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An Analysis of the Power of Local Governments to Protect Migrants' Human
Rights by Challenging National Policies

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Abstract

In the context of recent global economic and political shifts expanding the role of local governments and the trend of increasingly restrictive measures on migration to the EU and US, this thesis examines how and why local governments are challenging national rights-restricting migration policies through acts of municipal disobedience and what impact these actions have on the protection of migrants' human rights. Drawing on concepts from the fields of public policy and human rights, the research provides a new way of approaching local government engagement with human rights, focusing on the question of local government power and its source in analyzing case studies of defiant local government policies in Utrecht and San Francisco. The findings reveal that local governments, driven by legal and pragmatic concerns, have power to positively impact human rights, derived from structures of governmental authority, their role in policy implementation, policy diffusion, and ability to influence the national and public debate. This suggests that more attention should be paid to local governments in the field of human rights as they have ample power and a unique position to contribute to the protection of human rights within and beyond their jurisdictions.

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ACLU	American Civil Liberties Union
CJEU	Court of Justice of the European Union
DHS	Department of Homeland Security
ECHR	European Charter on Human Rights
ECSR	European Committee on Social Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
ESC rights	Economic, social, and cultural rights
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICE	US Immigration and Customs Enforcement
ICESCR	International Covenant on Economic, Social, and Cultural Rights
LOGO`	National Consultation on Local Authorities' Reception and Return Policy
NLC	National League of Cities
PDHRE	People's Movement for Human Rights Learning
PEP-Comm	Priorities Enforcement Program (ICE)
S-Comm	Secure Communities Enforcement Program (ICE)
UCLG	United Cities and Local Governments
UDHR	Universal Declaration of Human Rights
VNG	Association of Dutch Municipalities

CHAPTER 1

INTRODUCTION

A milestone in human history has been passed in recent years: for the first time, more than half of the world's population lives in cities.¹ Cities have long held a unique and significant role in our societies; however, the increase in urban migration as well as economic and political developments related to globalization and decentralization have altered the role of cities in the world order, making them more autonomous with added responsibilities and seeking to form distinct identities.² These changes have impacted the character of the city, making for more diverse and crowded urban areas, which in turn, has created new challenges for city governments to navigate at closest level to the people, including maintaining social cohesion and preventing segregation and inequalities.³ In addition to the increased local government authority brought by these developments, local actors across the world have been taking on new responsibilities of their own volition focused on improving the human rights situations within their communities.⁴ Through this increased local engagement with human rights, local actors are addressing many human rights related policy areas, including migration, and local governments are banding together to exchange ideas and best practices on a wide array of policy areas without the involvement of states or international

¹ United Nations, "World's population increasingly urban with more than half living in urban areas," 10 July 2014, available at <http://www.un.org/en/development/desa/news/population/world-urbanization-prospects-2014.html>.

² Oomen & Baumgartel, 2014, pg 711-712.

³ Ibid.

⁴ *For example:* the Human Rights Cities movement, European Charter for the Safeguarding of Human Rights in Cities, Global Charter-Agenda for Human Rights in the City, Montreal Charter of Rights and Responsibilities, Mexico City Charter for the Right to the City, Gwangju Human Rights Charter, European Coalition of Cities Against Racism.

organizations. Some cities have even gone so far as to push their power past traditional limits by challenging national policies, and recent actions by local governments have demonstrated that the official limits to their authority specified in national law may not prevent them from having a significant impact on policy areas outside their competence, such as migration policy. As one advocate of such actions puts it, “Change does not happen by silver-tongued lawyers going into courthouses. The only way law changes is through disobedience,” and there is no reason this disobedience can’t come from local governments.⁵ This thesis seeks to further examine such actions of ‘municipal disobedience’ to uphold and protect the human rights of migrants.

1.1 Research Problem & Questions

The central hypothesis of this thesis is that local governments do have power to have a significant positive effect on the protection of migrants’ human rights. Focusing on the power and authority of local governments reveals the area of policy implementation as a key source of influence over policies beyond the usual competences of local governments, including migration policy. The aim of this study is to identify the significance of local governments’ contributions to the protection of migrants’ human rights by employing acts of ‘municipal disobedience’—a term that will be used to refer to the phenomenon of municipal governments challenging national policies through defiance. To reach this end, two main questions will guide the research:

- 1) How and why are local governments using their power to challenge national policies that restrict migrants’ human rights?
- 2) What does the impact of these local government actions reveal about the potential power of local governments to contribute to the protection of human rights?

1.2 Methodology & Scope

This thesis draws primarily from two main disciplines: public policy and human rights. Theories and concepts from both disciplines are discussed in the theoretical framework from the viewpoint that the combination of concepts from both disciplines is necessary to

⁵ Thomas Linzey, co-founder of Community Environmental Legal Defense Fund, in Yeoman, Barry, “Rebel Towns,” *The Nation*, 16 January 2013, available at <https://www.thenation.com/article/rebel-towns/>.

attain a more comprehensive understanding of local governments' role in human rights. Within these two disciplines, the research is qualitative, utilizing interviews, academic literature, legal and government documents, media, and political discourse.

In addition, this thesis uses two case studies for the empirical analysis, each focusing on a local government challenging national policies that restrict migrant's rights. Case studies were determined to be the most suitable method given the nature of the research questions. The cases of Utrecht (Netherlands) and San Francisco (US) were chosen as distinct yet complementary examples in order to gain insight into conditions that may allow for spread of or limit this phenomenon. Distinctions exist given the two different geographical contexts (Netherlands and the US), which have significant legal, political, and historical implications. Both of the chosen cases also involve a different degree of disobedience—Utrecht's local government openly and directly defies national law, while San Francisco's seems to be staying within the law (though this is an ongoing debate among scholars yet to be tested by the courts) but challenging federal policies nonetheless. Though the geographical contexts and degree of disobedience differ in each case, both local governments have taken similar actions to protect the rights of undocumented migrants in their communities with similar justifications. It is also important to note that Utrecht and San Francisco are far from the only two cases of such municipal disobedience to protect migrants' rights. Similar actions have been taken by the local governments, for example, in New York municipal ID program,⁶ Hamburg's urban visas,⁷ and Vienna's attempt to extend local voting rights to migrants.⁸

The same framework of analysis was applied to the two case studies. Since the question of power of local governments is at the core of this research, the cases are analyzed in terms of the power employed by both governments in each case by framing their actions in terms of the implementation gap theory. This theory and others outlined in the theoretical framework are used to analyze the origins of the conflict initiated by local governments, actions by both levels of government, motives of the local governments, and finally how the positive impact was achieved in each case. Conclusions are drawn regarding the local governments power to have a positive effect on rights locally, vertically, and horizontally with broader implications in terms of the research questions discussed in the final conclusions.

⁶ See: Barber, 2014, pg. 18.

⁷ Ibid.

⁸ See: Perching, 2004.

Though these case studies are not sufficient to achieve a comprehensive analysis of the phenomenon addressed by the research questions, they provide a basis for further research. This study does not aim to be comprehensive, but rather to serve as a point of departure for further investigation of other cases and the power of local governments to improve human rights protection.

1.3 Relevance of Research Topic

Within the field of human rights, local governments and sub-state actors have not traditionally received significant attention. Instead, research in this field tends to focus on the state and international levels. However, there appears to be increasing recognition of the role of sub-state actors and attention being paid to these actors in a growing body of research dedicated to human rights at the local level and human rights in cities, which will be considered at more length in Chapter 2 of this thesis.⁹ In addition, it seems local actors are increasingly engaging with human rights.¹⁰ Despite the recent research attention to human rights and sub-state actors, the existing literature is far from comprehensive, leaving much to be explored further. Much of the existing research has focused only on cities within the human rights cities movement and emphasized the role of civil society rather than local governments.¹¹ In addition, authors of the existing literature in the human rights field for the most part have not connected their research to the vast body of literature in the fields of political science, public policy, governance studies, and public administration or utilized concepts and approaches from these fields in their analyses. The lack of research on local engagement combining these political fields with the field of human rights forms a gap in the existing literature. One of the aims of this thesis is to contribute to filling this gap, since linking these two fields appears both valuable and even necessary to gain deeper insight in how far local governments can be understood as human rights actors.

Developing a better understanding of what drives local governments to engage with human rights could be a useful contribution to efforts to promote and protect human rights. This thesis focuses on a particular type of engagement in the form of local governments

⁹ See: Oomen & Baumgartel, 2014; Grigolo, 2010; De Feyter, 2006; Meyer, 2009; Marks & Modrowski, 2010; Shawki, 2011; Van Aarsen et al., 2013.

¹⁰ See: Oomen & Baumgartel, 2014, pg. 725; Grigolo, 2010, pg. 896.

¹¹ See: Marks & Modrowski, 2010; Van Aarsen et al., 2013.

challenging national policies that restrict migrant rights through municipal disobedience. This form of engagement was chosen because it requires local governments to have exceptionally strong motivations to take such bold stances on human rights. Focusing on this type of engagement with human rights should also provide insight into the power of local governments to affect human rights protection not just within their jurisdictions but also in other jurisdictions and nationally, which could have significant implications for human rights projects in the future and cooperation with civil society organizations, human rights institutions, and human rights defenders.

While this research aims to contribute to literature on human rights at the local level, this thesis specifically focuses on migrants' human rights. Both case studies center around the impact of national and local policies on specific rights of migrant groups. The focus is narrowed to migrants' rights rather than human rights generally, in part, for reasons of feasibility. In addition, migrants, especially undocumented migrants, are a vulnerable group and often lack protections for their rights no matter the geographical context.¹² Thus, gaining insight into methods of strengthening protections of their rights represents a pressing need.

Additionally, there are ongoing debates around the world at the moment over migration policies. These debates in Europe and the North America, the two regions of focus in the case studies, are interwoven with security concerns and largely center on developing stricter migration controls and deterrents. A study of migration policies in 45 countries around the world found there has been a "relative increase" of more restrictive policies specifically associated with socioeconomic and security concerns, since the 1990s.¹³ This has included a shift "towards more coercive (rights-depriving) measures focused on...irregular migrants."¹⁴ While these policy debates have mostly been focused at the national and international levels, migration also has a major impact on the local level. However, local governments often lack control in this area due to the division of competences of authority between national and local governments. For this reason, having power to affect changes in migration matters in their communities may be appealing for local governments. Given the trend of national governments imposing increasingly restrictive measures on migrants, migrants' rights may become even more compromised if this trend continues. For these reasons, it seems pertinent

¹² Dembour & Kelly, 2011, pg. 1.

¹³ De Haas, et al., 2014, pg 10-11.

¹⁴ Ibid.

to search for possible remedies to the expanding protection gap for migrants' human rights, in this case by assessing whether local governments can be an influential counter or mediating force to the lack of protections for this vulnerable group, with the threat surfacing in policy debates of even more restrictive national policies.

1.4 Structure of Thesis

The next chapter (Chapter 2) will outline the theoretical framework that provides a basis for the empirical research portion of the thesis. The theoretical framework is divided into two main sections, the first focusing on key concepts and theories from the fields of political science, public policy, public administration, and governance studies, while the second section focuses on important concepts from the field of human rights.

The two chapters following the theoretical framework include case studies focused on actions of municipal disobedience to improve the realization of migrants' human rights in two different contexts. The case study in Chapter 3 centers on the city of Utrecht and the local government's refusal to comply with a national law restricting shelter and services to rejected asylum seekers. The case study in Chapter 4 concentrates on the US city of San Francisco and the local government's policy of non-cooperation with federal enforcement of migration policies that the local government perceives as infringing on human rights. Both chapters will apply theories discussed in Chapter 2 by examining the nature of power and authority of the local and national governments in each context and analyzing actions of both levels of government as well as their motivations and impact through the lens of the implementation gap theory to gain insight into the power dynamics of each case.

Finally, the main conclusions of the research will be discussed in Chapter 5 in terms of the research questions of this thesis and the broader implications regarding the role of local governments in contributing to the protection of migrants' rights and human rights more generally. This final chapter will address the limits to local governments' power in this regard, make suggestions for further research, and include recommendations for other stakeholders in terms of how they might support local governments in taking on a larger role in the area of human rights.

CHAPTER 2

THEORETICAL FRAMEWORK

In order to address the research questions and understand the role of local governments in strengthening human rights, this thesis takes an interdisciplinary approach, primarily at the intersection of two broad fields: political and public policy studies and the field of human rights. Not a great deal of research has been done at the intersection of these two fields regarding the local level, but this chapter will outline concepts and theories of these two fields to analyze how the nature of local governments affects the reasons for their engagement with human rights; the authority and power of local governments; how local governments influence policy beyond their jurisdictions; various approaches to defining human rights and who benefits; what measures exist to protect access to human rights; the role of local governments and human rights; and how this role has been expanding. Though there has been some previous research into local governments challenging national policies in the political and public policy field and other research on local governments engaging with human rights in the human rights field, there appears to be a definite gap in connecting perspectives from these two fields. As stated in the previous chapter, one goal of this research is to fill this gap to achieve a more comprehensive understanding of the role of local governments in human rights.

2.1 Political & Public Policy Concepts

This section contains descriptions of crucial concepts and theories from the fields of political science, public administration, governance studies, international relations, and public policy that pertain to understanding local government; the nature and sources of power of local governments, especially in relation to policy implementation; and the capability of local

governments to influence policies in other jurisdictions through policy transfer and diffusion. The concepts and theories explored in this section provide a crucial basis for the analysis applied to the case studies in this thesis.

2.1.1 Distinguishing Local from National Government:

Examining the debate among scholars regarding the purpose, value, and characteristics of local government that distinguish it from other levels of government is vital to gain insight into the motivations that drive local governments to engage with human rights and participate in municipal disobedience, included in the first research question of this thesis. Within the debate over the nature and purpose of local government, scholars have identified several main arguments. Humes points to two “main purposes” of local governments: carrying out activities as ‘subdivisions’ of the state and providing an opportunity for local residents to achieve objectives of their choice.¹⁵ This dual purpose reflects the unique nature of local government, as part of the national government, tasked with bringing government to the people through implementing national policies, and bringing the people to government by representing local choice. John Stuart Mill put forth two main arguments for the ‘value’ of elected local government that continue to be asserted by scholars today: the ‘efficiency argument’ and ‘participation argument.’¹⁶ The efficiency argument proposes that local elected officials are better able to oversee local affairs because of their connection to and knowledge of the locality, as opposed to officials in the national government who do not have these qualities.¹⁷ The participation argument states that electing local officials offers wide opportunities for political participation and allows citizens practice and education on engaging with politics.¹⁸

It is a common argument that governments at the local level are more democratic than at the national level.¹⁹ This is related to the notion of local governments being closer to the people. Barkan explains, “...the closer representative government is brought to the citizens of a society, both spatially and physically, the more it approximates ‘real’ democracy. Conversely, the more distant and less accessible representative government is to the citizenry,

¹⁵ Humes, 1959, pg. 8.

¹⁶ Andrew & Goldsmith, 1998, pg. 107-108.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Hutchcraft, 2001, pg. 33.

the less it is democratic.”²⁰ This concept is often associated with Alexis de Tocqueville’s arguments of the 19th century.²¹ In addition to these two components, Kjellberg asserts the purpose of local government is also to “give local communities the liberty—or autonomy—to establish their own priorities.”²² Thus, qualities pertaining to efficiency, public participation, and local choice are essential characteristics that distinguish local governments from national governments.

Other scholars, like Barber, argue that local, specifically urban, governments have an increased significance in the current era, and that their unique nature provides potential for even greater value in the future. Related to the participation argument, Barber advocates that several aspects of local urban governments make them ideally positioned to protect human rights. Similar to the participation argument, he asserts, “democracy...[is] more effectively manifested in cities than at higher levels of government” making them the “ideal home” for human rights.²³ Barber also argues that local urban governments emphasize pragmatism more than national governments and deal with the practical reality of situations, allowing them to find solutions rather than ignoring problems like the national authorities.²⁴ Barber is among the increasing number of scholars raising challenges to the concept of the nation-state, and proposes city governments as an alternative,²⁵ and arguing, “when cities work democratically and effectively... rights can be secured in ways that global state no longer can guarantee.”²⁶ He cites examples of local governments in Los Angeles, New York City, and Bogota taking actions to address climate change, which can have a severe impact on rights, by significantly reducing citywide greenhouse gas emissions and wasted energy, while heads of state “cannot summon the will to work for a sustainable planet.”²⁷ These assertions by Barber, Mill, and others that local governments are particularly democratic, efficient, and pragmatic are significant to the analysis of the case studies, especially in understanding the motives that drive local governments as well as the broader understanding of potential for local governments to challenge national governments over policies that restrict human rights.

²⁰ Barkan 1998 in Hutchcraft, 2001, pg. 33.

²¹ Herrera, 2012, pg. 1-2.

²² Hutchcraft, 2001 pg. 45.

²³ Barber, 2014, pg. 18.

²⁴ Ibid., pg. 19.

²⁵ Darling, 2016, pg. 124.; *also see*: Taylor, 1995, pg. 58.

²⁶ Barber, 2014, pg. 22.

²⁷ Ibid., pg. 19-21.

2.1.2 Understanding Local Government Power & Authority:

The concepts of authority and power are essential to the questions at the core of this thesis, as the research centers around the power of local governments. The notions and theories of power and authority discussed in this section provides a basis to approach the analysis of the structure of legal authority of national and local governments in each case study. The implications of this structure and other factors on the power of each level of government will also be considered, enabling the question of how local governments are able to use their power to challenge national government policies to be addressed. First, to clarify the concepts, ‘authority’ can be defined as “a legal ability to make a decision.”²⁸ Power, on the other hand, can be defined as “the actual ability to influence the decision-making process”²⁹ or “the probability of an individual or group being able to exercise its will despite resistance.”³⁰ Government authority has a legal source, which dictates the powers that governments are authorized to exercise, but other factors affect the power of each level of government.

The legal sources of government authority, of course, vary by country, but generally serve the important tasks of clarifying the relationship between the levels of government and the extent and nature of their authority. The source of national government authority is normally the country’s constitution. The source of local government authority is sometimes also found in the country’s constitution, but may otherwise be mandated by a specific law or originate from an administrative decision by the national government.³¹ In terms of the relationship between national and local authority, there are two traditional models: vertical and horizontal.³² The vertical relationship, in which the local level is subordinate to the national level’s authority, is more common;³³ however, there are certain countries, such as the Netherlands, where the legal framework for government authority provides for a more horizontal relationship between the national and local levels, in which the levels of

²⁸ Humes, 1959, pg. 10.

²⁹ Ibid.

³⁰ Nash, 2010, pg. 35.

³¹ ICHRP, 2005, pg. 44.

³² Hartley, 1971, pg. 439-440.

³³ Miller, 2004, pg. 37.

government work more in partnership than in hierarchy.³⁴ Aside from clarifying the relationship between levels of government, the legal framework also generally specifies the extent and nature of the authority afforded to the government,³⁵ which may include the competences for each level of government and their specific branches as well as the limits on authority. These aspects will be analyzed in the case studies to understand the authority and power of the national and local governments.

For local governments, the legal framework should also include the degree to which they have autonomy as well as stipulations regarding accountability and subsidiarity.³⁶ The degree of autonomy and financing significantly affect the ability of local governments to effectively fulfill the competences of their mandate.³⁷ Moreover, the degree of autonomy is especially important in accomplishing local governments' unique dual role, discussed in the previous sub-section, as both an extension of the national government and a vehicle for local choice. Though the specific aspects of local government authority vary by country context, there has been a general shift in recent decades towards greater autonomy, altering the role of local governments globally.

Both the power and authority of local governments around the world have faced significant changes in recent decades, including both economic and social developments rooted in globalization.³⁸ One aspect of globalization is that “more people [are] on the move than at any time in human history,”³⁹ which has brought increased populations to cities,⁴⁰ giving city governments new importance as their constituencies have grown. Migration has also made cities more diverse and added social and economic challenges for local governments, including challenges related to social segregation and cohesion.⁴¹ Another aspect of globalization is the “relaxation of traditional inter-governmental relationships,” meaning greater autonomy for local governments.⁴² One component of this relaxation of relations is decentralization, which has been a growing trend in countries around the world for

³⁴ Dijkoff, 2014, pg. 279.

³⁵ ICHRP, 2005, pg. 44.

³⁶ Ibid.

³⁷ Ibid., pg. 44-45.

³⁸ Andrew & Goldsmith, 1998, pg. 102.

³⁹ OHCHR, 2014, pg 3.

⁴⁰ Oomen & Baumgartel, 2014, pg. 711-712.

⁴¹ Ibid.; Andrew & Goldsmith, 1998, pg. 104.

