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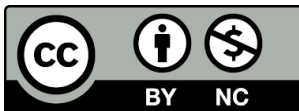
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Framing National Human Rights Institutions: European and Comparative Experiences and the Prospect of Establishing an Italian NHRI*

Oreste Pollicino – Matteo Monti

National Human Rights Institutions (NHRIs) have increasingly assumed a prominent role in monitoring and ensuring the effective domestic implementation of human rights. The minimum standards and requirements for the establishment of effective NHRIs were set out in the Paris Principles, adopted by the United Nations General Assembly in 1993. Their non-judicial nature, together with their broad functional mandate, reflects their essential role in both the protection and promotion of human rights. In particular, NHRIs engage in awareness-raising activities and may play a crucial preventive role with respect to potential violations, thereby complementing judicial remedies, which are not always capable of fully redressing harm and may remain difficult to access for minorities and vulnerable groups.

In recent years, NHRIs have attracted growing scholarly attention. Existing literature has explored their global diffusion¹, as well as the opportunities and challenges they face². Much of this scholarship has been situated within the broader framework of international law and politics³. At the European level, too, the defining features and functions of NHRIs have been extensively analysed⁴.

This Special Issue seeks to examine the role of NHRIs within the European legal framework, with particular attention to the possible establishment of an Italian NHRI.

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² Lyer K. R., *National human rights institutions*, in G. Oberleitner (ed.), *International Human Rights Institutions, Tribunals, and Courts*, London, 2018, 1; K. Linos - T. Pegram, *What Works in Human Rights Institutions?*, in *The American Journal of International Law*, 111, 3, 2017.

³ L. Violini, *The Role of Non-Judicial Bodies in Human Rights Implementation*, in E. Bribosia – I. Rorive (eds), *Human Rights Tectonics: Global Dynamics of Integration and Fragmentation*, Cambridge, 2019; D. Zipoli, *NHRI Engagement with UN Human Rights Treaty Bodies: A Goal-based Approach*, in *Nordic Journal of Human Rights*, 37, 3, 2019; G. de Beco - R. Murray, *Commentary on the Paris Principles on National Human Rights Institutions*, Cambridge, 2015.

⁴ K. Meuwissen - J. Wouters (eds.), *National Human Rights Institutions in Europe: Comparative, European and International Perspectives*, Cambridge, 2013; R. Murray, *The Role of National Human Rights Institutions at the International and Regional Levels*, Oxford, 2007; G. de Beco, *National Human Rights Institutions in Europe*, in *Human Rights Law Review*, 7, 2, 2007.

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Within Europe's multilevel system of human rights protection, it is necessary to investigate the horizontal relationships between the European Union Agency for Fundamental Rights (FRA) and other key institutions of both the European Union and the Council of Europe (CoE), which together constitute central reference points in the protection of fundamental rights. The FRA represents one of the emerging bodies tasked with maximising and operationalising the potential of the EU Charter of Fundamental Rights. Any prospective Italian NHRI would necessarily operate within this complex institutional environment, including in its relations with the Agency.

In this context, vertical relationships—between the FRA and NHRIs, as well as between NHRIs and the institutions of the Council of Europe—become equally crucial. At the same time, this Special Issue addresses a further dimension, namely the diversity of NHRI models that emerge from a comparative law perspective. By mapping and analysing the principal institutional models adopted across jurisdictions, this Special Issue aims to highlight both the underlying rationales and the dynamics through which the absence of an NHRI may negatively affect the protection of fundamental rights at both the European and national levels. A key research question concerns whether, in order to ensure a more comprehensive and effective protection of rights, it is preferable to establish a single institution endowed with a general human rights mandate, rather than relying on a plurality of bodies tasked with the protection of specific interests. In this regard, particular attention is also devoted to assessing the effectiveness of such an institution in light of the powers conferred upon it and the nature of the acts it is entitled to adopt.

The first part of the Special Issue aims to shed light on the role of the FRA, as well as on its distinctive features compared to the institutions of the Council of Europe, by analysing its contribution to European digital constitutionalism. This section opens with an introductory contribution by Michael O'Flaherty, former Director of the FRA and currently Commissioner for Human Rights of the Council of Europe. His reflections focus on the role of NHRIs in the contemporary European context. Against the backdrop of widespread rights violations, disinformation, institutional weakening, and a broader crisis of trust, O'Flaherty argues that NHRIs constitute essential instruments for the protection of rights, the resilience of democratic systems, and the overall quality of public policymaking. Within the challenges posed by Europe's multilevel system, his analysis also addresses the Italian case, calling for the establishment of an independent, inclusive, ambitious, and adequately resourced NHRI.

The European perspective is further developed through our contribution on the FRA. Building on the existing literature concerning the Agency and its impact on fundamental rights within the European Union, the article by Oreste Pollicino and Matteo Monti examines whether—and to what extent—the FRA has influenced the development of European digital constitutionalism and shaped EU digital regulatory policies. In the field of digital regulation, legislative processes are increasingly informed by reports, opinions, and empirical research produced by specialised technical bodies.

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Among these, the FRA occupies a significant yet still underexplored position. The article also engages with the well-known debate concerning the potential overlap between the FRA and the institutions of the Council of Europe, a particularly salient issue at the time of the Agency's establishment. From a normative standpoint, the FRA's conception of fundamental rights largely aligns with the paradigm developed within the Council of Europe in this field. From a policy perspective, however, the FRA's influence on EU legislative and regulatory processes appears uneven. In certain instances—such as the Regulation on terrorist content online, the Digital Services Act, and the AI Act—the Agency has played a visible and constructive role, contributing through formal opinions, impact assessments, and monitoring activities, thereby strengthening the fundamental rights dimension of these instruments. Nevertheless, the FRA does not yet appear to occupy a central position within the EU's institutional public discourse, a role that is instead more clearly assumed by other experiences, as demonstrated in the comparative section of this Special Issue.

The Issue further explores the role of NHRIs from a comparative perspective, enabling an analysis of experiences across different jurisdictions and the identification of best practices that may inform the establishment of an Italian NHRI. The contribution by Francesco Saitto examines the German Institute for Human Rights (GIHR) as an NHRI which, despite lacking quasi-judicial powers, plays a significant role in the promotion of human rights in Germany. The article traces the development of the Institute from the 2000 parliamentary motion to the 2015 founding law. The absence of quasi-judicial powers of the GIHR is explained not only by the deeply rooted view that specialised courts should retain a primary role in this field, but also by the intrinsic difficulties of entrusting an essentially public function to an institution that, while independent, is legally characterised by a private associative nature. This limitation, however, does not diminish the authority of the GIHR, nor its capacity to exert influence in the public sphere. The Institute has performed both reactive and proactive functions, particularly in public debates concerning the possible ratification of international treaties. The analysis of the GIHR's activities partly confirms the idea that NHRIs may serve as consultative interlocutors for constitutional courts. More broadly, the Institute operates within the public sphere as a bridge between institutions and society, engaging with civil society organisations, non-governmental actors, and a wide range of international stakeholders. The article argues that the GIHR influences constitutional interpretation and public debate through research, policy advice, cooperation with courts and institutions, and human rights education, thereby acting as an instrument of the open constitutional state. It may therefore be regarded as a functional model of NHRI capable of shaping constitutional interpretation even in the absence of strictly judicial powers. This aspect is particularly significant, as the Institute may contribute—indirectly yet decisively—to the constitutionalisation of the legal order. As the Institute itself has emphasised since its first report, its connective function may significantly influence not only political direction and legislative reforms, but also the judicial interpretation of federal law.

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The contribution by Angelo Schillaci examines the establishment and evolution of the *Defensor del Pueblo* within the Spanish constitutional experience, offering a particularly valuable vantage point from which to analyse evolving trends concerning National Human Rights Institutions (NHRIs) in contemporary constitutional democracies. From this perspective, the article explores the relationship between the *Defensor del Pueblo*, NHRIs, and ombudsman institutions, focusing on its constitutional relevance as reflected in its interaction with the political process, including its power to initiate proceedings before the Constitutional Court. The analysis demonstrates that the role of the *Defensor del Pueblo* extends beyond safeguarding a traditional understanding of the rule of law, instead contributing to the strengthening of the constitutional rule of law. This emerges clearly through several dimensions: (i) its relationship with the political process, including the use of its power to bring constitutional challenges; (ii) its potential counter-majoritarian function; (iii) its role as an actor in processes of integration within the constitutional public sphere, thereby acting as a guarantor of the constitutional rule of law; and (iv) its contribution to enriching the scholarly understanding of fundamental rights law. In particular, the power to lodge constitutional complaints places the *Defensor del Pueblo* firmly within the system of constitutional guarantees. At the same time, according to the Author, constitutional litigation represents an important channel of interaction with the political process, potentially enhancing the institution's capacity to shape rights-oriented public policies. The constitutional complaints brought by the *Defensor del Pueblo* have historically provided a platform for minority claims that would otherwise lack representation. An analysis of these constitutional complaints highlights both the potential counter-majoritarian role of the *Defensor del Pueblo* and its contribution to constitutional interpretation within the “open society of constitutional interpreters,” as well as its broader function in fostering processes of constitutional integration. Together with other NHRIs and ombudsman institutions, it may therefore enhance democratic quality and strengthen political integration, while contributing to the protection of the constitutional rule of law.

The contribution by Federico Nania compares two National Human Rights Institutions established in accordance with the Paris Principles—the UK Equality and Human Rights Commission and the Netherlands Institute for Human Rights—examining their mandates, powers, and activities. Particular attention is devoted to their promotional functions and to the differences between the two institutional models. The article further considers whether such bodies, operating beyond traditional powers—particularly judicial authority—may play a meaningful role in integrating the protection of rights and equality in contemporary democracies as institutions of a “fourth branch.” The Author argues that these bodies shall situate within the category of “fourth branch institutions,” namely autonomous and independent actors that cannot be reduced to the classical separation of powers, yet are nevertheless legitimised to interact with each of them through non-binding forms of intervention and dialogue. Rather, by virtue of their specialised focus on human

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rights, they are able to act as interlocutors for institutional actors and courts alike, functioning as “non-judicial national institutions for the implementation of international human rights law.” The experiences of the United Kingdom and the Netherlands demonstrate that such institutions are fully capable of contributing to the protection of human rights, complementing the traditional framework without competing with judicial guarantees. As highlighted, they operate across multiple levels: promoting a culture of rights, conducting research and investigations, intervening before courts and thereby connecting with the judicial sphere, and adopting measures that impact the protection of fundamental rights of individuals and minorities.

Chiara de Santis’s contribution examines the role of National Human Rights Institutions in the Global South, with particular focus on the South African Human Rights Commission (SAHRC), analysing its history, structure, and competences. The article mainly focuses on the implementation of socio-economic rights by the Commission and its interaction with courts, particularly the Constitutional Court. It also addresses the controversial issue of the binding nature of the SAHRC’s recommendations, which remains central to South African legal debate, especially in light of recent case law denying such binding force. The contribution shows how a recent decision of the Supreme Court of Appeal has brought renewed attention to this issue and how a future redefinition of the Commission’s role will likely depend on the Constitutional Court’s determination of whether the SAHRC may be considered a quasi-judicial body under the constitutional and legislative framework. While the question of the binding nature of NHRI decisions remains—at least for now—largely unresolved both in South Africa and in other jurisdictions, the future development of NHRIs appears to follow two main trajectories. On the one hand, there may be value in fully developing those competences of human rights commissions that lie outside the judicial sphere, avoiding functional overlap and reinforcing the distinctive nature of NHRIs without transforming them into quasi-judicial bodies. On the other hand, should a strengthening of their adjudicative role be envisaged, it may become necessary to enhance their financial autonomy—often regarded as the “Achilles’ heel” of NHRIs—as well as to further increase their independence from the executive, an area in which the SAHRC still exhibits certain weaknesses. These experiences reveal a range of best practices that could be especially instructive for the establishment of an Italian NHRI.

The Special Issue finally turns to the question of establishing an NHRI in Italy. The contribution by Vincenzo Tudisco highlights that, despite repeated international and European recommendations, Italy remains one of the few EU Member States that has not yet established a NHRI. After outlining the draft bills currently under consideration in both chambers of Parliament, the article focuses on institutional design, weighing the arguments for and against the creation of a new ad hoc body versus assigning a human rights mandate to an existing institution, thus creating a multi-mandate body (as envisaged in some Senate proposals concerning the Data Protection Authority).

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Ad hoc institutions benefit from a dedicated mandate, specific competences, targeted advocacy, and greater visibility. However, in a fragmented system they may also lead to overlaps and gaps, and risk marginalisation or political influence. Multi-mandate institutions, by contrast, may address issues more comprehensively, operate under a single legal framework ensuring equal protection, facilitate the exchange of best practices, provide more coherent services, achieve cost efficiencies, and enjoy greater recognition and authority. At the same time, such models may give rise to tensions between different mandates and uneven distributions of powers, while inadequate leadership could negatively affect the overall protection of human rights. Given the fragmented Italian system, the article emphasises the need for systematic cooperation and coordination among institutions, in order to promote synergies, facilitate the exchange of best practices, and work towards a more uniform protection of vulnerable groups and individuals. Particular attention is also devoted to the potential opportunities arising from the implementation of recent EU directives on equality bodies, which may offer useful insights for the establishment of an NHRI and for creating linkages between such an institution and existing equality bodies. Tudisco's conclusions underline that there are compelling arguments both for the creation of a new NHRI and for entrusting the mandate to an existing body. Regardless of the chosen institutional model, however, certain core requirements remain indispensable: clear legislation, full independence, adequate resources, and effective mechanisms of cooperation and coordination with other actors.

The Special Issue concludes with the contribution by John Morijn, whose reflections aim to provide guidance for the establishment of an NHRI in Italy. Morijn argues that, rather than focusing exclusively on institutional design, it is crucial to take into account the national context in which such institutions operate. In this perspective, the effectiveness of NHRIs depends to a large extent on the quality of their leadership and staff, which are decisive in ensuring meaningful human rights protection. According to the Author, one of the most important yet often overlooked elements in determining the added value of an NHRI is precisely the people who work within it. Leadership and personnel may matter more than formal legal structures when it comes to achieving tangible results. It is entirely conceivable for an NHRI to be well-funded and endowed with extensive powers, yet to remain ineffective if its leadership lacks the courage to act. For this reason, when Italy eventually establishes its own NHRI, the most critical factor in ensuring its effectiveness will be the selection of leadership and staff genuinely committed to the protection of the rights of all individuals within its jurisdiction, particularly those in vulnerable situations. Ultimately, the protection of human rights rests on a strong ethical commitment, the ability to address conflicts with both determination and balance, and a consistent focus on delivering concrete outcomes for individuals.

In conclusion, we strongly believe that an Italian NHRI would strengthen existing safeguards by providing a coherent and unified framework within what remains, at present, a fragmented national system of human rights protection. In this

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respect, as already emphasised in another paper⁵, the establishment of an ad hoc NHRI would foster the development of a promotional dimension of human rights protection, which remains significantly underdeveloped when compared to its more traditional reactive counterpart, i.e. courts. This function would be enabled by the NHRI's capacity to issue opinions, recommendations, and proposals—including in relation to legislative and regulatory measures—addressed to both Government and Parliament on all matters concerning the protection of human rights. As the comparative contributions in this Special Issue demonstrate, such activities play a crucial role in shaping the public sphere. In addition, the NHRI could assume a proactive role in encouraging the signature and ratification of international conventions and agreements, as well as in monitoring their domestic implementation. The experience of the German Institute for Human Rights (GIHR) provides a particularly illustrative example of this trend.

We believe that a number of key elements should guide the establishment of an Italian NHRI. First and foremost, independence must constitute the cornerstone of its institutional design. This requires, *inter alia*, that the term of office of commissioners be at least equal to—or longer than—that of the Parliament responsible for their appointment, and that commissioners not be subject to mid-term review or dismissal procedures that could compromise their autonomy. Closely related to this is the need to ensure the NHRI's full organisational and financial autonomy. The institution should be able to manage independently its internal structure, including human resources and budgetary decisions. Adequate and secure financial resources are essential to enable the Authority to carry out its mandate effectively and without external interference.

Another fundamental aspect concerns the representativeness and pluralism of the Commission's composition. As highlighted by the European Union Agency for Fundamental Rights, pluralism entails the broadest possible inclusion of diverse social groups within NHRIs⁶. While, as Morijn persuasively argues, the quality of leadership remains decisive, pluralism nonetheless constitutes a structural requirement for ensuring the legitimacy and effectiveness of the institution. The promotion of pluralism is closely linked to cooperation with civil society actors. Meaningful and structured interaction with civil society is essential to ensure that the voices of minorities and vulnerable groups are adequately represented, as comparative experience—such as the Spanish case—clearly demonstrates.

Finally, it is crucial that the Authority be endowed with powers to investigate human rights violations, whether individual or systemic. In this regard, particular attention should be given to equipping an Italian NHRI with tools enabling it to

⁵ J. Zenti - O. Pollicino, *È arrivato finalmente il tempo della italiana human rights institution?*, in *Diritticomparati.it*, 27 October 2020 (www.diritticomparati.it).

⁶ FRA, *Strong and effective national human rights institutions*, 2020, p. 49 (fra.europa.eu).

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interact with ongoing judicial proceedings, for instance through the possibility of intervening as *amicus curiae*. The comparative contributions to this Special Issue demonstrate the crucial role of NHRIs in promoting and protecting rights across diverse institutional and legal contexts, thereby reinforcing the case for establishing an Italian NHRI⁷.

KEYWORDS: National Human Rights Institutions - human rights protection - - public policy - Italy

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⁷ For a leading contribution on this issue, see G. Repetto (ed.), *Una National Human Rights Institution per l’Italia: problemi e prospettive*, Turin, 2025.

The essential role of a National Human Rights Institution in a country's human rights architecture*

Michael O'Flaherty

Before coming to the content of my intervention today, allow me to say a word about my current role as the Council of Europe Commissioner for Human Rights. I serve as the fifth Commissioner, with a mandate that was established 25 years ago. We serve for six years, a non-renewable term. This is essentially a diplomatic role. My toolbox is mostly made of words, as ultimately it is about persuading the member states of the Council of Europe, and all the other actors that make a difference, to do a better job in upholding human rights.

