

National Human Rights Institutions in *Global South* countries: the South African experience*

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1. Introduction. Transformative constitutionalism and human rights into the so-called *Global South* countries

The studies focusing on the *Global South* that have been done in recent years have unclosed new and uncharted areas of research for comparative law scholars, offering them considerations, suggestions and questions that were previously unseen and unimaginable.

The aim of this paper is not to exactly establish whether a proper and specific *Global South* countries constitutionalism exists and what exactly it involves¹; as the matter cannot be thoroughly dealt with here, there will be rather shortly mentioned only some relevant aspects, which seem to be in line with the literature.

David Bilchitz, who has devoted much of his studies to these issues, has found as the main difference standing between the countries aligned with the Northwestern legal tradition and those part of the emerging *Global South* the specific attention that the respective constitutions place on different categories of rights. The former, those

* Contribution to the proceedings of the conference “The Role of National Human Rights Institutions in Promoting Rights and Preventing Rights-Related Litigation and Conflicts”, Bocconi University, 8–9 September 2025. The paper is part of the author’s contribution to PRIN 2022 *FRAMing national human rights institutions: European and comparative interplays* (FRAME) - CUP - J53D23005290001, prot. n. 2022BXT5HR, funded by the European Union – Next Generation EU. The extended version of this research, also including the comparison between the South African Human Rights Commission and the National Human Rights Commission of India as well as the analysis of the Indian experience, is presented in C. De Santis, *Le National Human Rights Institutions nei Paesi del Global South: Sudafrica e India*, in *Diritti Comparati*, 2, 2025.

¹ For an overview on the subject, see, above all, P. Dann - M. Riegner - M. Bönnemann, *The Southern turn in comparative constitutional law: an introduction*, in P. Dann - M. Riegner - M. Bönnemann (eds.), *The Global South and comparative constitutional law*, Oxford, 2020, p. 1 ff..

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of the *Global North*, would be mainly based on the concept of *liberty*, and thus centred on the defence of the civil and political rights rooted in the liberal tradition, according to a model primarily embodied in the United States Constitution. The constitutional texts of the *Global South* countries would pay greater attention to the social or socio-economic rights, as factors able to convey principles of *distributive justice* and substantive equality. In these countries, and especially in South Africa, these values are often also seen as tools for emancipation from a colonial or deeply illiberal and racist past, which has left behind a legacy fraught with social and economic disparities, inequalities and a political and ethnic conflict extremely difficult to overcome².

The idea of a *Global South* constitutionalism is thus closely linked to the concept of *transformative constitutionalism*³, which implies precisely the transformative potential of Constitutions and, in particular, of those provisions that regulate, perhaps even in detail, socio-economic rights. These constitutional provisions are especially entrusted with the task of catalysing those social transformations deemed necessary to make “the past a foreign country”, and whose promise often plays a foundational role in the new regime established through the adoption of the Constitution, as shall be shown. This reasoning applies especially to South Africa – one of the countries that particularly stands out to legal experts in the *Global South* framework and that is, indeed, the focus of this study.

The concern for social rights and the pursuit of substantive equality that so markedly characterises *Global South* countries is by no means foreign to those of the *Global North* – first and foremost, the vast majority of European countries, whose constitutions are rooted in the post-World War II democratic constitutionalism. Besides, this constitutionalism era has been inexorably marked, in every respect, by the phenomenon of the codification of rights at the international level. There will be here only recalled the two Covenants adopted by the United Nations in 1966 on Civil and Political Rights and, more relevant for the purposes of this study, on Economic, Social and Cultural Rights (from now on, ESCR), which have necessarily influenced the domestic law of the States that ratified them, including South Africa.

The impact of international law and the United Nations has also been decisive in the exponential proliferation of National Human Rights Institutions (NHRIs), which protect human rights and have emerged across all continents in the form of *Ombudsman* or Human Rights Commissions, operating alongside with the more traditional bodies and instruments in charge of the protection of rights – though not

² This distinction, not to be intended as clear-cut, has been highlighted by D. Bilchitz, *Constitutionalism, the Global South and economic justice*, in D. Bonilla Maldonado (ed.), *Constitutionalism of the Global South: the activist tribunals of India, South Africa and Colombia*, Cambridge, 2014, p. 41 ff.. D. Bilchitz devoted more than one contribution to the subject; see also *Id.*, *Socio-economic rights and expanding access to justice in South Africa: what can be done?*, in P. Dann - M. Riegner - M. Bönnemann (eds.), *The Global South*, cit., p. 210 ff..

³ See P. Dann - M. Riegner - M. Bönnemann, *The Southern turn*, cit., p. 17 ff. and, specifically referenced to the South African context, P. Langa, *Transformative constitutionalism*, in *Stell. L. Rev.*, 3, 2006.

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always in a linear manner. This primarily occurred in the aftermath of the last major wave of democratisation, which took place around the 1990s, when the Human Rights Commission was established in South Africa. As will be shown, in this country, the NHRI was established alongside the democratic Constitution in which it finds the fundamental principles of its functioning.

This will be then the standpoint from which the country will be examined, focusing, indeed, on the functioning of its NHRIs, and paying special consideration to its contribution to the ‘promotion’ (deliberately vague term) of social rights.

South Africa, belonging to the macro-area of the *Global South*, has chosen to place particular emphasis on this category of rights within its Constitution.

The paper will be clearly more focused on the peculiarities of the human rights institution within the legal system under consideration and less on those structural aspects and functioning more easily traceable back to the typical NHRIs model and to the international standards for this type of body. Elements common to the vast majority of NHRIs as they have emerged and proliferated on a global scale, especially in the last decades, are a more or less pronounced degree of independence from the executive branch, a certain level of financial autonomy, a defined range of competences and powers generally vested in these institutions (as the inquiry power), and the typically non-binding nature of the decisions (recommendations) they may issue.

The most distinctive features of this NHRI are the current primary concern, also and mostly when they are dissonant with – or somehow diverge from – the more classical and traditional model of a Human Rights Institution, not necessarily in a negative way.

Moreover, as mentioned above, the focus shall be on how this body actively contributes in its country to the concrete fulfilment of social rights in terms of an effective legal protection.

2. The Chapter 9 in the South African Constitution: a plurality of State institutions supporting constitutional democracy. The South African Human Rights Commission and the office of the Public Protector

In order to properly place the South African Human Rights Commission (SAHRC) in the context in which it operates, it is necessary to first foreground that its mandate derives directly from the 1996 South African Constitution rather than from ordinary legislation like many other NHRIs. The 2013 South African Human Rights Commission Act, entered into force to entirely replace a previous statute from 1994⁴,

⁴ It should be noted that the 1994 statute (*Human Rights Commission Act*, n. 54/1994) was enacted when the 1993 *Interim Constitution* was still in force. Therefore, some of its provisions had already been superseded by the 1996 Constitution itself, which came into effect at the beginning of the following year.