⁴² Pierre, 2011, pg. 122.

decades.⁴³ Decentralization includes the transfer of responsibilities and decision-making authority from central governments to local government, also referred to as devolution.⁴⁴ The assumptions behind devolution are similar to John Stuart Mill's assertions about local government discussed earlier, namely that local governments are efficient and increase political participation and transparency, while reducing corruption.⁴⁵ Decentralization and these arguments are also connected to the principle of subsidiarity, found at the roots of political systems in numerous contexts that emphasize the significance of the local level. Subsidiarity refers to the notion that "governmental decisions should be made as locally as possible to maximize accountability and the participation of those affected by particular issues."⁴⁶ The increased migration linked to globalization and the wave of decentralization have arguably brought increased power to local governments. However, these changes also present new challenges for local governments in terms of growing inequalities within communities and having to generate their own revenue, as in some cases to fulfill increased responsibilities without receiving increased funding from central governments.⁴⁷ While some scholars have argued increased decentralization can lead to regressive policies that may negatively impact rights,⁴⁸ this research focuses on how decentralized structures of increased local authority help enable local governments to strengthen protections for rights.

Though decentralization has shifted more responsibilities to local governments, both national and local governments retain distinct competences. Though these vary by context, national governments generally have unique competences in foreign policy and national security that are not shared by the local level. Local governments have traditionally played a major role in service delivery, delivering the bulk of welfare services in most countries.⁴⁹ Regardless of how many or which competences have been allocated to local governments, the national government retains the obligation to monitor and ensure accountability for national and local government actors.⁵⁰ There are certain tools related to the obligation to ensure

⁴³ Devas & Delay, 2006, pg. 677.

⁴⁴ Hutchcraft, 2001, pg. 30.

⁴⁵ ICHRP, 2005, pg. 15.

⁴⁶ Nash, 2010, pg. 202.

⁴⁷ ICHRP, 2005, pg. 45.

⁴⁸ See: Koff, 2007.

⁴⁹ Pierre, 2011, pg. 147.

⁵⁰ ICHRP, 2005, pg. 44, 71-72.

accountability that national governments have in order to achieve this task.⁵¹ These tools vary by country context and allow national governments to interfere with local actions to some degree. One such tool, stemming from the national government's control over financial resources, is the denial of funding as a penalty.⁵² Other monitoring and enforcement tools may include the ability to unseat local officials.⁵³ This ability of the national government to penalize or interfere with actions of local authorities is representative of the distinctive hierarchical authority of national and local governments.

2.1.3 Policy Implementation as an Important Area for Local Government Power:

Though the legal authority of national and local governments may separate them in terms of hierarchy or areas of competence, both the local and national governments have some authority involved in the implementation of national policies. Since this is one area that requires cooperation between the national and local levels, it presents an opportunity for local governments to attempt to exert power and influence national policies in areas outside their legal authority. As this research is focused on local government challenges to national policies, policy implementation and theories pertaining to non-cooperation are central to analyzing the situations of conflict between government levels and exercise of power in the case studies.

While scholars used to perceive the implementation process as apolitical and straightforward, over the last few decades, research into problems that arise in the policy implementation process has led to the development of numerous theories regarding the process and necessary conditions for successful implementation.⁵⁴ It is evident that during the implementation process, policies become reformulated and may reach outcomes other than those expected by policy-makers.⁵⁵ Scholars have termed this mismatch between what is realized through the implementation process and what was expected the 'implementation gap' phenomenon. Many theories have been developed to explain this gap, some of which relate to interests and incentives of actors involved, such as conflicts arising from incompatible

⁵¹ Hutchcraft, 2001, pg. 29.

⁵² See: King, 1987.

⁵³ Hutchcraft, 2001, pg. 29.

⁵⁴ Radboud Universiteit Nijmegen School of Management, "Implementation: Putting Policy into Practice," available at <http://www.ru.nl/publicadministration/research/our-research-0/read-more/>.

⁵⁵ Ibid.

organization missions of stakeholders; political interference; and insufficient incentives for stakeholders to make choices consistent with the original policy objectives.⁵⁶ Others have pointed to the lack of delineating clear responsibilities for each stakeholder involved in the implementation process as a key to the implementation gap.⁵⁷ This leads to ambiguity in roles and raises difficulties for accountability; however, the original objectives of the policy itself or the means for implementation may also be ambiguous.⁵⁸ Combined with the possibility of divergent interests or political agendas of local and national government officials, such room for discretion could present serious problems for the implementation of national policies.

Matland has focused on issues of ambiguity and conflict to explain the implementation gap and has developed a framework to analyze a policy's level of ambiguity and conflict.⁵⁹ He explains conflict as arising from the interdependence of actors with interests at stake who have incompatible objectives.⁶⁰ This conflict in goals and interests leads to bargaining and 'coercive methods' in attempts to eliminate the conflict; however, Matland asserts that the capacity to resolve a conflict depends on the degree of incompatibility.⁶¹ His analysis yielded four models with varying degrees of ambiguity and conflict: administrative implementation (low ambiguity, low conflict), political implementation (low ambiguity, high conflict), experimental implementation (high ambiguity, low conflict), and symbolic implementation (high ambiguity, high conflict), seen in his matrix below.⁶²

⁵⁶ Weaver, 2010, pg. 14-16.

⁵⁷ Nadgrodkiewicz, et al., 2012, pg. 14.

⁵⁸ Matland, 1995, pg. 158.

⁵⁹ Ibid., pg. 155.

⁶⁰ Ibid., pg. 156.

⁶¹ Ibid., pg. 156-157.

⁶² Ibid., pg. 160-170.

		CONFLICT	
		Low	High
AMBIGUITY	Low	<p><i>Administrative Implementation</i></p> <p>Resources</p> <p>Example: Smallpox eradication</p>	<p><i>Political Implementation</i></p> <p>Power</p> <p>Example: Busing</p>
	High	<p><i>Experimental Implementation</i></p> <p>Contextual Conditions</p> <p>Example: Headstart</p>	<p><i>Symbolic Implementation</i></p> <p>Coalition Strength</p> <p>Example: Community action agencies</p>

Figure 1: Matland's Ambiguity-Conflict Matrix⁶³

For the case studies in this thesis, the ‘political implementation’ model is most relevant, given the circumstances in each case as will be described in detail in the respective chapters. Regarding political implementation, Matland says, “The central principle...is that implementation outcomes are decided by power.”⁶⁴ In this model, implementation requires one actor having enough power to overcome those that disagree or having ample resources to come to an agreement through bargaining.⁶⁵ When applied to national and local government cooperation on implementation, the national government may use tools to ensure local accountability, like those mentioned in the previous subsection (related to financial penalties and removing local officials); however, these are not guaranteed to bring about local compliance. In a study of two political implementation conflicts between a US federal agency and a state government institution where sanctions were used as a coercive measure, the sanctions were only found to be effective when they threatened the ‘central mission’ (or mandate) of the state government institution.⁶⁶ This reflects the challenges of executing effective coercive or bargaining measures to address non-compliant local governments even

⁶³ Ibid., pg 160.

⁶⁴ Ibid., pg. 163.

⁶⁵ Ibid., pg. 164.

⁶⁶ Ibid., pg. 164.

when the national government unquestionably has more authority over an issue, which relates back to the distinction between authority and power discussed previously. Indeed, Matland concludes that in cases of substantial conflict and ambiguity, local actors “dominate the process” through actions that can be characterized as “highly political.”⁶⁷ This view has been supported by others, including Nadgrodkiewicz et al., who noted, “When local political forces do not see an incentive to implement a given law, that law will remain on paper only.”⁶⁸ Following these scholars, while national governments may have greater legal authority, local governments may have more power.

The implementation gap theory and, specifically, Matland’s model of political implementation gaps stemming from conflict will be used as a framework to analyze the situations of municipal disobedience in each of the case studies. This model provides a useful tool to analyze the conflict between the local and national governments, the coercive actions taken by both sides that rely on their power, and the motivations (or objectives) driving the local governments to engage in the conflict. Other scholars, like Versteegt and Maussen and Kos et al., have shown the usefulness of the implementation gap theory to analyze the refusal of local governments to fulfill their role in implementing national policies as well as the power of local governments, through creating implementation gaps, to influence national policy.⁶⁹ This thesis will add to research of these scholars by analyzing the human rights implications of municipal disobedience through political implementation gaps.

2.1.4 Norm & Policy Diffusion: How Local Governments Can Influence Policies Beyond Their Jurisdictions

In order to analyze the power of local governments to improve the conditions for human rights outside their jurisdictions on a horizontal level, the process of how policies and ideas are transferred from one local government to another is also considered in this thesis, as part of the overall assessment of local government power to improve conditions for human rights by challenging national policies.

Norm and policy diffusion is one approach to explaining how ideas and policies can be spread between local governments. It is closely connected to constructivism, which is

⁶⁷ Ibid., pg. 171.

⁶⁸ Nadgrodkiewicz et al., 2012, pg. 14.

⁶⁹ See: Versteegt & Maussen, 2012; Kos et al., 2015.

based on the assumption that shared ideas and beliefs are key to understanding human interaction.⁷⁰ Diffusion denotes “the spread of something within a social system” and involves both a “source” and an “adopter.”⁷¹ In their research on the diffusion of international norms to domestic contexts, Finnemore and Sikkink propose a norm ‘life cycle,’ involving three stages: norm emergence, norm cascade, and internalization.⁷² For the first stage, ‘norm entrepreneurs’ motivated by altruism, empathy, or an ideational commitment advocate for the adoption of new norms.⁷³ As some become convinced, those ‘norm leaders’ influence more actors to embrace the new norms through socialization, causing the second stage of the ‘norm cascade’ to ensue.⁷⁴ Finnemore and Sikkink note that the motives for actors to adopt the norms during the second stage vary, but they argue pressures related to conformity, enhancing legitimacy, reputation, and self-esteem enable the norm cascade.⁷⁵ After the cascade, norms become taken for granted.⁷⁶ Skawki uses similar terms to explain the incorporation of international norms into local norms, referring to the actors who initiate the process as ‘translators’ rather than entrepreneurs since they must not only advocate for the new norm but also translate it from an international context to be appropriate for the local context.⁷⁷

Though these theories were developed to explain the diffusion of international norms to national and local contexts, the same principles can be applied to the horizontal spread of norms, for example from one local government to another. If officials in one municipal government get the idea that every resident should receive a minimum basic income and adopt this idea through policy, this local government may serve as a ‘norm entrepreneur’ by advocating its new policy to other local governments. If several other municipalities are persuaded to adopt similar policies tailored to their specific local contexts, more municipalities may follow suit, causing a ‘norm cascade.’ These municipal governments may adopt the norm or policy because they are under pressure to conform, are concerned for their reputation, or recognize potential practical and positive outcomes by adopting the policy. If

⁷⁰ Shawki, 2011, pg. 2.

⁷¹ Ibid.

⁷² Finnemore & Sikkink, 1998, pg. 895.

⁷³ Ibid., pg. 895, 898.

⁷⁴ Ibid., pg. 895.

⁷⁵ Ibid. pg. 895, 898.

⁷⁶ Ibid., 1998, pg. 895.

⁷⁷ Shawki, 2011, pg. 3.

enough municipalities adopt a basic income policy, then this will simply become standard and accepted at a certain point.

This process of ideas in the form of policies spread from one government to another is known as policy diffusion or policy transfer.⁷⁸ Both terms refer to the borrowing of policy concepts.⁷⁹ One finding that emerged from research in this area is the significance of ‘policy entrepreneurs’ (or translators) and informal policy communities in promoting policies, such as the federal government assisting diffusion of policies among US states or the UN promoting diffusion of norms and policies among member states.⁸⁰ When applied to horizontal diffusion among local governments, regional governments or local government networks and organizations might fill this role.

Mossberger and Wolman argue that one reason policy-makers engage in policy transfer is because they are able to evaluate the policy before adopting it themselves, which they refer to as “prospective policy evaluation.”⁸¹ In other words, policy transfer is “a form of decision-making by analogy.”⁸² They note a variety of formal and informal ways that officials engage in this type of policy evaluation, ranging from conducting formal social experiments and microsimulations to asking for testimony, advice, and personal anecdotes.⁸³ One motivation for policy-makers to engage in policy transfer is that this practice reduces uncertainty and risk of an implementation gap, thus increasing the likelihood the policy will succeed.⁸⁴ Mossberger and Wolman indicate three steps in the ‘prospective policy evaluation’ process: awareness, assessment, and application.⁸⁵ Though it may seem intuitive, the key for this policy transfer process to be initiated is for policy-makers to become aware of what their counterparts in other contexts are doing. Conferences, networks, and membership in organizations can therefore be crucial in facilitating the policy transfer process, as they allow for the exchange of ideas. In addition to these three steps, Mossberger and Wolman also emphasize the need for identifying differences in contexts and adequately accounting for

⁷⁸ Mossberger & Wolman, 2003, pg. 429.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid., pg. 428.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid., pg. 429.

⁸⁵ Ibid., pg. 430-431.

those differences when applying the policy to their local context.⁸⁶ In other words, it is essential for policy-makers to adapt the policy when transferring it from another context rather than simply duplicate it.

While Mossberger and Wolman focus on cross-national policy transfer,⁸⁷ the same concepts may be applied to transfer and diffusion horizontally on the local level. Lozner has studied the policy diffusion process specifically in terms of US municipal governments adopting the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁸⁸ She cites “communication and information pooling” between actors in San Francisco and in other localities as initiating the policy transfer.⁸⁹ Like Mossberger and Wolman, she emphasizes the need for adapting policies to local contexts rather than simply replicating one city’s policy elsewhere.⁹⁰ The spread of San Francisco’s CEDAW ordinance, first from the international level to San Francisco and then from San Francisco’s local government to other local governments serves as an example of the spread of ideas and policies both horizontally among local governments and vertically between various levels of government. It follows that if one municipality has a good, effective idea, others, upon becoming aware, will assess whether their community could also benefit from such an idea, and if so, adopt their own adaptation of the policy locally.

These theories relating to how norms and policies spread between governments suggest that local governments do have power to influence policies beyond their own jurisdiction through norm diffusion and policy transfer. They provide a framework to analyze whether and how the local governments have demonstrated power to exert such influence. Using the theories of Finnemore and Sikkink, Shawki, Mossberger and Wolman, and Lozner as a basis, the case studies will consider whether the local governments have acted as norm/policy entrepreneurs and what activities they have engaged in to enable or encourage diffusion.

2.2 Human Rights Framework

⁸⁶ Ibid., pg. 431-435.

⁸⁷ Ibid., pg. 428-429.

⁸⁸ Lozner, 2004, pg. 790-799.

⁸⁹ Ibid., pg. 799.

⁹⁰ Ibid., pg. 770-771.

While the previous section outlined theories and concepts crucial for the analysis of actions of the local and national governments as well as their power in the case studies, the following section will provide greater context regarding the connection of human rights to this research. A brief consideration of the migrants' human rights, as well as measures in place to ensure protection of human rights, is essential to establish the significance of local governments as a powerful actor in strengthening the protection of human rights. In addition, the recent developments in increased localization of human rights and previous research conducted on local engagement with human rights are also relevant and will be elaborated on in this section.

2.2.1 Multiple Approaches to the Concept of Human Rights:

There is no singular and agreed on definition of 'human rights;' instead, human rights can be approached from a number of directions. Human rights are often viewed from a 'legal-positivist' approach,⁹¹ or what Grigolo terms the 'dominant version' of human rights, in which human rights are viewed as a set of norms and institutions defined in law with the universality and equality of rights is emphasized.⁹² This thesis draws on elements of this approach by accounting for the legal basis of the rights in the case studies that have been firmly established in international human rights norms. The universality of rights is also considered in the following section as applied to migrants. In contrast, the social constructivist approach conceives of human rights as "social facts" contingent on and a product of a particular social context.⁹³ This departs from human rights as an abstract concept, towards human rights as practice—something social actors produce and engage with—stressing the role of actors, their agency, and the possibility for them to produce new meanings of rights.⁹⁴ This conception of rights is influential as this thesis focuses on the agency of local governments as well as the relations between governmental actors in shaping the understanding and the protection of rights in their countries. This research aims to take a more practical approach to human rights by examining real-world cases, rather conceiving as than human rights in the abstract.

⁹¹ Oomen, 2016, pg. 4.

⁹² Grigolo, 2016, pg. 278.

⁹³ Oomen, 2016, pg. 4; Grigolo, 2010, pg. 897.

⁹⁴ Grigolo, 2016, pg. 278.

2.2.2 The Human Rights ‘Protection Gap’ for Migrants:

According to the notion of universality of human rights enshrined in the Vienna Declaration, all human rights are inherent to all human beings and applicable everywhere.⁹⁵ This implies that migration or residence status, citizenship, and national origin should not influence rights. Article 2 of the Universal Declaration of Human Rights (UDHR) makes it clear that the rights set out in it should apply to *everyone*. The International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR) similarly oblige state parties “to respect and to ensure to *all individuals* within its territory and subject to its jurisdiction the rights recognized” in the treaties.⁹⁶ The UN Committee on ESC Rights further clarified whether rights in the ICESCR apply to migrants in a general comment, noting, “The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”⁹⁷ States may have further obligations to non-nationals through other international and regional human rights instruments that contain similar provisions, such as the Convention on the Rights of the Child (CRC), Convention for the End of All Forms of Discrimination Against Women (CEDAW), European Convention of Human Rights (ECHR), African Charter on Human and Peoples’ Rights, and the American Convention on Human Rights.⁹⁸ Thus, under international human rights law, states are obligated to extend rights, with the exception of certain political rights, to all people within their jurisdiction, including migrants regardless of their status.⁹⁹ Moreover, there are instruments providing additional protections and rights to refugees, including the UN Convention Relating to the Status of Refugees and the Geneva Convention, which include many of the same rights guaranteed in the ICCPR and ICESCR as well as extra protections specific to the situation of being a refugee, such as prohibiting states from expelling refugees who are lawfully in the country.¹⁰⁰ Significantly, the protections of these instruments only apply to refugees and not to all migrants.

⁹⁵ Vienna Declaration and Programme of Action, 1993, Part I, para. 5.

⁹⁶ ICCPR, Article 2; *also see*: ICESCR, Article 2.

⁹⁷ UN CESCR, General Comment No. 20, 2009, para. 30.

⁹⁸ Mattila, 2001, pg. 56.

⁹⁹ IPU et al., 2015, pg. 38.

¹⁰⁰ UN Convention Relating to the Status of Refugees, Article 32.

Despite the fact that it is widely accepted that migrants are protected under international human rights standards¹⁰¹ and that states are obliged to protect the rights of all human beings residing in their territory,¹⁰² migrants generally have ‘problematic access’ to human rights.¹⁰³ Though there are many different forms of migration, affording some migrants more power and resources than others, migrants commonly face difficulties in exercising their rights.¹⁰⁴ The UN has recognized that undocumented migrants face disproportionate violations of their human rights, including the right to health care, housing, social security, work as well as freedom of association and principle of non-discrimination.¹⁰⁵ One UN publication also notes, “obligations on officials to report such migrants to the police or immigration authorities can have a serious effect on their enjoyment of ESC rights.”¹⁰⁶ Mattila refers to this mismatch of human rights protection in principle and practice as a ‘protection gap,’ and explains its sources in terms of political, social, and economic obstacles.¹⁰⁷ According to Mattila, these obstacles include states’ imposition of restrictions in the application of human rights norms to citizens or nationals when incorporating international standards into domestic law, social segregation and “scapegoating of migrants for domestic social and economic purposes,” and employment discrimination.¹⁰⁸ Dembour and Kelly boil the protection gap down to a “tension between law and ethics” and assert that this gap in protection for migrants’ human rights “is noticeable in respect for all of the rights which are recognized in human rights law.”¹⁰⁹

Based on the findings, it seems clear that the principle of universality of human rights is failing to include migrants. In other words, “migrants may have their rights protected in the abstract, but their everyday lives are testimony to a very different set of experiences.”¹¹⁰ The high risk that migrants, especially those without documents, are not be able to enjoy their human rights points to the significant need for strengthening the protections of migrants’ human rights in an attempt to fill the protection gap.

¹⁰¹ Dembour & Kelly, 2011, pg. 3.

¹⁰² Mattila, 2001, pg. 53.

¹⁰³ Dembour & Kelly, 2011, pg. 11.

¹⁰⁴ Ibid., pg. 5.

¹⁰⁵ OHCHR, 2014, pg. 9-10.

¹⁰⁶ IPU et al., 2015, pg. 96.

¹⁰⁷ Mattila, 2001, pg. 53.

¹⁰⁸ Ibid., pg. 59.

¹⁰⁹ Dembour & Kelly, 2011, pg. 3.

¹¹⁰ Ibid., pg. 1.

2.2.3 Measures in Place & Actors Obligated to Protect Human Rights:

To better understand the context of the protection gap for migrants' human rights and what need exists for further strengthening human rights protections, it is necessary to consider what instruments and mechanisms already exist and the extent to which various actors are obligated to protect human rights. Outlining the systems to protect human rights and the shortcomings of these systems will help establish what kind of change is needed and show the significance of recognizing sub-state actors, like local governments, that have the potential to improve the protection of human rights. It is also essential to account for the instruments, mechanisms, and legal obligations in the context of each case study in order to analyze the human rights impact of relevant policies and actions of the local and national governments.