While I also have a formal role with regard to the European Court of Human Rights, I spend most of my time travelling through Europe, engaging with rights-holders and member states to promote respect for human rights. President Macron described the Commissioner for Human Rights as Europe's "pilgrim" of human rights. I have always considered it to be a beautiful term, as it captures precisely the nature of the job: to be out there, with people who are most in need, engaging, understanding, bringing their voice back to the centre.

Through my travels across Europe, I have observed at least six developments that are very worrying.

The first is a shockingly high level of human rights violations. This is exemplified at its extreme by the obscenity of the Russian aggression against Ukraine, and the comprehensive disregard for human dignity and human rights in the conduct of war there, but also by the transfer of arms to the Middle East, and the use those arms are put to. Beyond these specific situations, I notice a high level of violations across Europe. Human rights violations assume a different physiognomy in different countries, but no country is exempt.

The second observation, perhaps even more worrying, is about a disavowal of the standards, and claims that standards no longer apply. Certain governments suggest with increasing openness that, if a certain treaty hinders the implementation of their plans, they will disregard relevant obligations. This is particularly frightening, because it threatens to undermine a great system of protection. And what is more frightening is that, while a disavowal of the system was once only threatened by people on the political extremes, now it has moved to otherwise reasonable politicians from the mainstream.

* Abridged transcript of the speech delivered by the Council of Europe Commissioner for Human Rights Michael O'Flaherty at 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.

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The third dimension of what I see at the moment in Europe, is the significant degree of disinformation in circulation. Its sheer volume, and the sophistication of AI-enabled disinformation, are making it increasingly difficult to distinguish truth and falsehood. On top of lies, we observe so-called ‘slops’, which are pieces of disinformation generated not with malice, but through the stupidity of the technology. This combination is extremely worrying, and the manner in which it interplays with populist politics has to be taken properly into account.

Very closely related to all of this is the fourth of my concerns, which has to do with the weakening of institutions that are intended to stand up for dignity, human beings, human welfare, and human rights, at national and international levels. For example, we observe the increasing sidelining of the United Nations.

Then there are the attacks on civil society – I would not have anticipated the extent to which these would keep me preoccupied in this job. Civil society is the oil of our democracies. And civil society has to thrive, for our societies to be able to work. I observe an array of problems: the borrowing of models of a law first adopted in Russia to block funding; the blocking of access to decision-makers and the persecution of people on the streets and in their homes. It is a constant part of my job to engage with a government somewhere to address the pressure on civil society.

And then the final of the six concerns is the collapse of trust at so many different levels: certainly between the citizen and the state, but also between young people and old people, and between countries. This lack of confidence in each other is deeply corrosive of our societies. In 2024, the International Institute for Democracy Assistance (IDEA) conducted a survey in 19 countries that had elections during the year. People were asked whether they considered that the elections in their country were free and fair, and, only in less than half of the countries were elections perceived to have been free and fair by a majority of respondents.

From all this, we can draw many conclusions, but a particularly important one is the importance of investing in our human rights defence institutions. We can argue about where the world is going, how we stop this calamitous decline – that is a very important discussion – but regardless of where we go on that discussion, we have to strengthen the protection machinery.

And that is why I am so very happy to be here today, with the invitation to discuss the role and the importance of National Human Rights Institutions.

I would like to share a little of my own story of experiences with NHRIs. I joined the UN in 1993, and it was a very special year, because the Vienna World Conference on Human Rights had just ended. The energy of Vienna was pulsing through the Palais des Nations in Geneva, joined with the energy from Paris, where the Paris Principles on the Status of National Human Rights Institutions had been adopted just a few months earlier. And this combination meant that in the 1990s there was an optimism and a sense of the value of NHRIs for the realisation of human rights at national level, which was powerful. It was championed by a number

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of governments, Australia in particular, which supported the UN to promote the concept of an NHRI. I witnessed these institutions being set up right across the world in a context that was very optimistic. In many countries, this provided a focus for a discussion around implementing human rights that had never happened before.

At the end of the 1990s, I went to Sierra Leone to run the UN operations during the war there, and I was involved in setting up a Paris Principles compliant NHRI. I saw that it was very difficult to get that NHRI established. Nevertheless, the new, Paris Principles compliant NHRI, played a really important role in developing a culture of human rights in that very poor and conflict-affected country.

Early in the 2000s, I ran the Asia Pacific programmes of the United Nations Human Rights, and in that context, I dealt with so many very impressive NHRIs across that vast region. I do not have time to tell you many stories this morning, but I think, for instance, of the courage of the members of the Indonesian National Commission on Human Rights. Notwithstanding the politics of that country, notwithstanding the fraught nature of the issues, it was the Indonesian National Commission on Human Rights that was the greatest champion of defending the human rights of the Indonesian LGBTI communities. Another example I saw was the incredible value for national debate of an innovative NHRI in New Zealand. The New Zealand Human Rights Commission was forever inventing new ways to promote and protect human rights, and it was highly impactful. I also saw the bravery of the Australian Human Rights Commission in standing up for the Aboriginal and Torres Strait Islanders, and in very bravely rejecting the externalisation of migration policy, which began back in that time in Australia.

Then, I became the Chief Commissioner of the Northern Ireland Human Rights Commission. I was there for a little more than two years, but I saw from the inside – in a way that I could not have otherwise – the particular role of the commission in, for example, helping consolidate the peace process. The title of this conference mentions the role of NHRIs in preventing conflicts, maybe without meaning it in a war setting, but Northern Ireland demonstrates the role of an NHRI in a post-war setting and how it can help build the basis for a solid and reliable peace. The other thing that the Northern Ireland Human Rights Commission was able to do, in the context of a blocked government that often could not agree on things, was to advance social agendas that the government was not delivering on.

By being in Northern Ireland when I was, I was also able to watch the birth of ENNRHI, the European Network of National Human Rights Institutions, and to witness its story of increasing impact at the European level.

Today, I deal with NHRIs all around Europe. I will not mention them by name, but I am deeply impressed by the work that many of them carry out, tenaciously, in defence of human rights.

It is because of this experience of observing NHRIs – which are not all perfect but often operate effectively – that I so highly welcome the increasing recognition of their importance. I acknowledge, in particular, the identification of the establishment

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of an NHRI as an indicator for delivery of the UN Sustainable Development Goal number 16: that states, in the negotiation of the SDGs, found agreement that the establishment of an NHRI was an indicator for delivery of the rule of law is quite remarkable. Similarly, for the EU, the establishment, maintenance, and quality of an NHRI is central to the European Commission’s yearly analysis of the Rule of Law across the member states. In 2023, the summit of Heads of States of the Council of Europe, in its outcome Reykjavik declaration, also underscored the pivotal role of NHRIs in safeguarding human rights, democracy, and the rule of law across Europe.

That is why I regret that we still do not have NHRIs in certain European countries. In the Council of Europe, more or less ten NHRIs accredited at the Global Alliance of NHRIs (GANHRI) are missing. In the EU, more or less three. But whether it is Council of Europe or EU, a big stand-out is Italy – which is the last major country on the continent not to have an NHRI.

I have been coming to Italy for years to talk about the establishment of an NHRI. I had a number of conversations about it, including with then Minister of Justice, Marta Cartabia, and then Under-Secretary Benedetto Della Vedova. I went to the Senate to talk about it. I acknowledge with respect that the government has agreed to establish an NHRI, and I am aware that there are five proposals in Parliament.

Stakeholders in Italy, will decide the model of a national human rights institution that fits, based on the specificities of the country and its human rights architecture. I know that during the conference today you will look at different models that exist, and there are many different ones in Europe. Whatever the preferred option, however, I would like to invite you to agree on just one: indeed, if all the voices are joined together in advocacy for the same goal, then we have so much better chances of its realisation.

I would like to suggest a few criteria that you may keep in mind as you reflect on what a single shared model would look like and for the process to get there.

The first is to be inclusive. By inclusive I mean that the process of working out a shared model for the NHRI has to take account of a diversity of voices. You need to bring into the room the breadth of all those voices in society that have so much say about human rights, so that they are heard, listened to, and actively reflected in the outcomes. It is vital that the NGOs are in the room, that different civil society groups are in the room, judges are in the room, parliamentarians, regional government, local government, city government, and that the conversation is appropriately gendered.

My second exhortation is to be ambitious. By ambitious, I am referring to the normative base and the substantive scope of the institution you seek to establish. I think it is not enough to be Paris Principles compliant. NHRIs today need to be Paris Principles “plus”, taking account of the reality of today’s world in terms of the minimum standards to expect of a NHRI. The GANHRI General Observations elaborating on the Paris Principles and the 2021 Recommendation of the Committee

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of Ministers of the Council of Europe on the development and strengthening of effective, pluralist and independent NHRIs provide important guidance.

In this regard, it is particularly important to pay attention to all elements that will ensure a high quality of independence for the institution. Independence from the government should be set out in legislation or in the Constitution.

As to the material scope of the NHRI, it is important that you explicitly take account of the great issues of the day and interrogate whether the models you propose are adequate. For example, an institution will have to be capable of engaging with the challenges of artificial intelligence, of climate change, of rising inequality – it needs to be relevant to the issues that are shaping our society.

The third dimension that I think is important to keep in mind, is the need to hardwire the institution into the public policy processes. This should make it automatic, rather than facultative, that the institution be consulted by the state whenever the latter is engaging with relevant issues. I am thinking of the experience of COVID: NHRIs ultimately seem to have done a good job in reacting to the COVID pandemic and providing advice on the state's behaviour, but only in few countries did the state from the very beginning consult its NHRI, and only in these was the NHRI a member of the pandemic committee or similar body from the outset. There is a need to find a legal formula that requires the state to consult its NHRI before adopting decisions that may have a significant impact on human rights.

There is an additional dimension of the hardwiring of the NHRI into the state policymaking process – which is more obvious and less likely to be overlooked – and that is the prerogative to take cases to court on its own initiative. This is a well-recognised role of an effective NHRI.

I would submit two additional considerations. One regards the need to avoid, while designing an institution, any transfer of responsibility from the state to the institution. I have seen this in a few countries, as a member of the UN Human Rights Committee: the government would come in front of the committee and object to any recommendation by suggesting that the NHRI, rather than the government, was responsible for its implementation. I believe that no government should deflect its human rights responsibilities and take advantage of such an inappropriate transfer of responsibility.

Finally, I would suggest insisting on capacity and resources. Italy is a large country, and the complexity of the country would have to be acknowledged in the ambition and the resourcefulness of whatever body is created.

As the debate moves forward, there are two dates to keep in mind. One is coming up soon: the Committee of Ministers of the Council of Europe, through its Steering Committee on Human Rights, has launched a review of how member states have implemented its 2021 Recommendation on establishing and strengthening NHRIs. The Steering Committee asks all the member states of the Council of Europe to provide inputs, then an event will be organised in Strasbourg in November and a report will be issued on the implementation of the recommendation

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by June 2026. Would it not be notable if Italy was able to report to Strasbourg that it was well on the path towards establishing its own institution by then?

The second date is in five years. I mentioned Sustainable Development Goal 16, which, like the other SDGs, shall be implemented by 2030. I would encourage us all to have that ambition: that before the SDG deadline is reached in 2030, there will be a fully functioning and thriving National Human Rights Institution in this country.

Let me assure you that you can count on my full support, in the form that you think is most useful, as we go towards this target.

ABSTRACT: This abridged transcript presents Michael O’Flaherty’s reflections on the role of National Human Rights Institutions within contemporary European human rights protection. Against a backdrop marked by widespread violations, disinformation, institutional weakening, attacks on civil society, and declining public trust, the speech argues that NHRIs are essential components of national human rights architectures. Drawing on comparative experience, it emphasizes their functions in promoting rights, supporting democratic resilience, preventing conflict, and strengthening public policy. Particular attention is devoted to Italy, which is urged to establish an independent, inclusive, ambitious, and adequately resourced NHRI.

KEYWORDS: National Human Rights Institutions – human rights protection – democratic resilience – public policy – Italy.

Michael-O’Flaherty – Commissioner for Human Rights of the Council of Europe.

The Fundamental Rights Agency (FRA) and the EU's Digital Regulation: Giving Shape to Digital Constitutionalism in the Times of the Platformised Public Sphere and Autonomous AI*

Oreste Pollicino – Matteo Monti

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1. Introduction

In the contemporary digital environment, shaped by the rivalry among the “digital empires” identified by Anu Bradford¹ — the United States, China, and the European Union —, the European Union has distinguished itself by regulating new technologies through an approach based on fundamental rights, elaborating a model of digital constitutionalism². Rather than treating digital technologies as merely economic instruments, the Union has framed them as objects of constitutional concern, requiring governance consistent with the values enshrined in the EU Charter of Fundamental Rights. This “constitutionalisation” of the digital environment has been shaped by a plurality of institutional actors, most prominently the Court of Justice

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¹ A. Bradford, *Digital Empires: The Global Battle to Regulate Technology*, New York, 2023.

² O. Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?*, Oxford, 2021; E. Celeste, *Digital constitutionalism: the role of internet bills of rights*, London, 2022; G. De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society*, Cambridge, 2022.

of the European Union, the EU legislator, and specialised expert bodies. While courts often find themselves on the frontline of fundamental rights protection in the field of digital regulation³, the legislator's role is equally decisive, given the need for positive regulation capable of structuring the exercise and limits of those rights in the digital environment: through legislative intervention, digital constitutionalism acquires its concrete normative form⁴. In the context of the European Union's regulation of the digital sphere, this legislative activity is informed and influenced by the reports, opinions, and empirical research produced by specialised expert bodies. Among these, the European Union Agency for Fundamental Rights (FRA) occupies a prominent, yet underexplored position. Although lacking formal regulatory or adjudicatory powers, the Agency has significantly contributed to defining the framework of fundamental rights within which EU digital regulation evolves. This raises important questions regarding the role of epistemic and advisory bodies in the emergence of European digital constitutionalism.

Building on the existing literature on the FRA and its impact on fundamental rights in the EU⁵, this article examines whether the FRA has influenced the development of EU digital constitutionalism and shaped EU digital regulatory policies. In particular, it will explore which conception of fundamental rights has informed the FRA's contribution to shaping the EU's digital constitutionalism and to what extent this has influenced public policies in the field of EU digital regulation. In doing so, the article will also indirectly engage with the well-known debate concerning the potential overlap between the FRA and the institutions of the Council of Europe (CoE), an issue that was particularly salient at the time of the Agency's establishment⁶.

The FRA⁷ is an independent EU body established to provide EU institutions and Member States with assistance and expertise on fundamental rights, at the same

³ O. Pollicino, *Judicial Protection of Fundamental Rights on the Internet*, cit.

⁴ *Ibid.*; G. De Gregorio, *Digital Constitutionalism in Europe*, cit.

⁵ L. Violini, *The Fundamental Rights Agency of the EU: A step on the way toward an integrated EU policy in the domain of fundamental rights*, in L. Violini - A. Baraggia (eds.) *The Fragmented Landscape of Fundamental Rights Protection in Europe*, London, 2018; R. Byrne - H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency*, London, 2019; M. Moschovidis, *The Fundamental Right Agency's Influence in Reforming EU Roma Policy*, in *International Journal of Roma Studies*, 4, 2022.

⁶ M. Kolb, *The Fundamental Rights Agency*, in *Ibid.*, *The European Union and the Council of Europe*, London, 2013; T. Termacic, *Hand in Hand for a Better Protection of Human Rights in Europe*, in R. Byrne - H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency*, London, 2019; O. De Schutter, *The Two Europes of Human Rights. The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe*, in *Columbia Journal of European Law*, 14, 2008.

⁷ G.N. Toggenburg, *The European Union Fundamental Rights Agency*, in G. Oberleitner (ed.), *International Human Rights Institutions, Tribunals and Courts*, New York, 2018; J. Grimheden - M. Kjaerum - G. Toggenburg, *'Administering human rights': the experience of the EU's Fundamental Rights Agency*, in C. Harlow - P. Leino - G. Della Cananea (eds.) *Research Handbook on EU Administrative Law*, London, 2017; B. Bercusson, *The contribution of the EU Fundamental Rights Agency to the Realization of Workers' Rights*, in O.

time contributing to more informed policymaking and the protection of fundamental rights across the Union. Although the Court of Justice of the European Union remains the ultimate authoritative interpreter of the Charter, the FRA nonetheless plays a central role in shaping EU policies from a fundamental rights perspective⁸, by collecting, analysing and publishing reliable and comparable data and assessments on the state of fundamental rights within the EU. The Agency formulates remarks and opinions on issues concerning specific rights, develops methodologies and standards to enhance the quality of the protection of fundamental rights, and promotes dialogue with civil society organisations to raise awareness of rights and freedoms. Although it does not enforce rights or handle individual complaints, the FRA also provides independent advice on fundamental rights to EU institutions, as well as contributing to the general understanding and monitoring of EU fundamental rights. Its work therefore supports not only the “monitoring” of the EU Charter’s implementation, but also the evidence-based drafting of legislation and policy by informing the EU legislator and other public authorities about challenges and trends concerning fundamental rights. Furthermore, the FRA frequently intervenes at the pre-legislative and monitoring stages of EU action, providing its “interpretation” of fundamental rights derived from its analysis of the case law of the Court of Justice and of the European Court of Human Rights (ECtHR).

This role appears to mirror that of National Human Rights Institutions (NHRIs)⁹, which contribute to the protection of fundamental rights, even though the primary responsibility for their interpretation and enforcement remains with the courts. Although the role of the FRA is sometimes described as limited to the analysis and systematisation of case law and of the application of fundamental rights by EU institutions and under the European Convention on Human Rights (ECHR), such work of systematisation inevitably entails a degree of interpretation. By adopting specific interpretations of rights and issuing opinions addressed to the EU legislator, the FRA ultimately contributes to shaping and consolidating particular frameworks and understandings of fundamental rights.