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provides the implementing provisions and detailed normative structure related to the SAHRC, even though its establishment and foundational principles are laid down by the Constitution⁵.

The extreme need for constitutionalisation that characterises many constitutional texts of the second half of the twentieth century – in particular of newly independent and recently democratised countries⁶ – is a defining feature of the democratic South Africa shaped by the 1996 Constitution as well. Independent from Great Britain since 1931, the country gradually slid into a decade-long growing isolation from the international community due to the implementation of the apartheid regime, which lasted up until the late 1980s and early 1990s, when it embarked on a long and complex process of democratic transition and dismantling of the segregationist system. This process peaked with the adoption of the 1993 Interim Constitution and, a few years later, of the currently operative one⁷.

The colonial past and problematic legacy of a particularly ruthless and violent regime of segregation have left an indelible mark on the history of the country. Indeed, the new meticulously articulated constitutional text reflects not only the need for emancipation from a troubling past but, above all, the much more profound need to impose firm and hardly surmountable limits on public power; a notable example is the limitation clause on fundamental rights set forth in Section 36, which stands out for its precise and strict formulation.

Herein lies the – certainly not merely symbolic – reason why the foundational framework governing the South African NHRI is not only in the constitutional text itself but also in a dedicated chapter – *Chapter 9* of the 1996 Constitution –, significantly titled *State institutions supporting constitutional democracy*. The South African Human Rights Commission is thus not the sole body entrusted with the task of supporting

⁵ I.M. Mathenge, *The ability of Kenya's, Zimbabwe's and South Africa's National Human Rights Institutions (NHRIs) to promote constitutionalism*, available at the link <https://ssrn.com/abstract=3540080> (February 18th 2020), has highlighted that in South Africa, as well as in Kenya and Zimbabwe, two countries deeply influenced by the South African model, the respective NHRIs are *creatures of constitutions* (p. 4) that, thus, not only benefit from a greater legitimacy stemming from their constitutional mandate but also possess additional guarantees – those inherent to the constitutional amendment process. This is the reason why any attempt to remove them from the legal system would be considerably more complex than if they had been established by ordinary legislation, as it has occurred in many other countries, both African and beyond.

⁶ With specific reference to the African context, S. Cardenas, *Chains of justice. The global rise of State institutions for human rights*, Philadelphia, 2014, p. 106 ff. has underlined that the spread of NHRIs is part of a broader and more general process of democratisation, also driven by international pressure to that effect. This process unfolded more rapidly and smoothly in the countries of the British Commonwealth, while in Francophone ones it followed a more convoluted and less direct path. Cardenas noted that fundamentally two main NHRIs models have emerged in the African context: the *complaints-handling body*, prevailing in former British colonies, and the *consultative agency*, predominantly adopted in former French colonies.

⁷ On the democratic transition of South Africa see A. Dirri, *Federalismi africani. Pluralismo e centralismo in Sudafrica, Nigeria ed Etiopia*, Torino, 2024, p. 77 ff..

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constitutional democracy, but is rather part of a plurality of institutions that also includes the Office of the Public Protector (PP), the Auditor-General's Office, and three more commissions with specific mandates, namely the Electoral Commission, the Commission for Gender Equality, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities. This study will only analyse the functioning and actions of the main commission, the Human Rights Commission, with limited references to the role of the Public Protector that permit to better clarify some relevant issues.

Indeed, it might seem unusual that the South African constitutional framers opted for such a fragmentation of mandates, institutions, and objectives, leading to question whether this plurality of bodies actually translates into a greater effectiveness in the protection of rights; above all, a legitimate question arises as to why the framers chose to establish the Office of the Public Protector alongside a Human Rights Commission and other specialised ones, as the PP is a figure that undoubtedly falls within the category of the *Ombudsman* or public defenders⁸.

The constitutional provisions actually differentiate rather clearly the competences of the two bodies: while the SAHRC is a collegiate body competent in all human rights matters – implementing their protection and advancement, monitoring their compliance, and promoting awareness and culture of human rights⁹ –, the Public Protector is a single-person office that has a mandate that can be considered having an objective character, primarily consisting of investigating possible cases of maladministration by any organ or official of the Republic of South Africa, except for judicial decisions, which remain excluded from such oversight¹⁰. In

⁸ According to S. Cardenas, *Chains of justice*, cit., p. 111, the South African choice of establishing a plurality of institutions, each responsible for a defined area of concern, would not stem from a deliberate choice of diversifying the system of protection but would rather reflect an *ab initio* lack of consensus regarding the institutional configuration that the national human rights body ought to have.

In a slightly different sense, see K. Sundström, *Watchdogs or Lapdogs? National Human Rights Institutions in Africa*, PhD. dissertation (March 2022), available at the link <https://su.diva-portal.org/smash/get/diva2:1629992/FULLTEXT02.pdf>; in particular, p. 262. K. Sundström also underlines that the institution of the Public Protector has a historical precedent in the figure of the Advocate-General, established under the former regime, although obviously lacking the guarantees of independence currently in place.

Regarding the origin of this plurality of bodies see also H. Klug, *Corruption, the rule of law and the role of independent institutions*, in R. Dixon - T. Roux (eds.), *Constitutional triumphs, constitutional disappointments. A critical assessment of the 1996 South African Constitution's local and international influence*, Cambridge, 2018, p. 108 ff.; p. 116 ff..

⁹ Section 184(1) of the South African Constitution states: “The South African Human Rights Commission must: (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic.”

¹⁰ Section 182(1) of the South African Constitution states: “The Public Protector has the power, as regulated by national legislation: (a) to investigate any conduct in state affairs, or in the public

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summary, any function pertaining to the protection of rights in a subjective sense falls outside the role of the Public Protector and exclusively into that of the Commission.

After the enumeration of the various *institutions supporting constitutional democracy*, Section 181 of the South African Constitution on the one hand prescribes their independence and impartiality in performing their functions, stating that their powers must be exercised without fear, prejudices or preferential treatment; on the other, it assigns to other state organs the duty to support these institutions and to contribute to ensuring their independence, impartiality, effectiveness, and dignity, without interfering in any way with their functioning.

Lastly, the provision involves accountability of the various institutions before the National Assembly – the lower house of the South African Parliament –, and that they submit at least annually a report on their activities to this Assembly.