In the case study countries (Netherlands and US), international obligations, derived from numerous UN human rights treaties and regional human rights instruments, contribute to the protection of rights. In Europe, regional instruments include the ECHR, European Social Charter (ESC), and the Charter of Fundamental Rights of the European Union. Though the US is part of the Inter-American human rights system, the only regional human rights instrument the US has ratified is the American Declaration on the Rights and Duties of Man; however, the US does not recognize the document as legally-binding.¹¹¹ Along with these international and regional instruments, there are additional mechanisms to monitor and ensure compliance. At the international level, some mechanisms include complaints procedures and universal periodic review through which UN bodies investigate and monitor countries' compliance with obligations. Similar mechanisms exist at the European regional level, such as the European Committee on Social Rights (ECSR), a quasi-judicial treaty-body that oversees a complaints mechanism with no direct legal authority over states. The US is subject to the Inter-American Commission on Human Rights (IACHR), which adjudicates complaints of alleged violations of the American Declaration and issues recommendations to states, but like the ECSR, the IACHR lacks enforcement authority.¹¹² Though the rulings and comments issued by quasi-judicial bodies like the ECSR, IACHR, and the UN treaty-bodies lack a

¹¹¹ See: Response of the Government of the US to the IACHR Report 85/00 of October 23, 2000 Concerning Mariel Cubans (Case 9903), Summary Response, Article 1(2).

¹¹² Pakkala, Christine, "U.S. and the Inter-American Human Rights System Symposium," *Columbia Law School*, 2008, available at https://www.law.columbia.edu/media_inquiries/news_events/2008/april2008/Interamerican.

binding legal basis, they still contribute to human rights protection by clarifying obligations among other points and being available as sources which traditional judicial bodies may draw on when issuing fully binding decisions. The decisions produced by these treaty-bodies also may contribute to political pressure and affect public opinion through media attention, which may influence states' approach to their human rights obligations.¹¹³ In addition, some mechanisms exist that have legal force, such as the European Court of Human Rights (ECtHR), which receives complaints of alleged violations of the ECHR and issues decisions that are binding on states. Besides the ECtHR and ECSR as important sources of human rights protection for European countries (like the Netherlands), membership in the European Union also has significant implications for rights as well as migration policy, given the supremacy of EU law imposed on all member states, including e.g. the anti-discrimination directives, and unified migration law such as the 2008 Return Directive.¹¹⁴ As the US is not subject to an international human rights court or other mechanism with binding enforcement authority, there is a lack of accountability for its international human rights obligations. US domestic courts provide the only legally-binding mechanisms for rights in the country, though, of course, they only have authority to enforce rights-obligations found in US law.

The actors (duty-bearers) that are bound to provide for human rights through human rights instruments and domestic law and subject to the mechanisms, mentioned above, are another significant component of the overall system of protection for human rights. States are recognized as the traditional duty-bearers in human rights, though other actors have also been recognized as having obligations. Generally, human rights obligations require actors to respect, protect, and fulfill rights.¹¹⁵ These levels of obligation relate to actors' positive and negative obligations. Positive obligations refer to actions states must take in order to prevent rights from being violated, while negative obligations refer to actions actors must refrain from taking in order to avoid infringing on rights. Despite the legal obligations placed on states regarding human rights, some scholars, like Barber, argue that states are increasingly failing to meet their obligations.¹¹⁶ Based on this failure or refusal to uphold their obligations, Barber asserts the need for other actors to take on states' obligations, and he proposes local urban

¹¹³ Ibid.

¹¹⁴ Directive 2008/115/EC.

¹¹⁵ OHCHR, "International Human Rights Law," available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>.

¹¹⁶ Barber, "The Role of Cities and Mayors in Empowering Rights Holders," 2016.

governments as the best solution based on their strong democratic and pragmatic nature, as discussed previously. Though Barber suggests local governments as actors ideally positioned to take on human rights obligations, local governments have not traditionally been recognized as significant actors in the field of human rights. While the role of non-state actors, such as businesses and NGOs, has been prevalent in the human rights field for some time, local authorities represent a “new kid on the block,” as Oomen puts it, in terms of recognition of their role in the realization of human rights.¹¹⁷

Though ‘states’ as duty-bearers in traditional human rights discourse refers to the national government,¹¹⁸ local governments are also implicated in a state’s human rights obligations. The International Council on Human Rights Policy explains this transfer of obligations as occurring in two ways: through local governments being a “constituent element of government” and through the decentralization of powers from national to local governments.¹¹⁹ Oomen and Baumgartel argue that local governments are generally bound by a state’s international obligations, though, according to them, this assumes the right is justiciable and that it can be claimed in the country given its specific legal system.¹²⁰ They assert Article 28 of the UDHR, which entitles everyone to a social and international order that allows their rights to be realized, as providing a basis for local authorities sharing states’ obligations as duty-bearers.¹²¹ There is also case law to support this viewpoint. The ECtHR found that obligations binding on a “government organization” in international law “cannot be held to refer only to the government or the central organs of the State” and apply to whichever authority is “exercising public functions” in instances of decentralization.¹²² Similarly, the Court of Justice of the European Union (CJEU) has ruled that obligations imposed by EU law not only apply to the national level but to “all organs of the administration, including decentralized authorities such as municipalities.”¹²³

Though there seems to be consensus that local authorities share responsibilities of states’ human rights obligations,¹²⁴ they do not play the same role as the national government.

¹¹⁷ Oomen, 2015, pg. 403.

¹¹⁸ ICHRP, 2005, pg. 20.

¹¹⁹ Ibid.

¹²⁰ Oomen & Baumgartel, 2014, pg. 720.

¹²¹ Ibid., pg. 720-721.

¹²² *Assanidze v. Georgia*, no. 71503/01, Judgment (ECtHR, 2004), para. 148.

¹²³ *Fratelli Costanzo SpA v. Comune di Milano*, no. 103/88, Judgment (CJEU, 1989), para. 31.

¹²⁴ Meyer, 2009, pg. 9.

The national government holds the primary responsibility for international human rights obligations as the signatory of human rights treaties.¹²⁵ However, in recent years, there has been growing recognition of the importance of local authorities in this context.¹²⁶ Oomen and Baumgartel go so far as to say, "...[L]ocal governments might well be one of the most prominent actors in human rights implementation in the future."¹²⁷ The need to strengthen human rights protections has been evidenced by a significant protection gap for migrants' human rights and argued by Barber in his view of the failing nation-state. This need for protection underscores the reason for this research and the potential importance of local governments proving to be an effective contributor to human rights' protection. This thesis seeks to support the assertions of Barber, Oomen, and other scholars who are championing local governments and cities as crucial to the future of human rights.

2.2.4 Recent Developments in Local Engagement With Human Rights:

To establish the research context of this thesis, this subsection will provide an overview of previous research on local engagement with human rights and existing theories to explain why and how local actors are becoming involved with human rights. Local actors' engagement with human rights is often framed in terms of the 'localization' of human rights, which relates to the process of international human rights norms being adapted to a local context.¹²⁸ There are several distinct approaches to localizing human rights, negotiating the interaction of the international and the local. One approach involves local government authorities applying international standards directly to their local context.¹²⁹ Essentially, this means local standards and problems are re-shaped according to international human rights standards. One increasingly common example of taking this kind of internationally-centered approach to localization is the phenomenon of local governments adopting UN human rights instruments into their local laws. San Francisco's local government adopting the entirety of CEDAW into local law is one of the most frequently referenced examples of this.¹³⁰ By adopting CEDAW—rather than draw on norms within the local community—San Francisco's

¹²⁵ ICHRP, 2005, pg. 53.

¹²⁶ Oomen, 2015, pg. 403.

¹²⁷ Oomen & Baumgartel, 2014, pg. 709.

¹²⁸ Shawki, 2011, pg. 1-2.

¹²⁹ Van Aarsen et al., 2013, pg. 13-14.

¹³⁰ *See*: Oomen & Baumgartel, 2014, pg. 719-720; Van Aarsen et al., 2013, pg. 13; Shawki, 2011, pg. 5.

local government imposed international norms on the city, requiring all local policies to comply with international standards in order to combat discrimination against women. This example further demonstrates that city officials may choose to focus on one or a few types of rights, in this case women's rights and discrimination, or they may choose to develop a more all-encompassing human rights framework to apply more broadly.¹³¹

Another approach to localizing human rights entails modifying international standards to fit the local context.¹³² Rather than adapting local standards to meet standards set internationally, the local context is used as the central starting point—termed ‘vernacularization’.¹³³ One example of vernacularization is the Mexico City Charter for the Right to the City adopted in 2010, which reframes many international human rights norms under the umbrella of the collective and individual ‘right to the city’ in order to address local problems of exclusion and inequality, among other social and economic issues.¹³⁴ Though this charter includes many international human rights standards, they are reframed in terms specific to the local context, such as those connected to the historical context of neoliberalism, globalization, and the indigenous peoples of the community.¹³⁵ Other cities such as Montreal, Canada and Gwangju, South Korea have adopted similar city charters adapting human rights norms to their local contexts.¹³⁶ Another example of this type of approach re-shaping international norms to a local context can be found in Rosario, Argentina, where the local government, in cooperation with civil society, signed a declaration making it the first ‘human rights city’.¹³⁷ This was the result of a diverse array of stakeholders in Rosario working together to develop an action plan, drawing on international human rights norms, to address pressing needs in the city.¹³⁸ This plan included promoting human rights education and capacity-building, combatting discrimination, addressing environmental issues, and reducing social exclusion.¹³⁹

The case of Rosario, as well as many other cities engaging with human rights, is

¹³¹ See: Mexico City Charter on the Right to the City and Gwangju Human Rights Charter.

¹³² Van Aarsen et al., 2013, pg. 13.

¹³³ Ibid., pg. 12-14.

¹³⁴ See: Mexico City Charter on the Right to the City, 2010, preamble.

¹³⁵ For example see: Ch.2 Article 2.2 and Article 3.2.4.

¹³⁶ See: Montreal Charter of Rights and Responsibilities and Gwangju Human Rights Charter.

¹³⁷ Marks & Modrowski, 2010, pg. 113.

¹³⁸ Ibid.

¹³⁹ Ibid., pg. 115-118.

closely related to transnational networks and movements of local governments and civil society groups focused on engaging with human rights. One such network is among ‘human rights cities’ led by the People’s Movement for Human Rights Education (PDHRE). PDHRE is a non-profit organization that developed a community-driven framework for cities to become human rights cities,¹⁴⁰ which they define as “community-based initiatives, locally conceived and directed by local groups around the world, which combine participation, empowerment and social change with international solidarity based on agreed principles of human rights education and sustainable development.”¹⁴¹ Rosario was the first city to adopt the PDHRE framework, and since then, cities across the world have followed, including Graz, Austria; Edmonton, Canada; Kati, Mali; and Nagpur, India.¹⁴² Their framework includes creating a steering committee with representatives from all stakeholders, drafting and implementing an action plan, evaluating all activities, and working to share experiences with other cities and encourage other cities to take similar actions.¹⁴³ PDHRE maintains a network with representatives in over 60 countries,¹⁴⁴ enabling stakeholders to gain knowledge from the organization’s expertise and for cities around the world to share knowledge and cooperate.

Rather than being focused on practices, other networks of local representatives have worked to develop new human rights instruments for the local level. At the regional level, for example, the European Charter for the Safeguarding of Human Rights in the City is a document that developed out of the cooperation between European cities after Barcelona organized a conference for the 50th anniversary of the UDHR.¹⁴⁵ Over 400 European cities have signed the charter, which, building on the UDHR and ECHR, puts forth provisions to address the need for “certain rights [to] be more clearly defined” and to “acknowledge new issues, such as respect for the environment, the guarantee of healthy food, the matter of tranquility and the opportunity for social exchange and leisure.”¹⁴⁶ The necessity of creating a new charter is further asserted by declaring, “the city is now where the future of mankind lies”

¹⁴⁰ Though PDHRE originated the term ‘human rights city,’ this term has taken on broader meaning and is frequently applied to cities engaging with human rights in different forms without a singular, agreed-upon definition; *see*: Van Aarsen et al., 2013, pg. 28-29; Oomen & Baumgartel, 2014, pg. 710.

¹⁴¹ *Ibid.*, pg. 39-40.

¹⁴² PDHRE, “Human Rights Cities—A Practical Way to Learn and Chart the Future of Humanity,” available at <http://www.pdhre.org/projects/hrcommun.html>.

¹⁴³ Marks & Modrowski, 2010, pg. 47-50.

¹⁴⁴ PDHR, “About PDHRE,” available at <http://www.pdhre.org/about.html>.

¹⁴⁵ European Charter for the Safeguarding of Human Rights in the City, 2000, pg. 6.

¹⁴⁶ *Ibid.*, pg. 8.

and specifically addresses this notion in the regional context by stating, “in the view of the concern over European bureaucracy, the city emerges as a possible new political and social space.”¹⁴⁷ This regional project, emerging from cooperation initiated by city officials, influenced an international effort to create a similar charter on a global level through the Committee on Social, Inclusion, Participatory Democracy and Human Rights (CISPD) of the United Cities and Local Governments (UCLG).¹⁴⁸ UCLG is the largest network of local officials in the world,¹⁴⁹ and though it deals with areas other than human rights, human rights have been incorporated into its agenda.¹⁵⁰ This network aims to “foster political debate, exchange of experiences and the collective generation of new knowledge.”¹⁵¹ It does so through organizing debates and conferences, offering access to case studies to demonstrate best practices, providing communication tools and ‘institutional coordination’ of city networks, and promoting the European cities charter and Global-Charter Agenda for Human Rights in the City.¹⁵² Based on the sheer number of cities involved in them, networks of local officials, such as these, seem to play an important role in the localization of human rights by giving local actors tools and expertise to implement human rights initiatives locally and serving as platforms for local officials to exchange ideas and practices.

Aside from local actors cooperating with each other on human rights issues, there has also been greater inclusion of local actors in major international organizations. UNESCO established a network of cities in order to address racial discrimination called the International Coalition of Cities Against Racism.¹⁵³ The EU Fundamental Rights Agency engages directly with local authorities through its joined-up governance approach.¹⁵⁴ Direct cooperation between local authorities and international or supranational organizations bypasses states—the traditional actor at the international level—and allows international actors to work with actors that are “more often in a position to directly realize...rights” in part due to their

¹⁴⁷ Ibid.

¹⁴⁸ UCLG CISDP, “Global Charter-Agenda for Human Rights in the City,” available at <http://www.uclg-cisdp.org/en/right-to-the-city/world-charter-agenda>.

¹⁴⁹ Kervella, Guy, “Unification of IULA and UTO creates largest international local government association” in *City Mayors*, available at <http://www.citymayors.com/orgs/unitedcities.html>.

¹⁵⁰ Oomen & Baumgartel, 2014, pg. 717-18.

¹⁵¹ UCLG CISDP, “Mission,” available at <http://www.uclg-cisdp.org/en/committee/mission>.

¹⁵² Ibid.

¹⁵³ ECCAR, “International Coalition of Cities Against Racism,” available at <http://eu-ecar.eu/index.php?id=6>.

¹⁵⁴ Oomen & Baumgartel, 2014, pg. 719.

increased authority as a result of decentralization.¹⁵⁵ This cooperation demonstrates the recognition at the international level of the important role of local governments in addressing issues of rights and discrimination.

Local engagement with human rights has been recognized as an increasing development in the human rights field,¹⁵⁶ and there has also been more attention to it within human rights scholarship.¹⁵⁷ Oomen and Baumgartel trace the origins of increased local involvement in human rights and the ‘rise of human rights cities’ to several shifts: the change within the human rights field to emphasize implementation; the political trend of decentralization causing local authorities to have greater responsibilities; and the demographic shift resulting in a higher proportion of the global population to be concentrated in cities.¹⁵⁸ Others have analyzed the phenomenon in terms of norm diffusion, like Shawki who explains the localization of human rights through the existence of ‘translators’ and ‘political and discursive opportunity structures.’¹⁵⁹ According to Shawki, local human rights initiatives involve actors who are already familiar with human rights to some degree as well as a political context, in terms of institutional and normative elements, that has favorable conditions for such an initiative.¹⁶⁰ By this analysis, the increase in local engagement with human rights may be connected to an increase in actors with knowledge of and experience with human rights that can serve as translators for the local authorities and/or a shift in political conditions that are more open to human rights at the local level.

There has been some research into motivations of local actors launching human rights initiatives, though much of this research has only focused on European cities and cities affiliated with PDHRE. In the context of human rights cities in Europe, Van Aarsen et al. found that motives for local engagement with human rights involved political factors, including the presence of left-leaning parties; cultural and historical factors; and city marketing to be relevant.¹⁶¹ Oomen and Baumgartel argue that the reasons cities engage with

¹⁵⁵ Oomen, 2015, pg. 403.

¹⁵⁶ *See*: Oomen & Baumgartel, 2014, pg. 725; Grigolo, 2010, pg. 896.

¹⁵⁷ *See*: Oomen & Baumgartel, 2014; Grigolo, 2010; De Feyter, 2006; Meyer, 2009; Marks & Modrowski, 2010; Shawki, 2011; Van Aarsen et al., 2013.

¹⁵⁸ Oomen & Baumgartel, 2014, pg. 709-712.

¹⁵⁹ Shawki, 2011, pg. 4.

¹⁶⁰ *Ibid.*, pg. 3-4.

¹⁶¹ Van Aarsen et al., 2013, pg. 169-171.

human rights are “social and political rather than purely legal.”¹⁶² In later research, Oomen asserts local engagement may be motivated by human rights being an “inclusive standard” for local policies or by providing a “discursive umbrella” to unite interests from various stakeholders.¹⁶³ She also notes, “reference to international obligations strengthens the local position in deviating from national policies,” which is especially relevant for this research.¹⁶⁴ This thesis aims to contribute to the research, by analyzing the motives of local governments that lead them to challenge national policies that restrict rights. By focusing on this type of localization, the research may fill gaps in the existing literature, providing analysis of governmental actors and contexts rather than civil society actors like much of the current literature. Also, by analyzing the motives that led to local human rights engagement challenging the national policies the research should reveal especially strong and persuasive factors that may be helpful in encouraging more local governments to become involved with human rights.

Several scholars within the human rights field have constructed arguments for why local authorities should engage with human rights. Grigolo argues European cities should implement human rights policies with more EU level support for human rights at the local level and more local government support for human rights institutions, such as local non-discrimination offices or human rights commissions, by ensuring adequate resources and mainstreaming human rights across departments.¹⁶⁵ As part of this argument, he notes local government’s ‘proximity’ to human rights violations as a basis for supporting local engagement with human rights.¹⁶⁶ This is similar to the central argument for subsidiarity and decentralization of government competences, discussed previously. De Feyter makes a similar assertion, “It is at the local level that abuses occur, and where a first line of defense needs to be developed, first and foremost by those that are threatened... It is at the local level that having human rights either proves vital or illusory.”¹⁶⁷ He also argues that connecting human rights to local communities provides important advantages to the potential development of human rights by providing knowledge communities have about ‘concrete living conditions’ in

¹⁶² Oomen & Baumgartel, 2014, pg. 710.

¹⁶³ Oomen, 2015, pg. 404.

¹⁶⁴ Ibid.

¹⁶⁵ Grigolo, 2010, pg. 910.

¹⁶⁶ Ibid.

¹⁶⁷ De Feyter, 2006, pg. 12.

a human rights crisis and promoting similarities across local communities, creating a sort of ‘global solidarity.’¹⁶⁸ These scholars’ views demonstrate that the localization of human rights may both benefit cities and benefit the development of human rights.

2.3 Conclusion

The interdisciplinary concepts and theories elaborated on in this chapter both clarify the context of this research and provide essential tools to analyze the actions of local governments challenging national policies that restrict migrants’ rights in the proceeding case studies. By applying these concepts and theories to migrant rights in the case study analysis, this research aims to contribute to the stances of Grigolo and others, who argue that local governments have a unique and powerful position to make significant contributions to strengthen the protection and realization of human rights.

¹⁶⁸ Ibid., pg. 12-13.

CHAPTER 3

CASE STUDY OF UTRECHT & THE RIGHTS OF REJECTED ASYLUM SEEKERS

Utrecht, the fourth largest city in the Netherlands, has set itself apart from other Dutch cities through a particularly robust commitment to human rights. The local government began increasing its attention to human rights several years ago, taking an active role in organizing human rights conferences¹⁶⁹ and working extensively with other local governments through networks such as Eurocities to exchange knowledge on human rights and migration issues.¹⁷⁰ Former UN High Commissioner for Human Rights Navi Pillay referred to Utrecht as the “first Dutch ‘human rights city’” in recognition of the city’s dedication to human rights.¹⁷¹

In recent years, Utrecht’s commitment to human rights contributed to the municipal government coming into direct conflict with national law. This conflict between local and national policy dates back to 2001, when a new national law prohibited local authorities from providing social services to asylum seekers shortly after their asylum requests had been rejected, thereby also contributing to a protection gap for migrants’ social and economic rights. Utrecht’s local government decided to continue providing services in spite of the national law. Though Utrecht was not the only city¹⁷² to defy this law in such a way, Utrecht officials were among the most vocal opponents to the law.¹⁷³ They openly and directly refused

¹⁶⁹ Eurocities, “International Conference ‘Human Rights in the City,’” available at <http://www.eurocities.eu/eurocities/events/International-Conference-Human-Rights-in-the-City->.