In this perspective, although Article 52 of the EU Charter¹⁰ provides for a coherent interpretation of EU fundamental rights in light of the ECHR, certain divergences can nevertheless be identified in EU practice. On several matters, the EU Charter is becoming increasingly autonomous from the ECHR, often establishing only

De Schutter - P. Alston (eds.), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency*, Oxford, 2005; M. Kolb, *The European Union and the Council of Europe*, London, 2013.

⁸ R. Byrne – H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy*, cit.

⁹ K.R. Lyster, *National human rights institutions*, in G. Oberleitner (ed.), *International human rights institutions, tribunals and courts*, London, 2018.

¹⁰ Cf. O. Scarcello, *Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?*, in *European Constitutional Law Review*, 16, 2020.

minimum standards for the protection of human rights across Europe¹¹. Against this background, the analytical and systematizing work carried out by the FRA plays an even more important role in clarifying the scope of application of EU fundamental rights in the digital environment. In light of this, it appears particularly useful to investigate the role of the FRA in systematizing a *corpus iuris* of principles characterizing the concept of freedom of expression and rule of law, and to examine the impact of this work on EU policies in digital regulation. The interpretative nature of the FRA's contribution to the EU's understanding of fundamental rights warrants particular attention, given its potential to significantly influence legislation and practices relating to fundamental rights across the Union, as well as its role in shaping EU constitutionalism.

The methodological approach adopted in the paper is primarily that of comparative public law. The analysis will focus on examining the conception (and limitations) of fundamental rights promoted by the FRA, also in relation to that advanced by the Council of Europe (CoE). With regard to the analysis of the FRA's policy impact, this study does not rely on interviews but rather on a textual examination of the work of EU institutions, thus embracing an institutionalist approach¹². While we are fully aware of the informal influence that the FRA may exercise through consultations, the article concentrates on what emerges from institutional documents and verbatim records, in order to develop reflections on the role of the FRA in shaping that limited segment of public discourse which may be referred to as the “institutional public sphere”—namely, the public sphere of the EU institutions themselves. As far as the FRA's direct impact on EU policies is concerned, this investigation also acknowledges the limits stemming from the Agency's NHRI-like characteristics, particularly in light of its originally restricted mandate under the Multi-Annual Framework (MAF)¹³ and its origin as an institution primarily focused on anti-discrimination law¹⁴.

The article is structured into four sections. Following this Introduction, Section 2 analyses the concept of freedom of expression and information promoted by the

¹¹ This phenomenon could likely be traced back to a form of asymmetry in the protection of fundamental rights. This requires a distinction between the situations in which the core of a fundamental right is expanded and those in which, conversely, it is restricted or affected: on this topic, see M. Monti, *Subnational Constitutions between Asymmetry in Fundamental Rights Protection and the Principle of Nondiscrimination: A Comparison between Belgium (Charter for Flanders) and Switzerland*, in *Perspectives on Federalism*, 11, 1, 2019.

¹² This institutionalist approach has first been proposed by M. Dawson, *Fundamental Rights in European Union Policy-Making: The Effects and Advantages of Institutional Diversity*, in *Human Rights Law Review*, 20, 2020.

¹³ J. Wouters - M. Ovádek, *Exploring the Political Role of FRA. Mandate, Resources and Opportunities*, in R. Byrne - H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency*, London, 2019.

¹⁴ O. De Schutter, *The Genesis of the EU Fundamental Rights Agency*, in R. Byrne - H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency*, London, 2019.

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FRA and the role of the FRA in shaping EU digital policies in this field, looking at the “digital constitutionalism 1.0”. Section 3 investigates the analysis conducted by the FRA regarding AI and the ways proposed to protect fundamental rights in this context, looking at the “digital constitutionalism 2.0”. Finally, Section 4 offers concluding remarks and reflections on the FRA’s role in promoting fundamental rights in EU digital regulation.

2. *“Digital Constitutionalism 1.0”: the FRA, freedom of expression and the platformised public sphere*

The choice of this section’s scope intends to reflect one of the main current regulatory impulses of the European Union in the field of fundamental rights¹⁵: the regulation of free speech and public discourse with a particular focus on its online form. This is one of the areas where the Union’s current action is both stronger and more structured¹⁶, and the FRA’s involvement has been particularly relevant. This section examines, first, the specific understanding of freedom of expression advanced by the FRA and, second, the manner in which the Agency has shaped and influenced EU policies and institutional public discourse. In doing so, this section adds a new dimension to the literature on the EU’s governance of freedom of expression, highlighting the emerging role of the FRA in this field.

In the first part of the analysis, particular attention will be dedicated to content-based limitations on freedom of expression as well as regulatory modalities that constrain or protect specific forms of expression, such as political speech during electoral campaigns or media freedom. To conduct this analysis and to fully appreciate the specificity of the European paradigm, it is useful to highlight certain features that distinguish it from the U.S. model, which is often used by the literature as a comparative benchmark. The predominance of the First Amendment in the United States, together with the ongoing transatlantic conflicts over the regulation of online free speech, makes the U.S.–EU comparison particularly relevant¹⁷.

¹⁵ On the centripetal force that ‘attracts’ fundamental rights discourse within the European project, contrasted with a centrifugal force that seeks to ‘push it away’, see E. Spaventa, *Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU*, in M. Dougan - S. Currie (eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward*, Oxford, 2009.

¹⁶ C. Caruso, *Towards the Institutions of Freedom: The European Public Discourse in the Digital Era*, in *German Law Journal*, 1, 2024; M. Monti, *Towards a Federal-Type Regulation of Online Public Discourse by the EU?*, in *European Public Law*, 30, 2024; J. Bayer, *Legislative Instruments Protecting Freedom of Expression in Europe - an Overview*, in *ERA Forum*, 2025.

¹⁷ G. Pitruzzella - O. Pollicino, *Disinformation and Hate Speech: A European Constitutional Perspective*, Milan, 2020.

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The regulation of public discourse can be defined as the rules governing those forms of expression which form part of the democratic debate¹⁸. Within the EU, this regulation represents one of the most compelling regulatory developments of recent years, marking a renewed intervention by the Union in the governance of freedom of expression, especially in the digital sphere. Such regulatory activity is innovative from a fundamental rights perspective, since the regulation of public discourse and of freedom of expression and information has long been considered an exclusive competence of the Member States¹⁹. Notable examples of this new trend include: “Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online”, “Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act—DSA)”, “Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising”, and “Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act—EMFA)”.

2.1. The FRA's Conception of Freedom of Expression and Information Compared to that of the Council of Europe

Unlike the field of AI and digital constitutionalism 2.0, freedom of expression constitutes an area characterised by an extensive and well-established body of case law of the European Court of Human Rights, complemented by numerous standard-setting and interpretive instruments adopted by Council of Europe institutions. By examining the concept of freedom of expression and information under Article 11 of the EU Charter of Fundamental Rights as interpreted and articulated by the FRA²⁰, it is possible to identify a trend of interpretive choices and permissible limitations that largely align the Agency's understanding of free speech with the approach developed within the CoE²¹. Nonetheless, it is worth examining this trend in the FRA's policy

¹⁸ R. C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, in *Harvard Law Review*, 103, 1990.

¹⁹ This does not mean that there were no EU measures impacting freedom of expression, particularly in the field of media regulation, see C. Holtz-Bacha, *Media Regulation of the European Union*, in J. Krone, - T. Pellegrini (eds.), *Handbook of Media and Communication Economics*, Wiesbaden, 2024.

²⁰ G.N. Toggenburg, *The Implementation of the Charter of Fundamental Rights by the EU Member States (as Reflected in the Work of the EU Fundamental Rights Agency)*, in S. Peers - T. Hervey - J. Kenner - A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, 2021.

²¹ J. Bayer, *Legislative Instruments Protecting Freedom of Expression in Europe*, cit.; D. Erdos, *The Development of European Human Rights and Freedom of Expression Law*, in *European Data Protection Regulation, Journalism, and Traditional Publishers*, 1, 2019.

recommendations and to analyse how the Agency has addressed specific changes to the concept of freedom of expression in the digital sphere. In this context, some balancing between freedom of expression and other fundamental rights and interests may indeed reach a different equilibrium. After all, the FRA was established as “a centre of expertise on fundamental rights issues at the EU level”, in the belief that “Establishing an Agency will make the Charter more tangible, and the close relation to the Charter is reflected in the Agency’s name”²². And making the Charter more tangible appears particularly significant in the context of the online environment.

From a content-based perspective, the FRA appears to have identified two types of expression considered “unprotected” under Article 11 of the Charter and Article 10 ECHR: hate speech and disinformation²³, intended as factually false content created with malice and the knowledge of their falsity. In parallel, the Agency appears to have endorsed forms of regulation concerning the modalities of free speech during electoral campaigns, as well as measures aimed at safeguarding media pluralism and media freedom²⁴.

2.1.1. (Racist) Hate Speech & Terrorist Propaganda

The FRA’s policy guidance and reports on EU Member States’ actions, as well as on broader European policies, regarding hate speech regulation, both offline and online, seem to delineate a restriction and potential censorship of such expressions²⁵. In line with “Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law”²⁶, hate speech appears to be framed as a form of illegal expression in the EU when based on religion or ethnicity. In this field, the ECtHR has relied on Article 17 ECHR (prohibition of abuse of rights) to uphold the imposition of criminal sanctions for racist propaganda, whether carried out by members of minorities²⁷ or by white supremacists²⁸, as well as in cases involving forms of so-called “differentialist racism”²⁹.

²² See the *European Commission’s proposal for a Council regulation establishing a European Union Agency for Fundamental Rights*, COM (2005) 280 final, p. 2.

²³ G. Pitruzzella – O. Pollicino, *op. cit.*

²⁴ C. Holtz-Bacha, *Freedom of the Media, Pluralism, and Transparency. European Media Policy on New Paths?*, in *European Journal of Communication*, 39, 2024; D. Tambini, *Media Freedom*, Cambridge, 2021.

²⁵ F. Tulkens, *FRA’s Efforts to Combat Hatred, Xenophobia and Racism*, in R. Byrne - H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency*, London, 2019.

²⁶ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55.

²⁷ ECtHR, *Belkacem v. Belgium*, 27 June 2017.

²⁸ ECtHR, *Glimmerveen and Hagenbeek v. the Netherlands*, 11 October 1979.

²⁹ ECtHR, *Norwood v. the United Kingdom*, 16 November 2004. See P.-A. Taguieff, *The force of prejudice: on racism and its doubles*, Minneapolis, 2001.

In analysing policies both at the national and EU levels, the FRA has endorsed the definition of racist hate speech developed by the “Framework Decision 2008/913/JHA” and by the ECHR system³⁰. FRA Opinion 4.1 of 2019 clearly states that “EU Member States should ensure that any alleged hate crime, including illegal forms of hate speech, is effectively recorded, investigated, prosecuted and tried”³¹. As a matter of fact, the FRA’s understanding of the limits of free expression in the political sphere mirrors the case law of the ECtHR, which has consistently held that hate speech falls outside the scope of Article 10 ECHR without requiring proof of a concrete threat to public order. “[L]a tolérance et le respect de l’égalité de tous les êtres humains constituent le fondement d’une société démocratique et pluraliste. Il en résulte qu’en principe on peut juger nécessaire, dans les sociétés démocratiques, de sanctionner voire de prévenir toutes les formes d’expression qui propagent, incitent à, promeuvent ou justifient la haine fondée sur l’intolérance (y compris l’intolérance religieuse), si l’on veille à ce que les ‘formalités’, ‘conditions’, ‘restrictions’ ou ‘sanctions’ imposées soient proportionnées au but légitime poursuivi (en ce qui concerne le discours de haine et l’apologie de la violence (...))”³².

Analogously, when dealing with the online environment, the Online Content Moderation report published by the FRA identifies that concrete incitement does not appear necessary³³, ultimately considering hate propaganda as unprotected expression under freedom of expression clauses³⁴. In this respect, the FRA’s position is consistent with CoE framework, as expressed in “Recommendation No. R (97) 20 of the Committee of Ministers on ‘Hate Speech’”³⁵ and with “Recommendation CM/Rec(2022)16 on combating hate speech”³⁶. Thus, the FRA has contributed to consolidating the constitutional conception according to which racist propaganda is not considered a protected form of expression under Article 11 of the EU Charter,

³⁰ See European Union Agency for Fundamental Rights, *Fundamental Rights Report 2023* (Publications Office of the European Union 2023), p. 94 and ff.

³¹ FRA Opinion 4.1, *Fundamental Rights Report 2019* (Publications Office of the European Union 2019), p. 100. In the same way, Opinion 4.1, *Fundamental Rights Report 2021* (Publications Office of the European Union 2021), p. 110: “EU Member States should fully and correctly transpose and apply the Framework Decision on Racism and Xenophobia to criminalise racist hate crime and hate speech”.

³² ECtHR, *Erbakan v. Turkey*, 6 July 2006, § 56.

³³ “The Council of Europe is also very active in the area of hate speech. It has issued several relevant recommendations on this issue, such as its 1997 Recommendation No (97) 20 (13) and its updated 2022 Recommendation CM/Rec (2022) 16 of the Committee of Ministers to member states on combating hate speech (14). The latter also contains a broader definition of hate speech that goes beyond incitement and aims at combating hate speech in a comprehensive way, including in the online environment”. European Union Agency for Fundamental Rights, *Online content moderation – Current challenges in detecting hate speech* (Report, Publications Office of the European Union 2023), p. 21.

³⁴ FRA, *Online Content Moderation*, cit., p. 26.

³⁵ Council of Europe, Committee of Ministers, Recommendation No R (97) 20 on “Hate Speech”, adopted 30 October 1997.

³⁶ Council of Europe, Committee of Ministers, *Recommendation CM/Rec(2022)16 on combating hate speech*, adopted 20 May 2022.

regardless of the risk to public order³⁷. In this context, racist hate speech may be regarded as subject to regulatory restrictions, potentially extending to forms of censorship and even criminalisation. This stands in stark contrast to the U.S. system³⁸, in which hate speech is generally protected under the First Amendment, subject only to restriction where there is incitement that could lead to a concrete risk of imminent unlawful action.

Ultimately, this approach strengthens the Digital Services Act in its fight against hate speech³⁹. Indeed, the FRA has further endorsed the approach to combat hate speech reflected in the DSA, which identifies hate speech as a systemic risk that Very Large Online Platforms are required to address pursuant to Articles 34 and 35 DSA. Thus, the FRA acknowledges that “the underlying principle of the balance to strike in legislating in a manner compliant with the freedom of expression is set out in ECtHR case-law”⁴⁰, but in its role of interpreting freedom of expression and systematizing European case law the Agency strengthens the EU approach to contrast digital hate speech.

The FRA’s Fundamental Rights Report 2023 also notes the attempt by the CoE to extend the umbrella category of hate speech in both online and offline environments, and encourages Member States to take action: “Member States should take all appropriate measures to effectively combat hate speech and address the harmful impact of homophobic and transphobic statements made in public debates, political campaigns, the media, and on the internet”⁴¹.

A comparable approach to restrictions on freedom of expression also applies to the specific category of hate speech disseminated in the form of online terrorist propaganda. In various reports, the FRA has observed that, in the field of counter-terrorism, the Directive (EU) 2017/541 defines relevant offences, including public provocation to commit a terrorist offence, while Regulation (EU) 2021/784 establishes binding obligations to remove terrorist content from online platforms⁴². Both instruments emphasise that tolerance and respect for the equal dignity of all human beings constitute the foundational values of a democratic and pluralistic society, thereby justifying restrictions on expressions inciting hatred or violence, provided that

³⁷ E. Stradella, *Hate Speech in the Background of the Security Dilemma*, in *German Law Journal*, 9, 1, 2008.

³⁸ See the landmark case *Brandenburg v. Ohio*, 395 U.S. 444 (1969), pursuant to which only racist hate speech that is likely to incite imminent lawless action may be subject to restriction, under what is commonly referred to as the “clear and present danger test” or the “imminent lawless action” test. See R. Post, *Hate Speech*, in I. Hare - J. Weinstein (eds.) *Extreme Speech and Democracy*, Oxford, 2009.

³⁹ FRA, *Online Content Moderation*, cit., p. 66 and ff.

⁴⁰ FRA, *Online content moderation*, cit., p. 22. Cf. A. Sardo, *Hate Speech: A Pragmatic Assessment of the European Court of Human Rights’ Jurisprudence*, in *European Convention on Human Rights Law Review*, 4, 1, 2022.

⁴¹ FRA Opinion 3.3, European Union Agency for Fundamental Rights, *Fundamental Rights Report 2023* (Publications Office of the European Union 2023), p. 79.

⁴² See, for instance: FRA, *Online Content Moderation*, cit., p. 23.

such restrictions comply with the principles of legality, necessity and proportionality⁴³. In the field of terrorist hate speech, the FRA has played a significant role in shaping a form of “proportionality test” applicable to the removal of terrorist content online, as ultimately reflected in Regulation (EU) 2021/784. The FRA’s interpretation of freedom of expression appears to have directly influenced the final regulatory framework governing the removal of online terrorist propaganda. At the request of the European Parliament, the FRA issued its Opinions on the proposal for a Regulation on preventing the dissemination of terrorist content online. In those Opinions, the Agency highlighted potential risks to fundamental rights and recommended, *inter alia*: (1) narrowing the definition of “terrorist content,” which it considered overly broad; (2) ensuring explicit safeguards for journalistic, academic and artistic expression; and (3) reinforcing procedural safeguards by requiring stronger involvement of the judiciary in removal procedures⁴⁴. The recommendations put forward by the FRA to ensure compliance with Article 11 of the Charter appear to have been incorporated into the current Regulation on terrorist content online⁴⁵. This Regulation enshrines a conception of freedom of expression under which hate speech cannot be tolerated irrespective of any concrete risk to public order, while at the same time providing for safeguards for artistic, academic and journalistic expression.