Before delving further into the analysis of the constitutional provisions governing the composition and functions of the SAHRC, it seems relevant to refer to an important contextual aspect. As is well known, the African continent has seen the development of a well-structured regional organisation aimed at the protection of human rights, the African Union, which is an organisation endowed with its own Charter of Rights, a Commission, and an *ad hoc* Court – the African Court on Human and Peoples' Rights –, although subject to the various limitations that such regional organisations face, especially in the case of international courts established by treaties for the protection of human rights.

This is clearly not the most appropriate context to examine the relations between the African Union and the individual state NHRIs of its member countries; it is sufficient to mention here that the SAHRC is part of the Network of African National Human Rights Institutions (NANHRI), a network that brings together precisely the NHRIs of many African countries and that should, among other things, act as a connecting body between the latter and the African Commission on Human and Peoples' Rights¹¹.

Regarding the composition of the SAHRC and the other institutions referred to in *Chapter 9*, Section 193 of the Constitution sets out the fundamental principles, which are to be supplemented by ordinary legislation¹². The Human Rights Commission is composed of eight members, six of whom are full-time and two at most part-time.

administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; (b) to report on that conduct; and (c) to take appropriate remedial action”.

¹¹ On these matters and, in particular, on the insufficient coordination between the national NHRIs and the African Commission on Human and Peoples' Rights, see the enlightening essay by B.R. Dinokopila, *Beyond paper-based affiliate status: National Human Rights Institutions and the African Commission on Human and Peoples' Rights*, in *AHRLJ*, 10, 2010; above all, see p. 40 ff..

¹² In addition to Section 193 of the Constitution, see also Section 5 of the *SAHRC Act* (2013) for all matters related to the composition of the Court, which, among other things, regulates in detail also the different instances of incompatibility between the office of the commissioner and the assumption of other public offices.

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They must be South African citizens and must meet the requirement of being *a fit and proper person* to hold the position, as well as possessing both competence and experience in the subjects within the Commission's remit; the Constitution further requires that the ethnic and gender composition of the South African population must be taken into account in the selection of the candidates in order to have a proper representation of the population in the members of the SAHRC.

The appointment procedure for the Commissioners begins in Parliament, and, more specifically, within the National Assembly, in which a committee – composed in a way that ensures a proportional representation of the political parties of the lower chamber – prepares a list of candidates to be recommended to the President of the Republic of South Africa for subsequent appointment; prior to this, however, the list is submitted to the vote of the *plenum* of the Assembly, where it must be approved by a majority vote of its members¹³.

The fact that the appointment of the commissioners is entrusted to the President of the Republic has been sharply criticised from various quarters, particularly while the old 1994 legislation was in force, as it granted the position broad discretion, including over the duration of the commissioners' mandates, which was not fixed but rather adjustable by the President, and over the number of the potential part-time appointees. The 1996 Constitution first and the 2013 *SAHRC Act* later introduced, as a counterbalance, the role of the elected House to limit the presidential power of appointment.

However, there are still concerns about the excessive politicisation of the appointments to the SAHRC, as well as to the other commissions established under Chapter 9, due to factors related to the peculiarities of the South African legal system, in terms of both its form of government and its political-party system.

In the first place, the peculiarity of the South African government is well known. It is characterised by a system that is apparently parliamentary but includes a President who, despite lacking direct popular legitimacy, embodies also the role of Prime Minister and is, in all respects, the head of the executive. As such, the President not only holds more decisive powers than those of a President in a classic parliamentary republic but also a role imbued with a stronger and more distinctive political connotation¹⁴. This may not be easily compatible with the level of independence that the Constitution *in primis* requires by the commissioners appointed by this role.

In the second place, it must be taken into account that the recent history of South Africa has been characterised by the long and for decades uncontested

¹³ In the case of the appointment of the Public Protector, a specific majority is required, amounting to 60% of the members of the National Assembly. Regarding this phase of the procedure, see K. Sundström, *op. cit.*, p. 263.

¹⁴ It is the so-called *Washminster* model, as defined by academic scholarship. Regarding this, see R. Orrù, *Il Sudafrica*, in P. Carrozza - A. Di Giovine - G.F. Ferrari (eds.), *Diritto costituzionale comparato*, Vol. I, Roma-Bari, 2014, p. 689 ff.; p. 708. On the South African form of government, see also V. Federico, *Sudafrica*, Bologna, 2009, p. 75 ff..

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dominance of a single party, the African National Congress (ANC), central figure in the movement for desegregation and for the country's democratic transition¹⁵; dominance on the political scene that, it can be said, was first challenged only in the last legislative elections.

Moreover, as previously mentioned, the old legislation granted the President the power to determine the duration of the commissioners' terms, while the 2013 new one transferred this power to the National Assembly. In any case, the length of the mandate cannot exceed seven years, after which it can be renewed only once, contrary to that of the Public Protector, which has the same duration but is not renewable.

Following the recommendation of the National Assembly, it is still the President who appoints the individuals appointed to perform the functions of Chairperson and Deputy Chairperson of the Human Rights Commission, while the Commission itself will appoint its own Chief Executive Officer (CEO).

Section 194 of the Constitution strictly regulates the grounds for removal from office of the Public Protector, the Auditor-General, and the members of the Human Rights Commission; in this case, it is again regulated by the President but following a resolution of the National Assembly adopted by a qualified majority.

From an administrative perspective, the SAHRC is present in each of the eight provinces into which South Africa is divided with dedicated offices, in addition to its central office in the Gauteng province.

A detailed framework of the functions and main duties entrusted to the Commission can be derived by taking into account both the Constitution (s. 184) and the *SAHRC Act* (s. 13)¹⁶. First of all, it is tasked with monitoring the compliance with and respect for human rights in South Africa, which implies the authority to check whether the treaties and international agreements related to human rights are implemented and applied; the power to report to the competent legislative assembly any potential conflict between a draft bill and the Bill of Rights or other domestic or international human rights norms; the role of advancing legislation and, thus, of signalling to the Parliament any legislative measures to be adopted to ensure greater compliance with human rights; the power to issue recommendations to public bodies at all levels and to request that they provide information concerning their legislative or administrative measures related to human rights.

The SAHRC is also tasked with promoting human rights at a cultural and educational level and disseminating the culture of human rights by conducting studies or research on specific topics; launching targeted awareness campaigns or educational programs to increase public knowledge and awareness on issues within its mandate, as well as regarding its role and activities; strengthening and expanding collaborations

¹⁵ On the South African political system, see V. Federico, *op. cit.*, p. 103 ff.