¹⁷⁰ Eurocities, “Cities Welcome Refugees: Utrecht,” 23 September 2015, available at <http://www.eurocities.eu/eurocities/news/Cities-welcome-refugees-Utrecht-WSPO-A2MJKV>.

¹⁷¹ Pillay, “Speech for the Inauguration of the Netherlands Institute for Human Rights,” 2012.

¹⁷² For example, Amsterdam & Rotterdam, *see*: Kos et al., 2015, pg. 361.

¹⁷³ Kos et al., 2015, pg. 363.

to comply with the national policy as a local government, while some other municipalities undermined the policy using more indirect methods.¹⁷⁴

This chapter will analyze the sources of the local government's authority and power, provide context on the policy conflict, and examine motivating factors for the local government to use its power for the protection of migrants' human rights by disobeying the national policy. It will also analyze how the local government exerted its power to influence the rights of rejected asylum seekers locally, vertically, and horizontally by investigating the sources of the local government's ability to influence each level, the strategies used, and the overall impact. Finally, the chapter will draw conclusions about the nature and use of the local government's power to improve the protection of rejected asylum seekers' human rights in this case study and the overall implications of this case study regarding the potential power of local governments to influence human rights protection.

3.1 Structure of National & Local Government Authority

In order to analyze the power of the local government in Utrecht, it is necessary to examine the nature of government authority in the context of the Netherlands by outlining the sources of authority, legal limits, the degree of local autonomy, and division of competences. The structure of legal authority and competences of each level of government has major implications for their power.

3.1.1 Source & Limits of National Government Authority:

In the Netherlands, the authority of the national government is found in the Constitution. In terms of national government authority, the Dutch Constitution specifies the division of power between the monarch, ministers, legislature, and judicial bodies that comprise the national government, giving them legal authority to carry out governance.¹⁷⁵ The Constitution also stipulates a variety of limits to national government authority, for example by prohibiting capital punishment and a list of fundamental rights the government cannot restrict.¹⁷⁶ The Constitution additionally specifies a limit on authority in terms of international law, stating that no law can be applicable in the Netherlands if it conflicts with international

¹⁷⁴ Ibid., pg. 363-365.

¹⁷⁵ Constitution of the Kingdom of the Netherlands, Ch. 2-6.

¹⁷⁶ Ibid., Articles 7, 114.

law, which includes human rights instruments.¹⁷⁷ Related to this limit by international law on the authority of the Dutch national government are further restrictions on authority through the Netherlands' membership in the European Union, subjecting it to a supranational level of authority.

3.1.2 Source & Limits of Local Government Authority:

The Dutch Constitution also provides the framework for local government authority. The document specifies local governments have the power to “regulate their own internal affairs.”¹⁷⁸ This reflects recognition of municipal authorities' important position to understand and react to the needs of the people, as it is in unique proximity to people. The central government may only interfere with local decisions “on the grounds that they conflict with the law or the public interest,” representing the most direct limit to local authority.¹⁷⁹ Despite autonomy to regulate local affairs, the national government retains authority over the supervision of local government bodies.¹⁸⁰ The national government can also designate additional tasks to the local governments not specified in the Constitution, reflecting that in the Dutch system, rather than being subordinate to the national government, local authorities are understood more as partners working together with the national authorities in the overall governance scheme.¹⁸¹ Therefore, local governments in the Netherlands enjoy a relatively large degree of autonomy to reach their own decisions with limited interference. This autonomy is further enhanced as more power is increasingly being passed down to municipal authorities in the relatively decentralized Dutch system,¹⁸² thus adding to local government authority and allowing the local governments in the Netherlands greater opportunity to develop policies to respond to the specific needs of the local community.

3.1.3 Division of Competences:

Dutch national government competences originate from provisions in the Constitution that outline government authority. These include the areas of: nationality and migration,

¹⁷⁷ Ibid., Article 94.

¹⁷⁸ Ibid., Article 124.

¹⁷⁹ Ibid., Article 132(4).

¹⁸⁰ Ibid., Article 132(1-2).

¹⁸¹ Dijkoff, 2014, pg. 279.

¹⁸² VNG, 2008, pg. 14-16.

fundamental rights specified in the Constitution, education, elections, military, taxes and financial matters, justice and pardons.¹⁸³ In terms of migration policy, the Minister of the Interior and Kingdom Relations and the Minister for Migration have portfolios related to migration.¹⁸⁴ These ministers also oversee numerous administrative agencies that implement migration policy, including Immigration and Naturalization Service (IND) and the Central Agency for the Reception of Asylum Seekers (COA). IND is tasked with implementation of the Aliens Act and the Netherlands Nationality Act and assessing all residency and citizenship applications from foreigners, while, as its name suggests, COA is responsible for operating reception centers for asylum seekers.¹⁸⁵ Though the national government has the primary competence in terms of migration matters,¹⁸⁶ it shares certain aspects of this competence with local governments, including providing accommodation to asylum seekers with residence permits.¹⁸⁷

Competences of municipal governments in the Netherlands differ significantly from those of the national government, reflective of the narrower constituency and context. Dutch municipal competences include: local planning, maintaining infrastructure, issuing licenses and permits, organizing schools and cultural facilities, operating emergency services and police force, providing social services, and promoting general welfare.¹⁸⁸ These competences do not directly include migration; however, there are clearly competences that affect migrants as residents within the city's jurisdiction, such as those related to service delivery. As provided for in the Constitution, the national government has been transferring more and more responsibilities to local governments in recent years.¹⁸⁹ Though the national government has been delegating further competences to local governments, the national government still retains the competence of supervision.¹⁹⁰

3.2 Overview of Policy Conflict

¹⁸³ Constitution of the Kingdom of the Netherlands, Articles 2, 3-23, 59, 97, 104-105, 107, 116.

¹⁸⁴ European Migration Network, 2011, pg. 13-14; Government of the Netherlands, "Minister for Migration: Tasks," available at <https://www.government.nl/government/contents/members-of-cabinet/klaas-dijkhoff/tasks>.

¹⁸⁵ European Migration Network, 2011, pg. 13-15.

¹⁸⁶ Constitution of the Kingdom of the Netherlands, Article 2(2).

¹⁸⁷ European Migration Network, 2011, pg. 15.

¹⁸⁸ NIMD & IPP, 2008, pg. 62; VNG, 2008, pg. 43-52.

¹⁸⁹ *Ibid.*, pg. 63.

¹⁹⁰ Constitution of the Kingdom of the Netherlands, Article 132(2); NIMD & IPP, 2008, pg. 63.

The policy conflict at the center of this case study primarily concerns a national law regulating migration that went into effect in 2001 and added to a shift to more robustly restrictive measures towards undocumented migrants. This national policy altered the treatment and services provided to asylum seekers whose their asylum requests were rejected and have resulted in increasing numbers of rejected asylum seekers becoming homeless across the Netherlands.¹⁹¹ Utrecht, along with other municipalities, had conflicting interests in the treatment of rejected asylum seekers, which led to an implementation gap for the Aliens Act and bargaining efforts by the national government.

3.2.1 National Policy on Rejected Asylum Seekers' Access to Services:

The Aliens Act of 2000 was a major reform to the Dutch immigration system and continues to serve as one of the primary laws regulating migration in the Netherlands. The reform changed the procedures for repatriation, including the procedures applied to asylum seekers after their asylum applications have been rejected by ending *all* government support including shelter, with few exceptions.¹⁹² This law builds on the Linkage Act of 1998, which represented a significant change in Dutch migration policy by linking legal residence status to access for essentially all social benefits.¹⁹³ Even though the Linkage Act included exceptions for enrolling children in school and receiving emergency medical care, many asylum seekers still stayed away from these services out of fear.¹⁹⁴ According to the Aliens Act, asylum seekers are required to leave the country within 28 days after having their asylum claim rejected.¹⁹⁵ The asylum seekers are provided shelter at national migration centers during this 28-day period, but no services are to be provided to them afterward.¹⁹⁶ The only exceptions to this ban on service provision after 28 days apply to minors, families with minors, or individuals who seek an exception for medical needs.¹⁹⁷ The main objective of this policy is to reduce the undocumented migrants residing in the Netherlands.¹⁹⁸ Minister Verdonk put it this way: "...accommodation until the effective return of people, cannot and will not be

¹⁹¹ Versteegt & Maussen, 2012, pg. 21, 33.

¹⁹² Ibid, pg. 25-26; Aliens Act, Section 10 (1-2), Section 43.

¹⁹³ Oomen, 2014, pg. 153.

¹⁹⁴ Versteegt & Maussen, 2012, pg. 25.

¹⁹⁵ Aliens Act of 2000, Section 60.1.

¹⁹⁶ Ibid., Section 43.1(b,c).

¹⁹⁷ Ibid., Section 62; European Migration Network, 2011, pg. 21-22.

¹⁹⁸ Versteegt & Maussen, 2012, pg. 40-41.

effectuated. With such a measure, every incentive to return will be taken away.”¹⁹⁹

The Aliens Act fails to account for the possibility of rejected asylum seekers remaining in the Netherlands beyond the 28-day period; however, after the law took effect, many did remain beyond 28 days.²⁰⁰ Rejected asylum seekers may be subject to detention and deportation if remaining in the country after 28 days of rejection of their asylum application; however, “the basic principle” of the Dutch return system is that “foreign nationals are responsible for this [departure] themselves,”²⁰¹ with efforts made to avoid detention in the return process.²⁰² The fact that after the Aliens Act went into effect, many rejected asylum seekers became homeless—as they were evicted from national shelters but not removed²⁰³—demonstrates the gaps in the national return policy and need for reform. Though the reasons failed asylum seekers were not deported may not be clear, the national law has proven inadequate for accounting for rejected asylum seekers remaining beyond 28-days, as noted by the Conference of European Churches “there is a real and persistent problem faced by hundreds of undocumented migrants who cannot return or who for whatever reason are not removed from the Netherlands, who nevertheless have no right to shelter.”²⁰⁴ One reason that many rejected asylum seekers remained is that they were unable to leave because they lacked the necessary documents to travel.²⁰⁵ Obtaining the necessary documents to leave the Netherlands is difficult for migrants from countries that lack a functioning government to issue passports and other documents, like Somalia,²⁰⁶ and for migrants whose governments may choose not to accept them back.²⁰⁷ Failed asylum seekers may also remain in the Netherlands beyond the 28-day limit because they are awaiting the results of an appeal or other legal procedure.²⁰⁸ Under the Aliens Act, migrants remaining in the Netherlands after

¹⁹⁹ Ibid, pg. 42-43.

²⁰⁰ Lovett & Schimmer, “City of Utrecht Undermines National Asylum Law: A Humanitarian Initiative,” *Humanity in Action*, 2001, available at <http://www.humanityinaction.org/knowledgebase/15-city-of-utrecht-undermines-national-asylum-law-a-humanitarian-initiative>.

²⁰¹ European Migration Network, 2014, pg. 59.

²⁰² Ven Der Helm & Brouwer, 2015, pg. 60.

²⁰³ Versteegt & Maussen, 2012, pg. 33; Lovett & Schimmer, “City of Utrecht Undermines National Asylum Law: A Humanitarian Initiative,” *Humanity in Action*, 2001, available at <http://www.humanityinaction.org/knowledgebase/15-city-of-utrecht-undermines-national-asylum-law-a-humanitarian-initiative>.

²⁰⁴ *Conference of European Churches (CEC) v. The Netherlands* (ESCR, 2013), complaint, pg. 6.

²⁰⁵ Municipality of Utrecht, 2011, pg. 17.

²⁰⁶ Ibid.

²⁰⁷ Versteegt & Maussen, 2012, pg. 41.

²⁰⁸ Kos et al., 2015, pg. 360.

the 28-day period, even for reasons largely out of their control like those mentioned above, lose their legal right to social benefits and will be evicted from national migration shelters.

3.2.2 Impact of the National Policy on Human Rights:

This policy has significant consequences for migrants' human rights, especially economic and social rights, like the rights to food, housing, and health care. As discussed in the theoretical framework, international human rights obligations, with the exception of some political rights, apply to non-citizens as well as citizens.²⁰⁹ So, as a state party to ICESCR as well as other instruments, the Netherlands is obliged to fulfill at least the minimum core content of ESC rights of *all* individuals within their jurisdiction, including rejected asylum seekers. However, instead the Aliens Act allows migrants to become homeless without resources to fulfill their basic needs. Civil society and human rights officials have urged the Dutch government to change its policy on providing shelter and services to failed asylum seekers. UN human rights officials have done so through appeals,²¹⁰ and local NGOs have filed complaints with the European Committee of Social Rights (ECSR), which found violations in two complaints regarding the Aliens Act. The first was in 2009, when the ECSR found the Netherlands had violated its obligations under Articles 17(1) and 31(2) of the European Social Charter (ESC), which require that states provide “adequate housing to all children present in the country” and take “measures designed to prevent and reduce homelessness.”²¹¹ This caused the national policy to shift and no longer evict children from reception centers if they were not to be removed from the country immediately.²¹² In 2014, the ECSR found the Netherlands had violated Articles 13 and 31 of the ESC by withholding shelter and basic services from adult migrants.²¹³ In 2015, a case regarding the impact on human rights of denying services to rejected asylum seekers in the Netherlands was submitted to the ECtHR and is still pending.²¹⁴ These responses by civil society organizations and

²⁰⁹ See: Section 2.2.2.

²¹⁰ OHCHR, “Urgent Appeal: UN experts call on the Netherlands to give homeless migrants emergency help before Christmas,” 16 December 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15425&LangID=E>.

²¹¹ European Social Charter, Articles 17, 31; *Defense for Children International (DCI) v. The Netherlands* (ESCR, 2009), decision, para. 77.

²¹² European Migration Network, 2011, pg. 21-22.

²¹³ *CEC v. The Netherlands* (ESCR, 2014), decision, para. 126, 145.

²¹⁴ INLIA Foundation, “Europees Hof oordeelt over 'bed,bad,brood' [European Court Judges Bed, Bath, Bread],” available at <http://www.inlia.nl/news/show/europees-hof-oordeelt-over-bedbadbrood>.

human rights bodies to the Aliens Act demonstrate the significant impediment this national policy presents to the realization and protection of the human rights of rejected asylum seekers.

3.2.3 Implementation of National Policy & the Gap:

Given the nature of the national policy and shared competence between the national and local governments in migration, the implementation of this national policy requires both the national and local levels to work together. The cooperation of local governments was necessary since the policy prohibited social services and providing social care is largely a municipal government competence in the Netherlands. Beginning in 2001, this Aliens Act began to face opposition from local governments, stemming from the forced eviction of migrants and the “void” left by the national policy failing to provide for rejected asylum seekers after the 28-day period.²¹⁵ This opposition highlights the conflicting objectives and interests of the local and national officials. The level of conflict varied by municipality with some municipalities, like Utrecht, refusing to comply outright with the prohibition of offering any social service to rejected asylum seekers after their 28-day period elapsed. According to Kos et al., around 30% of Dutch municipalities offered shelter to rejected asylum seekers by 2007.²¹⁶ This local opposition to the national policy, therefore resulted in an ‘implementation gap,’ fitting into the ‘political implementation’ model in Matland’s ambiguity-conflict framework.²¹⁷ As he argued, to overcome conflicting objectives, coercive methods and bargaining must be used, and in the case of political implementation, power is key.²¹⁸ Such coercive methods are evident in the context of the Aliens Act in a 2007 agreement between municipalities and the national government.

3.2.4 National Bargaining Methods:

In 2007, the national government utilized its authority and power to address the ongoing implementation gap caused by municipal non-compliance with the Aliens Act. In order to coerce municipal governments to cooperate on implementation, the national

²¹⁵ Versteegt & Maussen, 2012, pg. 26-28.

²¹⁶ Kos et al., 2015, pg. 361.

²¹⁷ See: Section 2.1.3.

²¹⁸ Ibid.

government offered a pardon to foreigners who had been in the Netherlands for a specified number of years and not received citizenship status, but national officials decided to make this pardon conditional on an Administrative Agreement between the central government and the Association of Netherlands Municipalities (VNG), which all municipal governments are members of.²¹⁹ The Administrative Agreement was essentially a quid pro quo arrangement, requiring that all municipal governments stop providing shelter and social services to rejected asylum seekers and comply with the Aliens Act.²²⁰ In exchange, the national government would offer the pardon and would address the situation of rejected asylum seekers by developing an “adequate” return policy.²²¹ A comprehensive return policy was persuasive because it would prevent failed asylum seekers from becoming homeless and lacking access to services to fill their basic needs by effectively deporting them from the Netherlands.

This quid pro quo agreement exemplifies the national government attempt to use the power provided by their authority to offer a general pardon and reform their return policy to coerce local governments into cooperating in the implementation of the Aliens Act. Nevertheless, not all parties to the Administrative Agreement held up their ends of the bargain. Utrecht’s local government continued to defy the Aliens Act by offering shelter and social services to rejected asylum seekers, and the central government still has yet to implement a return policy that comprehensively provides for such migrants.²²² This failure to resolve all conflicting objectives in the implementation of the Aliens Act reflects a lack of sufficient power on the part of the national government to force all local governments to comply with the national law.

3.2.5 Utrecht’s Non-Compliance & Local Policy Stance:

Despite the provisions in the Aliens Act and 2007 Administrative Agreement, the authorities in Utrecht refuse to cooperate with the implementation of these policies, and have developed their own local policy on providing emergency shelter and other social services to rejected asylum seekers.

²¹⁹ Versteegt & Maussen, 2012, pg. 27; VNG, 2008, pg. 58-60.

²²⁰ Versteegt & Maussen, 2012, pg. 27.

²²¹ Ibid.

²²² Kos et al., 2015, pg. 363.

Utrecht's defiance of the national policy began in 2001, when the Aliens Act went into effect. The city's mayor and alderman made the decision to offer emergency services to rejected asylum seekers who were unable to return to their countries of origin and who were left without access to national shelters and services by the Aliens Act.²²³ According to Jan Braat, former policy advisor for Hans Spekman, the alderman tasked with migration matters in Utrecht at the time, once "the national migration law changed [so] that everyone after 28 days came on the street if they [were] rejected. And, we saw those people on the streets...we saw the change quickly."²²⁴ Local churches wrote to Hans Spekman, drawing attention to the homeless migrants in the city, and he took up the issue, deciding Utrecht needed to take action to address the problem of homeless rejected asylum seekers.²²⁵ Under Spekman's leadership, the issue was able to gather enough support for the defiant local policy of continuing to provide services to rejected asylum seekers to pass the Board of Aldermen with strong support, though there was some opposition from two aldermen, who objected on grounds that the municipality should follow the rules set by the national government.²²⁶ Together with local churches, the Dutch Refugee Council, and other NGOs, the municipal government developed a policy of providing 'emergency shelter' and services to rejected asylum seekers.²²⁷ Utrecht's emergency shelter, which has become known as 'bed, bath, bread'²²⁸ includes: a bed, access to sanitary facilities, clothes, food and guidance about possibilities of regularization or voluntary return.²²⁹ The policy specifically aims at filling the gap in social services and rights protection for vulnerable people that the central government does not provide other care options for.²³⁰

While the Aliens Act negatively affects migrants' rights to housing and food, Utrecht's policy helps counter this by providing access to services that fulfill these basic social rights. The municipality's policy is also more in line with the principle of respecting

²²³ Municipality of Utrecht, 2011, pg. 17.

²²⁴ Interview with J. Braat & N. Oepkes, Senior Policy Advisors for the Municipality of Utrecht, 1 April 2016 (Interview #1).

²²⁵ Ibid.

²²⁶ Lovett & Schimmer, "City of Utrecht Undermines National Asylum Law: A Humanitarian Initiative," *Humanity in Action*, 2001, available at <http://www.humanityinaction.org/knowledgebase/15-city-of-utrecht-undermines-national-asylum-law-a-humanitarian-initiative>.

²²⁷ Interview #1.

²²⁸ See: Kos, et al., 2015, pg. 361.

²²⁹ Municipality of Utrecht, 2011, pg. 18.

²³⁰ Ibid, pg. 22.

human dignity, since it aims to avoid forcing migrants to live on the streets in inhumane conditions. This local approach to migrants supports the claim of Utrecht being a human rights city, as the city addresses problems within its community through methods that support the realization of human rights.

3.3 Motivations Behind the Local Policy Stance

Following Matland's political implementation gap model, the local government's non-compliance and creation of the implementation gap originated from conflicting objectives. In this case, Utrecht's objectives relate to the nature and purpose of local government, their competences, and recognized duties under domestic and international law as well as the fact that the municipality is affected to a greater degree by negative externalities of the Aliens Act, which the national level does not have to face. These conflicting objectives correspond to the motives that drove Utrecht's local government to adopt their defiant local policy to provide emergency shelter. These motives can be separated into two main categories: 1) legal obligations and 2) pragmatic. Narrowing the factors in these categories aids the analysis of what led the local government to employ municipal disobedience and what that implies for the potential of other local governments engaging in human rights.