Thus, in the field of racist hate speech and its extreme manifestation in terrorist propaganda, the FRA appears to be fully aligned with CoE institutions and to advance an interpretation of Article 11 of the EU Charter that is consistent with Article 10 ECHR⁴⁶. This approach reinforces the view that racist hate speech and terrorist speech do not constitute protected categories of expression under Article 11 of the Charter and may therefore be subject to restriction, including in the online environment.

The FRA seems however to call for a stricter response to digital political hate: “The European Commission and EU Member States should deal with threats of violence and intimidation during elections using national and EU law. The DSA is one option of law that they can use to deal with threats. In doing so, they should balance

⁴³ See also ECtHR, *Erbakan v. Turkey*, 6 July 2006, § 56.

⁴⁴ FRA Opinion – 2/2019 [Online terrorist content] Vienna, 12 February 2019.

⁴⁵ Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online [2021] OJ L 172/79.

⁴⁶ “At the EU level, in line with Article 52(1) of the Charter, any interference with the freedom of expression needs to be provided for by law. In this context, however, there is currently no EU law instrument that would address online hate in a comprehensive manner and provide a harmonised definition. Certain EU laws establish specific forms of speech that are illegal and not protected by freedom of expression. Notably, the Council framework decision on combating certain forms and expressions of racism and xenophobia by means of criminal law of 2008 (‘the framework decision’) defines a common EU-wide criminal law approach to countering severe manifestations of racism and xenophobia. It requires Member States to legislate not only against the public expression of hateful speech related to the protected grounds but also against the dissemination of that speech. “. FRA, *Online Content Moderation*, cit., p. 23.

any action with the right to freedom of expression and other fundamental rights”⁴⁷. This opinion, as clarified in the accompanying explanation, appears to call for a broader response to hate speech in all its forms across the digital environment, particularly in light of the increasing polarization that characterises online public discourse⁴⁸. Additionally, what is particularly noteworthy is the FRA’s call to address sexist hate speech, which cannot be directly traced to established ECtHR case law, even though certain trends in tackling this form of hate speech can be identified within the broader CoE framework⁴⁹: “Online platforms should have specific regard to protected characteristics of users in the context of their terms and conditions, content moderation practices and monitoring policies, including addressing sexist online hate”⁵⁰.

These two recent opinions represent a more innovative interpretive development concerning the scope of Article 11 of the EU Charter of Fundamental Rights, as they both advocate for stricter regulation of certain forms of expression in the online public sphere and endorse a particular understanding of the Charter’s free speech clause.

2.1.2. Disinformation as the deliberate creation of false facts/news in bad faith

Since 2021, the FRA has increasingly engaged with the issue of online disinformation⁵¹. The Agency adopted a definition of disinformation as false facts spread in bad faith: “In the first place, at least for us as an agency, we adopted the definition of disinformation put forward by the European Commission. In other words, verifiably false or misleading information that cumulatively is created, presented, and disseminated for economic gain or to intentionally deceive the public, and that may cause public harm. It is just one among many definitions of

⁴⁷ FRA Opinion 2, European Union Agency for Fundamental Rights, *Fundamental Rights Report 2025* (Publications Office of the European Union 2025), p. 46.

⁴⁸ As stressed in the explanation: “EU law requires the criminalisation of some forms and expressions of racism and xenophobia. The 2024 European Parliament elections witnessed cases of harmful rhetoric, including elements of racism, misogyny, xenophobia, and discrimination against Muslims. Incidents of intimidation persisted throughout the campaign and increasingly took place online, backed up by acts of political violence that contributed to the polarisation of the political climate”. Fra Opinion 2, *Fundamental Rights Report 2025*, cit., p. 46.

⁴⁹ K. Sękowska-Kozłowska - G. Baranowska - A. Gliszczyńska-Grabias, *Sexist Hate Speech and the International Human Rights Law: Towards Legal Recognition of the Phenomenon by the United Nations and the Council of Europe*, in *Int J Semiot Law*, 5, 2022; F. Ciccarella, *Sexist hate speech in the European and Italian legal framework*, in *Dirittifondamentali.it*, 2, 2023.

⁵⁰ FRA Opinion 1, *Online Content Moderation*, cit., p. 10.

⁵¹ “Tackling disinformation is one of the key topics on the Fundamental Rights Forum 2021, an international conference organised by the FRA. The same topic was explored by the network of human rights communicators in June 2021, also organised by the FRA”. A. Björk, *Facts, Narratives and Migration: Tackling Disinformation at the European and UN Level of Governance*, in M. Conrad – G. Hálfdanarson - A. Michailidou - C. Galpin – N. Pyrhönen (eds.), *Europe in the Age of Post-Truth Politics*, Cham, p. 177.

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misinformation. It is the one we use⁵². The FRA's approach seemed to hold that disinformation can be legitimately countered under EU law and therefore – implicitly – does not constitute a protected category of expression under Article 11 of the EU Charter if it is liable to harm public debate⁵³. It appears that the FRA supports the DSA's view that this type of disinformation falls within the “grey zone”⁵⁴ of expressions that are either unprotected or subject to only weak protection, and may therefore be subject to regulatory countermeasures, even though such expressions are not in themselves unlawful or criminal. Otherwise, the FRA would have had to conclude that EU measures aimed at countering disinformation amount to unlawful censorship and constitute an infringement of freedom of expression guarantees. The countermeasures against disinformation must, however, be subject to a proportionality test. If journalists may be sanctioned for disseminating disinformation⁵⁵, or if online disinformation may be deprioritized in favour of so-called “reliable” news sources⁵⁶, this necessarily implies that disinformation is not treated as a protected category of expression. This conclusion is further confirmed by a comparison with the U.S. system. Under the U.S. constitutional framework – where disinformation is protected by the First Amendment⁵⁷ – public authorities are largely precluded from adopting policies aimed at restricting disinformation or from granting preferential treatment to journalistic or other “reliable” news sources.

In essence, while the FRA broadly followed the interpretative approach of the Council of Europe regarding the role of the press in disseminating verified information⁵⁸, it appears to have placed greater emphasis on the non-protection of disinformation as a category of expression. This approach could represent a partial

⁵² European Union Agency for Fundamental Rights. *How to tackle disinformation? Speech by Michael O'Flaherty*, 28 June 2021, available at <<https://fra.europa.eu/en/speech/2021/how-tackle-disinformation>>.

⁵³ Indeed, the FRA, as early as in its 2020 Report, has stated that “Challenges with illegal online content and disinformation persisted, prompting national and international stakeholders to reconsider legal and technical avenues to tackle them effectively”. European Union Agency for Fundamental Rights, *Fundamental Rights Report 2020* (Publications Office of the European Union 2020), p. 143.

⁵⁴ One might draw a comparison with the U.S. concept of “low-value speech” for understanding the non-protection of such speech in the EU legal order. On the concept of “low-value speech”, see G. Lakier, *The Invention of Low-Value Speech*, in *Harvard Law Review*, 128, 8, 2015.

⁵⁵ ECtHR, *Khural and Zeynalov v. Azerbaijan*, 17 June 2025.

⁵⁶ These measures were set out by the Code of Practice on disinformation. European Commission, *Strengthened Code of Practice on Disinformation* (16 June 2022), available at <<https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>>.

⁵⁷ *United States v. Alvarez*, 567 U.S. 709 (2012). L. Levi, *Real Fake News and Fake Fake News*, in *First Amendment Law Review*, 16, 2017.

⁵⁸ This approach has subsequently been reinforced by the case law of the General Court of the European Union, which—within the specific context of the invasion of Ukraine—has even upheld the exclusion of certain Russian media outlets from the EU news market. Case T-125/22 *RT France v Council of the European Union*, 27 July 2022.

divergence in tone and emphasis⁵⁹ from the CoE framework. The CoE institutions—such as the Parliamentary Assembly of the Council of Europe⁶⁰—have often advocated for non-censorial approaches to countering disinformation. In this field, the FRA seems to advance a specifically EU-oriented perspective. In its 2024 and 2025 Reports, the FRA placed particular emphasis on the risks to fundamental rights posed by online disinformation⁶¹ and on the need to study and counter it⁶². These reports appear to further confirm the Agency's view that disinformation, as such, is not protected speech, in alignment with the broader EU paradigm. Indeed, the FRA seems to fully support the EU plan to combat disinformation: “The DSA can support combating the spread of disinformation and election interference or manipulation, if implemented effectively”⁶³. In doing so, the FRA corroborate the view that such action by the EU does not fall outside the scope of Article 11 of the EU charter. This is further proved by the fact that the Agency did not identify any inconsistencies between EU digital regulation and the guarantees enshrined in Article 11 of the EU Charter of Fundamental Rights. However, the FRA's 2024 and 2025 Reports also stated that disinformation cannot be countered without a proportionality test, especially when relying on criminal law and sanctions. The FRA's former Director explicitly highlighted

⁵⁹ B. Török, *The Fight against Disinformation in the Council of Europe, and the Relevant Case Law of the European Court of Human Rights*, in A. Koltay - C. Garden - R.J. Krotoszynski (eds.), *Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context*, Cambridge, 2025; A. Sardo, *Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights*, in *Canadian Journal of Law & Jurisprudence*, 33, 2, 2020. See; I. Katsirea, “Fake news”: reconsidering the value of untruthful expression in the face of regulatory uncertainty, in *Journal of Media Law*, 10, 2, 2018. G. Pitruzzella - O. Pollicino, cit. See: ECtHR, *GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland*, 9 January 2018, § 68;

⁶⁰ In particular, Parliamentary Assembly of the Council of Europe Resolution 2255 (2019) emphasised that disinformation and propaganda undermine the democratic debate and highlighted the essential role of independent public service media in providing trustworthy information. This concern was further developed in Parliamentary Assembly of the Council of Europe Resolution 2326 (2020), which recognised the risks posed by online disinformation and micro-targeting to electoral integrity and called for forms of regulation of digital platforms consistent with freedom of expression. In parallel, the Committee of Ministers of the Council of Europe Recommendation CM/Rec(2018)2 established that internet intermediaries have responsibilities to address harmful content, including disinformation, as well as to ensure full protection of fundamental rights, in particular freedom of expression and access to information.

⁶¹ “This year's Fundamental Rights Report 2024 comes at a time when the EU is experiencing threats to democratic values and civic space. Online hatred and disinformation pose serious challenges to fundamental rights”. European Union Agency for Fundamental Rights, *Fundamental Rights Report 2024* (Publications Office of the European Union 2024), p. 5.

⁶² “The DSA can support combating the spread of disinformation and election interference or manipulation, if implemented effectively. Protecting fundamental rights online means protecting both the right to freedom of expression and information and the right to non-discrimination. This remains an area in which FRA will continue to work in 2025 and 2026 to provide for a better understanding of interferences with those rights in the online sphere”. FRA, *Fundamental Rights Report 2024*, cit., p. 14.

⁶³ FRA, *Fundamental Rights Report 2025*, cit., p. 10.

the need for proportionality in combating disinformation⁶⁴, echoing positions developed within the CoE. The FRA, however, analogously to the CoE framework, has not provided a clear proportionality test to determine when disinformation becomes legitimately sanctionable⁶⁵.

2.1.3. Elections, Media Freedom, and Media Pluralism

A particular aspect of online disinformation that has also come to focus in recent years is that of electoral disinformation⁶⁶. On this issue, the convergence between the FRA's and CoE's positions appears stronger, with both actors emphasizing the necessity of countering electoral manipulation.

The CoE institutions addressed this issue through, inter alia, "Resolution 2326 (2020)"⁶⁷, the "Guidelines on the Protection of Individuals with Regard to the Processing of Personal Data by and for Political Campaigns"⁶⁸, and the "Venice Commission's Report on the Impact of Information Disorder on Elections"⁶⁹. In this perspective, the guidelines contained in the FRA's 2025 Report – particularly those regarding online campaigning – closely aligned with the CoE's positions⁷⁰, highlighting the importance of protecting electoral integrity from both disinformation and distortions created by social media, such as opaque political advertising and deceptions of campaign financing rules. In general, the FRA's 2025 report highlighted the need to

⁶⁴ European Union Agency for Fundamental Rights. *How to tackle disinformation? Speech by Michael O'Flaherty, 28 June 2021*, available at <<https://fra.europa.eu/en/speech/2021/how-tackle-disinformation>>.

⁶⁵ Cf. ECtHR, *Salov v. Ukraine*, 6 September 2005.

⁶⁶ "Although Member States took significant measures, and the Commission took a proactive approach to dealing with the potential misuse of online platforms to manipulate elections in 2024, there is evidence of the use of disinformation, the growing use of AI and the use of other techniques to attempt to exert undue influence on the conduct and outcome of elections in the EU." FRA, *Fundamental Rights Report 2025*, cit., p. 18. "Digital rights have a particular salience in the context of election campaigns. The threat that digital technologies pose to the integrity of elections, including through disinformation and cyberattacks, has become a serious concern for people living in the EU". European Union Agency for Fundamental Rights, *Fundamental Rights Report 2024*, cit., p. 13.

⁶⁷ Council of Europe, Parliamentary Assembly, Resolution 2326 (2020).

⁶⁸ Council of Europe, *Guidelines on the Protection of Individuals with Regard to the Processing of Personal Data by and for Political Campaigns* (2018) <<https://rm.coe.int/guidelines-on-political-campaigns-and-data-protection/1680a1b2c3>>.

⁶⁹ Venice Commission, Report on the Impact of the Information Disorder on Elections (CDL-LA(2018)002).

⁷⁰ See the Venice Commission, *Code of Good Practice in Electoral Matters*, Strasbourg, CoE, 2025. C. Fasone - G. Piccirilli, *Towards a Ius Commune on Elections in Europe? The Role of the Code of Good Practice in Electoral Matters in "Harmonizing" Electoral Rights*, in *Election Law Journal: Rules, Politics, and Policy*, 16, 2017. On the digital issues: Venice Commission, *Interpretative Declaration Of The Code Of Good Practice In Electoral Matters As Concerns Digital Technologies And Artificial Intelligence*, Strasbourg, CoE, 2024.

limit electoral disinformation in order to safeguard democratic processes and affirmed to monitor the various policy measures implemented in the EU⁷¹.

The same report⁷² also explicitly suggested that the freedom of expression permits regulatory measures on electoral campaigning, such as transparency requirements, in line with “Recommendation (2022)12” on digital political communication and electoral campaigns⁷³ and the Venice Commission’s “Interpretative Declaration of the Code of Good Practice in Electoral Matters as Concerns Digital Technologies and Artificial Intelligence”⁷⁴. For instance, during its analysis of the Romanian case, the FRA’s 2025 Report emphasized the need for “a fundamental rights approach to transparent and fair elections in the online sphere”⁷⁵, underscoring the necessity of regulation in this area. It is then possible to underline that anonymous speech is not protected under the European conception of “electoral speech”, in contrast to the U.S. model, where transparency requirements often struggle to survive First Amendment scrutiny by the US Supreme Court⁷⁶. Furthermore, in the EU, online campaign financing is expected to comply with strict transparency standards. The FRA’s Report stresses that: “The European Commission and the EU Member States should ensure sufficient resources are available to implement and enforce the provisions of the DSA, AI Act and political advertising regulation. Applying and enforcing EU legislation, among other measures, can ensure the integrity of future elections in the EU. It can ensure elections are protected from manipulation by domestic or foreign actors and ensure respect for fundamental rights such as freedom of expression”⁷⁷. Thus, the FRA appears to support the EU’s digital regulation of electoral financing and transparency requirements, considering them fully compatible with Article 11 of the EU Charter of Fundamental Rights and, in some passages of its reports, even as part of the positive obligations of States.

On the general issues of media pluralism, media freedom, and the protection of journalists—which have also been addressed by the European Media Freedom Act (EMFA) in relation to the online environment—once again, the FRA’s position appears closely aligned with the CoE’s regulatory framework⁷⁸. In its 2016 study

⁷¹ FRA, *Fundamental Rights Report 2025*, cit., p. 32 and ff.

⁷² *Ibid.*

⁷³ Council of Europe, CM/Rec(2022)12 - Recommendation of the Committee of Ministers to Member States on Electoral Communication and Media Coverage of Election Campaigns (Adopted by the Committee of Ministers on 6 April 2022 at the 1431st meeting of the Ministers’ Deputies).

⁷⁴ Council of Europe, Venice Commission, *Interpretative Declaration of the Code of Good Practice in Electoral Matters as Concerns Digital Technologies and Artificial Intelligence* (2023) <<https://www.coe.int/en/web/electoral-assistance/ai-and-digital-tools>>.

⁷⁵ FRA, *Fundamental Rights Report 2025*, cit., 35.

⁷⁶ J.M. King, *Microtargeted Political Ads: An Intractable Problem*, in *Boston University Law Review*, 102, 3, 2022.

⁷⁷ FRA Opinion 1, *Fundamental Rights Report 2025*, cit., p. 46.

⁷⁸ E.g., Council of Europe, Committee of Ministers, Recommendation CM/Rec(2018)1 on Media Pluralism and Transparency of Media Ownership (7 March 2018); Council of Europe,

“Violence, Threats and Pressures Against Journalists and Other Media Actors”, the FRA highlighted the need to guarantee and protect media pluralism⁷⁹, while more recently the Agency emphasized the need to safeguard the press, particularly against abusive lawsuits (SLAPPs)⁸⁰, even though without developing a fully comprehensive approach to media pluralism. Indeed, despite the lack of a specific analysis of these issues, the FRA appears to suggest the existence of positive obligations for the EU and its Member States: on the one hand, to guarantee special protection for journalists; on the other, to ensure pluralism within the media environment. This approach again differs starkly from the U.S. free speech paradigm and its consideration of medial pluralism. In the U.S. system, regulation on this issue is regarded as an exceptional measure, which has been historically formulated only in connection with the scarcity of broadcasting frequencies⁸¹. Analogously, with regard to media freedom, any form of special protection for journalists is deemed inconsistent with the principle of epistemic equality underpinning the First Amendment⁸².