¹⁶ On the duties and activities of the Commission, also compared with those of the Public Protector, with other specialised commissions and other African NHRIs, see K. Sundström, *op. cit.*, p. 270 ff.

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with non-governmental organisations with similar objectives and with other sectors or segments of civil society aimed at undertaking joint initiatives to achieve their goals.

It is the Constitution that directly assigns to the Human Rights Commission the duty to investigate violations of rights and, if one is confirmed, to take appropriate measures to ensure that the victim is adequately compensated.

Regarding the inquiry power, Section 13 of the *SAHRC Act* specifies that, once a violation is identified, the SAHRC may refer the victim to the appropriate judicial body so that they may receive compensation for the harm suffered, potentially providing also the necessary financial assistance. Furthermore, the Commission may bring a case before a court and take part in legal proceedings either on its own behalf or on behalf of an individual, group, or category of persons.

Pursuant to the provisions of Section 15 and Section 16 of the *SAHRC Act*, the Commission holds broad investigative, inquiry, and inspection powers, which it may exercise *motu proprio*, in the absence of a specific complaint regarding an alleged violation. In this context, the Commission can summon individuals to testify under oath, demand the presentation of documents – that may also be confiscated – and other evidences, and even conduct searches, both personal and of premises; moreover, in order to carry out these latter ones, even via a designated police officer, the Commission must obtain a specific warrant signed by a magistrate or a judge of the competent High Court, and the entire process must be underdone in such a way as to respect the privacy and dignity of the individual, who may also choose to be assisted by legal counsel¹⁷.

In this field, although not expressly stated by the law, the guarantees related to the procedure's execution – concerning the individual undergoing the relative investigations – seem to refer quite immediately to criminal law contexts; and the explicit admonition to safeguard the individual's freedom, security, dignity and privacy might suggest that the position of the individual before the SAHRC is indeed particularly protected and safeguarded.

When the South African Commission identifies a violation and takes appropriate action, it is required to notify the National Assembly, as well as the authority or state or provincial body affected by the decision, who have sixty days to respond to the Human Rights Commission and inform it of the steps they intend to take in response to the decision.

The issue concerning the legal weight of the decisions and measures adopted by the SAHRC will be further addressed below, as it is currently at the centre of the South African constitutional debate and a ruling of the Constitutional Court may soon clarify the numerous questions raised by this issue at this stage. At present, the prevailing view seems to be that the Commission's decisions, like those of many other NHRI, do not

¹⁷ In any case, refer to the full text of the cited provisions, Section 15 and Section 16 of the *SAHRC Act*, for further details on the investigation procedure, the main steps of which are only summarised here.

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carry binding legal force and should thus be interpreted as non-binding recommendations.

Lastly, it is worth mentioning that additional jurisdiction over specific matters had been conferred upon the SAHRC by the *Promotion of Equality and Prevention of Unfair Discrimination Act* (2000) and the *Promotion of Access to Information Act* (2000), later amended by the *Protection of Personal Information Act* (2013), in the field of personal data protection; which builds upon those already mentioned stipulated in the Constitution.

Another yet unexamined issue, which will be addressed in the following section, concerns the specific mandate the South African Constitution confers upon the SAHRC with regard to the protection and safeguarding of social rights, in which, as will be shown, the Commission's efforts and its actions have been particularly impactful.

3. The South African Human Rights Commission tested by the enforcement of social rights

In order to better understand the context in which the SAHRC operates with regard to social rights, it is first necessary to examine the constitutional text. It has already been mentioned that the South African Constitution is a typical product of late 20th-century democratic constitutionalism, and, thus, is highly analytical and characterised by a high degree of detail in its provisions, also as a reaction to a former regime marked by violations and abuses of power of all kinds that were, moreover, perpetrated by a minority of the population against the black majority.

The provisions that establish and regulate socio-economic rights are no exception to this characteristic; they are fully incorporated in the South African *Bill of Rights* without any of the limitations other countries may have, and they have thus always been regarded by legal scholars as justiciable on the same terms as any other right before South African courts.

Therefore, the Constitution analytically regulates the right to a healthy environment (s. 24); the right to adequate housing (s. 26); the right to food, health, and social security, as well as the right to access to water resources (s. 27) and to education (s. 29); the right to property (s. 25) may also deserve to be – at least partially – included in this list, due to its high social value and profound symbolic significance in the South African context in contrast to the injustices that, within this specific domain, were emblematic of the segregationist regime.

In this regard, D. Bilchitz, in particular, has effectively shed light on the emancipatory value of social rights in the post-apartheid South African context. This is particularly true regarding the right to education, which during the segregation period was systematically denied to the black population to preserve a state of subjugation – from a cultural point of view as well – to the white population, and the right to housing, which takes on profound political significance if one considers the unlawful and

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forcible evictions and the ghettoisation of black people in certain areas during the segregationist period¹⁸. It can be fundamentally stated that, while, in general, Constitutional charters in *Global South* countries are often grounded in the principle of *distributive justice*, the South African Constitution is more precisely inspired by the principle of *corrective justice*¹⁹.

One should not be surprised, thus, that this emphasis on social rights is reflected also in the mandate of the South African Human Rights Commission; it is indeed the Constitution itself (s. 184(3)) that first specifically assigns to the SAHRC the task of monitoring state organs' compliance with social rights. The provision requires that every year the Commission requests from the various State organs a specific report on the measures and actions taken for the implementation of the specific above-mentioned social rights regulated by the specific constitutional provisions that individually address them²⁰.

The Commission has fully embraced the task the Constitution assigned it and, among NHRIs, has distinguished itself, throughout its thirty years of activity, as one of the most attentive and proactive in the implementation of ESCRs, although it had also played a significant role in the promotion and protection of civil rights.

In order to understand how the SAHRC can operate as a human rights body, particularly regarding socio-economic ones, it is now worth it to briefly recall some aspects concerning the general enforcement of such rights in the South African context, because, as will be shown, much of the SAHRC's work in this area is linked

¹⁸ See D. Bilchitz, *The performance of socio-economic rights in the South African Constitution*, in R. Dixon - T. Roux (eds.), *op. cit.*, p. 45 ff.; p. 49.

¹⁹ *Ibidem.*

²⁰ Furthermore, scholars have repeatedly underlined that, even in the absence of an explicit statement, the mandate of NHRIs must necessarily encompass the protection of social rights, in accordance with prevailing international law.