3.3.1 Motives Related to Legal Obligations:

Aspects of both domestic and international legal responsibilities manifest as motives for Utrecht's local government's non-compliance with the Aliens Act. The domestic legal responsibilities relate to the authority and competences of Dutch municipal governments, specifically the competences of social care and public order. The obligations for local governments to ensure social care and public order stem from national law and the authority assigned in this regard to local governments. These domestic legal obligations relate to devolution and decentralization as the competences have been devolved to the local level in the Netherlands rather than being retained by the national government. Under the Dutch system, municipalities have a legal 'duty of care' to promote the general welfare of individuals in their community and provide social care,²³¹ which Utrecht officials have

²³¹ VNG, 2008, pg. 52.

referred to in their documents regarding their local policy.²³² Social services, including services for the homeless, have been devolved to municipalities through the Welfare Act and Social Support Act, allowing them flexibility to develop their own social support policy.²³³ Dutch municipalities also have a legal duty to ensure public order and safety, with the mayor serving as the head of the police.²³⁴ Municipalities have both the obligation to protect their residents by maintaining order and fighting crime and from other types of harm by providing care and social services. These duties may be linked more broadly to human rights and human security, which reorients security around the individual rather than the state.²³⁵ Human security is based on the argument that threats to an individual's well-being, such as hunger, poverty, social exclusion, pose risks to global society and thus global security, so the human security framework includes a combination of development, peace and security, and human rights focused on protection and empowerment to address individual well-being.²³⁶ Utrecht officials have cited risks to public safety as a reason for preventing rejected asylum seekers from ending up on the streets,²³⁷ demonstrating that the municipal government seems to support the human security argument that risks to individual safety and well-being, such as homelessness, threaten the security of the whole community. By this perspective, the local government is obligated to protect the rights and basic needs of all individuals in order to fulfill their domestic legal duties under the competences of social care and public order.

Utrecht officials have demonstrated that aspects of international law are motivating factors for their non-compliance with national migration policy by repeatedly claiming that the national policy violates human rights obligations. The ESCR rulings, previously mentioned,²³⁸ legitimize the legal basis for the local policy by giving further authority to the local government's assertion that in order to comply with international human rights standards, a basic minimum standard of living needs to be provided to all people regardless of whether they have a legal right to reside in the country or not. The local authorities in Utrecht recognize that migrants are entitled to the same human rights as all other individuals within

²³² Municipality of Utrecht, 2011, pg. 17.

²³³ Hermans, 2012, pg. 102.

²³⁴ VNG, 2008, pg. 33-34; Sprakel, 2010, pg. 24.

²³⁵ Churruca Muguruza, 2007, pg. 15.

²³⁶ Ibid, pg. 15, 23.

²³⁷ Braat & Oepkes, "Local Undocumented Migration Policy in the Municipality of Utrecht, The Netherlands," 2013; Braat et al., 2014, pg. 15.

²³⁸ See: *DCI v. The Netherlands* (ESCR, 2009); *CEC v. The Netherlands* (ESCR, 2014).

the Netherlands according to the UDHR, ICCPR, ICESCR, and ECHR.²³⁹ In addition to recognizing that human rights obligations extend to migrants, Utrecht's local government acknowledges that all of the Netherlands' legal human rights obligations not only apply to the national government but apply equally to the municipal government level.²⁴⁰ As one Utrecht official put it, just because "the national government has showed some disregard [for human rights] that does not mean that we should follow the national government."²⁴¹ If the national government ignores its human rights obligations, that does not mean those obligations cease for the municipalities. This perception of shared responsibilities under international human rights law as duty-bearers corresponds to the arguments put forth by Oomen and supported by decision by the ECtHR and CJEU that international obligations are shared by local governments.²⁴²

The decision of the national government to stop providing services to fulfill rejected asylum seekers' social rights puts the municipalities in a difficult position of having to choose between their obligations to comply with national law and their obligations to comply with international (human rights) law. Utrecht's local government has argued that their local policy of providing emergency shelter and services fulfills all of their obligations under international law.²⁴³ And, on this point, they have asserted, "human rights principles and EU directives are more important than national policies."²⁴⁴ Therefore, complying with duties under both national law and international human rights law is another source factor to explain Utrecht's conflicting interests and local response to implementing the Aliens Act.

3.3.2 Pragmatic Motives:

It is evident from the public statements and presentations given by the local authorities in Utrecht that one of the main reasons they chose not to comply with the national migration policy was because they found it ineffective. The main argument behind the Aliens Act is that giving rejected asylum seekers shelter will prevent them from leaving the country by giving them too much incentive to stay. However, as discussed previously, there are many migrants

²³⁹ Municipality of Utrecht, 2011, pg. 20-21.

²⁴⁰ Ibid, pg. 21-22.

²⁴¹ Interview #1.

²⁴² See: Section 2.2.4.

²⁴³ Municipality of Utrecht, 2011, pg. 21-22.

²⁴⁴ Braat, & Oepkes, "Local Undocumented Migration Policy in the Municipality of Utrecht, The Netherlands," 2013.

that remain in the Netherlands after their asylum applications are rejected, who are not entitled to shelter but have yet to leave the country. Many of these individuals are lost in the national migration system, remaining in the country with their whereabouts unknown to the national authorities.²⁴⁵ In 2014, 7,440 failed asylum seekers' whereabouts became unknown to the central government compared to 8,510 that were known to have left the country.²⁴⁶ Therefore, it seems clear the national policy is not fulfilling its objective. Utrecht's local policy is targeting the same objective—to “prevent and reduce illegal stay in the Netherlands”²⁴⁷—from a different approach, demonstrating the concern over lack of efficiency of the national policy can be seen as another motivating factor. This relates to the theoretical “efficiency argument” asserted by John Stuart Mill and numerous other scholars about the nature of local government, which proposes that local governments are more capable of managing local affairs because of their local knowledge.²⁴⁸ Though regulating migration may be a national issue, the migrants themselves reside in municipalities; therefore, the concerns affecting migrants become local issues as well, and with their knowledge of the community, Utrecht's local authorities may believe they can be more effective in addressing the issue.

In addition to the inefficiency of the national policy, Utrecht's local government seems to also have been motivated by negative externalities generated by the Aliens Act. Foremost among such problems is the increased homelessness among migrants. With homelessness, come many other potential challenges that specifically affect city governments, such as increased crime, exploitation, and threats to public health and safety. Utrecht officials involved in the development of the local policy have cited human trafficking, sexual exploitation, and increased drug crime as specific concerns raised when migrants began to be put on the streets.²⁴⁹ Utrecht's local government has emphasized, “Homelessness... is not the solution, but part of the problem.”²⁵⁰ This is not just the perspective of Utrecht's local government, but is also the point of view of other municipalities and members of civil

²⁴⁵ Pieters, Janene, “Report: Many Failed Asylum Seekers Still in the Netherlands,” in *NL Times*, 25 June 2015, available at <http://www.nltimes.nl/2015/06/25/report-many-failed-asylum-seekers-still-in-the-netherlands/>.

²⁴⁶ Ibid.

²⁴⁷ Braat & Oepkes, “Local Migration Policy in the Municipality of Utrecht, The Netherlands,” 2013.

²⁴⁸ See: Section 2.1.1.

²⁴⁹ Interview #1.

²⁵⁰ Braat & Oepkes, “Local Migration Policy in the Municipality of Utrecht, The Netherlands,” 2013.

society.²⁵¹ As one civil society representative phrased it, “The national government...does not look into the facts or reality, and the local governments, well, they are faced with reality, so they have to come up with a solution for this.”²⁵² Generating any kind of increase in homelessness and related issues makes the national policy even less practical. Utrecht’s local policy does not create, but rather addresses, these problems. This motivating factor relates to the nature of local governments, specifically their proximity to individuals’ lives, and the typical competences of local government, including social welfare and local law enforcement and public order. Challenges generated as externalities of the Aliens Act and increased homelessness, such as those mentioned above, do not affect the national level as much as the local level. Therefore, addressing or ending such externalities may not be an objective of the national government, while the nature and unique competences of local government makes this a significant objective of Utrecht’s local government. This characteristic of the pragmatic motives driving Utrecht’s non-compliance, which stem from the distinct nature and competences of local government, which contrast with the national objectives, leading to conflict between the two levels of government.

3.4 Impact of Local Power in the Policy Conflict

With the context and motivations for the policy conflict and implementation gap established, the impact of Utrecht’s defiance of the national policy will be analyzed at three levels in terms of whether the local government has strengthened the protection of migrants’ human rights. The three levels include: the local context; the vertical context, referring to influence at the national level; and horizontal context, referring to the impact on other municipalities. This section will consider how Utrecht’s local government had the power to affect each level and what strategies and tools it used, analyzed within the frame of Matland’s political implementation model, in which power and the use of coercive methods are key to resolving the conflicting objectives at the center of an implementation gap.

3.4.1 Local Context:

²⁵¹ Interview with P. Postma, Secretariat Official, LOGO, 11 April 2016 (Interview #2).

²⁵² Interview #2.

Utrecht's local government and others view the local policy as a major success.²⁵³ Of those that have benefited from Utrecht's emergency shelter services, the vast majority have left the city's shelters with a solution to their irregular status—by obtaining a residence permit, being granted the right to care by the central government, or opting for voluntary return to their countries of origin.²⁵⁴ Through disregarding the 28-day rule in the Aliens Act and providing shelter and guidance to migrants who would be required to leave the country under the national law, the local authorities are able to reduce unlawful residence through enabling regularization and assisting individuals in overcoming obstacles to voluntary return.²⁵⁵ The policy has also addressed the protection gap created by the national policy and lack of a comprehensive return system, which led to homelessness among rejected asylum seekers and lack of possibilities to realize their basic rights.²⁵⁶ According to the municipal government, the local policy of providing shelter has benefited hundreds of rejected asylum seekers who would have otherwise been forced to live on the streets.²⁵⁷ By providing social services, including housing and food, the local policy allows for migrants' basic needs to be met and greater protection of their social rights. Not only are migrants benefiting from the policy by receiving social care, but under the human security framework, the whole city of Utrecht benefits from increased security by addressing threats to the welfare of individual migrants.

To reach this positive impact in the local context, Utrecht's local government used the authority granted to them by the Constitution to regulate their own internal affairs of the municipality. This legal authority gave them the power to develop and implement their local policy on emergency shelter. There has been plenty of criticism from national politicians of the local actions, including calling Utrecht a 'rebel city'.²⁵⁸ Many might assume that a municipal government directly contradicting national law would ultimately face some consequences; however, this has not been the case for Utrecht. According to a municipal official, the city government has not faced any real consequences, though there have been

²⁵³ Municipality of Utrecht, 2011, pg. 18-19.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Braat & Oepkes, "City of Utrecht: Human Rights First," 2014.

threats from the national government of financial penalties or firing municipal officials.²⁵⁹ However, under Dutch law, the national government does not have the competence to dismiss municipal officials; the municipal aldermen and mayor are accountable to the city council,²⁶⁰ and the city council has the competence to dismiss them.²⁶¹ The members of the city council are accountable to their constituents as they are directly elected by the people, and thus, not subject to possible removal by the national government.

One reason for the lack of consequences is the particular political and legal structure of government in the Netherlands. As mentioned previously, Utrecht's local government bases their local policy on concerns that fall within their competences, including social care and public order. This makes it difficult for the national government to interfere with a policy that the local government deems necessary to fulfill its competences. The lack of consequences for over a decade of Utrecht's defiance demonstrates the lack of power on the part of the national government to force the local government to cooperate, while the power exhibited by the relative success of Utrecht's policy in improving migrants' situation locally and the local government's ability to maintain the disobedient policy for many years, shows the power local governments can have in strengthening the protection of migrants' human rights in their communities.

3.4.2 Vertical Context:

Another dimension of the power of Utrecht's local government is found in how its has influenced the national level in the context of the policy conflict. As mentioned previously, following Matland's political implementation model, one attempt at coercion from the national government was exhibited in the quid pro quo Administrative Agreement of 2007.²⁶² Utrecht's local government has also employed coercive tactics to compel the national government to change its policy to comply with Utrecht's objectives. Though the national policy is still in place, recently, the national government has begun to reconsider its policy regarding shelter and services for rejected asylum seekers, with the leaders of the two

²⁵⁹ Interview #1.

²⁶⁰ Netherlands Municipalities Act, Article 169.

²⁶¹ Ibid, Article 49, 61b.

²⁶² See: Section 3.2.4.

coalition parties agreeing to some changes in April 2015.²⁶³ However, this agreement has continued to be condemned by human rights and municipal officials²⁶⁴ alike, with UN Special Rapporteur on Extreme Poverty and Human Rights Philip Alston referring to it as an infringement on basic human rights.²⁶⁵ In an interview on the issue, Alston's message to the Dutch national government was: "Why try to continue to be the home of international law and tribunals and so on? Why try to become a member of the UN Security Council. Just come out and say it: we don't believe non-Europeans have human rights. At least not in our country."²⁶⁶ Though the minor shift in the national government's stance still has not brought the national policy in line with Utrecht's local policy or international human rights standards, it has at least brought the national government to the bargaining table, which constitutes some progress. This shift at the national level cannot be solely credited to Utrecht's outspoken defiance of the national government, but the local government's actions can be seen as one of the contributing factors that pressured the national government to reconsider changes to the national policy.

In this context, Utrecht's local government has drawn power through utilizing media strategies to draw attention to the issues of rejected asylum seekers, win support for their stance in the conflict, and put pressure on the national government to change their position in the policy conflict. The municipal government has carefully developed media strategies to utilize local and national journalists to cover stories related to the situation of rejected asylum seekers and use tactics to humanize the situation of homeless rejected asylum seekers.²⁶⁷ According to Jan Braat, senior policy advisor, Utrecht's local government recognizes that the strongest strategy for supporting their local policy is to rely on both a rational (pragmatic and legal) basis as well as a humanitarian one, noting that when people see "the humans

²⁶³ In April 2015, both parties in the ruling coalition (VVD and PvdA) reached a compromise on the policy of shelter for rejected asylum seekers, deciding the central government would provide shelter at six 'freedom restricting' locations for a temporary (12 week) period to rejected asylum seekers in order to prepare the migrants to return to their country. See: Pieters, Janene, "Dutch to Pay African Nations to Take Back Refugees," in *NL Times*. 23 April 2015, available at <http://www.nlimes.nl/2015/04/23/dutch-to-pay-african-nations-to-take-back-refugees/>.

²⁶⁴ Savela, Taneli, "Government's Asylum Seeker Plan Angers Mayors," in *NL Times*, 29 April 2015, available at <http://www.nlimes.nl/2015/04/29/governments-asylum-seeker-plan-angers-mayors/>.

²⁶⁵ "UN Human Rights Expert Condemns Dutch Refugee Deal," in *DutchNews.nl*, 23 April 2015, available at <http://www.dutchnews.nl/news/archives/2015/04/un-human-rights-expert-condemns-dutch-refugee-deal/>.

²⁶⁶ Ibid.

²⁶⁷ Interview #1.

themselves, then it's different."²⁶⁸ In addition to using humanizing tactics to create pressure on the national government, the media also provides an opportunity to highlight how Utrecht's own local policy is effective, providing a compelling example for other cities.

In addition to using the media to exert pressure and coerce the national government to change its stance, Utrecht's local government has also developed networks with other municipalities, discussed further in the next section, in order to have a stronger influence on the national government. By participating and influencing the municipalities in such networks as the National Consultation on Local Authorities' Reception and Return Policy (LOGO) and Association of Dutch Municipalities (VNG), Utrecht achieves greater power in the policy conflict with the national government through 'strength in numbers.' Having more than one municipal government take a similar stance as Utrecht widens the implementation gap for the Aliens Act and weakens the national policy. In turn, this creates greater obstacles for the national government to resolve the conflict by requiring it to coerce multiple parties into cooperation. Though Utrecht and the other municipalities in the networks may not have been able to compel the national government to completely alter the national policy to be in line with Utrecht's objectives thus far, the local government has undoubtedly had an influence on the national debate and has contributed to making shelter for rejected asylum seekers an issue that in some way must be reckoned with by national politicians. As a result of the pressure Utrecht, together with the other municipalities, has placed on the national government, local officials argue, "They didn't solve the problem yet...but [the national government] can't move back to the old policies of just put[ting] people on the street."²⁶⁹ As the national government cannot disregard the issue of shelter for rejected asylum seekers and revert to the previous practice of putting high volumes of undocumented migrants on the streets—which significantly restricted migrants' human rights—Utrecht's local government has demonstrated its power to have an impact vertically by succeeding in drawing sufficient attention to the issue through its use of the media and networking.

3.4.3 Horizontal Context:

²⁶⁸ Ibid.

²⁶⁹ Ibid.

In addition to having an impact on the situation of migrants' rights in the local and vertical contexts, Utrecht's local government has also had an effect on other municipal governments, demonstrating how local power can extend horizontally to improve the human rights situation. The local government's influence on other municipal governments relates to the theories of norm and policy diffusion. In this context, Utrecht's local government has played the role of the 'policy entrepreneur,' promoting policy diffusion and transfer within informal policy communities.²⁷⁰ In this case, the policy communities are found in the national and international networks of other municipal governments that Utrecht is a part of, including LOGO, VNG, and Eurocities among others.²⁷¹ LOGO is a cooperation between local municipalities and the civil society organization International Network of Local Initiatives for Asylum Seekers (INLIA), which serves as a platform for lobbying the national government, provides information on laws and policies to better inform municipal officials, and allows local authorities to exchange information on their practices and policies in order to learn from each other.²⁷² Utrecht is also a member of the VNG,²⁷³ a network that provides similar services as LOGO but in a broader context since they are not limited to a single policy area. In addition to being a member of networks of Dutch cities, the city of Utrecht has also become active in exchanges with city officials across Europe through its participation in the Eurocities Migration and Integration Working Group together with 29 other European cities.²⁷⁴

These networks allow for the exchange of ideas and practices, giving Utrecht the opportunity to promote its policy to other local governments, and also present opportunities to lobby the national government. VNG is especially focused on lobbying, and it promotes the interests of all Dutch municipalities to the national government, consulting directly with government departments.²⁷⁵ In terms of exchanging ideas, the networks facilitate conferences and committees of municipal officials to discuss policy areas; they also may provide information and advising to the municipalities.²⁷⁶ Utrecht officials also frequently serve as

²⁷⁰ See: Section 2.1.4.

²⁷¹ VNG, 2008, pg. 57; LOGO, "Over LOGO [About LOGO]," available at <http://www.logogemeenten.nl/over-logo>; Eurocities, "Cities Welcome Refugees: Utrecht," available at <http://www.eurocities.eu/eurocities/documents/Cities-welcome-refugees-Utrecht-WSPO-A2MJKV>.

²⁷² LOGO, "Over LOGO [About LOGO]," available at <http://www.logogemeenten.nl/over-logo>.

²⁷³ VNG, 2008, pg. 57.

²⁷⁴ Eurocities, "Cities Welcome Refugees: Utrecht," available at <http://www.eurocities.eu/eurocities/documents/Cities-welcome-refugees-Utrecht-WSPO-A2MJKV>.

²⁷⁵ VNG, 2008, pg. 57-59.

²⁷⁶ *Ibid.*, pg. 59; LOGO, "Over LOGO [About LOGO]," available at <http://www.logogemeenten.nl/over-logo>.

spokespersons for the networks on matters related to emergency shelter, for example when national cabinet officials need to consult with the municipalities.²⁷⁷ Utrecht officials have presented information on the effectiveness of their local policy in both reducing illegal residence and protecting human rights.²⁷⁸ These presentations include quantitative measures of the policy's impact, strategies employed, and methods to overcome challenges.²⁷⁹ Through such presentations and shared information, Utrecht allows other municipal governments to evaluate the local policy and whether a similar policy might be appropriate for their own municipality without having to implement it first. In Mossberger & Wolman's terms, the exchanges through these networks allow for 'prospective policy evaluation,' which they argue is one driver of policy transfer.²⁸⁰

Though it is difficult to measure how much influence Utrecht's local government alone has had on other municipalities adopting similar stances, there is some clear evidence of policy diffusion. One of the strongest indications of influence on other municipalities relates to the program Utrecht developed under their local policy for assisting rejected asylum seekers who are former unaccompanied minors after they become 18 and no longer qualify for shelter under the national law. As with the rest of its local policy on rejected asylum seekers, the local government approached this group by meeting their basic needs with respect for their human rights and then helping them work towards a real solution to their status.²⁸¹ The approach to dealing with former unaccompanied minors pioneered by Utrecht was adopted nationwide by *all* other Dutch municipalities.²⁸² This example illustrates one way Utrecht's local government has had a significant impact on other local governments' policies on rejected asylum seekers, further strengthening the protection of migrants' human rights beyond Utrecht. Overall, this section has shown the power of Utrecht's local government, through raising awareness of its policy and exchanging knowledge with other local

²⁷⁷ Interview #2.