2.2. *The Policy Framework and the FRA's Influence on Public Discourse Regulation*

Although at the time of the FRA's establishment there were concerns that it might undermine the role of CoE institutions or create inconsistencies between the EU legal system and the CoE one, this analysis suggests that, regarding the issues of free speech, the opposite is true: in this field, the FRA has aligned itself with the CoE, thereby reinforcing uniformity between the rights protected under the ECHR and those guaranteed by the EU Charter of Fundamental Rights (cf. Article 52). In certain areas, the FRA has advanced a more precise interpretation of the limits of free speech for the online world; however, to date, no contradictions can be identified.

The key question, in this section, is whether these interventions have had a tangible impact on EU policies and on institutional public discourse. As an institution external to the EU decision-making process, the FRA occupies a unique position to influence institutional public discourse and to orient policy debates within the Union. As different scholars have shown, the impact of the FRA is evident across various

Parliamentary Assembly, Resolution 2382 (2021) on Media Freedom, Public Trust and the People's Right to Know.

⁷⁹ “The continued vigilance of institutions and bodies of the EU, its Member States, and non-governmental organisations is needed if media pluralism and democracy are to be upheld durably. The nature and extent of threats, abuses and pressures experienced by women journalists highlighted in this paper are a case in point. Their experience shows that there is no room for complacency when it comes to ensuring the safety of journalists and other media actors in the EU”. FRA, *Violence, Threats and Pressures Against Journalists and Other Media Actors*, 2016, p. 20.

⁸⁰ FRA, *Protecting Civil Society – Update 2023*, Publications Office of the European Union, 2023.

⁸¹ It is possible, for instance, to refer to the Fairness Doctrine. On this tradition: G. Lakier, *The Non-First Amendment Law of Freedom of Speech*, in *Harvard Law Review*, 134, 7, 2021.

⁸² S. R. West, *Favoring the Press*, in *California Law Review*, 106, 1, 2018.

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domains of EU legislation—such as anti-discrimination policies and asylum law. Bearing in mind the Agency's role as “adviser” and “collector of data”⁸³, the present analysis aims to identify its impact on the regulation of online public discourse and of freedom of expression and information, by focusing primarily on institutional documents concerning recent EU regulations in the field of public discourse.

A first case in which the FRA's role has been particularly explicit, active, and recognizable is that of the Regulation on Terrorist Content Online. On 12th February 2019, following a request from the European Parliament, the FRA delivered an opinion addressing the potential impact of the proposed regulation on fundamental rights⁸⁴. This opinion significantly influenced the revision of the proposal: the final regulation incorporated most of the objections raised by the FRA and conformed to the Agency's interpretation and balancing of fundamental rights. Furthermore, in January 2023, the European Commission has also mandated the FRA to support a fundamental rights impact assessment of the Regulation⁸⁵. The Agency's ongoing monitoring process seeks to evaluate the impact of removal measures on the freedoms of expression, privacy, and non-discrimination, as well as the freedom to conduct a business, drawing on evidence from national authorities, digital platforms, civil society organisations, and academic experts. The FRA has therefore played a significant role both in the legislative process and in the subsequent monitoring of the Regulation. Nevertheless, explicit references to the FRA remain absent from the Commission's official documents, plenary debates in the European Parliament or parliamentary committee proceedings (e.g., LIBE). This would seem to suggest that, despite playing a central and substantial role, the Agency has not yet been recognized as an authoritative source to be explicitly invoked by political actors or by the Commission in support of policies concerning fundamental rights in the field of public discourse regulation.

The case of the Digital Services Act (DSA)⁸⁶ offers a more nuanced picture. There is no reference to the FRA neither in the impact assessment, prepared by DG CONNECT, nor in the legislative proposal published by the Commission on 15th December 2020⁸⁷. The FRA does not feature in the list of stakeholders consulted during the Commission's public consultation on the European Digital Strategy (June–

⁸³ G.N. Toggenburg, *The European Union Fundamental Rights Agency*, cit.

⁸⁴ FRA Opinion – 2/2019 [Online terrorist content] Vienna, 12 February 2019.

⁸⁵ FRA, *The impact of addressing terrorist content online on fundamental rights*, January 2023, available at <https://fra.europa.eu/en/project/2024/impact-addressing-terrorist-content-online-fundamental-rights?utm_source=chatgpt.com>.

⁸⁶ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (OJ L 277, 27.10.2022).

⁸⁷ European Commission, Impact Assessment and Legislative Proposal, COM(2020) 825 final (15 December 2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0825>>

September 2020) either⁸⁸. Similarly, during the legislative phase in Parliament (2020–2022), parliamentary resolutions on the DSA and fundamental rights made no mention of the FRA, and no record of a formal FRA hearing in committees or the plenary can be found. This is all the more remarkable when considering that the FRA's Multi-Annual Framework (MAF) expressly included the 'information society' within the Agency's mandate – a provision that could have positioned the FRA as an important actor in this field. This lack of references to the FRA, however, does not necessarily mean the absence of involvement or impact on the DSA. The FRA participated in various discursive engagements, such in a European Parliament panel discussion on 6th September 2021⁸⁹, showing an involvement at a public – albeit informal – level. In March 2022, the FRA was described as playing a “key role in evaluating respect for fundamental rights in order to avoid disproportionate actions” in the “Motion for a European Parliament Resolution on foreign interference in all democratic processes in the European Union, including disinformation”⁹⁰. Indeed, some of the FRA's crucial opinions—such as those on procedural rights in content moderation and on access to content moderation data⁹¹—would ultimately have been incorporated into the DSA, suggesting an indirect impact during the legislative phase. Most importantly, the FRA is expressly mentioned in Recital 107 of final text of the DSA⁹², which foresees a consultative role for the Agency with respect to the implementation of the DSA's codes of conduct. Finally, the FRA has played an active role in the application phase of the DSA. The Agency presented its 2023 “Report Online Content Moderation – Current Challenges in Detecting Hate Speech” to the IMCO Committee on 20th March 2024, providing evidence relevant to enforcement priorities under the DSA. In the Report, the FRA issued a series of opinions, including: i) the need for VLOPs to address “sexist online hate” under the systemic risk framework (Opinion 1)⁹³;

⁸⁸ European Commission, Public Consultation on the European Digital Strategy (June–September 2020) <<https://digital-strategy.ec.europa.eu/en/consultations>>.

⁸⁹ FRA joins discussion on fundamental rights and digital services, 9 September 2021, available at <<https://fra.europa.eu/en/news/2021/fra-joins-discussion-fundamental-rights-and-digital-services>>.

⁹⁰ European Parliament, *Motion for a European Parliament Resolution on Foreign Interference in All Democratic Processes in the European Union, Including Disinformation* (2020/2268(INI)) (Resolution A9-0022/2022) <https://www.europarl.europa.eu/doceo/document/A-9-2022-0022_EN.html>.

⁹¹ FRA Opinion 7.2., European Union Agency for Fundamental Rights, *Fundamental Rights Report 2022* (Publications Office of the European Union 2022), p. 183: “EU institutions and Member States regulating digital services should ensure that both over- and underremoval of content are prevented and that moderation practices are not disproportionate, so as not to interfere with the rights to freedom of expression, freedom of information and non-discrimination. In view of the importance of evidencebased oversight for effective and fundamental rights-compliant moderation of online content, EU institutions and the Member States should ensure that the relevant legal framework allows academic and civil society experts to legally access data and conduct research”.

⁹² Recital 107, DSA.

⁹³ “For very large online platforms (VLOPs), such as X and YouTube, misogyny should be one of the systemic risks considered in the context of the risk assessment and risk mitigation measures required by Articles 34 and 35 of the DSA”. FRA Opinion 1, *Online Content Moderation*, cit., p. 10.

ii) the requirement for the EU and Member States to support “the creation of a wide and heterogeneous network of organisations acting as trusted flaggers to ensure that different forms of online hate are widely and reliably detected” (Opinion 2)⁹⁴; iii) the necessity for content moderation by AI systems to be non-discriminatory (Opinion 3)⁹⁵; iv) the importance of external review in content moderation (Opinion 4)⁹⁶. Additionally, in promoting the application of the EU freedom of expression paradigm to content moderation, the FRA appeared to recognize the need to address the excessive removal of content: “The European Commission should ensure in its implementing guidance that providers of online services interpret and implement the obligations laid down in the DSA in a fundamental rights-compliant manner, for example in relation to the risk of over-removal and the freedom of expression”⁹⁷. In the context of the regulation of digital public discourse, the Agency, while still less frequently cited in parliamentary debates or institutional documents than in other areas of EU policy, appears to be increasingly recognised as a key actor in overseeing and monitoring EU digital regulation.

In other EU regulations on online public discourse the FRA's role seems to have been more indirect, with interventions that have remained external to the legislative process. In Regulation (EU) 2024/900⁹⁸, there is no evidence of the FRA's input during either the drafting or implementation phases. The Agency has, however, drawn discursive connections between this Regulation, the DSA, and the AI Act in some of its opinions, emphasizing the need for proper implementation in light of fundamental rights⁹⁹. In addition, in light of the annulment of the Romanian

⁹⁴ An example being the reinforcement of a network of trusted flaggers for combatting hate speech: FRA Opinion 2, *Online Content Moderation*, cit., p. 12.

⁹⁵ “It must be ensured that AI-supported online content moderation decisions are not discriminatory. Providers and users (i.e. platforms) must assess the fundamental rights compliance of any AI system in line with the DSA and current and developing standards regulating the use of AI”. FRA Opinion 3, *Online Content Moderation*, cit., p. 13.

⁹⁶ FRA Opinion 4, *Online Content Moderation*, cit., p. 15.

⁹⁷ FRA Opinion 7.2, *Fundamental Rights Report 2023* (Publications Office of the European Union 2023), p. 190.

⁹⁸ Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising (OJ L 2, 4.4.2024).

⁹⁹ “The European Commission and the Member States should ensure sufficient resources are available to implement and enforce the provisions of the DSA, AI Act and political advertising regulation. Applying and enforcing EU legislation, among other measures, can ensure the integrity of future elections in the EU. It can ensure elections are protected from manipulation by domestic or foreign actors and ensure respect for fundamental rights such as freedom of expression. EU Member States should cooperate with the European Commission to ensure mutual learning”. FRA Opinion 1, *Fundamental Rights Report 2025*, cit., p. 46.

elections¹⁰⁰ due to serious distortions of the electoral campaign, the FRA has called for closer collaboration between Member States and EU authorities¹⁰¹.

The situation is analogous in the field of EU regulation on media freedom and pluralism. The European Media Freedom Act (EMFA)¹⁰² and subsequent institutional debates about media freedom online contain no mention of the FRA. The oversight system established by the regulation is administered by the Commission and the European Board for Media Services, without any formal involvement of the FRA. Similarly, the anti-SLAPP initiative did not directly engage the Agency. This is the case despite the fact that the FRA's 2016 report "Violence, Threats and Pressures Against Journalists and Other Media Actors in the EU" was expressly cited in the "Motion for a European Parliament Resolution on Media Pluralism and Media Freedom in the European Union (2017/2209(INI))"¹⁰³. The FRA has however contributed to the "Rule of Law Report 2025"¹⁰⁴, in which media pluralism and freedom constitute one of the four main pillars. In this context, the FRA provided input at the request of the Commissioner, while civil society organisations explicitly called the Commission to build on the Agency's findings on civic space¹⁰⁵. These elements indicate a recognition—albeit indirect—of the FRA's informational role in the field of media pluralism.

In conclusion, it can be said that the FRA's role in shaping EU policies on public discourse appears less visible than in other areas of its mandate. Its influence emerges only sporadically in parliamentary debates and official documents. Rather than serving as a consistent reference point in the structuring of regulations on online public discourse, the FRA's contribution seems to operate largely in the shadows—either

¹⁰⁰ See Romanian Constitutional Court, Decision 32/2024. A. Mercescu, *The Romanian Constitutional Court Doing "Militant Democracy" (Twice and More to Come)*, in *Journal of Contemporary Central and Eastern Europe*, 33, 2025.

¹⁰¹ "the European Commission to ensure mutual learning. They should share promising practices and guarantee that new challenges, such as the use of AI, are addressed. This cooperation will help them respond effectively to the challenges associated with these transnational phenomena such as manipulation and undue influence". FRA Opinion 1, *Fundamental Rights Report 2025*, cit., p. 46.

¹⁰² Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (OJ L 202, 19.7.2024)—the Commission's proposal (COM(2022) 457 final, 16 September 2022).

¹⁰³ European Parliament, Resolution on Media Pluralism and Media Freedom in the European Union (2017/2209(INI)) https://www.europarl.europa.eu/doceo/document/TA-8-2018-0224_EN.html.

¹⁰⁴ Submission by the European Union Agency for Fundamental Rights to the European Commission in the context of the preparation of the annual Rule of Law Report 2025 Vienna, 30 April 2025, Vienna, 30 April 2025.

¹⁰⁵ *Upholding and Expanding the Rule of Law in the EU: Joint Recommendations Towards a Stronger and More Effective 2025 Rule of Law Report April 2025*, available at < <https://www.fidh.org/en/international-advocacy/european-union/joint-recommendations-for-upholding-and-expanding-the-rule-of-law-in>>, p. 4.

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informally, indirectly, or discursively—rather than in an explicit and institutional manner. Analysis of verbatim records and hearings also suggests that the FRA's role within the parliamentary and institutional public sphere¹⁰⁶ remains limited in this field¹⁰⁷.

3. "Digital constitutionalism 2.0": the FRA, the Rule of Law, and Artificial Intelligence

The growing autonomy of AI systems¹⁰⁸ — evolving from symbolic AI to machine learning and, more recently, agentic architectures — is reshaping the way power is exercised in the digital world and beyond, and significantly affecting fundamental rights. This transformation poses a new challenge for digital constitutionalism, which must evolve from its earlier focus on regulating digital platforms and online freedoms toward addressing artificial intelligence and its continuing development¹⁰⁹.

Early forms of symbolic AI were rule-based: deductive instructions, written in logical languages, were applied to data in order to produce transparent and predictable outputs. Such systems raised legal questions — including the validity of the legal basis for their deployment and the fairness of their outcomes — but within relatively inspectable structures. Contemporary AI, by contrast, is largely sub-symbolic. Modern AI techniques encompass a variety of processes: machine learning, deep learning, and neural networks no longer rely on predefined rules but instead extract patterns from large datasets. These techniques identify correlations, infer rules, and generate apparently autonomous behaviour. Generative AI, grounded in deep neural architectures, produces new content — including text, images, and code — by modelling linguistic and statistical patterns. The most recent development is agentic AI, designed to pursue complex objectives autonomously through reinforcement learning and adaptive decision-making, with limited human intervention.

In this context, machine learning may be either supervised or unsupervised. A particular branch of machine learning, deep learning, uses neural networks to model complex, high-dimensional data. One of its most prominent applications is the development of systems capable of understanding and analysing human language. Such

¹⁰⁶ A. Davis, *Citizens, Political Representation and Parliamentary Public Spheres*, in *Political Communication and Social Theory*, 2010.

¹⁰⁷ This is particularly evident when compared with other expert bodies, such as the Article 29 Working Party. See Y. Pouillet - S. Gutwirth, *The Contribution of the Article 29 Working Party to the Construction of a Harmonised European Data Protection System: An Illustration of "Reflexive Governance"?*, in O. De Schutter - V. Moreno Lax (eds.), *Human Rights in the Web of Governance: Towards a Learning-based Fundamental Rights Policy for the EU*, Bruxelles, 2010.

¹⁰⁸ L. Floridi, *AI as Agency Without Intelligence: On ChatGPT, Large Language Models, and Other Generative Models*, in *Philosophy & Technology*, 36, 2023.

¹⁰⁹ O. Pollicino - F. Paolucci, *Regulating AI Autonomy: A Constitutional Framework for the Digital Era*, in M. Durante - U. Pagallo (eds.), *The De Gruyter Handbook on Law and Digital Technologies*, Berlin, 2025.

systems are used, for example, in online content moderation, but they also raise challenges related to their complexity and opacity.

These technological developments have direct constitutional implications for the rule of law and the protection of fundamental rights. They raise novel questions for which consolidated case law of the European Court of Human Rights is still limited, while the European Union is assuming an increasingly autonomous role in shaping a form of “digital constitutionalism 2.0” capable of protecting the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union¹¹⁰. In this field, the actions of the EU and those of the Council of Europe are proceeding in parallel, and so the guiding role of Article 52 of the EU Charter, as regards the interpretation of EU fundamental rights in light of the ECHR, seems less strong than in the area of freedom of expression. The parallel enactment of the AI Act and of the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law¹¹¹, which was finalised by the Council of Europe’s Committee on Artificial Intelligence (CAI) and adopted by the Committee of Ministers on 17 May 2024, illustrates this development. The European Union signed the Convention on behalf of its Member States¹¹², but in the meantime develops its own autonomous regulatory strategy.

While the Convention adopts a principle-based approach centred on state responsibility and rights protection, the AI Act employs a risk-classification model imposing specific compliance requirements, such as risk management systems, data governance standards, and fundamental rights impact assessments. In this different regulatory approach, as will be shown, the FRA has played a major role. Thus, the two approaches contain significant differences¹¹³, and even if the CoE initiatives started before the EU ones, “the EU has tried to exert a certain influence on the standard-setting process taking place at the CoE level, once again, through its active participation in its negotiations”¹¹⁴. And in this process, the FRA was also involved¹¹⁵,

¹¹⁰ As noted “The performed analysis seems to confirm that. When it comes to the regulation of ai, the dynamics between the two organisations in the process of standard- setting and the protective potentialities of the substantive provisions they propose seem to confirm that the EU has taken the lead”. F.P. Levantino - F. Paolucci, *Advancing the Protection of Fundamental Rights through AI Regulation: How the EU and the Council of Europe Are Shaping the Future*, in P. Czech – L. Heschl – K. Lukas - M. Nowak – G. Oberleitner (eds.) *European Yearbook on Human Rights 2024*, Nijhoff, 2025, p. 36.

¹¹¹ *Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law* (CETS No. 225, Council of Europe 2024).