See, for instance, M.G. Techane, *Emerging Opportunities for Economic and Social Rights Adjudication: Exploring the Inquiry Procedure of National Human Rights Institutions*, in *ESR Review*, 20, 2019, p. 12: "Notwithstanding the fact that most NHRIs lack an express ESR mandate anchored in their countries' national law, ESR should inherently form part of the mandates of NHRIs (even in the absence of explicit formal authority) by virtue of the role these institutions play in monitoring compliance with international obligations. [...] The broader mandate of NHRIs thus needs (as of a right and duty) to incorporate all categories of rights, without the necessity that there be express legal authority for this".

The fact that the SAHRC has been granted an explicit mandate for ESCR constitutes an *unicum* in the global landscape of NHRIs, and, though not essential, it has undoubtedly contributed to shaping and defining the role of the Human Rights Commission as one of the key actors in the protection of this category of rights.

On the matter, see G. de Beco, *The role of National Human Rights Institutions in the promotion and protection of economic, social and cultural rights: historical, theoretical and critical perspectives*, in E. Brems - G. de Beco - W. Vandenhole (eds.), *National Human Rights Institutions and economic, social and cultural rights*, Cambridge-Antwerp-Portland, 2013, p. 7 ff.; p. 18. See also O. Nowosad, *National Institutions and the protection of economic, social and cultural rights*, in B.G. Ramcharan (ed.), *The protection role of National Human Rights Institutions*, Boston-Leiden, 2005, p. 179 ff.; p. 186.

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to the work – first and foremost of the Constitutional Court – on the same issues; furthermore, as will be noted in the following section, the influence the Commission may have in this domain in the near future is also, almost certainly, under the jurisdiction of the Johannesburg Court.

An initial element that may shed light on the potential ‘competition’ between the Human Rights Commission and the Constitutional Court concerns the modalities of access to the South African Constitutional Court; indeed, Section 167 of the Constitution, which lays down the general principles governing the functioning of the Johannesburg Court, also provides that direct access to the Court, or direct appeal to it from any other court within the country may be permitted, insofar as a constitutional matter is raised²¹. Nevertheless, it must be acknowledged that resorting to the inquiry procedure conducted by the Commission – which can be initiated also on its own motion – often proves to be more effective than judicial remedies, especially in the case of structural or systemic rights violations, given the flexible and informal nature of proceedings before the SAHRC and the fact that the SAHRC is considerably less burdensome and more accessible than a judicial recourse²².

Another and more significant issue specifically regards how the South African Court has addressed the question of social rights and how it has approached their judicial protection. In this regard, it must be noted that Section 27 of the Constitution – after having established the right to health care, the right to food and access to water resources, and the right to social security – states in Subsection (2): “The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”.

The provision seems thus to indicate a specific path for the realisation of social rights, a path that necessarily relies on financial resources that are all the more limited the more severe and deep are the social inequalities to be remedied inherited by democratic South Africa from its historical legacy. The South African Court seems to have embraced the Framers’ invitation to exercise caution in matters concerning social rights from the beginning²³; and, even though it has undoubtedly contributed to the enforcement of such rights, it has always done so with a deferential stance toward the

²¹ See R. Orrù, *op. cit.*, p. 715. See also S. Bagni - M. Nicolini, *Giustizia costituzionale comparata*, Milano-Padova, 2021, p. 182 ff.

²² See M.G. Techane, *op. cit.*, p. 13 ff.

²³ One of the Court’s earliest significant cases in the area of social rights is the renowned *Government of the Republic of South Africa and Others v. Grootboom and Others* (CCT11/00), [2000] ZACC 19, regarding the *right to housing* and the *right to shelter*, that also involved the Human Rights Commission as *amicus curiae*. On the importance and the scope of this decision see K.G. Young, *The canons of social and economic rights*, in S. Choudhry - M. Hailbronner - M. Kumm (eds.), *Global canons in an age of contestation: debating foundational texts of constitutional democracy and human rights*, Oxford, 2024, p. 405 ff.. See also R. Gargarella, *The law as a conversation among equals*, Cambridge, 2022; especially p. 166 ff.

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legislature and due regard for its discretionary authority, adopting what has frequently been described as a conservative approach to the principle of separation of powers²⁴.

A detailed analysis of the Johannesburg Court's case law on social rights cannot be here undertaken but as insofar as it bears relevance to the present analysis²⁵; however, it is worth recalling that the jurisprudential standard of reasonableness it developed on the basis of the constitutional provision has, at least partially, held back the expansive potential of social rights within the South African legal system, failing more than once to meet the expectations of those who had hoped for a stronger activist approach from the Johannesburg judges, more closely related to the one adopted by other courts in the *Global South* framework, such as the Indian Supreme Court.

Despite the constitutional recognition of the justiciability of social rights – or, perhaps, precisely because of that – in this context there still remains a space in which the Human Rights Commission can effectively carve itself out a significant role for the enforcement of social rights and for enhancing, through its own instruments, their transformative potential.

One of the primary tools at the Commission's disposal are the annual reports established by Section 184(3) of the Constitution, which are not merely informative but rather – due to the way in which the SAHRC has structured the process of gathering relevant data and information from various state bodies – ultimately assume an evaluative function, including with regard to the resources allocated by these bodies to manage the implementation of specific social rights²⁶.

Indeed, the annual report marks the culmination of a procedure that begins with the Commission's development of protocols pertaining to each of the social rights under examination, which are then sent as questionnaires to the administrations and other state bodies for the exact purpose of obtaining responses concerning the policies and legislative measures adopted, the allocation of the corresponding financial resources, and also more specific data that may be relevant to a particular right. The Commission will thus evaluate the received responses in light of both domestic and international legal standards, and will draft a report that will reach its final form only after the outcome of a workshop in which partake, among others, interest groups,

²⁴ See D. Bilchitz, *The performance of socio-economic rights*, cit., p. 86.

²⁵ For a more detailed discussion of the issues here mentioned, see S. Liebenberg, *South Africa's evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty?*, in *Law, democracy and development*, 6, 2002. See also D. Bilchitz, *Constitutionalism, the Global South and economic justice*, cit., p. 68 ff.; M. Ebadolahi, *Using structural interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic and social rights in South Africa*, in *N. Y. U. L. Rev.*, 83, 2008.

²⁶ On the matter, see D. Horsten, *The role played by the South African Human Rights Commission's economic and social rights reports in good governance in South Africa*, in *Potchefstroom Electronic L. J.*, 9, 2006, p. 4.

In particular, regarding the criteria adopted by the SAHRC in the preparation of its initial reports, see also J. Klaaren, *A second look at the South African Human Rights Commission, access to information, and the promotion of socioeconomic rights*, in *HRQ*, 27, 2005.