²⁷⁸ See: Braat & Oepkes, "Local Migration Policy in the Municipality of Utrecht, The Netherlands," 2013; Braat & Oepkes, "Local Undocumented Migration Policy in the Municipality of Utrecht, The Netherlands," 2013; Braat & Oepkes, "City of Utrecht: Human Rights First," 2014; Braat et al., 2014.

²⁷⁹ Ibid.

²⁸⁰ See: Section 2.1.4.

²⁸¹ Municipality of Utrecht, 2011, pg 18.

²⁸² INLIA Foundation. "Noodopvang—Hoe nu Verder? [Emergency—What now?]," available at <http://www.inlia.nl/news/show/noodopvang---hoe-nu-verder>.

governments as a ‘policy entrepreneur,’ to spread its policy and objectives horizontally, further strengthening the protection of migrants’ human rights on this level.

3.5 Conclusion

When forced with the choice of complying with national law on migration or violating national law to fulfill domestic competences and obligations under human rights law, the local government of the human rights city of Utrecht not only chose the latter but also encouraged other municipalities to do so and pressured the national government to reform its policy. The analysis of the structure of authority and power in this case revealed an increasingly decentralized system of cooperation between the national and local governments in partnership rather than in a hierarchical arrangement, allowing for a significant degree of autonomy and power that helped facilitate Utrecht’s disobedience. Utrecht’s duties under domestic law related to social services and public order as well as the local government’s recognition of its obligations under human rights law led to conflicting objectives with the national government over rejected asylum seekers, generating an implementation gap. Relative success can be attributed to Utrecht’s defiant local policy given that it has endured so long without interference and that the situation of migrants’ rights is better addressed and respected in Utrecht than if local officials complied with the national policy and provided no assistance to meet the basic needs of rejected asylum seekers. The ongoing debate and national attention to the issue and small reforms of the national policy, such as through the April 2015 agreement, further demonstrate some influence to strengthen migrants’ rights at the national level. Even though the local government has not completely overcome the implementation gap by coercing the national government to change its policy to be in line with Utrecht’s objectives and human rights, there has still been some positive influence. The findings also reveal that Utrecht’s local government has extended its influence on migrants’ rights beyond its city to other municipalities by cooperating with other municipal officials and advocating through national and international networks. The positive impact at each level demonstrates that Utrecht’s local government does possess sufficient power to improve conditions for migrants’ human rights.

CHAPTER 4

CASE STUDY OF SAN FRANCISCO'S SANCTUARY POLICY

San Francisco is famous for many reasons, including its creative culture, its role in the gay rights movement, its proximity to Silicon Valley, and its progressive politics. This culture with an emphasis on innovation and a dedication to progressive ideals sets San Francisco apart from other cities. It has been the first city to do many things in the US—the first to ban plastic shopping bags from its stores,²⁸³ the first to prohibit asking about criminal convictions on job applications, and the first to adopt CEDAW into local law,²⁸⁴ all of which have spread to other cities across the country. In addition to being a leader in these areas, the city is in many ways at the forefront of human rights in the US. This is demonstrated by city having its own Human Rights Commission, which operates a complaints mechanism, makes recommendations to local government bodies, and promotes human rights among the public,²⁸⁵ as well as an Immigrant Rights Commission to advise the local government on migration affairs and enhance “the quality of life and civic participation of all immigrants in the City.”²⁸⁶

This commitment to human, and specifically migrant rights, has contributed to San Francisco's local government taking actions to protect rights in the face of strict federal migration policies. In the 1980s, the local government joined other cities in refusing to cooperate with federal authorities and protect Central American refugees after the federal

²⁸³ Chartrand, Sabra, “Paper Bags or Plastic Bags? New Proposals Like Neither,” in *The New York Times*, 20 May 2010, available at <http://www.nytimes.com/2010/05/21/us/21sfplastic.html>.

²⁸⁴ San Francisco Government, “Factsheet: Implementing CEDAW as a Local Ordinance,” available at <http://sfgov.org/dosw/cities-cedaw>.

²⁸⁵ San Francisco Administrative Code, Chapter 12A, Sec12A4-5.

²⁸⁶ San Francisco Government, “Immigrant Rights Commission,” available at <http://sfgov.org/oceia/immigrant-rights-commission>.

government refused to uphold its international legal obligations to grant asylum to them.²⁸⁷ These ‘sanctuary’ policies have evolved since then to focus on protecting the rights of undocumented migrants and supporting the community as a whole. Though not the only city with such policies,²⁸⁸ San Francisco is among the most consistent and committed and was the first city to make its sanctuary policy into law.²⁸⁹ In precise legal terms, it is still open to debate whether such sanctuary policies violate federal law, as the constitutionality has yet to be assessed by a court.²⁹⁰ However, San Francisco’s policy of non-cooperation presents a clear challenge to federal enforcement policies and federal authority on migration.

In order to analyze the power of San Francisco’s local government involved in its sanctuary policies and the impact on migrants’ human rights, this chapter will examine the structure of federal and local government authority in the US, outline the conflict between federal and local policies in terms of an implementation gap, analyze the motives that led to San Francisco’s non-compliance, and assess the impact of San Francisco’s non-compliance locally, horizontally, and vertically in terms of the policy goals and enhancement of protection of migrants’ rights.

4.1 Structure of National & Local Government Authority

The structure of national and local government authority in the US varies significantly from that of the Netherlands and other European countries. The US is known for its commitment to federalism and strong notions of independence, which affect the organization of government in the country. This section will examine the sources and distribution of authority between levels of government and the degree of local autonomy in order to analyze the power of San Francisco’s local government in the conflict with the federal policies.

4.1.1 Source & Limits of National Government Authority:

²⁸⁷ Ridgley, 2008, pg. 55.

²⁸⁸ For example: Los Angeles, Chicago, Milwaukee, Miami-Dade County, Baltimore, New York, Philadelphia, Washington DC, see: Griffith et al., “Map: Sanctuary Cities, Counties, and States,” *Center for Immigration Studies*, available at <http://cis.org/Sanctuary-Cities-Map>.

²⁸⁹ “Timeline: How San Francisco Became a Sanctuary City for Undocumented Immigrants,” in *CBS SF Bay Area*, 8 July 2015, available at <http://sanfrancisco.cbslocal.com/2015/07/08/timeline-how-san-francisco-became-a-sanctuary-city-for-undocumented-immigrants/>.

²⁹⁰ See: Gulasekaram & Villazor, 2009.

In the US, the federal government's authority is established in the Constitution. The Constitution affirms 'federal supremacy,' meaning federal laws take precedence over state and local laws and all states are bound by them.²⁹¹ This firmly establishes a vertical, hierarchical relationship of authority between the federal and local levels of government, restricting local government's power to challenge federal policies. In addition, the document authorizes Congress to create whatever laws it deems "necessary and proper for carrying into execution its... powers," while the Constitution further assigns specific areas of competence to the federal level, including budgeting, national security and the military, declaring war, regulating naturalization, general welfare, foreign and interstate commerce, economic regulation, and the court system.²⁹² Federal authority is limited to these areas of competence by the 'reserved powers of the states' in the Tenth Amendment, which declares that all authority not specifically granted to the federal government in the Constitution belongs to the states or the people.²⁹³ This presents a significant limit to federal authority, requiring any action or law at the federal level to be justified by one of the competences granted to the federal government in the Constitution. Therefore, though the federal government's authority takes precedence over the authority of state and local governments through the principle of federal supremacy, federal authority is restricted in terms of areas of competence. This arrangement highlights the system of federalism in the US, involving a high degree of subsidiarity and decentralization, which is significant for this case study as these restrictions on federal authority limit the federal government's ability to compel local authorities to cooperate with federal policies²⁹⁴ and allow for a high degree of local autonomy.

4.1.2 Source & Limits of San Francisco's Local Government Authority:

The US Constitution does not address local governments; thus, under the 'reserved powers of the states,' state governments are responsible for determining the authority of local governments.²⁹⁵ In California, the state constitution permits local governments to "make and enforce all ordinances and regulations in respect to municipal affairs" provided they comply

²⁹¹ US Constitution, Article VI, Sec. 2.

²⁹² Ibid., Article I, Sec. 8.

²⁹³ Ibid., Amendment X.

²⁹⁴ See: *Printz v. United States*, 521 US 898 (1997), para. 935.

²⁹⁵ NLC, "Local US Governments," available at <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-structures/local-us-governments>.

with state and federal laws.²⁹⁶ The state allows the option for local governments to derive their authority from charters approved by the voters,²⁹⁷ which is the case in San Francisco with a charter establishing the authority of each branch of the local government.²⁹⁸ The fact that local citizens can chose to create their own charter to suit their preferences in terms of the structure and priorities of their local government demonstrates very strong local autonomy and local choice, which corresponds to the American federalist ideal and both arguments of local participation and local efficiency advocated by John Stuart Mill and others.²⁹⁹ As discussed in Chapter 2, this autonomy is crucial in enabling the local government to make decisions that account for the needs of the local community, including migrants. Combined with the unique perspective and competences of the local government, this autonomy enables local policymaking that contrasts with federal priorities, focusing on pressing community needs rather than broad, national measures that do not recognize the same needs.

4.1.3 Division of Competences:

Generally speaking, the federal government has authority to decide on national issues, while the states have authority to govern their internal affairs. In terms of migration, the federal government, specifically Congress, has “exclusive authority.”³⁰⁰ Coupled with the concept of federal supremacy, this means that local laws on migration could be deemed unconstitutional.³⁰¹ However, the Supreme Court has clarified that this exclusive authority only extends to regulating entry/exit into the country and that it is possible for state and local governments to make laws that deal with the lives of migrants in their jurisdictions, as long as they do not contradict federal laws.³⁰² Several executive agencies are responsible for carrying out Congress’ authority and overseeing migration law enforcement. One of them is the Department of Homeland Security (DHS), and within DHS, US Immigration and Customs Enforcement (ICE) focuses on “enforcement and removal operations,” which entails

²⁹⁶ Constitution of the State of California, Article XI, Sec.5.

²⁹⁷ *Ibid.*, Sec.3.

²⁹⁸ *See*: San Francisco Charter.

²⁹⁹ *See*: Section 2.1.1.

³⁰⁰ Gulasekaram & Villazor, 2009, pg 1685.

³⁰¹ *Ibid.*, pg 1687.

³⁰² Chacon, 2014, pg 21-22.

identifying, apprehending, detaining, and removing what the agency terms “illegal aliens” from the country.³⁰³

Though local governments have no explicit legal competence in migration, the federal government has become increasingly reliant on local participation in migration enforcement.³⁰⁴ The federal government has recruited assistance from state and local authorities for decades, but these efforts increased significantly in the 1990s and after 9/11, resulting in a “devolutionary shift”³⁰⁵ with the expectation from the federal level of cooperation from local authorities.³⁰⁶ In addition, local governments are responsible for a wide array of duties affecting the daily lives of members of their communities, including migrants. These duties include maintaining a city police force and other emergency services, providing sanitation and other essential services, and operating public transportation.³⁰⁷ Though the federal government has authority over migration matters, local policies inevitably affect the lives of migrants. Local governments’ discretion in dictating how local law enforcement agents will handle cases involving potential undocumented migrants or to what extent the city will offer social services without proof of migration status are two examples of the substantial ways local government competences can have a significant impact on the lives of undocumented migrants in their communities.

4.2 Overview of Policy Conflict

The policy conflict in this case concerns San Francisco’s local government’s refusal to cooperate with federal enforcement of migration policies, leading to an implementation gap. This section outlines the federal enforcement policies, local response, and coercive measures used in line with the policy implementation gap model.

4.2.1 Federal Policies Regarding ‘Unlawful’ Migration:

A variety of federal laws have been passed over the years regulating all aspects of migration. The 1952 Immigration and Nationality Act (INA) specifies the rules for entering the US, regulations on authorization for legal residence, the procedures for addressing

³⁰³ ICE, “Who We Are: Overview,” available at <https://www.ice.gov/about>.

³⁰⁴ Su, 2009, pg. 301.

³⁰⁵ Ibid., pg 301-302.

³⁰⁶ Bilke, 2009, pg. 182.

³⁰⁷ Constitution of the State of California, Article XI, Sec.5, 7, 9.

“unlawful” migration, and the criteria that allow a migrant to be deported.³⁰⁸ In recent decades, new laws regulating migration have become more restrictive and have “gradually eroded legal protections and due process,” not just for undocumented individuals but for legal residents and citizens as well.³⁰⁹ The Immigration and Reform and Control Act of 1986 introduced sanctions on employers who hire undocumented migrants, restricting access to jobs.³¹⁰ Several 1996 laws added to this by limiting access to federal social services, driver’s licenses, and higher education, while increasing penalties for violating migration laws.³¹¹ This represented a shift in responsibility, extending enforcement duties to social service providers, health care workers, and educators by requiring them to verify individuals’ migration status.³¹² The 1996 laws also began to restrict due process and judicial review in removal proceedings, which became even further constrained by post-9/11 laws, such as the Patriot Act on 2001.³¹³

In addition to the rules laid out in federal law, the federal government develops programs detailing its priorities and approach to enforcement. The Safe Communities Program (S-Comm) represented a major shift in enforcement policies by linking the regular work of local police to migration enforcement. Beginning in 2008, S-Comm required the fingerprints taken by state and local law enforcement agencies to be run through migration databases to allow ICE to access the information.³¹⁴ ICE would determine whether to issue a detainer request to the local police, informing (but not obliging) the local police to detain the individual for ICE.³¹⁵ These ICE detainers may last up to 48 hours plus holidays and weekends, which can result in up to five days of detention over a holiday weekend.³¹⁶ Though detainer requests had existed before, S-Comm significantly increased their importance.³¹⁷ S-Comm was stopped in 2014 and replaced by the Priorities Enforcement Program (PEP-Comm), which uses similar practices but focuses attention on criminals.³¹⁸ The federal

³⁰⁸ Immigration and Nationality Act of 1965, 8 U.S.C. 1101-1381.

³⁰⁹ Ridgley, 2008, pg. 62.

³¹⁰ Ibid., pg. 59-60.

³¹¹ Ibid., pg. 61-62.

³¹² Ibid., pg. 61.

³¹³ Ibid., pg. 61-62.

³¹⁴ Theodore, 2013, pg. 2.

³¹⁵ Omar, 2016, pg. 165-167.

³¹⁶ ACLU, 2014, 1.

³¹⁷ Omar, 2016, pg. 165.

³¹⁸ Johnson, 2014, pg 2.

government argues that programs like S-Comm and PEP-Comm allow the government to “identify and remove” migrants who “pose a potential threat to public safety.”³¹⁹ Despite the goal of protecting the public, these federal enforcement policies employed under these programs have raised many human rights concerns.

4.2.2 Impact of the Federal Policies on Human Rights:

The strict federal enforcement of migration policies have numerous negative effects on migrants’ human rights. The US recognizes some human rights through its own constitution as well as several UN treaties, including the ICCPR. In terms of the S-Comm and PEP-Comm programs specifically, civil society organizations, such as the American Civil Liberties Union (ACLU), have alleged that practices of federal officials violate multiple rights provisions in the US Constitution. The ACLU argues ICE’s enforcement policies violate both the Fourth and Fourteenth Amendments, which contain protections against unlawful detention, due process violations, and discrimination.³²⁰ These rights are also present in the ICCPR in Articles 9 and 14. In addition to the ACLU, Amnesty International and Human Rights Watch have reported on violations of migrants’ human rights in the form of arbitrary and unlawful detention.³²¹

Another concern over the federal policy is that it affects the realization of other human rights by creating an environment of fear for migrants. In its report on detention of migrants in the US, Amnesty International quotes a former executive director of ICE who said, “If you don’t have enough evidence to charge someone criminally but you think he’s illegal, we [ICE] can make him disappear.”³²² This kind of rhetoric demonstrates the “climate of fear” generated by federal policies and practices, giving, as Amnesty International argues, “the impression that immigrants do not—and should not—have any rights at all”³²³ Such critical responses from civil society and human rights organizations to federal enforcement of migration policies highlight the harmful impact on a wide array migrants’ human rights, contributing to the protection gap for migrants.

³¹⁹ ICE, “Secure Communities: Get the Facts,” available at <https://www.ice.gov/secure-communities#tab1>.

³²⁰ ACLU, 2014, pg. 1.

³²¹ See: Human Rights Watch, “US 20 Years of Immigrant Abuses,” 25 April 2016, available at <https://www.hrw.org/news/2016/04/25/us-20-years-immigrant-abuses>; Amnesty International, 2009.

³²² Amnesty International, 2009, pg. 4.

³²³ Ibid.

4.2.3 Implementation of Federal Enforcement Policies & the Gap:

While ICE is the main entity tasked with enforcement of laws concerning undocumented migrants living in the US, the federal government has increasingly sought local involvement in enforcement of migration policies in recent years.³²⁴ Though the Supreme Court has ruled it is not within the federal government's authority to "compel the States to enact or enforce a federal regulatory program,"³²⁵ federal law bars any government official or entity (at any level) from "prohibit[ing], or in any way restrict[ing], any government entity or official from sending to, or receiving from" federal migration authorities "information regarding the citizenship status, lawful or unlawful, of any individual."³²⁶ This statute demonstrates the expectation of cooperation from state and local governments in the implementation and enforcement of federal migration laws. Though the federal government may not have the authority to compel local governments to enforce its programs, local governments are bound to comply with federal laws under the principle of federal supremacy. Though the federal law prohibits restrictions on sending and receiving information, as noted above, it does not prevent local governments from refusing to collect information on individuals' migration status,³²⁷ which has been a key tactic of the sanctuary movement.

Despite these legal provisions on cooperation with federal enforcement authorities, cities and counties since the 1980s have been challenging federal authority on matters related to undocumented migrants by refusing to cooperate with enforcement of federal migration policies in what has been termed the 'sanctuary movement.' The movement arose in response to the federal government's refusal to recognize the asylum claims of Central Americans who had fled civil wars.³²⁸ Religious organizations began providing protection to the Central American refugees, and cities, including San Francisco, followed suit.³²⁹ Those in the movement were motivated by the view that the federal government was not administering the law regarding refugees fairly, claiming it was compromised by foreign policy interests in the

³²⁴ Su, 2009, pg. 301.

³²⁵ *Printz v. United States*, 521 US 898 (1997), para. 935.

³²⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. 1373(a).

³²⁷ Ridgley, 2008, pg. 62.

³²⁸ Bau, 1994, pg. 50.

³²⁹ *Ibid.*, pg. 51-52.

Central American countries.³³⁰ Local governments adopted resolutions banning local government officials from cooperating with the federal government's arrest and deportation of Central American refugees within their jurisdictions,³³¹ and in this way, challenged federal government authority over migration. This opposition by local government, towards cooperating with the enforcement of federal migration policies has resulted in an 'implementation gap.' Following Matland's framework, this fits into the 'political implementation' category, like the case in Utrecht, because conflicting objectives between the federal government and local governments that led to the gap.

4.2.4 San Francisco's Non-Cooperative Local Policy Stance:

As a member of the sanctuary movement since the 1980s, San Francisco's local government has taken a stance of non-compliance with assisting in identification and deportation of undocumented migrants and has maintained this policy of non-cooperation for decades. The legal basis for this local policy has been established in the San Francisco Administrative Code through several local ordinances explicitly banning local officials from cooperating with federal authorities on migration enforcement. The local policy has been altered over the years, but the core of the principle of non-cooperation has remained.

In 1985, San Francisco's Board of Supervisors passed a non-binding resolution that declared San Francisco to be a 'City and County of Refuge' and was intended to set a general stance for the city.³³² In 1989, Ordinance 375-89 made the policy into law, and prohibited any city entity or official from aiding "in the enforcement of Federal immigration law or to gather or disseminate information regarding the immigration status of individuals."³³³ This provision means that police and other local officials do not ask individuals about their migration status in an effort to avoid collecting information that they could be obligated to share with federal enforcement officials. This prevents the local government from assist with in the enforcement of federal migration policies or the investigation or deportation of migrants. In 2013, San Francisco further strengthened its sanctuary policy by adopting another ordinance that prohibited city officials and entities from complying with detainer requests from federal

³³⁰ Ibid., pg. 50-51.

³³¹ Ibid.

³³² Bau, 1994, pg. 54.

³³³ Ibid., pg. 53-54; San Francisco Administrative Code, Chapter 12H, Sec 12H.2.

authorities, known as the ‘Due Process for All Ordinance.’³³⁴ The ordinance refers to ICE detainer requests, as discussed previously, which are non-legally binding requests by ICE for police to temporarily detain a suspected undocumented individual in custody until they can be picked up by federal authorities.³³⁵ Though these ordinances have been adopted separately over the years, they form a cohesive policy together in response to federal migration enforcement.³³⁶

These local ordinances attempt to address the negative effects of the federal policies on human rights within the community. The local law fits in to the city’s goal mentioned in its human rights policies to “give effect to the rights of every inhabitant” to “equal economic, political, and educational opportunity” as well as to equal treatment by businesses and public agencies.³³⁷ Not only does San Francisco’s local policy protect migrants from having their rights to due process violated and from being unlawfully detained, but it also helps remove the culture of fear generated by federal migration policies from the community. The ordinances aim to facilitate easier access to public services for undocumented individuals by removing potential fear of being asked about migration status when accessing public services like health care and education. The 1989 ordinance even specifies that no services or benefits provided by the city can be conditioned on migration status, unless required by federal or state law.³³⁸ Overall San Francisco’s local sanctuary policy respects international human rights standards at the center of San Francisco’s own long-standing human rights policies.