¹¹² E. De Capitani, *The coe Convention on Artificial Intelligence, Human Rights and the Rule of Law*, in *free-group.eu*, 4 March 2024 (<free-group.eu>).

¹¹³ F.P. Levantino - F. Paolucci, cit.

¹¹⁴ F.P. Levantino - F. Paolucci, cit., p. 24.

¹¹⁵ Idem, p. 25. See Fundamental Rights Agency of the European Union, ‘Fra joins Council of Europe ai Committee meeting’, Press Release, 23.10.2023, available at <<https://fra.eur opa.eu/news/2023/fra-joins-coun-cil-eur-ope-ai-commit-tee-meet-ing-0>>, last accessed 30.03.2024>.

seeking to guarantee compliance with rule of law requirements as regards fundamental rights protection.

Indeed, the notion of the rule of law concerns not only the limitation of public authority through general and predictable norms, but also the guarantee of rights and access to remedies. This dual function — law as a constraint on power and the rule of law as a mechanism for the protection of rights — explains why debates on artificial intelligence cannot be reduced to purely technological or efficiency-based considerations¹¹⁶. The Venice Commission's "Rule of Law Checklist" synthesises these traditions into five operational pillars¹¹⁷: legality, legal certainty, prohibition of arbitrariness, equality before the law, and access to justice. Within the EU legal order, these elements have become justiciable through Article 19(1) TEU and Article 47 of the Charter, which the Court of Justice has interpreted in conjunction with Article 2 TEU¹¹⁸ to produce binding institutional standards. For present purposes, what matters is that the rule of law operates as a bridge between legality and rights. Its formal dimension regulates the exercise of power: laws must be clear, general, and foreseeable; decisions must be adopted by competent authorities in accordance with legal procedures; records must be kept and reasons provided. Its substantive dimension ensures that legality does not become an empty shell: decisions must respect equality and non-discrimination, remain proportionate, and allow effective remedies before an independent tribunal. This combination of form and substance makes the rule of law the primary mechanism through which fundamental rights are guaranteed in practice.

Artificial intelligence simultaneously engages both dimensions¹¹⁹. Exogenously, when automated systems are used in areas such as welfare, education, migration, or credit allocation, their legitimacy depends on compliance with the principles just outlined: the existence of a legal basis, transparency, meaningful human oversight, and the availability of timely remedies. Endogenously, AI raises questions concerning the legality of the design and governance of the systems themselves: the origin and management of data, the definition of objectives and thresholds, retraining procedures and change control, and the distribution of responsibility along the provider–user chain. These are not merely technical matters but normative choices that determine who is accountable, what constitutes an error, and which values prevail in trade-offs between efficiency and fairness.

¹¹⁶ K. Crawford, *The atlas of AI: Power, politics, and the planetary costs of artificial intelligence*, Yale, 2021; G. De Gregorio, *The Normative Power of Artificial Intelligence*, in *Indiana Law Journal*, 30-2, 2023, p. 55 ff.

¹¹⁷ "Report on the Rule of law", adopted in Venice, March 25-26, 2011 - CDL-AD (2011)003rev., and the "Rule of Law Checklist", adopted in Venice, March 11-12, 2016 - CDL-AD(2016)007.

¹¹⁸ See W. Schroeder, *The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?*, in A. von Bogdandy – P. Bogdanowicz – I. Canor – C. Grabenwarter – M. Taborowski – M. Schmidt (eds.), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, Heidelberg, 2021, p. 106.

¹¹⁹ P. Burgess, *AI and the Rule of Law: The Necessary Evolution of a Concept*, in P. Burgess (ed.), *AI and the Rule of Law: The Necessary Evolution of a Concept*, Oxford, 2024.

The plurality of approaches to defining the rule of law does not represent a weakness but rather reflects its layered character in contemporary constitutionalism. Nevertheless, the fragility identified by András Sajó¹²⁰ and manifested in the so-called “rule of law crisis” reminds us that these guarantees are never definitively secured and require constant vigilance, particularly when new forms of power — such as AI systems — enter the legal order.

By redistributing the locus and modalities of decision-making, AI systems directly engage the guarantees that the European Union has linked to the rule of law. As observed elsewhere, “the autonomy of AI systems challenges traditional conceptions of accountability and control, prompting scholars and policymakers to identify new regulatory frameworks capable of governing these technologies while safeguarding constitutional values such as democracy, the rule of law, and fundamental rights. For instance, the lack of transparency in certain algorithmic decisions may constitute a direct challenge to the constitutional principle of due process, which requires that decisions — especially those affecting individual rights — be understandable and subject to review”.

The evolution of AI represents a profound transformation of the regulatory landscape, requiring a shift from principles of algorithmic governance toward instruments capable of addressing the complexity of AI autonomy. Autonomous systems, unlike traditional automated processes, introduce new challenges because of their ability to operate without direct human supervision, relying on machine-learning mechanisms and adaptive algorithms. While these capabilities enable unprecedented levels of efficiency and innovation, they also pose risks to transparency, accountability, and the protection of fundamental rights, particularly in fields such as law enforcement. The pervasive influence of algorithmic society extends beyond information management to sectors such as healthcare, labour, justice, and public security, where the diffusion of automated decision-making systems reveals an increasing entanglement between public and private actors and a significant transformation of governance structures.

The transition from an algorithmic society to one increasingly driven by artificial intelligence further intensifies this complexity. In this context, the European Union Agency for Fundamental Rights occupies a crucial position, performing research, advisory, and monitoring functions concerning the scope of fundamental rights in relation to autonomous AI. As will be discussed in the next section, this role has developed since 2019 and has involved the FRA increasingly in AI regulatory processes and in the protection of the rule of law.

In order to carry out this study, the first subsection explores the specific understanding of AI and fundamental rights embraced by the FRA and, the second

¹²⁰ A Sajó, *The Rule of Law*, in R. Schütze-R. Masterman (eds.), *The Cambridge Companion to Comparative Constitutional Law*, Oxford, 2019, p. 258–290.

subsection draws some considerations on how the Agency has shaped and influenced EU policies in the domain of AI.

3.1. The Theoretical Framework of Fundamental Rights and the Rule of Law in the FRA's Approach

Compared with the analysis developed in the previous section, it is more difficult to draw a comparison between the position of the European Union Agency for Fundamental Rights and that of the Council of Europe institutions on fundamental rights and digital challenges to them, given both the innovative nature of artificial intelligence and the limited case law of the European Court of Human Rights in this field¹²¹. In this new and unexplored context, however, the Agency's commitment to examining and interpreting the fundamental rights enshrined in the Charter in relation to emerging technologies becomes particularly evident.

With regard to the second focus of this article — namely, the role of the FRA in relation to the regulation of artificial intelligence — it is possible to observe that the Agency has been actively engaged, since 2019, in producing a series of studies applying the fundamental rights framework of the Charter of Fundamental Rights of the European Union to this new technology.

In 2019, the FRA report “Facial Recognition Technology: Fundamental Rights Considerations in the Context of Law Enforcement”¹²² represents one of the first analyses at EU level of AI-based biometric systems from a fundamental-rights perspective. The report examines the growing use of facial-recognition technologies by law-enforcement authorities and evaluates their implications for privacy, data protection, non-discrimination, and effective judicial oversight¹²³.

The FRA identifies facial recognition as a particularly sensitive application of artificial intelligence because it combines biometric identification with large-scale data processing, potentially enabling forms of surveillance that may affect the fundamental rights protected by the EU Charter. The report distinguishes among different uses of facial recognition, including real-time identification in public spaces, retrospective identification through archived images, and identity-verification systems, and examines how these technologies are actually employed in EU Member States by public authorities¹²⁴. Each of these uses raises distinct legal and proportionality questions under EU law¹²⁵. In this sense, the impact of these new technologies is assessed in light

¹²¹ G. Repetto, *The constitutional relevance of the ECHR in domestic and European law*, Cambridge-Antwerp-Portland, 2013.

¹²² European Union Agency for Fundamental Rights, *Facial recognition technology: fundamental rights considerations in the context of law enforcement* (Publications Office of the European Union 2019).

¹²³ FRA, *Facial recognition technology*, cit., p. 18 and ff.

¹²⁴ Idem, p. 11-13.

¹²⁵ Idem, p. 20.

of the rights to privacy and personal-data protection, but also more broadly in relation to democratic freedoms. For the first time, an institution has engaged directly with a technology used in other legal systems, such as the Chinese one, highlighting the impact of AI on fundamental rights.

In line with its tradition in the development of EU anti-discrimination law, the report expressed particular concern regarding the risk of inaccuracies and algorithmic bias in facial-recognition systems, which may disproportionately affect certain demographic groups and lead to discriminatory outcomes¹²⁶. The report also emphasises the importance of strict legal bases, necessity and proportionality assessments, and independent oversight mechanisms when biometric technologies are used by law-enforcement authorities¹²⁷. In this sense, the FRA suggests the type of proportionality test that should be carried out, without formulating a binding one, a task that belongs to courts and, subsidiarily, to the legislature. Departing, to some extent, from the proportionality test developed by the ECtHR, the FRA suggests that: “Once it has been established that the inalienable, essential core of a right is not violated by a measure, the necessity and proportionality test as outlined in the Charter is to be conducted as a next step in respect of non-core aspects of that right”¹²⁸.

But already in this first report, transparency and accountability are identified as fundamental safeguards. According to the FRA, individuals must be able to understand when biometric identification technologies are used and must have access to effective remedies in cases of misuse or error¹²⁹. The report anticipates subsequent regulatory debates in the European Union concerning biometric surveillance and high-risk AI systems.

As noted elsewhere¹³⁰, if, for example, a national police agency intended to adopt an artificial-intelligence-based facial-recognition system to monitor sensitive public areas, such as airports or central urban zones, it would be necessary to balance this legitimate interest with the fundamental rights of citizens. The objective of the agency — to increase levels of security and identify in real time individuals suspected of crimes — would be legitimate, but its impact would need to be considered. A system of this kind would fall among those classified as “prohibited risk” under Article 5 of the AI Act, since it involves the use of biometric data and may significantly affect individuals’ fundamental rights. The use of these tools may be authorised in exceptional situations, for example to prevent or identify suspects of crimes listed in Annex II of the Regulation, such as terrorism. In such circumstances, before activating the system, the public authority concerned is required to carry out a fundamental rights impact assessment (FRIA). This analysis must first identify which rights could be compromised by the use of AI, such as privacy, personal liberty, and the presumption

¹²⁶ Idem, p. 27 and ff.

¹²⁷ Idem, p. 23-25.

¹²⁸ Idem, p. 21.

¹²⁹ Idem, p. 30-31.

¹³⁰ O. Pollicino - F. Paolucci, cit.

of innocence. Although published before the development of the EU AI Act, the FRA report (2019) contributed to framing facial-recognition technologies as a high-risk AI application requiring strengthened fundamental-rights safeguards. By combining legal analysis and technological assessment, the report illustrates the broader role of the FRA in identifying emerging risks associated with digital technologies in law-enforcement contexts and also its role in highlighting legislative gaps that may affect fundamental rights in the field of new digital technologies.

The report “Getting the Future Right: Artificial Intelligence and Fundamental Rights” (FRA, 2020) represents one of the first comprehensive attempts at European level to analyse, through empirical research, the implications of artificial intelligence for fundamental rights. Published before the adoption of the EU Artificial Intelligence Act, the report contributed significantly to shaping the policy debate on risk-based AI governance, documenting how AI systems were already used in public administration in several Member States. The report shows awareness of the use of AI-based tools by public authorities in areas such as social services, healthcare, predictive policing, and online public services, and highlights the specific fundamental rights affected by these uses¹³¹. Rather than addressing AI in abstract terms, the FRA examines administrative practices, highlighting how automated decision-support systems increasingly influence access to public services and benefits¹³². This empirical orientation reflects the Agency’s broader mandate to provide evidence-based expertise to EU institutions and Member States. “When introducing new policies and adopting new legislation on AI, the EU legislator and the Member States, acting within the scope of EU law, must ensure that respect for the full spectrum of fundamental rights, as enshrined in the Charter and the EU Treaties, is taken into account. Specific fundamental rights safeguards need to accompany relevant policies and laws”¹³³.

One of the central findings of the report is that AI systems used in public administration often operate in complex legal and institutional contexts in which decision-making responsibility formally remains human but is substantively influenced by algorithmic outputs. This raises questions concerning accountability, transparency, and effective judicial protection. The FRA observes that individuals affected by AI decisions frequently encounter difficulties in understanding how decisions are made or in challenging them through existing administrative and legal procedures¹³⁴. “To ensure that available remedies are accessible in practice, the EU legislator and Member States could consider introducing a legal duty for public administration and private companies using AI systems to provide those seeking redress information about the operation of their AI systems. This includes information on how these AI systems

¹³¹ European Union Agency for Fundamental Rights, *Getting the future right: Artificial intelligence and fundamental rights* (Publications Office of the European Union 2020), p. 57 and ff.

¹³² FRA, *Getting the future right*, cit., p. 50 and ff.

¹³³ FRA Opinion 1, *Getting the future right*, cit., p. 7.

¹³⁴ FRA, *Getting the future right*, cit., p. 78.

arrive at automated decisions. This obligation would help achieve equality of arms in cases of individuals seeking justice¹³⁵.

The report identifies several risks to fundamental rights associated with the use of AI. These include risks related to data protection and privacy, but also broader concerns regarding non-discrimination, access to social rights, and the right to good administration¹³⁶. The FRA emphasises that automated systems may reproduce or amplify existing structural inequalities when trained on biased or incomplete datasets, disproportionately affecting vulnerable groups¹³⁷. In signalling these potential risks to fundamental rights, the FRA interprets their scope on the basis of both EU law and the ECHR framework. At the same time, the report does not limit itself to assessing substantive impacts, but also highlights procedural guarantees and institutional safeguards. Again, transparency and explainability emerge as central governance challenges. This creates potential tensions with procedural rights protected under EU law, including the right to be heard and the right to an effective remedy.

Another important contribution of the report is the emphasis on the need for preventive governance mechanisms. The FRA argues that fundamental-rights safeguards should be integrated into the design and procurement of AI systems used in public administration, rather than addressed only after implementation¹³⁸. This anticipates subsequent developments in EU digital regulation, including the integration in the AI Act of risk-management obligations and conformity-assessment procedures. The report also highlights the importance of strengthening institutional capacity within public administrations. Many authorities using AI systems lack sufficient technical expertise to assess the reliability, fairness, and legality of algorithmic tools: therefore, specialised expertise¹³⁹ and effective oversight mechanisms¹⁴⁰ are necessary. Consequently, the FRA recommends strengthening interdisciplinary cooperation between lawyers, data scientists, and public officials involved in the acquisition and supervision of AI systems.

From a governance perspective, “Getting the Future Right” illustrates the role of the FRA as an epistemic actor within the European fundamental-rights architecture. By combining legal analysis and empirical research on administrative and private practices, the Agency contributes to bridging the gap between normative principles and technological implementation. The report demonstrates that effective protection of fundamental rights in the context of AI requires not only legal frameworks, but also institutional learning and methodological development. These constitute clear invitations to the European legislator to adopt regulation in this area of the digital environment that takes into account the development of AI in a preventive

¹³⁵ FRA Opinion 1, *Getting the future right*, cit., p. 13.

¹³⁶ FRA, *Getting the future right*, cit., p. 60 and ff.

¹³⁷ FRA, *Getting the future right*, cit., p. 72; see also FRA Opinion 4, *Getting the future right*, cit., p. 10.

¹³⁸ FRA Opinion 2, *Getting the future right*, cit., cit., p. 8.

¹³⁹ FRA, *Getting the future right*, cit., p. 3.

¹⁴⁰ FRA Opinion 3, *Getting the future right*, cit., p. 9.

perspective, aimed at managing risk rather than correcting its effects. The findings of the report proved particularly influential in subsequent policy debates on AI governance. Many of the issues identified by the FRA — including AI bias, lack of transparency, and insufficient impact assessment — later became central themes in the EU legislative process leading to the adoption of the Artificial Intelligence Act. In this sense, the report may be understood as an early contribution to the development of a European model of trustworthy AI grounded in fundamental-rights protection.

Across its annual Fundamental Rights Reports (2021–2024), the European Union Agency for Fundamental Rights (FRA) progressively integrates artificial intelligence into its broader monitoring of digitalisation and fundamental-rights protection in the European Union. These reports address AI-related issues in discussions of digital public administration, data protection, non-discrimination, and law-enforcement technologies. The FRA consistently emphasises that automated decision-making systems must comply with the EU Charter of Fundamental Rights, particularly with regard to data protection, equality, transparency, and access to effective remedies¹⁴¹. Through thematic observations and FRA opinions, the reports underline the importance of human oversight, accountability, and risk-awareness in the deployment of digital technologies by public authorities. By documenting national practices and emerging technological governance challenges, the FRA's annual reporting contributes to identifying fundamental-rights risks associated with automated decision-making and reinforces the need for rights-based governance of digital transformation in the European Union.

Thus, the FRA integrates the AI issue into the monitoring of Charter implementation and technological transformation in the EU. In the Fundamental Rights Report 2021, the Agency highlights the expansion of digital public services and data-driven decision-making, noting in its opinions that technological innovation must remain consistent with fundamental-rights guarantees, including data protection and effective remedies¹⁴². As indicated in the FRA opinion section, public authorities should “assess the impact on fundamental rights of any AI use in the area of home affairs, including asylum, visa, immigration and borders Stringent, effective and independent oversight mechanisms should accompany the use of AI”¹⁴³.

¹⁴¹ See for instance: FRA Opinion 7.4, *Fundamental Rights Report 2021* (Publications Office of the European Union 2021), p. 201: “EU institutions and EU Member States should ensure that any future EU or national AI-related legal and political instruments are grounded in respect for fundamental rights. To achieve this, they should include strong legal safeguards, promote fundamental rights impact assessments, and ensure independent oversight and access to effective remedies”.

¹⁴² European Union Agency for Fundamental Rights, *Fundamental Rights Report 2021* (Publications Office of the European Union 2021), p. 194 and ff.