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representatives of the same public administrations, and NGO representatives²⁷; once this second version – that includes the conclusions of the SAHRC and its recommendations pertinent to each specific area – is drafted, the report will then be submitted to the National Assembly.

Concerning the inquiry power vested in the Commission, it suffices to chronologically review the investigative reports²⁸ to understand how social rights have always been – a substantial, if not prevailing – part of the Commission’s docket. In particular, the Human Rights Commission seems to have frequently faced complaints from groups of residents in particularly impoverished urban areas, where the inhabitants were subjected to living conditions that could hardly be considered dignified; in these cases, the SAHRC has correctly identified an intertwined – and indeed hardly separable – relationship between the right to (adequate) housing, the right to water, and the right to a healthy environment on the one hand, and wide-reaching constitutional values such as dignity and the right to privacy on the other hand²⁹.

Besides exercising its investigative power, the SAHRC has given another significant contribution to the protection of social rights by making extensive use of what might be called its litigation authority, or, in other words, its power to initiate litigation, i.e. its ability to bring cases before the courts either on its own behalf or on behalf of third parties, also in order to obtain rulings that are more incisive than its own, with regard to the determination of rights or the imposition of sanctions upon the individual or entity responsible for the violation; furthermore, as with other commissions, bodies, and organizations of various kinds, the Human Rights Commission may also act as *amicus curiae* in cases brought by other litigants.

All of this has led the Commission to be at the centre of attention also in cases in which it was not the body tasked with deciding the dispute. It has played a significant role in influencing the final decision of the Constitutional Court on more than one occasion, which, in turn, has had the opportunity to offer acknowledgement of the

²⁷ D. Horsten, *op. cit.*, p. 7 ff. argues that the involvement of NGOs and civil society should take place in the initial phase, i.e. before the Commission drafts the proposal. On the contrary, the Commission only makes the information and data provided by state bodies public after the draft has been prepared. D. Horsten rather claims that opening the first phase of the procedure to NGOs would promote the completeness, transparency, accuracy, and reliability of the information. See also J. Klaaren, *op. cit.*, p. 549.

²⁸ Note that the Commission’s investigative reports are available for consultation from 2008, as reports of the SAHRC’s activities prior to this date have not been digitised.

²⁹ Without any claim to exhaustiveness, see the cases: *SAHRC on behalf of Sasolburg residents v. Metsimaholo Local Municipality* (2012); *Henro Kruger v. Emalableni Local Municipality* (2013); *NETREG v. City of Cape Town* (2016); *Sewer Spillage Investigative Report* (2019); *Jobannes Senna v. Ngaka Modiri Molema* (2022); *Kebaneile Tumelo Phinda v. Ngaka Modiri Molema District Municipality (Limpopo water report)*; (2023).

All the cited report are available at the link: <https://www.sahrc.org.za/index.php/publications/25-investigative-reports/>.

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work of the SAHRC. This occurred, in particular, within the context of constitutional litigation regarding social rights and, among other things, specifically in several leading cases on the matter of the Johannesburg Court; a first example could be the already mentioned 2000 *Grootboom* judgment on the right to housing, in which the Court expressly entrusted the Commission – involved as *amicus curiae* – with the task of overseeing the enforcement of the judgment by the administration, in fulfilment of its constitutional mandate³⁰.

More recently, in 2021, the SAHRC filed an appeal on its own behalf before the High Court (KwaZulu-Natal division) against several municipal and provincial authorities, in a case of particular relevance concerning the right to a healthy environment, in which the Human Rights Commission had already extensively exercised its investigative and inquiry powers without obtaining any compliance to its provisions from the public authorities³¹.

In this case, the Commission, in addition to seeking a declaratory relief, requested and obtained a ruling from the High Court that involved a particular legal remedy, widespread in common law jurisdictions for certain cases, i.e. the structural interdict, which is a type of ‘conviction’ that requires the party found responsible for a given violation to submit an action plan to the court to comply with the court’s ruling and remedy the previously committed rights violations. Once the judicial body approves the action plan, the court itself will oversee its implementation, often setting its timelines and deadlines.

Reaching the final part of this paper’s argumentation, the conclusion will be a remark more focused on the realm of *de iure condendo*. Indeed, it needs to be pointed out that a suggestion has been advanced in legal scholarship³², on the one hand, to make the structural interdict the preferred instrument for resolving disputes in which are ascertained violations of socio-economic rights, especially in cases of structural or systemic violations which are ill-suited to ‘instantaneous’ judgments of condemnation, which could prove to be an insufficiently effective remedy in such circumstances. On the other hand, a proposal has been made to directly involve the Human Rights Commission in the stages of plan development by the condemned party, as well as in the entire phase of supervision and enforcement of the action plan; task in which the SAHRC could effectively replace the judicial body, which would also provide greater

³⁰ See § 97 of the *Grootboom* judgment, mentioned above n. 22. See also O. Nowosad, *op. cit.*, p. 185 ff..

³¹ *South African Human Rights Commission v. Msunduzi Local Municipality and Others* (8407/2020P), [2021] ZAKZPHC 35.

See L. Sekwakwa, *Structural interdicts for environmental rights violations? South African Human Rights Commission v. Msunduzi Local Municipality and Others* (8407/2020P) [2021] ZAKZPHC 35, in PER/PELJ, 27, 2024, available at the link: <https://perjournal.co.za/article/view/16044>.

³² See M. Ebadolahi, *op. cit.*, in particular p. 1602 ff..

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reliability guarantees regarding the actual implementation of the program and, consequently, the genuine restoration of the rights of those harmed.

This would allow the Commission's full potential to be fully exploited and the Commission to be granted a larger role in the enforcement of social rights, an area in which, more than in others, the mere determination of a violation risks remaining self-contained in the absence of effective reparation, especially in a social context where claimants often lack the financial resources needed to sustain prolonged judicial litigation.

It is yet to be determined how the courts will proceed, the South African Constitutional Court in particular, which has seemed as yet rather reluctant to entrust the Commission with such a task that would undoubtedly further expand the space it has been able to carve out for itself, over the years, in the enforcement of socio-economic rights.

4. The binding nature of the decisions of the Human Rights Commission and the Public Protector: a developing jurisprudence

The issue of the binding nature of the decisions of the South African Human Rights Commission has not yet been examined, stating only that they lack coercive force, as is the case with those of many other NHRIs around the world.