4.2.5 National Coercive Methods:

According to Matland’s model of political implementation, both sides will use their power to try to coerce compliance from the other, which has been exemplified by the federal governments’ numerous attempts to coerce local governments into cooperation with the enforcement of federal migration policies. Since the Supreme Court has ruled that the federal government does not have authority to force local governments to implement a federal

³³⁴ San Francisco Administrative Code, Chapter 12I, Sec 12I.3.

³³⁵ Ibid., Sec 12I.2.

³³⁶ For this reason, they will be referred to jointly as San Francisco’s local sanctuary policy throughout this thesis.

³³⁷ San Francisco Administrative Code, Chapter 12A, Sec 12A.2.

³³⁸ Ibid., Chapter 12H, Sec 12H.2.

enforcement programs,³³⁹ the methods for coercion are significantly limited. However, the federal government can still attempt to coerce local governments indirectly through influencing the federal funding allotted to local governments.³⁴⁰ Several recent bills in Congress involved using financial means to coerce sanctuary cities, like San Francisco, into cooperating with the federal government. In 2008, the Vitter Amendment tried to prevent funds from going to sanctuary cities that “ignore the immigration laws of the United States,” but it failed to pass.³⁴¹ In 2015, eight bills and one amendment were introduced in Congress all aiming to restrict federal funding to sanctuary cities.³⁴² All of these pieces of legislation are currently stuck in committee, with only one having passed the House.³⁴³ So far in 2016, one similar bill has been introduced, attempting to prevent certain federal funding to sanctuary cities.³⁴⁴ The surge in proposed legislation to penalize sanctuary cities has come in the wake of the murder of Kate Steinle by an undocumented migrant with multiple felony convictions in San Francisco in 2015.³⁴⁵ Steinle’s death attracted nationwide media attention and rhetoric from national politicians condemning San Francisco’s local policy, including Senator Pat Toomey, who argued legislation to cut funding to sanctuary cities was necessary “in order to get these cities to do the rights thing and stop undermining our immigration laws.”³⁴⁶

Though national attention on a case like Steinle’s may appear as though it would drive federal lawmakers to pass coercive legislation targeting defiant local governments with sanctuary policies, a similar case in San Francisco in 2008, in which a father and his two sons were murdered by an undocumented migrant with a criminal history,³⁴⁷ failed to galvanize action at the federal level. Given the lack of coercive action taken after the 2008 incident and

³³⁹ See: *Printz v. United States*, 521 US 898 (1997).

³⁴⁰ Gulasekaram & Villazor, 2009, pg. 1703.

³⁴¹ *Ibid.*, pg 1694.

³⁴² See: H.R.3002, H.R.3073, H.R.3128, H.R.3009, H.R.3011, H.Amdt.352, S.1764, S.1814, and S.2146 114th Congress (2015-2016).

³⁴³ See: H.R.3009, 114th Congress (2015-2016).

³⁴⁴ See: S.3100, 114th Congress (2015-2016).

³⁴⁵ DeBonis, Mike, “House Votes to Strip Federal Funding from ‘Sanctuary Cities,’” in *The Washington Post*, 23 July 2015, available at https://www.washingtonpost.com/politics/house-prepares-to-take-aim-at-sanctuary-city-policies/2015/07/23/24afa5c0-30c7-11e5-97ae-30a30cca95d7_story.html?tid=a_inl.

³⁴⁶ Fitzgerald, Sandy, “Toomey: Sanctuary Cities Law Vital for US Safety,” in *NewsMax*, 17 October 2015, available at <http://www.newsmax.com/Newsfront/toomey-gop-address-kate-steinle-sanctuary/2015/10/17/id/696689/>.

³⁴⁷ Bulwa, Demian, “S.F. Family’s Murderer Killed Before, FBI Was Told,” in *SF Gate*, 21 August 2014, available at <http://www.sfgate.com/crime/article/S-F-family-s-murderer-killed-before-FBI-was-told-3676718.php>.

the failure to pass the ten pieces of legislation proposed since 2015 that would block funding to sanctuary cities, it seems political support to force cooperation from cities with policies like San Francisco's may continue to be lacking. The significant restrictions on federal authority, through the 'reserved powers of the states,' leaves passing legislation limiting funding to disobedient local governments as one of the few methods available to coerce cooperation from local authorities. This relies on support of federal lawmakers, and their failure to succeed in passing such legislation indicates the federal government has the authority, but clearly insufficient power to compel local governments to cooperate, which under Matland's framework, is necessary to overcome the implementation gap.

4.3 Motivations Behind the Local Policy Stance

The motives behind San Francisco's conflicting objectives that are driving the implementation gap in the enforcement of federal migration policies can be separated into legal and pragmatic categories, like in the case in Utrecht. The motives stemming from the local government's legal and rights-related obligations pertain to protections of civil and human rights found in both domestic and international law. The pragmatic motives concern negative consequences that cooperating with federal enforcement policies would bring to the city as well as questionable effectiveness of the federal policies and relate the nature of local government in terms of efficiency and being positioned to deal with the "practical reality"³⁴⁸ on the ground.

4.3.1 Motives Related to Legal & Rights-Related Obligations:

There are a number of legal concerns, pertaining to rights contained in both the US Constitution and international human rights law, which have contributed to San Francisco's non-compliance with enforcement of federal migration policies. San Francisco's local government has cited concerns that federal enforcement practices infringe on the fulfillment of rights to liberty and due process, contained in the Fourth and Fifth Amendments of the US Constitution and similarly in Article 10 of the ICCPR,³⁴⁹ as an impetus for its local policy stance of non-cooperation. The Fourth Amendment prohibits unlawful search and seizure,

³⁴⁸ Barber, 2014, pg. 19.

³⁴⁹ ICCPR, Article 10.

including “a person’s freedom to walk away,”³⁵⁰ and requires probable cause for a search or seizure to be lawful.³⁵¹ The Fifth Amendment states, “No person shall be...deprived of life, liberty, or property without due process of law.”³⁵² The protections found in both of these amendments have been held applicable to non-citizens including undocumented migrants.³⁵³ The 2013 “Due Process for All” ordinance expresses the local government’s concerns about federal enforcement policies in a very direct way, stating that the fact that federal enforcement policies include requests for local authorities to detain individuals (‘ICE detainees’) could be “issued without evidentiary support or probable cause,” “without judicial oversight,” and “provide no minimum standard of proof for their issuance” raises “serious questions as to their constitutionality.”³⁵⁴ These ICE detainees also involve local police detaining individuals for federal authorities often without being informed of charges against them, review before a judge, or other procedural safeguards.³⁵⁵ The local government’s concerns about federal enforcement policies involving unlawful detention and infringing on rights have been bolstered by recent court rulings, which have found violations of rights under the Fourth and Fifth Amendments including *Morales v. Chadbourne*, involving a US citizen detained twice under federal enforcement policies which the court found to constitute unlawful detention.³⁵⁶

There is also evidence of San Francisco’s non-compliance with federal enforcement policies being driven by legal provisions of non-discrimination, found in the Fourteenth Amendment of the US Constitution and Article 2 of the ICCPR.³⁵⁷ The issue of discrimination goes back to the very beginning of San Francisco’s sanctuary policies with the original 1985 resolution barring city officials from “discriminat[ing] against Salvadoran and Guatemalan refugees because of immigration status.”³⁵⁸ This policy against discrimination based on migration status has been expanded by the local government over the years, reaffirmed in the 2013 Due Process of All ordinance, stating, “The City respects, upholds, and values equal protection and equal treatment for all of our residents, regardless of immigration

³⁵⁰ Manuel, 2015, pg. 18.

³⁵¹ ACLU, 2014, pg. 4.

³⁵² US Constitution, Amendment V.

³⁵³ Manuel, 2015, pg. 18.

³⁵⁴ San Francisco Administrative Code, Ch. 12I, Sec 12I.1.

³⁵⁵ Omar, 2016, pg. 171-173.

³⁵⁶ ACLU, 2014, pg. 3; *Morales v. Chadbourne*, (1st Cir. 2015).

³⁵⁷ US Constitution, Amendment XIV; ICCPR, Article 2.

³⁵⁸ San Francisco, Resolution No. 1087-85 in Bau, 1994, pg. 52.

status.”³⁵⁹ This inclusion of migration status as a category protected from discrimination goes beyond protections of US national law (which only covers discrimination on grounds of race, ethnicity, or national origin³⁶⁰), but is enshrined within international human rights instruments, including the ICCPR, which the US is bound by.³⁶¹ There have been numerous cases substantiating violations of non-discrimination involved in the enforcement of federal migration policies, in which individuals allege they were only suspected by enforcement officials because of their race, ethnic, or national origin,³⁶² including *Morales v. Chadbourne* and *Galarza v. Szalczyk*.³⁶³ These court cases support the local government’s concern that cooperating with federal enforcement policies presents risks to the local government’s strong commitment to non-discrimination protected in its local policies as well as national and international legal obligations.

In addition to civil rights and non-discrimination, San Francisco’s local policy of non-cooperation also appears to be driven by concerns of the federal policies’ impact on economic, social, and cultural (ESC) rights. Though the US is neither bound to international treaties recognizing ESC rights nor provides for such rights in national law, San Francisco’s local government has proclaimed a broad commitment to: “equal economic, political and educational opportunity” of “every inhabitant.”³⁶⁴ Additionally, in reference to the city’s sanctuary policies, San Francisco’s Mayor Edwin Lee stated, “We want people to report crimes, we want children of undocumented immigrants to attend school, and we want families to get access to much needed social services without fear of their city government reporting them to federal authorities.”³⁶⁵ This explanation by the mayor not only highlights that one goal of local policy is to support access to social services that contribute to the enjoyment of basic ESC rights, it also identifies the local government’s view that cooperating with enforcement of federal migration policies presents a barrier especially for undocumented migrants’ to access basic services. Research findings support assertions of San Francisco’s

³⁵⁹ San Francisco Administrative Code, Ch. 12I, Sec 12I.1.

³⁶⁰ Legal Information Institute Cornell University Law School, “Equal Protection,” available at https://www.law.cornell.edu/wex/equal_protection.

³⁶¹ See: ICCPR, Article 2 (‘other status’).

³⁶² Omar, 2016, pg. 173-174.

³⁶³ Ibid., pg. 175; *Galarza v. Szalczyk*, (E.D. Pa. 2012), pg. 19.

³⁶⁴ San Francisco Administrative Code, Ch. 12A, Sec 12A.2.

³⁶⁵ Richardson, Valarie, “San Francisco Mayor Defends Sanctuary City Policy After Fatal Shooting,” in *The Washington Times*, 6 July 2015, available at <http://www.washingtontimes.com/news/2015/jul/6/edwin-lee-san-francisco-mayor-defends-sanctuary-ci/>.

local government that cooperation with federal enforcement policies increases fear in the community and deters migrants from seeking services they are entitled to that assist in the realization of basic ESC rights.³⁶⁶ Thus, the local government's non-cooperative stance has been in part motivated by its commitment to human rights and substantiated concerns over the risks to a variety rights posed by the implementation of federal enforcement policies.

4.3.2 Pragmatic Motives:

Provisions in the local ordinances themselves as well as public statements by San Francisco officials establish that one of the primary 'pragmatic' factors for the local government's municipal disobedience relates to maintaining trust between migrants and local authorities. Local politician Malia Cohen demonstrated this by saying, "We can talk all we want about improving public safety...but if people in our community don't trust law enforcement, no level of police staffing is going to make our community safe."³⁶⁷ The local government asserts that compliance with federal enforcement policies would "undermine community trust of law enforcement by instilling fear in immigrant communities of coming forward to report crimes and cooperate with local law enforcement agencies."³⁶⁸ Several studies have found evidence to support the link between local authorities participating in enforcement of federal migration policies and increased distrust of local authorities, and that this fear makes individuals less likely to inform the police if they are victims or witnesses of a crime.³⁶⁹ These findings imply cooperation with federal enforcement policies or other local officials not only affects access to social services, as discussed above, but also negatively impacts public safety—two of the main responsibilities of local governments. The recognition of the importance of trust between the police and community and the negative consequences associated with a lack of trust has driven San Francisco's local government to develop their own policy of non-cooperation, and in this way, enable migrants to access services and contact the police without fear of being deported.

³⁶⁶ Nguyen & Gill, 2015, pg. 17.

³⁶⁷ Green, Emily, "Supervisors Say SF's Sanctuary City Policies are Just Fine," in *SF Gate* 20 October 2015, available at <http://www.sfgate.com/bayarea/article/Supervisors-say-SF-s-sanctuary-city-policies-6580287.php?cmpid=brknow>.

³⁶⁸ San Francisco Administrative Code, Ch. 12I, Sec 12I.1.

³⁶⁹ Theodore, 2013, pg. 5-7; *also see*: Nguyen & Gill, 2015.

A related factor driving San Francisco’s refusal to cooperate with federal enforcement policies is the lack of evidence to support federal government assertions about the effectiveness of its enforcement policies. Though the federal government cites public safety as the main motivation behind their strict approach to enforcement of migration laws,³⁷⁰ there is little evidence to support this justification, which suggests a link between migration and crime and positions local non-cooperation as a threat to public safety. Despite highly publicized incidents of violent crime perpetrated by undocumented migrants such as the Bologna and Steinle murders in San Francisco, studies have found that migrants are less likely than locals to commit crimes³⁷¹ and that “increases in immigration are associated with declining rates [of homicide].”³⁷² According to Miles and Cox’s recent study of S-Comm, the enforcement program did not reduce the overall rate of crime rate.³⁷³ Thus, large-scale targeting of suspected undocumented migrants through investigation and detention appears ineffective if public safety is the objective. Though opponents to sanctuary cities, like Senator Ted Cruz, frame sanctuary cities as “a threat to the safety of the American people,”³⁷⁴ the lack of proof substantiating a positive impact of federal enforcement programs on public safety and evidence to the contrary (cited in the previous paragraph) through inhibiting local policing, seem to indicate the opposite, explaining that from the perspective of San Francisco’s local government, cooperating with enforcement of federal migration policies seems to only add risks to rights by without providing any positive aspects.

A final pragmatic factor that influenced the non-cooperative stance by San Francisco’s local government relates to resource allocation. The text of the local ordinance itself includes provisions referencing cost and resources, noting, “The federal government should not shift the burden of federal civil immigration enforcement onto local law enforcement. It is not wise and effective use of valuable City resources at a time when vital services are being cut.”³⁷⁵ The way ICE’s requests for local authorities to detain individuals suspected of being

³⁷⁰ ICE, “Secure Communities: Get the Facts,” available at <https://www.ice.gov/secure-communities#a1>; ICE, “Priority Enforcement Program,” available at <https://www.ice.gov/pep/>.

³⁷¹ Sampson, 2008, pg. 29.

³⁷² Ousey & Kurbin, 2014, 483.

³⁷³ Miles & Cox, 2014, pg. 937; *also see*: Omar, 2016, pg. 163.

³⁷⁴ “Senate Dems Block Votes on Immigration Issues, Including Sanctuary Cities,” in *Fox News*, 7 July 2016, available at <http://www.foxnews.com/politics/2016/07/07/senate-dems-block-votes-on-immigration-issues-including-sanctuary-cities.html>.

³⁷⁵ San Francisco Administrative Code, Ch. 12I, Sec 12I.1.

undocumented are constructed, all costs involved in detaining an individual until ICE takes custody are the responsibility of the local government, not federal authorities.³⁷⁶ Compliance with federal enforcement policies also presents costs to the city in terms of allocation of police efforts, as it would require police officers dedicate time and attention to handling migration matters rather than other policing needs of the community. These logical and pragmatic concerns support the argument, discussed in Chapter 2, related to local governments being more efficient and practical than national governments by nature, and they also relate to the local government's responsibilities under their competences to provide for public safety, social services, and general well-being in their community.³⁷⁷ Their connection to aspects of the nature of local government and local competences, in part, indicate why these local objectives conflict with those of the federal government focused on broad national security, resulting in the implementation gap.

4.4 Impact of Local Power in the Policy Conflict

As with the case of Utrecht, the impact of San Francisco's local policy of non-cooperation will be analyzed at the local, vertical, and horizontal levels in terms of whether the local government has strengthened the protection of undocumented migrants' human rights. In addition to the human rights impact, the source of the local government's power to affect the outcomes of each level will also be analyzed.

4.4.1 Local Context:

Within the context of the city, it seems San Francisco's local policy stance of non-cooperation with the enforcement of federal migration policies has arguably yielded positive results, though a few high-profile incidents, like the Steinle murder, have marred the policy's reputation. Local government officials insist the policy has a positive impact on safety and individuals' rights in their community. For example, in reference to the local sanctuary policy, former San Francisco Sheriff Ross Mirkarimi said, "I firmly believe it makes us safe... We're a world-renowned city with a large immigrant population... From a law enforcement

³⁷⁶ See: 8 CFR 287.7(e).

³⁷⁷ See: Section 2.1.1.

perspective, we want to build trust with that population.”³⁷⁸ Though no specific studies have been conducted to assess the impact of the policies on trust towards public officials in San Francisco, research conducted in numerous cities around the US have yielded similar results,³⁷⁹ finding that local cooperation with enforcement of federal migration policies leads to decreased trust of local officials.³⁸⁰ The studies also show this results in a “chill effect” with negative impacts on public safety, by deterring individuals from communicating with the police, and on ESC rights by making individuals afraid to access services, such as hospitals and schools, that contribute to the realization of their rights.³⁸¹ The findings of these studies indicate that San Francisco’s decision to refuse to cooperate with enforcement of federal migration policies contributes to stronger trust between police and migrants, ultimately resulting in a safer community and better conditions for the realization of rights.

In addition to the studies, court cases and civil society also support the positive impact of San Francisco’s local policy on conditions for migrants’ rights locally. Numerous court rulings and reports by NGOs that finding violations of the rights to liberty, due process, and non-discrimination in cases of cooperation with enforcement of federal migration policies³⁸² provide further indication that the local policy reduces risks to individuals’ rights. Representatives of civil society that work with migrants have also expressed support for the effectiveness of San Francisco’s local policy in improving conditions for migrants by reducing fear and enabling migrants to access city services.³⁸³ This evidence from academia, the courts, and civil society demonstrates that San Francisco’s local government has have the power to protect rights within its own community, stemming from its role in the implementation of enforcement policies and federal government reliance on their cooperation.

4.4.2 Vertical Context:

³⁷⁸ Pearson, Michael, “What is s ‘Sanctuary City,’ and Why Should You Care?” in *CNN*, 6 July 2015, available at <http://edition.cnn.com/2015/07/06/us/san-francisco-killing-sanctuary-cities/>.

³⁷⁹ See: Nguyen & Gill, 2015; Theodore, 2013.

³⁸⁰ Nguyen & Gill, 2015, pg. 4, 15.; *also see*: Theodore, 2013, pg. 1.

³⁸¹ *Ibid*.

³⁸² See: Amnesty International, 2009; Human Rights Watch, “US 20 Years of Immigrant Abuses,” 25 April 2016, available at <https://www.hrw.org/news/2016/04/25/us-20-years-immigrant-abuses>; *Morales v. Chadbourne*, (1st Cir. 2015); *Galarza v. Szalczyk* (E.D. Pa. 2012).

³⁸³ Rene Saucedo of La Raza Centro Legal in Ridgley, 2008, pg. 71.

In addition to the local context, San Francisco's local policy has also impacted the federal and state levels. At the California state level, the California Trust Act was passed in 2013, prohibiting all county officials from cooperating with requests from federal migration enforcement officials to detain suspected undocumented migrants, unless the migrant has been convicted of a crime.³⁸⁴ This law's similarity to San Francisco's local Due Process for All ordinance demonstrates the effect local governments can have on policy that helps strengthen protections for human rights at a vertical level. The Assemblyman who introduced this legislation, Tom Ammiano, is a former San Francisco supervisor³⁸⁵ and continued to be involved with the city on its sanctuary policy by, for example, attending symposiums on migration policy organized by the city's Immigrant Rights Commission.³⁸⁶ This exhibits how local governments' networking tactics can be influential not just horizontally, as will be examined in the following section, but also vertically.