¹⁴³ FRA Opinion 6.4, *Fundamental Rights Report 2021*, cit., p. 174.

The Fundamental Rights Report 2022 further develops this concern by addressing risks of algorithmic discrimination, the growing use of automated systems, and the Achilles' heel of fundamental rights in the race to regulate AI¹⁴⁴.

The Fundamental Rights Report 2022 further develops this concern by addressing risks of algorithmic discrimination and the growing use of automated systems, described as the Achilles' heel of fundamental rights in the race to regulate AI. In particular, the FRA looks at the AI Act proposal, stating: “Notably, the EU legislator should ensure that the scope of use cases in the different risk categories is clear and that sufficient guidance and protection – with respect to fundamental rights compliance – is offered in relation to diverse practical contexts. The reliance on self-assessment, although a welcome first step, should be underpinned with effective oversight by independent bodies that are sufficiently resourced and possess the necessary fundamental rights expertise”¹⁴⁵.

In 2022, the FRA also published the report “Bias in Algorithms – Artificial Intelligence and Discrimination” (2022). This report emphasises that algorithmic bias can emerge from data, design choices, and deployment contexts, and may “amplify over time and affect people’s lives, potentially leading to discrimination”¹⁴⁶. The report highlights predictive policing and automated content-detection systems as examples of AI applications where bias risks may materialise. It stresses the importance of testing algorithms for bias before and during use, improving transparency and documentation practices, and enabling the collection of equality-relevant data where necessary to detect discrimination. Overall, the FRA frames algorithmic bias as a fundamental-rights issue requiring preventive governance, oversight, and accountability mechanisms: “algorithms that are used to make or support decisions about people, such as predictive policing, need to be assessed before and regularly after deployment. Special attention needs to be paid to the use of machine learning algorithms and automated decision-making. The EU legislator should make sure that regular assessments by providers and users are mandatory and part of the risk assessment and management requirements for high-risk algorithms”¹⁴⁷.

In the Fundamental Rights Report 2023, references to artificial intelligence become more explicit, particularly in discussions of predictive-policing tools, automated content-detection systems, and the ongoing legislative debate on the EU Artificial Intelligence Act and EU Member State initiatives¹⁴⁸. As stated in the opinions section of the report, the FRA took a stance on the AI Act and the protection of fundamental

¹⁴⁴ European Union Agency for Fundamental Rights, *Fundamental Rights Report 2022* (Publications Office of the European Union 2022), p. 167.

¹⁴⁵ FRA Opinion 7.1, *Fundamental Rights Report 2022*, cit., p. 19.

¹⁴⁶ European Union Agency for Fundamental Rights, *Bias in algorithms – Artificial intelligence and discrimination* (Publications Office of the European Union 2022), p. 106.

¹⁴⁷ FRA Opinion 1, *Bias in algorithms*, cit., p. 11.

¹⁴⁸ European Union Agency for Fundamental Rights, *Fundamental Rights Report 2023* (Publications Office of the European Union 2023), p. 179 and ff.

rights: “The EU co-legislators should ensure appropriate reference to fundamental rights safeguards in the proposal for the AI Act. The generic definition of AI should avoid narrowing down its scope, as this may unduly narrow the Act’s scope of protection. Existing laws, such as data protection and nondiscrimination laws, should also be used to address fundamental rights challenges posed by the use of AI, as these laws apply both online and offline”¹⁴⁹.

The Fundamental Rights Report 2025 situates artificial intelligence within broader reflections on digitalisation and democracy, reiterating in its opinions that emerging technologies must be accompanied by governance mechanisms grounded in fundamental rights, given the emerging diffusion of AI¹⁵⁰. The FRA 2025 Report states: “The AI Act is a welcome and timely development that will support the safeguarding of fundamental rights. (...) Fundamental rights impact assessments under the AI Act should, when implemented correctly, play a major role in ensuring rights compliance. FRA is involved in providing input in the development of these impact assessments”¹⁵¹. Taken together, these annual reports show a progressive consolidation of the FRA’s position that AI governance in the European Union requires preventive safeguards, rights-impact-assessment practices, and institutional oversight to ensure that automated decision-making remains compatible with the Charter. The expansion of artificial intelligence, particularly in its generative and agentic forms, increasingly affects the values that Article 2 TEU places at the foundation of European democracies — pluralism, non-discrimination, tolerance, justice, solidarity, and gender equality — and this makes an update of digital constitutionalism necessary.

This update has taken place with the AI Act, which follows many of the FRA’s indications while remaining general with regard to the balancing between fundamental rights and the impact of AI. Given the breadth of AI’s impact on multiple fundamental rights, it remains impossible for legislation to propose a balancing model comparable to that developed in the field of online speech, as discussed in the previous section. The AI Act therefore introduces a mechanism that incorporates balancing between fundamental rights and AI through a regulatory model based on risk and impact assessment. The attempt to reconcile sometimes divergent objectives — on the one hand, the promotion of technological innovation and market competitiveness, and on the other, the protection of democratic principles and values — has been pursued through a risk-based regulatory approach. This model provides for the classification of artificial-intelligence applications according to the level of risk they entail, accompanied by a progressive and differentiated system of legal obligations¹⁵². The risk classification established by the AI Act distinguishes, in general terms, three main categories — to which a fourth category concerning general-purpose generative-

¹⁴⁹ FRA Opinion 7.2, *Fundamental Rights Report 2023*, cit., p. 192.

¹⁵⁰ European Union Agency for Fundamental Rights, *Fundamental Rights Report 2025* (Publications Office of the European Union 2025), p. 15.

¹⁵¹ FRA, *Fundamental Rights Report 2025*, cit., p. 14.

¹⁵² Cf. G. Finocchiaro, *The regulation of artificial intelligence*, in *AI & SOCIETY*, 39, 4, 2024.

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AI models with systemic risk has been added: unacceptable-risk systems, high-risk systems, limited-risk systems, and general-purpose generative-AI models with systemic impact.

Unacceptable-risk systems are prohibited because they are considered incompatible with the protection of fundamental rights; these include certain forms of biometric recognition, social scoring, and subliminal manipulation techniques (Article 5 AI Act), albeit with some exceptions that raise questions concerning rights protection.

The category of high-risk systems represents the core of the regulation and concerns sensitive areas such as biometrics, critical infrastructures, education, employment, essential services, security, migration, justice, and democratic processes. For these systems, preventive risk-assessment obligations are established, aimed at preventing violations of fundamental rights such as privacy, data protection, and non-discrimination. Limited-risk systems are mainly subject to transparency obligations, as in the case of chatbots or deepfakes, while for general-purpose generative-AI models attention focuses on possible systemic risks.

Overall, the AI Act's approach combines the regulation of the most dangerous uses of AI with differentiated obligations depending on the type of system, privileging, in less critical cases, transparency measures and risk-mitigation mechanisms, while leaving open questions concerning effective accountability in the integration of AI into democratic processes. The use of such tools may be permitted in exceptional circumstances, for example to prevent or detect particularly serious crimes such as terrorism, listed in Annex II of the Regulation. In such cases, the public authority concerned must carry out in advance a Fundamental Rights Impact Assessment (FRIA), aimed at identifying the rights potentially affected by the use of AI, including privacy, personal liberty, and the presumption of innocence.

The FRIA obligation is relatively clear for public authorities, as they are directly bound by the Charter of Fundamental Rights of the European Union. Its application to private actors is more complex, however, since not all rights enshrined in the Charter have direct horizontal effect in private relationships, as in the case of the right to liberty and security under Article 6 of the Charter. It is therefore possible to observe a continuity between the FRA's position — even without examining individual cases of AI impact on fundamental rights — and that reflected in the Regulation. With the growing use of artificial-intelligence systems in public administration and private decision-making processes, the role of European institutions tasked with safeguarding fundamental rights in the digital environment has intensified, including the European Union Agency for Fundamental Rights (FRA). The FRA has indeed established itself as one of the principal knowledge-based institutions supporting the development of rights-sensitive AI governance.

The FRA report “Assessing High-Risk Artificial Intelligence: Fundamental Rights Risks” (FRA, 2025) represents one of the most significant recent contributions in this field, providing empirical evidence and methodological guidance for the

implementation of the EU's risk-based AI regulatory framework. The report must be understood within the broader context of the evolution of EU digital regulation, in particular the adoption of the Artificial Intelligence Act and its risk-classification model for AI systems. Within this regulatory architecture, the FRA contributes primarily through research, data collection, and methodological development aimed at ensuring that fundamental-rights considerations are effectively integrated into the lifecycle of AI systems. Regardless of the level of complexity, the FRA issues a series of opinions which stress some of the most problematic issues of the AI Act, inviting the Commission to encourage authorities responsible for applying the AI Act to adopt a broad definition of AI systems: "The Commission should encourage authorities in charge of the implementation of the AI Act (e.g. market surveillance authorities) to apply a broad interpretation of the definition when providing further guidance to providers and deployers of AI"¹⁵³.

A central contribution of the FRA (2025) report lies in its empirical examination of AI systems used in high-impact areas such as employment, education, asylum procedures, law enforcement, and access to public benefits. The report discusses concrete examples, including automated tools for job-application screening, AI systems for assessing reading abilities in schools, and automated decision-support tools used in the allocation of social benefits etc. Through different case studies, the FRA identifies a persistent gap between formal regulatory requirements and operational implementation in society¹⁵⁴.

FRA opinions 4 and 5¹⁵⁵ call for developing guidance to help the impact evaluation in different cases and considering different rights at stake: "Guidance related to FRIAs under the standards under Article 9 and the FRIA template under Article 27 of the AI Act should cover the main crosscutting fundamental rights concerns, namely privacy and data protection, equality and non-discrimination, and access to effective remedies. In addition, the impact on other rights should be considered and set out in accompanying guidance. The guidance should be tailored to specific high-risk areas and should provide examples of how high-risk AI systems might have an impact on certain rights in a practical and understandable manner"¹⁵⁶.

The FRA emphasises that fundamental-rights considerations should be integrated throughout the entire lifecycle of AI systems, from design and procurement to implementation and monitoring. This lifecycle-based approach reflects a shift from

¹⁵³ FRA Opinion 1, European Union Agency for Fundamental Rights, *Assessing High-Risk Artificial Intelligence: Fundamental Rights Risks* (Publications Office of the European Union 2025), p. 7.

¹⁵⁴ FRA, *Assessing High-Risk Artificial Intelligence*, cit., p. 36 and ff.

¹⁵⁵ "The Commission and Member States are encouraged to provide guidance on how the AI Act can be best implemented in practice. Any simplification considerations need to be based on evidence and informed by the experiences of various stakeholders involved in the AI Act's implementation. They must not lower existing fundamental rights protection". FRA Opinion 5, *Assessing High-Risk Artificial Intelligence*, cit., p. 10.

¹⁵⁶ FRA Opinion 4, *Assessing High-Risk Artificial Intelligence*, cit., p. 9.

reactive rights protection — traditionally centred on judicial review — toward preventive governance mechanisms embedded in administrative and technological processes. For this reason, the FRA calls for action: “the Commission and Member States should invest in establishing an evidence base that allows for a better understanding of fundamental rights risks and effective mitigation practices. As part of the current financial investment in AI in the EU, research and testing facilities on the safe use of AI are essential. Investments need to be made in studies on and the testing of AI systems’ compliance with fundamental rights, particularly in high-risk areas. Most notably, bias testing needs to be further developed to allow for a better understanding of when and how AI can be used in practice without infringing fundamental rights”¹⁵⁷. This is quite important because it shows how the EU’s National Human Rights Institution — the FRA — could play a role in involving different stakeholders and society in the assessment of AI.

One of the most important conceptual contributions of the report concerns the operationalisation of the Fundamental Rights Impact Assessment (FRIA). The FRA identifies FRIA as a key instrument for translating fundamental-rights principles into practical governance tools. However, the report also shows that FRIA practices remain fragmented across Member States and sectors, with organisations often lacking methodological guidance, institutional capacity, and standardised indicators for assessing rights-related risks¹⁵⁸. The need for supervision is also emphasised: “While self-assessment is important, it functions appropriately only in combination with effective oversight by independent bodies that are sufficiently resourced and possess the necessary fundamental rights expertise”¹⁵⁹. As stressed by the same Opinion explanation: “In previous reports, FRA has called for existing human rights structures – including data protection authorities, equality bodies, national human rights institutions, ombuds institutions and consumer protection bodies – to be built on to address fundamental rights risks stemming from the use of AI. The AI Act assigns some of these bodies additional responsibilities”¹⁶⁰.

In this sense, the FRA demonstrates both its impact on legislation and its monitoring function, complementing the role of judicial bodies.

Another relevant observation concerns the interpretation of “high-risk AI” in EU regulation. The FRA notes that certain AI-based tools with significant social impact may fall outside narrower regulatory definitions, and so a correct understanding of the risk-classification system should be implemented¹⁶¹. This highlights a structural tension within risk-based regulation: legal categories designed to ensure proportionality may inadvertently create gaps in rights protection if interpreted narrowly.

¹⁵⁷ FRA Opinion 6, *Assessing High-Risk Artificial Intelligence*, cit., p. 12.

¹⁵⁸ See FRA Opinions 4 and 5, *Assessing High-Risk Artificial Intelligence*, cit.

¹⁵⁹ FRA Opinion 7, *Assessing High-Risk Artificial Intelligence*, cit., p. 13.

¹⁶⁰ FRA Opinion 7, *Assessing High-Risk Artificial Intelligence*, cit., p. 13.

¹⁶¹ See FRA Opinions 2 e 3, *Assessing High-Risk Artificial Intelligence*, cit. p. 8.

From a governance perspective, the FRA's contribution reflects the growing importance of epistemic institutions within the European fundamental-rights ecosystem. Rather than exercising regulatory or judicial powers, the Agency supports policymaking through comparative research, data collection, and methodological standard-setting, in line with its mandate under Regulation (EC) No 168/2007.

Despite these institutional limitations, the FRA report represents an important step in operationalising fundamental-rights protection in AI governance. By identifying implementation gaps, clarifying methodological challenges, and promoting impact-assessment practices, the Agency strengthens the preventive dimension of rights protection within the European digital regulatory framework.

Finally, in the specific context of the digitalisation of justice, AI tools and fundamental rights, the FRA report "Digitalising Justice: A Fundamental-Rights-Based Approach" (FRA, 2025) examines how digital technologies — including AI-based tools — are integrated into judicial systems in the European Union and evaluates their implications for fundamental rights. The report is based on comparative research on 31 digital tools used in seven Member States, including remote-hearing platforms, electronic case-management systems, online legal-assistance portals, and AI-based anonymisation and transcription tools. Although digitalisation is widely recognised by justice professionals as improving efficiency and access to justice, the FRA emphasises that these benefits can be realised only if fundamental-rights safeguards are integrated into the design and implementation of such technologies. As the report notes, digital tools must "ensure fair outcomes for all"¹⁶² and remain accessible to users in diverse social and technological conditions.

The FRA identifies several rights-related risks associated with the digitalisation of judicial systems, including potential impacts on the right to a fair trial, data protection, equality before the law, and access to justice: "Member States should systematically consider the impact and possible risks regarding fundamental rights when designing digital tools for the justice sector. This assessment should not be limited to the right to respect for private and family life (Article 7 of the Charter) and protection of personal data (Article 8). It should also consider, as a minimum, the right to nondiscrimination (Article 21), the right to a fair trial and effective remedy (Article 47) and the right of defence (Article 48)"¹⁶³. In particular, the report stresses that technological solutions developed primarily for efficiency may inadvertently create new barriers for individuals lacking digital skills or adequate resources. Reflecting this concern, the FRA's opinion sections emphasise the importance of maintaining "non-digital alternatives" and providing training to justice professionals on fundamental-rights risks, including bias, privacy violations, and errors in automated systems¹⁶⁴.

¹⁶² European Union Agency for Fundamental Rights, *Digitalising justice: A fundamental rights-based approach* (Publications Office of the European Union 2025), p. 80.

¹⁶³ FRA Opinion 1, *Digitalising justice*, cit., p. 4.

¹⁶⁴ FRA Opinions 2, 3, 4, *Digitalising justice*, cit., p. 4 and ff.

The report thus situates artificial intelligence within the broader process of digital transformation of judicial systems, highlighting both opportunities and risks. By recommending early risk identification, stakeholder consultation, and the integration of safeguards from the design phase, the FRA promotes a preventive, fundamental-rights-based approach to technological innovation in judicial contexts, while also promoting the safe and informed use of these tools by users¹⁶⁵.

This approach reinforces the Agency's broader position that digitalisation — including the use of AI — must be accompanied by institutional oversight and rights-impact-assessment mechanisms to ensure that technological innovation strengthens, rather than weakens, access to justice.

3.2. The Policy Framework and the FRA's Influence on AI Legislation

As briefly mentioned above, the FRA has progressively developed a set of policy guidelines devoted to the relationship between artificial intelligence and the protection of fundamental rights in the European Union. Although the FRA does not exercise regulatory or supervisory powers, its reports, opinions, and empirical research play an important role in shaping evidence-based policies and supporting the implementation of EU digital regulation. In its publications on artificial intelligence — including research on biometric technologies, automated decision-making in public administration, predictive policing, and the digitalisation of judicial systems — the FRA consistently promotes a preventive approach to AI governance grounded in fundamental rights.

One of the earliest contributions in this field is the FRA report *Facial recognition technology: fundamental rights considerations in the context of law enforcement*, which identifies biometric-identification systems as particularly sensitive technologies requiring strict legal safeguards, independent oversight, and proportionality assessments. The report anticipates subsequent European policy debates on biometric surveillance, highlighting the risks that inaccuracies, bias, and large-scale processing of biometric data may pose to privacy, non-discrimination, and effective judicial protection.

The FRA further developed its policy guidance in “Getting the future right: Artificial intelligence and fundamental rights”, which examines the growing use of AI in public administration. This report highlights the importance of integrating fundamental-rights safeguards into the design and procurement of automated decision-making systems, promoting transparency, human oversight, and strengthened institutional capacity within public authorities. These recommendations anticipate key elements of the EU's subsequent risk-based approach to AI regulation.