The issue is actually far more complex, and, above all, it has become so in such recent times that it is not yet possible to address all the questions it raises; only the current state of the art can thus be assessed, taking into account that it is an issue whose developments are still *in fieri*.

At the beginning of the discussion on the SAHRC, it was stated that at least a brief mention of the role of the Public Protector would be made, in order to better clarify certain aspects and operational profiles of the Human Rights Commission and, mostly, to define where the line of demarcation between the domains of the two bodies lies.

Shifting now the focus back to the Public Protector, a particularly relevant case in this instance reached the Constitutional Court of Johannesburg between 2015 and 2016.

The events that sparked the dispute have attracted media attention and are probably well known; only a concise overview will be thus provided: it all stems from the scandal involving the then President of the South African Republic, Jacob Zuma, who had made improvements to his private residence in Nkandla in the course of some renovation projects that were in theory purely intended to the enhancement of security devices, and, as such, had been entirely financed with public funds, rather than with the President's personal resources.

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The case had come to the attention of the then Public Protector Thuli Madonsela, who had identified a series of unlawful acts, including unjust enrichment, and had instructed the President to rectify the situation, primarily by reimbursing the public finances for the portion used solely for private purposes, i.e. for the non-essential works carried out at the presidential residence.

Both the President and the National Assembly – to which the Public Protector’s report had then been submitted – had agreed upon the non-binding nature of the PP’s decisions, as the former refused to comply and the latter excluded the President’s responsibility and renounced to enforce accountability under Section 55(2)(c) of the Constitution.

As already mentioned earlier, this institutional conflict culminated in a ruling by the Constitutional Court in 2016 – *Economic Freedom Fighters v. Speaker of the National Assembly*³³ –, issued following the appeal of several South African political parties. This is an absolutely crucial decision that will undoubtedly shape the history of the relationship between the Public Protector and other state institutions and bodies in the years to come.

The ruling of the judges in Johannesburg incontrovertibly establishes, indeed, the binding nature of the decisions of the Public Protector, which require thus immediate compliance without the need for intervention by any judicial body to confirm them and render them enforceable and binding on the recipients; being inherently binding, though, recourse to the courts is necessary if one wishes to challenge them³⁴.

Although it is not possible to explore in detail the Court’s reasoning here, it can be said that its interpretation focuses almost entirely on the *take appropriate remedial action* clause (Section 182(1) of the Constitution), as a power granted to the Public Protector upon the completion of its investigations into cases of maladministration. To summarise, it can be stated that, to be appropriate, the remedy must also be effective for the constitutional judges, and that ensuring the effectiveness of the Public Protector’s actions implies that its decisions must be considered inherently binding, in accordance with the mandate of the office that directly derives from the Constitution.

³³ *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15), [2016] ZACC 11.

³⁴ The ruling of the Constitutional Court has caused an intense doctrinal debate, and, thus, there is an extensive body of literature on the matter. Among others, see: M.S. Phorego, *Powers of the Public Protector: are its findings and recommendations legally binding?*, Dissertation (LLM) - University of Pretoria, 2017, available at the link <https://repository.up.ac.za/items/7794b7ea-39dd-42b1-b20a-7f2ad2acd727>; Id. - H.J. van As, *Fettering of presidential discretion: did the Public Protector overreach?*, in *Obiter*, 43, 2022; S. Woolman, *A politics of accountability: how South Africa’s judicial recognition of the binding legal effect of the Public Protector’s recommendations had a catalysing effect that brought down a President*, in *Const. Court Rev.*, 8, 2016; H. Klug, *op. cit.*, p. 108 ff.

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Beyond the implications for institutional balances, this ruling seemed to pave the way for a similar recognition of the binding nature of the decisions of the Human Rights Commission, at least those adopted at the conclusion of its investigative reports.

Furthermore, regarding these latter ones, there is a significant difference to be noted between those from earlier years and those from the last few years, approximately from 2021 onward. The less recent investigative reports ended with an *appeals clause* that did not address the nature of the measures adopted by the SAHRC but instead informed the parties of the possibility to appeal before the same Commission within a 45-day period, a provision still contemplated by the *Complaints Handling Procedures* that governs the entire appeal process before the SAHRC.

With regard to the more recently formulated investigative reports, instead, it can be noted that all of them include a closing clause entitled ‘judicial review’³⁵; striking in these clauses is that the decisions of the SAHRC (findings and recommendations) are explicitly defined as binding for the respondents, with the option to seek judicial review – clearly to challenge the measures in question – within 180 days following the decision³⁶. By this means, it seems thus that the Commission has implicitly sought to claim for itself the authority to issue immediately binding decisions, which is a jurisdiction that has so far been more or less explicitly denied to it by legal scholarship, jurisprudence, and institutional practices.

The litmus test for this new approach of the SAHRC was the ruling *South African Human Rights Commission v. Agro Data CC*³⁷, issued in 2024 by the Supreme Court of Appeal – the highest judicial authority in South Africa, following the Constitutional Court – at the conclusion of a dispute that, once again, concerned an inquiry by the Commission concerning the right of access to water sources.

In this case, contrary to the expectations of the SAHRC, the Court categorically denied the binding nature of the SAHRC’s decisions and measures through a joint textual analysis of the constitutional provisions establishing the Commission and the 2013 *SAHRC Act*. Moreover, the analysis primarily focuses on the different lexical choices made by the Framers with respect to the Public Protector, using the phrase – which has already been discussed – “take appropriate remedial action”, and with respect to the Commission, to which they assigned the competence “to take steps to secure appropriate redress where human rights have been violated” (Section 184(2)(c) of the Constitution). In the exercise of its *persuasive rather than coercive powers*³⁸, the

³⁵ See, for illustrative purposes, *Kebaneile Tumelo Phinda v. Ngaka Modiri Molema District Municipality (Limpopo water report; 2023)* already mentioned above n. 28.

³⁶ This aspect has also been identified by B. Slade, *Clarifying the power of the South African Human Rights Commission to take steps to redress the violation of human rights: a discussion of South African Human Rights Commission v. Agro Data CC [2022] ZAMPMBHC 58*, in *Obiter*, 44, 2023, p. 459 ff..

³⁷ *South African Human Rights Commission v. Agro Data CC and Another (39/2023)*, [2024] ZASCA 121.

Regarding this ruling, see B. Slade, *op. cit.*, p. 463 ff..

³⁸ *South African Human Rights Commission v. Agro Data CC*, cit., § 51.