In terms of the federal level, San Francisco's local government has contributed to ensuring enforcement policies remain an important topic in the national and public debate and contributed to some changes in enforcement policies. The impact on the national and public debate by local governments refusing to cooperate with federal policies has been acknowledged by numerous scholars, including Bilke, who recognizes that "polarization" created by sanctuary cities "intensifies the national immigration debate"³⁸⁷ and Su, who notes that such local governments contribute by "making their cases known to courts and public opinion" and that cities "can serve as a powerful platform for shaping federal debates."³⁸⁸ The influence can also be seen in the attention of federal lawmakers on the issue through their frequent comments on cities' sanctuary policies³⁸⁹ and in the lack of support among federal lawmakers for legislation that penalizes sanctuary cities. Even though San Francisco's local government has yet to convince enough federal government officials to reform federal migration policies to conform to the local government's objectives, it appears some federal

³⁸⁴ CA AB 4, 2013-2014.

³⁸⁵ "About Tom," available at <http://www.tomammiano.com/about.html>.

³⁸⁶ San Francisco Immigrant Rights Commission, *Summary Report on Comprehensive Immigration Reform: San Francisco's Role in Shaping National Immigration Policy*, 2010, available at <http://sfgov.org/oceia/resolutions-reports>.

³⁸⁷ Bilke, 2009, pg. 166.

³⁸⁸ Su, 2009, pg. 305, 307.

³⁸⁹ For example, see: Ferrechio, Susan, "Dems block GOP plan to penalize 'sanctuary cities,'" in *The Washington Examiner*, 20 October 2015, available at <http://www.washingtonexaminer.com/dems-block-gop-plan-to-penalize-sanctuary-cities/article/2574512>.

lawmakers have been compelled to support, or at least not oppose, San Francisco's local government, and others, that maintain sanctuary policies. Though the federal government has yet to undertake comprehensive reform of its migration laws, there has been some change at the federal level in enforcement policies in shifting from S-Comm to PEP-Comm.³⁹⁰ While S-Comm targeted all individuals suspected of being deportable, PEP-Comm narrows its focus to undocumented migrants who pose a risk to national security, have been convicted of certain types of crimes, or caught attempting to cross the border.³⁹¹ Though this shift in focus may not bring the federal policies in line with San Francisco's, it does represent a step forward. This progress in federal migration enforcement policies cannot be solely attributed to San Francisco's local government; however, some scholars, such as Omar, have acknowledged the role of local governments with sanctuary policies in contributing to pressure on the federal government to reform its approach to enforcement (PEP-Comm).³⁹² The shift in federal enforcement policies as well as the adoption of the California Trust Act show that the role of San Francisco and other local governments in affecting the national and public debate has yielded improvements in the protection of rights of undocumented migrants beyond the local governments' jurisdictions, demonstrating local government power to influence positive changes vertically.

4.4.3 Horizontal Context:

There is also evidence that the decision of San Francisco's local government to challenge the federal policies through non-compliance has had an impact on other city governments both in the US and internationally. San Francisco's local government was the first to make its sanctuary policy into law in 1989.³⁹³ According to the Migration Policy Institute, more than 360 US city and state jurisdictions currently have similar local laws that "formally limit their cooperation" with the enforcement of federal migration policies, extending stronger rights protections to approximately 53% of the undocumented population

³⁹⁰ Johnson, 2014, pg 2.

³⁹¹ Ibid.

³⁹² Omar, 2016, pg. 169.

³⁹³ "Timeline: How San Francisco Became a Sanctuary City for Undocumented Immigrants," *CBS SF Bay Area*, 8 July 2015, available at <http://sanfrancisco.cbslocal.com/2015/07/08/timeline-how-san-francisco-became-a-sanctuary-city-for-undocumented-immigrants/>.

in the US.³⁹⁴ In this way, San Francisco's local government's decision to strengthen their sanctuary commitment by giving it a legal basis placed the city in the role of a 'policy entrepreneur,' which according to the theory on policy diffusion, serves as a leader by making other actors aware of policy ideas. Additionally, following the framework of Mossberger and Wolman, San Francisco's incorporation of its sanctuary policy into law has allowed other local governments to employ 'prospective policy evaluation' by observing the creation of a sanctuary law in San Francisco's context before deciding whether and how to develop their own to best suit their contexts.³⁹⁵ In this way, San Francisco's local government has helped facilitate policy diffusion across the country by removing risks and uncertainty from other local governments' adoption of similar policies.

In addition, San Francisco's local government has supported the diffusion of sanctuary policies to other municipalities by networking with and advising other local governments. San Francisco's Human Rights Commission, the entity tasked with monitoring and overseeing the implementation of the sanctuary policies, has advised organizations and local governments on the development and implementation of sanctuary policies. For example, in 2013, the local government in Toronto, Canada sought advice from the Human Rights Commission on developing its own sanctuary policy.³⁹⁶ This instance of direct cooperation between local governments further demonstrates how San Francisco has served as a policy entrepreneur and enabled prospective policy evaluation in terms of the development of local sanctuary laws. It also illustrates the influence San Francisco's local government can have in terms of serving as an entrepreneur by providing a policy example for others to consider and engaging in knowledge exchange.

The local government further participates in knowledge exchange and raising awareness of its sanctuary policy through its membership in numerous local government networks, including the National League of Cities (NLC), the United States Conference of Mayors (USCM), and Major Cities Chiefs Association. For example, through NLC, San Francisco officials have exchanged information on creating an Immigrant Rights Commission

³⁹⁴ Rosenblum, Marc R, "Federal-Local Cooperation on Immigration Enforcement Frayed; Chance for Improvement Exists," *Migration Policy Institute*, July 2015, available at <http://www.migrationpolicy.org/news/federal-local-cooperation-immigration-enforcement-frayed-chance-improvement-exists>.

³⁹⁵ See: Section 2.1.4.

³⁹⁶ San Francisco Human Rights Commission 2013 Annual Report, pg. 19.

to better support migrant rights and inclusion in the community.³⁹⁷ These networks offer opportunities for local government to network with each other through joining in committees, attending conferences, and participating in workshops, while also providing a platform to lobby the federal government and advocate for local government interests.³⁹⁸ This has led to the municipal networks issuing statements in support of sanctuary policies and condoning proposed federal legislation that would interfere with or penalize local governments that chose to adopt sanctuary policies,³⁹⁹ which helps contribute to vertical pressure on the federal level. Participation in these networks, the example of advising Toronto's local government, and the spread of sanctuary laws to other cities all demonstrate the power of San Francisco's local government to influence other local governments' policies, through its role as a policy entrepreneur, and contribute to the improvement of conditions for migrants' human rights horizontally.

4.5 Conclusion

The analysis of San Francisco's longstanding municipal disobedience over cooperation with the enforcement of federal migration policies exhibits the city government's power to improve conditions for the rights of undocumented migrants within its community and beyond. San Francisco's local government adopted a policy of non-cooperation out of concern for the negative impact of federal enforcement on rights as well as practical concerns such as resource allocation and public safety. The strong protection of local decision-making from federal interference in the US structure of government authority helped enable the local government to take this defiant stance, shown through the limited the methods available to the federal level to coerce local compliance. Evidence has indicated that the local policy contributes to the protection of migrants' rights within the city, given cooperation with federal enforcement policies has proven to infringe on the rights to liberty, due process, and non-

³⁹⁷ NLC, 2009, pg 2.

³⁹⁸ NLC, "Advocacy," available at <http://www.nlc.org/influence-federal-policy/advocacy>; NLC, "Build Skills & Networks," available at <http://www.nlc.org/build-skills-and-networks>; USCM, "About USCM," available at <http://usmayors.org/about/overview.asp>; Major Cities Chiefs Police Association, "About Major Cities Chiefs Association," available at <https://www.majorcitieschiefs.com/about.php>.

³⁹⁹ USCM, "Conference of Mayors Opposes Federal Legislation to Undermine 'Sanctuary Cities,'" 2015, available at <https://www.usmayors.org/pressreleases/uploads/2015/0720-release-SanctuaryCities.pdf>; Ors, Yucel, "NLC Urges Senate to Reject Sanctuary Cities Amendment," *National League of Cities*, 20 November 2015, available at [http://www.nlc.org/influence-federal-policy/resources/federal-advocacy-update/federal-advocacy-update-week-ending-november-20-2015#NLC Urges Senate](http://www.nlc.org/influence-federal-policy/resources/federal-advocacy-update/federal-advocacy-update-week-ending-november-20-2015#NLC%20Urges%20Senate).

discrimination and create barriers to the fulfillment of ESC rights. The local government's influence beyond its own jurisdiction has also been illustrated through positive changes in California state law and federal enforcement practices that reduce risks to migrants' human rights as well as through other local governments adopting similar policies and seeking advice from San Francisco. The positive influence at the local, state, and federal levels as well as in other cities confirms the power of San Francisco's local government to strengthen the protection of undocumented migrants' human rights, the implications of which will be further discussed in the final chapter of the thesis.

CHAPTER 5

CONCLUSION

Though not often regarded as significant actors in the field of human rights, this research shows that local governments have ample power to positively contribute to the protection of human rights. The case studies of municipal disobedience in Utrecht and San Francisco demonstrate two distinct situations in which local governments have used their power to challenge their national governments over measures that restrict the rights of migrants. Though the cases have divergent features, including the nature of the defiance (defiance through action vs. through the refusal to act) and other specific aspects of the legal and political context of the countries, numerous parallels can be drawn regarding how they challenged the national governments, what motivated them to do so, and the general impact of their actions.

The local governments' actions in both cases were framed around the creation of a policy implementation gap as a prominent source of local government power to challenge the national policies. The local governments in San Francisco and Utrecht utilized the reliance of the national governments on local government cooperation in policy implementation as a point of power, using non-compliance on implementation to take a stance on migration policy, though this is a policy area outside their legal authority. The national governments' need for local cooperation originates from the specific structures of government authority in the US and the Netherlands, which feature a relatively high degree of devolution of responsibilities to local governments, a significant degree of local autonomy, and limited means for national government interference with local government decisions. Without these elements, the local governments in Utrecht and San Francisco would not have been empowered to carry out such defiant actions, or if they had attempted to do so, the national governments, with authority far

surpassing that of the local governments, would have adequate means to put a stop to disobedient municipal action.

In terms of what has driven local governments to use their power derived from the structures of authority and their role in policy implementation to support migrants' rights, the case studies found the local governments' motivations were dominated by pragmatic and legal factors. The pragmatic factors in both cases related to efficiency and addressing externalities of the national policies that had severe negative effects on their communities. The legal factors stemmed from duties under domestic and international law, including recognition of rights-related obligations by both local governments. The motivating factors of both Utrecht and San Francisco also relate to a difference in perspective between the local and national governments. The local motivations derive from concern for the whole community, viewing migrants as its members and threats to migrants' rights and welfare as threats to the community, which may in turn affect public safety, social cohesion, and other significant aspects that impact local governance. The perspective of the national governments, on the other hand, is positioned at the state-wide level, viewing undocumented migrants as a risk, as their rhetoric suggests, to national security.⁴⁰⁰ Both Utrecht and San Francisco have established a commitment to human rights in their communities by creating local human rights policies and mechanisms as well as dedicating staff and resources to focus specifically on human rights in their communities.⁴⁰¹ This commitment to human rights shows recognition within these local governments of a connection between respecting human rights and having better cities. This thesis did not examine how these cities began their commitments to human rights, but it did look into how ideas, such engagement with rights, are spread through norm and policy diffusion involving norm/policy entrepreneurs making other actors aware of new ideas and policies. Following these theories, if other local governments are exposed to these ideas of human rights being good for the whole community and not just legal duties but

⁴⁰⁰ For example, see: Mayor Edwin Lee in Richardson, Valarie, "San Francisco Mayor Defends Sanctuary City Policy After Fatal Shooting," in *The Washington Times*, , 6 July 2015, available at <http://www.washingtontimes.com/news/2015/jul/6/edwin-lee-san-francisco-mayor-defends-sanctuary-ci/>; "Senate Dems Block Votes on Immigration Issues, Including Sanctuary Cities," in *Fox News*, 7 July 2016, available at <http://www.foxnews.com/politics/2016/07/07/senate-dems-block-votes-on-immigration-issues-including-sanctuary-cities.html>.

⁴⁰¹ See: San Francisco Human Rights Commission, "Commission Overview," available at <http://sf-hrc.org/commission-overview>; Municipality of Utrecht, 2011.

pragmatic reasons behind Utrecht and San Francisco's decision-making, then more may take similar actions to support rights in their communities.

Regarding the impact of the actions of Utrecht's and San Francisco's local governments, the case studies found evidence indicating improved conditions for migrants' human rights, though the impact of the policies was not comprehensively measured. In these cases, the local government actions had a positive impact on a variety of rights, including the rights to housing and food in Utrecht and the rights to liberty and due process as well as non-discrimination and ESC rights like the rights health care and education in San Francisco. This improvement came about in a direct way locally by reducing factors that created barriers for the fulfillment of migrants' rights, and it occurred indirectly by the local policy decisions having an impact on other municipalities and the national level, through means discussed in each case study. The existence of local government networks seems to be important in helping to facilitate the spread influence and diffusion of policy ideas to other cities. In neither case were the local governments influential enough to compel the national government to completely reform the policy in question to bring it in line with what the local government called for. However, in both cases the national policies underwent minor reforms that marked progress for migrants' rights to some degree. Additionally, the defiance of local governments over the national policies has kept the policies in the media and contributed to the ongoing national and public debates over restrictive migration policies. Even if many of the local governments' concerns with the national migration policies persist, some improvement in the conditions for migrants' rights locally and beyond as well as removal of elements in national policy infringing on those rights is consequential, especially to a group in pressing need of rights' protections.

Based on these studies of municipalities' use of power to protect migrants' rights, several conclusions can be drawn about the potential of local governments to support human rights. First, the case studies suggest that the decentralized structures of authority helped facilitate the local governments' municipal disobedience and ability to positively impact migrants' human rights. Since this research only analyzed situations in contexts with relatively decentralized structures of authority and a high degree of local autonomy, it is not clear if it is possible for local governments to effectively challenge the national policies that negatively affect rights using the policy implementation gap in contexts with different

structures of authority. In both case studies, these defiant local policies proved to be at least relatively successful at improving rights protections locally, and by their own standards, also reducing negative externalities caused by the national policies in their communities. This supports the notion that the nature of local governments being close to the people they govern allows them to better understand the reality on the ground and what impacts people's lives, making them aware of negative effects that the national government may not experience directly. This awareness adds to the potential of local governments in protecting rights, as they have a unique vantage point to allow them to see what barriers or risks are affecting human rights in their communities. The relative success of the local policies may be in part due to the insight gained by this position. In addition, the fact that the policies seem to be working and the local governments' use of strong practical and legal reasoning to back their policies, no doubt has enabled the policies to be sustained for years. Sound reasoning for adopting such defiant policies is crucial for, of course, justifying them to constituents, but also for influencing other municipalities to consider similar policies and for pressuring the national government to reform. Since networks help both spread ideas among local governments and put pressure on national governments, they play an important role in the phenomenon at the center of this research. Thus, further development of these networks, an increase in networks with a human rights focus, and an increase in the number of cities participating in such networks may lead to more local governments engaging with human rights and working to improve the protection of human rights.

Drawing on a combination of concepts from the political and human rights fields for the theoretical framing of the research was essential in leading to these findings that demonstrate that local governments have power to strengthen the protection of human rights. This approach allows for the human rights implications to be added to the existing body of literature on local government power and use of the policy implementation gap, while it provides a new way of analyzing local government engagement with human rights, which adds to the existing literature on localizing human rights to establish a more comprehensive understanding of forms of engagement and what drives local actors to engage with human rights. Given the conclusion that local governments have the power to play a significant role in the protection of human rights, it is clear that more attention in research has to be paid to understanding the potential and limits of this role. Since this thesis was positioned as initial

and somewhat exploratory research on the phenomenon of local governments challenging rights-restricting policies at the national level, further studies should be conducted on other cases in different geographical contexts to create a more comprehensive understanding. Though this research focused on the human rights of migrants, the findings may be extended to other categories of rights, and further research should be broadened to investigate how local governments may protect other rights. Additionally, since local government networks seem to hold significant potential in diffusing local engagement with human rights, further research is needed to comprehend their effectiveness and best practices.

The findings of this thesis also have implications for organizations and institutions concerned with human rights. These findings suggest that organizations, such as UN bodies, regional bodies like the Council of Europe, or NGOs like Amnesty International should pay more attention local authorities in order to develop greater participation of local governments in human rights protection. In order to foster more local government engagement with human rights, institutions might support the development of networks to encourage the exchange of ideas among local governments. This support may involve contributing funding, recommending network membership, or providing expertise to networks as a way to convince local governments that human rights for all is both practical and leads to a better, more cohesive communities—an idea already firmly established in the policies of San Francisco and Utrecht. Though researchers and human rights organizations may be hesitant to shift focus and resources away from states to the local level, it seems local governments may continue to gain increased importance in the global system, as more people move to cities and globalization morphs the political landscape. Some scholars have already predicted the decline of the sovereign state and rise of cities,⁴⁰² and even some representatives of major institutions are beginning to advocate such a shift in attention away from the state and international levels.⁴⁰³ Thus, rather than continue relying on the same type of actors to protect human rights, perhaps local governments may prove a useful ally in the effort to protect

⁴⁰² See: Taylor, 1995, pg 58 [“...cities are replacing states in the construction of social identities. Hence, alongside the erosion of nation- al economy we can glimpse the erosion of nation-state”].

⁴⁰³ Cavallaro, James L, in “Panel Debate: Empowering Rights Holders,” 2016, [“We [international organizations] have to take our role with a bit more humility and recognize that maybe the best thing we can do is facilitate for the drivers of social change to lead...[the] progressive implementation of rights, rather than believing that we can, through an even better treaty or better set of norms, change the layout in terms of social justice”].

human rights with their unique insight into their communities and an opportune position to affect change within and beyond their jurisdictions.

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Interviews:

Interview #1 – Jan Braat & Niene Oepkes, Senior Policy Advisors for the Municipality of Utrecht, Utrecht, 1 April 2016

Interview #2 – Pieter Postma, Secretariat Official, LOGO, 11 April 2016 (phone interview)

Annexes

I: Interview Questions for Utrecht Municipal Officials (Interview # 1):

1. Can you tell me about your role(s) with the Municipality of Utrecht?
2. What do you see as the role of municipal/local governments in human rights?
3. Do you consider Utrecht a 'human rights city'? Why?
4. Do you think Utrecht has been taking a stronger interest and becoming more involved in human rights in recent years?
 - a. If so, what do you think has led to this?
 - b. What specific structures are in place to support proactive human rights policies?
 - c. Are there any specific focus areas?
5. Can you tell me about the municipality's decision to continue offering emergency shelter and assistance to (rejected) asylum seekers after the national government prohibited this?
 - a. Were you personally involved in this process?
 - b. What do you see as the key factors that led to this decision? Do you think there were any political motivations?
 - c. Who were the main stakeholders? Who were the allies and the opponents?
 - d. As far as you know, was this the first time Utrecht intentionally violated national law?
6. What specifically was provided to asylum seekers according to Utrecht's policy? And, were their qualifications to determine who was eligible to receive benefits under the local policy?
7. Do you think the people of Utrecht support(ed) this local policy?
 - a. Was there any public participation or input involved in the local government's decision process?
 - b. Was there any cooperation with civil society organizations?
8. As far as you know, did Utrecht face any particular consequences or barriers in going against the national policy?
 - a. If so, do you think this caused any local officials or the public to question the local policy?
9. Some of the documents you sent me reference Utrecht facing criticism and being termed a 'rebel city'. Who exactly criticized the city and what was the extent of the criticism?
 - a. Did this pose any challenges for the city?
10. Can you tell me more about Utrecht's 'winning by losing' policy?

11. In your opinion, has Utrecht had any influence on other municipalities taking similar actions by undermining the central government?
12. Do you think Utrecht's policy towards (rejected) asylum seekers has had any influence on national policy decisions or on national political debate?
13. Can you clarify what has changed at the national and local levels since the government's compromise of April 2015 and the 2015 high court decisions?
 - a. What has been Utrecht's stance on the government's compromise plan?
14. Would you say Utrecht's policy towards (rejected) asylum seekers has been successful?
 - a. If so, what do you think has led to this success?
 - b. How do you define 'success' in this situation?
15. Can you tell me about any valuable lessons you think the municipality of Utrecht has learned from this experience that may benefit other city governments?
 - a. Are there any other policy areas related to human rights issues to which this strategy might be transferable?

II: Interview Questions for LOGO Official (Interview # 2):

1. Can you tell me about the objective of your organization and the kinds of activities it carries out?
2. Can you tell me about Utrecht's role in the organization?
 - a. Is the municipality especially active in the organization?
3. What is your organization's view of the current national policy on shelter for rejected asylum seekers?
4. What is your organization's view of Utrecht's policy on shelter for rejected asylum seekers?
 - a. Do you think it has been successful? Why or why not?
 - b. What do you think caused Utrecht to adopt this policy?
5. Do you think Utrecht has influenced other municipalities in the area of emergency shelter, for example to adopt similar policies?
6. Do you think the public supports Utrecht's (and other municipalities') shelter policies?
7. Do you think Utrecht has influenced public opinion, national debate, or the national government regarding emergency shelter and rejected asylum seekers?