which the institution itself is not competent).

⁷³ R. Carver, loc. cit. *supra* note 51, p. 9.

⁷⁴ *Ibidem*, p. 10.

⁷⁵ *Ibidem*, p. 10. For additional information on the problems surrounding the British institution: A. McSmith, ‘Equalities watchdog chief Trevor Phillips tried to influence inquiry’, *The Independent*, 10 February 2010; L. Peacock, ‘EHRC leadership rocked by three resignations’, *Personnel Today*, 30 March 2009; L. Peacock, ‘EHRC has faced tribunal claims for sexism, racism and religious discrimination’, *Personnel Today*, 12 February 2010; T. Harper, ‘Equality chief Trevor Phillips awarded friend £300,000 for £30,000 contract’, *Daily Mail*, 6 September 2009; G. Peev, ‘Equality chief Trevor Phillips faces inquiry for trying to influence parliamentary prob’, *Daily Mail*, 10 February 2010; J. Slack,

underlying these criticisms is the sense that especially equality issues have fared worse under the single body, having lost much of the momentum created by the DRC, the EOC and the CRE.

Finally, many of the risks of integrating equality bodies into a single human rights institution are strongly dependent on the object for which the merger takes place. In general, the risks are the greatest when the merger is primarily or exclusively based on considerations of cost.⁷⁶

3.4. Conclusion

This section made clear that there are good arguments both in favour and against combining the functions of an equality body with that of a general human rights institution. A single institution may lead to greater efficiency and other advantages, but it may also have significant drawbacks such as internal tensions and conflicts, and other practical and institutional problems.

In Belgium, the search for the best institutional design for equality and human rights bodies is even more complicated due to the federal nature of the country. Here again the question arises as to whether the country should opt for one integrated and “interfederal” equality and human rights body, or whether the communities and the regions should establish their own integrated bodies. The first option would require the communities and the regions to transfer not only the enforcement powers concerning their anti-discrimination legislation, but also those vis-à-vis other issues of human rights to an “interfederal” institution. No doubt such a complete centralisation would have certain advantages, but it would also serve to lend added weight to some of the above-mentioned arguments *against* centralisation.

Moreover, most countries that opted to transform their equality bodies into general human rights institutions have a strongly developed tradition in both discrimination law and its enforcement through independent agencies. The obvious examples are Australia, the Netherlands and the United Kingdom. This is far less the case for Belgium. Anti-discrimination legislation in Belgium long covered only the grounds of race and ethnic origin, and was exclusively criminal in nature. More general equality laws, containing civil law provisions, were adopted only in 2003,⁷⁷ and this legislation was initially plagued by a myriad of technical and constitutional problems, which led to it being replaced in 2007. As such, the current federal equality body only recently

‘Equality chief Trevor Phillips clinging to job following wave of protest resignations’, *Daily Mail*, 27 July 2009; J. Pring, ‘Movement slams watchdog’s first year’, *Disability Now*, October 2008.

⁷⁶ Equinet, loc. cit. *supra* note 52, p. 8.

⁷⁷ Specific sex discrimination legislation dates from 1999. However, no equality body was appointed for the enforcement of this legislation until 2002.

started to enforce this new type of anti-discrimination legislation. Case law on the civil non-discrimination provisions remains scarce.⁷⁸

Since the merging of equality bodies into human rights agencies seems to encounter difficulties even in those countries with a very long tradition in the field of enforcement through independent agencies, such as the UK, it is perhaps advisable for the existing Belgian equality bodies to first further develop and realise their potential as equality bodies, rather than immediately transforming them into an integrated human rights commission.

4. EPILOGUE

While the brief analysis in this chapter has its limitations, it does reveal the one-sided nature of the debate in Belgium, which was focused exclusively on centralisation, integration, and expansion. In effect, on 20 July 2012 a preliminary consensus was reached about a cooperation agreement between the federal level and the communities and regions, to first transform the federal equality body into an “interfederal” agency, and to subsequently – in the near future – further expand it into a full-fledged NHRI.⁷⁹

It remains to be seen whether this monolithic institution will be truly beneficial for the effective enforcement of discrimination law and human rights law in general. If anything, the foregoing analysis casts doubt on that assumption.⁸⁰ On the basis of both empirical and theoretical arguments, the most appropriate solution instead would seem to be a *balance* between absolute centralisation on the one hand, and that of complete decentralisation on the other hand. However, for the time being, Belgium appears to have ignored this comparative experience.

⁷⁸ For an overview, see: S. Sottiaux and J. Vrielink, ‘*Verschillende gelijkheden? Recente Europese en nationale rechtspraak over discriminatie*’ [Different equalities? Recent European and national case law on discrimination], in A. Alen, G. Maes and S. Sottiaux (eds.), *Publiekrecht. Themis Cahier*, no. 70, 2011-12, pp. 23-67.

⁷⁹ See e.g. Hrt, ‘*Ook Vlaanderen keurt nieuw anti-racismecentrum goed*’ [Flanders also approves of new anti-racism centre], *De Standaard*, 20 July 2012.

⁸⁰ These doubts are echoed in critique by human rights NGOs and minority organisations in Belgium of both the functioning of the existing federal equality bodies, and of the way in which the transformation process towards a NHRI was set up: Gom, ‘*Directeur nieuw mensenrechteninstituut behoort bij voorkeur zelf tot een minderheid*’ [Director of the new human rights institute appertains preferably to a minority group], *De Standaard*, 26 July 2012; Amnesty International, ‘*Hervorming CGKR moet leiden tot onafhankelijk en omvattend mensenrechteninstituut*’ [Reform CEOOR should lead towards an independent and comprehensive human rights institute], *Press release*, 20 July 2012.