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Commission, once it has determined the violation of a right for the purposes of its proceedings, can essentially only direct the complainant to the competent forum, potentially providing financial assistance; or, as an alternative, it may initiate a legal action itself, at the outcome of which the measures indicated by the Commission could also be incorporated into the judge's decision. According to the Supreme Court of Appeal, however, in no case can the measures of the SAHRC be considered analogous to binding directives capable of immediate application and enforceability against the alleged perpetrator of the violation.

Subsequent to this ruling, the Human Rights Commission expressed its firm intention to appeal to the Constitutional Court, which, over the next few months, will be tasked with resolving the matter once and for all. Should the Johannesburg Court uphold the ruling of the Supreme Court of Appeal, the SAHRC would be regarded by some authors as a *toothless watchdog*³⁹, with its powers proving to be a blunt instrument, devoid of any real capacity to influence the conduct of the parties affected by its decisions.

5. Concluding remarks: de iure condendo perspectives on the future of the South African Human Rights Commission

The paper has just demonstrated how the recent ruling of the Supreme Court of Appeal has forcefully made the issue of the binding nature of the SAHRC's decisions central, and how it is highly likely that a redefinition of the Commission's role in the near future will largely depend on what the Constitutional Court of Johannesburg determines, as it is tasked with deciding whether the SAHRC may or may not be considered as a quasi-judicial body, in light of the constitutional framework and current legislation⁴⁰.

³⁹ T. Calitz - M. van der Westhuizen, *One of South Africa's watchdogs' power to issue directives: the subject of litigation*, 23 August 2024, available at the link: <https://www.cliffedekkerhofmeyr.com/news/publications/2024/Practice/Dispute/dispute-resolution-alert-23-August-2024-one-of-south-africas-watchdogs-power-to-issue-directives-the-subject-of-litigation>.

⁴⁰ Pending the publication of the article, on April 22nd, 2026, the Constitutional Court of South Africa has adjudicated the case cited in the text, ruling on the issue whether the decisions of the SAHRC could be deemed binding to the recipients, particularly with regard to its investigative activity and the related acts.

In *South African Human Rights Commission v. Agro Data CC and Another* (CCT 264/24), [2026] ZACC 16, the Court of Johannesburg has upheld the decisions of the lower courts and, in particular, the judgment of the Supreme Court of Appeal (SCA) which had enshrined the non-binding nature of the measures adopted by the SAHRC. In other words, both the lower courts and the constitutional judges have denied the power to issue binding directives on the part of the Human Rights Commission.

The case has been decided unanimously by nine of the eleven Justices of the Constitutional Court. Justice Nicholls, author of the sole opinion of this sentence, underlines that, according to the

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In some respects, the line of reasoning followed by the Supreme Court of Appeal in *SAHRC v. Agro Data* can be seen as a textualist interpretation of the Constitution and the *SAHRC Act*, which is also in line with the overall stance of the judiciary after the enactment of the democratic Constitution. As a matter of fact, it can be said that South African judges have been decidedly proactive in dismantling the legislation dating back to the apartheid era, and yet generally deferential to the discretionary decisions of the legislature concerning the implementation of the more complex and sensitive aspects of the new constitutional framework, such as the same degree to which socio-economic rights can be implemented, subject to the limited availability of the resources.

If the issue of the binding nature of the decisions remains – at least for the time being – essentially unresolved, both in South Africa and in other countries, the future of NHRIs seems to point towards two main paths. On the one hand, as Okafor argued⁴¹, the competencies of Human Rights Commissions that fall outside of the so-called court-like functions could be maximised, such as all of those that distinguish and differentiate them from courts rather than conflating the two roles, emphasising and strengthening as such the specific nature of Human Rights Institutions by foregoing any attempt to transform them into quasi-judicial bodies.

On the other hand, if the role of adjudication of human rights institutions were to be enhanced, it might be necessary to strengthen their financial autonomy – widely considered to be the Achilles' heel of NHRIs in general – and to also further increase

Paris Principles, no State was bound to establish an NHRI with binding-enforcement powers and this is confirmed by looking at other NHRIs in a comparative perspective (see § 67-70 of the sentence).

Furthermore, the Constitutional Court has espoused the textualist reasoning of the SCA, also relying on the preparatory works of both the Constitution and the legislation regulating the SAHRC. Precisely in this perspective, the constitutional judges have also shared the different framing of the powers of the SAHRC compared to those the Public Protector is vested with.

At §§ 53-54, the Court states: “The ordinary meaning of the phrase ‘take steps to secure’ makes plain that the SAHRC is not empowered to provide a remedy itself, but to perform actions which support or enable the obtaining of redress which is to be dispensed elsewhere. [...] It authorises the SAHRC to arrange or fund litigation, or to direct complainants to appropriate forums”.

According to this view, the judges of Johannesburg thereby shape the SAHRC as “a body designed to facilitate, engage and influence rather than control and compel”, a body which “exerts cooperative control rather than coercive control” (§ 52), vested with “largely discretionary and advisory rather than coercive” powers (§ 57).

Essentially, in the Court's opinion, the model according to which the SAHRC has been established would unquestionably be that of a facilitative body rather than an adjudicative or quasi-judicial one (see § 54).

⁴¹ O.C. Okafor, *National Human Rights Institutions in Anglophone Africa: legalism, popular agency, and the “Voices of Suffering”*, in R. Goodman - T. Pegram (eds.), *Human rights, State compliance and social change. Assessing National Human Rights Institutions*, Cambridge, 2011, p. 124 ff.; especially p. 130 ff.

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their independence from the executive, an area in which, as shown, the SAHRC is perceived to be somewhat lacking⁴².

Furthermore, as has been observed, the specific area addressed, i.e. the enforcement of social rights, may fall outside the sanctioning mechanism typically applied to the violation of other categories of rights, which generally takes place before courts, and could also be pursued and implemented through mechanisms better suited to the not-yet non-fully judicial nature of human rights institutions.

ABSTRACT: The paper addresses the topic of NHRIs in *Global South* countries and it focuses especially on the South African Human Rights Commission, as for its history, structure and competences. The article examines the enforcement of socio-economic rights by this body and its interactions with the courts and, especially, with the Constitutional Court of Johannesburg. The paper also addresses the contentious issue of whether the recommendations of this NHRI should be deemed binding or not. This issue is still crucial in the South African debate, since the courts have stated the binding nature of the Public Protector's decisions, but the Supreme Court of Appeal has recently denied this feature as for the decisions of the SAHRC.

KEYWORDS: Global South – transformative constitutionalism – South African Human Rights Commission – social rights – binding decisions.

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⁴² Furthermore, the SAHRC is internationally regarded as being in full compliance with the Paris Principles, and holds the “A” status recognition from GANHRI.