¹⁶⁵ FRA Opinions 5 and 7, *Digitalising justice*, cit., p. 7 and ff.

The FRA's policy guidance on AI also emerges in the Agency's annual Fundamental Rights Reports (2021–2024), in which artificial intelligence appears primarily in relation to digitalisation, algorithmic decision-making, and technologies used by law-enforcement authorities. Through its opinion sections, the FRA repeatedly emphasises that technological innovation must remain consistent with the EU Charter of Fundamental Rights, highlighting the importance of transparency, oversight, and safeguards against algorithmic discrimination.

More targeted empirical research reinforces these policy messages. FRA work on predictive policing and automated detection systems highlights the need to address risks of bias, improve data quality, and avoid excessive reliance on algorithmic risk-assessment tools in law-enforcement activities. Similarly, FRA research on algorithmic bias and data quality underscores the importance of representative datasets, documentation practices, and interdisciplinary oversight in the development of AI systems. More recent FRA publications situate these recommendations within the evolving EU regulatory framework on artificial intelligence. The report “Assessing High-Risk Artificial Intelligence: Fundamental Rights Risks” focuses on the practical implementation of the EU's risk-based AI governance model and identifies persistent gaps in the assessment of fundamental-rights risks by AI providers and public authorities. The FRA supports the systematic use of Fundamental Rights Impact Assessment (FRIA) methodologies and the further development of institutional expertise in assessing AI-related risks. In parallel, “Digitalising justice: A fundamental-rights-based approach” extends this preventive perspective to judicial systems, recommending rights-impact assessments, training for justice professionals, and safeguards to prevent digital exclusion.

Taken together, these publications reveal a coherent set of policy indications emerging from the FRA's work on artificial intelligence. These include the promotion of preventive fundamental-rights impact assessment, the preservation of human oversight in automated decision-making, the strengthening of transparency and accountability mechanisms, the improvement of data quality and safeguards against discrimination, and the development of institutional capacity within public authorities. Although not legally binding, these policy orientations contribute to shaping the European model of AI governance by translating fundamental-rights principles into operational recommendations for policymakers and public administrations.

Although the European Union Agency for Fundamental Rights (FRA) is not explicitly cited in the text of the Artificial Intelligence Act, a comparative analysis of the regulation's core provisions reveals a significant degree of substantive convergence with the policy orientations and risk configurations developed in FRA research on artificial intelligence and fundamental rights. This convergence is particularly evident in five key areas: the regulation's fundamental-rights-based rationale, the treatment of biometric-identification technologies, the adoption of a risk-based regulatory model, the introduction of fundamental-rights impact-assessment obligations, and the requirement of human oversight.

First, the AI Act explicitly recognises that artificial-intelligence systems “AI may generate risks and cause harm to public interests and fundamental rights that are protected by Union law” (AI Act, Recital 5). This foundational premise closely reflects the analytical framework developed by the FRA in “Getting the future right: Artificial intelligence and fundamental rights”, in which the Agency identifies automated decision-making in public administration and the private sector as a structural challenge for fundamental rights such as human dignity, right to privacy and data protection, equality and non-discrimination, access to justice, right to social security and social assistance, consumer protection, and right to good administration¹⁶⁶. The FRA’s insistence on treating AI primarily as a fundamental-rights issue, rather than merely a technological or economic one, is therefore reflected in the normative rationale of the regulation.

Second, the AI Act’s restrictive approach to biometric-identification technologies — in particular remote biometric identification in publicly accessible spaces¹⁶⁷ — closely corresponds to the concerns expressed in the FRA report *Facial recognition technology: fundamental rights considerations in the context of law enforcement*. In that report, the FRA emphasises that biometric-identification systems entail high risks for privacy, non-discrimination, and effective judicial protection, thus requiring strict legal bases, necessity and proportionality assessments, and independent oversight¹⁶⁸. The legislative choice to identify biometric identification as a particularly sensitive AI application reflects this earlier rights-based risk analysis.

Third, the overall structure of the AI Act is explicitly based on a risk-based regulatory model¹⁶⁹, introducing graduated obligations according to the level of risk posed by AI systems. This approach is consistent with FRA recommendations promoting *ex ante* and proportionate governance mechanisms calibrated to the social and rights-related impact of AI technologies. In “Getting the future right”, the FRA explicitly calls for preventive safeguards and differentiated governance responses depending on context and use¹⁷⁰, a logic later consolidated in the AI Act’s classification of unacceptable-risk, high-risk, and limited-risk systems.

Fourth, the introduction of the obligation to conduct fundamental-rights impact assessments for certain high-risk AI systems¹⁷¹ constitutes one of the clearest examples of conceptual uptake of FRA research. In several publications, the FRA promoted the development of fundamental-rights impact-assessment methodologies as preventive governance tools capable of addressing risks before implementation¹⁷². The FRA

¹⁶⁶ FRA, *Getting the future right*, cit., p. 57 and ff.

¹⁶⁷ AI Act, Art. 5; Recitals 32–33.

¹⁶⁸ FRA, *Facial recognition technology*, cit., p. 20.

¹⁶⁹ AI Act, Recitals 26–27.

¹⁷⁰ FRA, *Getting the future right*, cit., p. 87 and ff.

¹⁷¹ AI Act, Art. 27.

¹⁷² FRA, *Getting the future right*, cit., p. 87 and ff. “Learning from data protection impact assessments” as stressed by the same report (*ibid.*, p. 89).

report “Assessing High-Risk Artificial Intelligence: Fundamental Rights Risks” explicitly presents such assessments as essential for operationalising Charter compliance in high-risk contexts, a position now reflected in binding regulatory obligations.

Finally, the AI Act requirement that high-risk AI systems be designed and used with effective human oversight¹⁷³ corresponds to a recurring theme in FRA research emphasising the need to preserve human accountability in automated decision-making. FRA reports on predictive policing, digitalisation of justice, and AI in public administration consistently warn against excessive reliance on algorithmic outputs and emphasise the importance of human review and responsibility¹⁷⁴.

Taken together, these convergences suggest that FRA research has indirectly but substantively contributed to the normative architecture of the AI Act. Rather than influencing legislative drafting through explicit citation, the FRA's influence operates at the level of problem definition, risk conceptualisation, and governance methodology. From a doctrinal perspective, this illustrates how EU agencies lacking regulatory or legislative powers may nonetheless contribute to the formation of binding legal norms by providing the epistemic foundations upon which regulatory choices are built.

As observed, these indications have been reflected in the AI Act. But has this impact translated into public recognition of the FRA within the legislative process — that is, within institutional public discourse?

A qualitative analysis of institutional databases shows that explicit references to the European Union Agency for Fundamental Rights are largely absent from European Parliament plenary debates on the Artificial Intelligence Act, where discussion instead focuses on broader normative principles such as human-centred artificial intelligence and the protection of fundamental rights. During the plenary debate preceding the adoption of the regulation, for example, the AI Act was described as an important step to ensure that artificial intelligence develops in a human-centred way and respects fundamental rights¹⁷⁵. This emphasis on value-based governance reflects themes extensively analysed in FRA research, even though the Agency is not mentioned in the debate transcripts.

By contrast, FRA expertise emerges more clearly in preparatory documents accompanying the legislative process. The Commission Impact Assessment supporting the proposal for the AI Act explicitly includes the FRA report “Getting the future right: Artificial intelligence and fundamental rights” within its evidence base¹⁷⁶. The same document notes that the introduction of stronger fundamental-rights risk-assessment mechanisms had been proposed by several stakeholders, including “the

¹⁷³ AI Act, Art. 14.

¹⁷⁴ See above in this section.

¹⁷⁵ European Parliament, Artificial Intelligence Act (debate) - Tuesday, 12 March 2024. See, for instance the speech of the rapporteur Dragoş Tudorache.

¹⁷⁶ Impact Assessment (SWD(2021) 84 final).

Fundamental Rights Agency” (European Commission, SWD(2021) 84 final). Parliamentary research documents prepared by the European Parliamentary Research Service (EPRS) likewise refer to FRA work when discussing risks associated with biometric technologies and automated decision-making, illustrating how FRA research informed the knowledge context of the legislative process.

This pattern reflects the FRA's institutional position within the EU fundamental-rights system. As an advisory agency tasked with providing expertise, comparative data, and methodological guidance, the FRA primarily contributes to the evidentiary and analytical foundations of EU policymaking rather than to political debate as such. Its reports on facial-recognition technologies (2019) and artificial intelligence in public administration (2020) helped frame artificial intelligence as a fundamental-rights issue requiring preventive governance mechanisms, including risk assessment and oversight. These themes later became central to the EU's risk-based approach to AI regulation and to the development of obligations such as fundamental-rights impact assessment in the AI Act.

As the 2025 report stresses, “At the time of publishing this report, the European AI Office was in the process of developing the FRIA template, with FRA's assistance”¹⁷⁷. Thus, the role of the FRA seems increasingly relevant in giving application to fundamental rights in the AI field. The FRA also highlights how, “In 2025, discussions took place concerning the simplification of existing EU laws, including in the digital area. Given that it is still early days in the implementation of the AI Act, simplifying the law may be better addressed by providing sufficiently practical guidance for its implementation. Any simplification considerations need to be based on evidence and informed by the experiences of various stakeholders involved in the AI Act's implementation. Civil-society actors have already expressed concerns about the potential lowering of the fundamental rights protection offered by the AI Act and have called for a focus on its proper implementation”¹⁷⁸.

The limited visibility of references to the FRA in parliamentary debates therefore does not indicate a lack of influence, but rather reflects the indirect manner in which EU agencies shape legislative processes. FRA research contributes to agenda-setting, problem identification, and policy design through impact assessments, parliamentary research briefings, and expert consultations. In this sense, the Agency's role in the development of the AI Act may be understood as epistemic and preparatory: by documenting risks associated with automated decision-making, biometric identification, and algorithmic bias, the FRA helped establish the fundamental-rights framework underpinning the Union's approach to artificial-intelligence governance. The absence of references to the FRA in public discourse may nevertheless constitute a challenge if the Agency seeks to assume the role of a European NHRI and to become,

¹⁷⁷ FRA, *Assessing High-Risk Artificial Intelligence*, cit., p. 33.

¹⁷⁸ FRA, *Assessing High-Risk Artificial Intelligence*, cit., p. 63.

at the societal level as well, a point of reference for the protection of fundamental rights in the digital sphere.

4. Conclusions

This analysis has examined the role of the FRA in EU digital regulation, focusing on the interplay between fundamental rights, institutional practice, and the evolving regulatory framework of the Union. Section 2 aimed to evaluate the FRA's conception of free speech and its influence both on the drafting and discussion of legislative proposals, as well as in the monitoring and implementation phases of online public discourse regulation. Section 3 focused on the FRA's contribution in protecting fundamental rights in relation to the risks posed by AI and its impact on EU legislation. Two aspects of the Agency's role in EU digital regulation have emerged as particularly significant.

Firstly, at the normative level, the FRA's conception of fundamental rights largely aligns with the paradigm developed within the Council of Europe. The FRA has not sought to depart from ECtHR case law, but rather to consolidate a common interpretative framework within the EU context. However, in certain fields, such as sexist hate speech, disinformation, and AI regulation, the FRA appears to have developed an autonomous standing¹⁷⁹, adapting fundamental rights to the digital environment and proposing specific solutions to address the risks posed by technologies that may undermine these rights. In doing so, the FRA effectively proposes specific interpretations of EU fundamental rights, reinforcing its position as a key actor in their protection at the EU level. Through its opinions and analyses, the Agency has contributed to adapting the principles of constitutionalism to the digital age. In the field of freedom of expression and information, it supports the gradual emergence of a distinctly EU-centred understanding of freedom of expression—anchored in the ECHR tradition but adapted to the Union's regulatory ambitions in the digital domain. In the area of AI, its role appears even more prominent, shaping the application of the rule of law in the digital sphere in an autonomous yet interconnected manner with Council of Europe institutions. In this framework, the FRA could, in principle, evolve into an actor capable of fostering an interpretation of fundamental rights under the EU Charter that is independent from that of the

¹⁷⁹ This could be considered part of the trend created by Opinion 2/13 of EU Justice Court on the autonomous nature of the EU legal order, however this autonomous standing could generate some problems for what concerns the equivalent protection doctrine. Cf. P. De Hert - F. Korenica, *The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights*, in *German Law Journal*, 13, 7, 2012.

ECHR—especially in light of Opinion 2/13 of the CJEU¹⁸⁰. So far, however, the Agency does not appear to have pursued such a role.

Secondly, at the policy level, the FRA's influence on EU legislative and regulatory processes in the field of digital regulation has been uneven. In some cases—such as the Regulation on Terrorist Content Online, the Digital Services Act, or the AI Act—the Agency has played a visible and constructive role, both by issuing formal opinions and by contributing through forms of impact assessments and monitoring activities. These contributions have strengthened the fundamental rights dimension of these regulations, ensuring attention to proportionality, procedural safeguards, and the protection of journalistic and academic expression. By contrast, in other cases—such as the Regulation on Political Advertising and the European Media Freedom Act—the FRA's role has remained marginal, limited to discursive interventions or indirect contributions. In general, it is worth emphasising that the regulation of digital technologies based on risk management appears consistent with the approach proposed by the FRA for governing the digital sphere, an approach the Agency has adopted since 2019: “Given that only a rights-based approach guarantees a high level of protection against possible misuse of new technologies and wrongdoings using them, Member States should put fundamental rights at the heart of national strategies on AI and big data. Such strategies should incorporate know-how from experts in various disciplines such as lawyers, social scientists, statisticians, computer scientists and subject-level experts. Ethics can complement a rights-based approach but should not replace it”¹⁸¹.

However, the FRA does not appear to play a central role in the EU's institutional public discourse: the Agency is not systematically invoked as a reference in parliamentary debates or Commission proposals. In the field of the regulation of digital technologies, the FRA does not appear to have acquired the role of an authoritative source to be cited in support of policy-making, unlike other national human rights institutions (NHRIs)¹⁸² within their respective legal systems, or even the

¹⁸⁰ G. Martinico, *Building Supranational Identity: Legal Reasoning and Outcome in Kadi I and Opinion 2/13 of the Court of Justice*, in *Italian Journal of Public Law*, 8, 2016; E. Spaventa, *A Very Fearful Court?: The Protection of Fundamental Rights in the European Union after Opinion 2/13*, *Maastricht Journal of European and Comparative Law*, 22, 2015.

¹⁸¹ FRA Opinion 7.4, *Fundamental Rights Report 2019* (Publications Office of the European Union 2019), p. 166.

¹⁸² See the proposals contained in European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Strengthening the Fundamental Rights Agency – The Revision of the Fundamental Rights Agency Regulation* (Study, May 2020) PE 653.056. The following revision of the FRA Regulation in 2022 significantly strengthened the Agency's mandate, expanding its competence to all areas of EU law and confirming its role as an independent provider of expertise on fundamental rights to EU institutions and Member States, thereby enhancing its capacity to contribute to emerging regulatory domains such as artificial intelligence (Council Regulation (EU) 2022/555 of 5 April 2022 amending Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights [2022] OJ L108/1).

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FRA itself in other domains, such as asylum law. However, it cannot be denied that the FRA has increasingly become a significant actor in EU policy-making on digital regulation and, above all, has established itself as a source of expertise and legitimacy in an area traditionally dominated by the Member States and the Council of Europe. Its impact often operates in the background—through expertise, reports, and participation in consultations—without necessarily translating into explicit political and institutional recognition. This analysis suggests that, in certain cases, the FRA has played a pivotal role in shaping the vocabulary, categories, and proportionality standards employed in policy debates. The Agency may thus have influenced the terms of discussion even where its name is not formally cited. This situation reflects both the structural limits of the Agency's mandate and its positioning as an advisory body external to the legislative process. The degree to which the FRA's role will be consolidated in future regulatory cycles—particularly through the full implementation of the Digital Services Act (DSA), the Regulation on Political Advertising, the European Media Freedom Act (EMFA), and the Artificial Intelligence Act (AI Act)—will constitute a key test of the Agency's capacity to shape not only policy, but also the Union's institutional public discourse in the field of digital regulation. As highlighted in a recent 2025 speech by the FRA Director, the Agency aspires to play an increasingly significant role in both the regulation of online freedom of expression and AI¹⁸³.

¹⁸³ Sirpa Rautio, Director, *The Effects of Digital Technologies on Fundamental Rights* (speech at University of Florence, 15 May 2025), European Union Agency for Fundamental Rights (FRA), <https://fra.europa.eu/en/speech/2025/effects-digital-technologies-fundamental-rights>.

For what concerns the regulation of freedom of expression and the challenges of hate speech and disinformation, the Director stressed how “the EU already has the tools to tackle this and ensure effective content moderation. The Digital Services Act – the DSA – requires platforms to remove illegal content and to reduce the risks their systems pose to fundamental rights. (...) However, the law on paper is not enough. To truly tackle online hate and abuse, we need to ensure the DSA is properly implemented and enforced – and that platforms are held accountable. There is currently an urgent need for more information, data and analysis of the protection of fundamental rights online. At FRA, we are contributing to filling this gap through our work on online hate and content moderation and, in the coming months, we will come out with new reports on the topic”. Regarding the regulation of online electoral campaigning, the Director stated: “Our upcoming Fundamental Rights Report – which is FRA's annual flagship report – focuses on the need for fair, transparent, and safe elections – including the online dimension. It repeats FRA's calls for proper implementation and enforcement of existing EU rules – from the Digital Services Act and AI Act to the Political Advertising Regulation. This will help to ensure that the integrity of future elections in the EU is fully protected from attempts at manipulation. At the same time, it will make sure that fundamental rights, such as the freedom of expression, are fully respected”. As far as AI is concerned, the Director highlighted that “The AI Act is the first piece of legislation globally that sets standards for AI and calls for the assessment of fundamental rights risks. My Agency is actively contributing to this process. We develop ways to assess fundamental rights risks, we advise on the implementation of the AI Act, and we scrutinise high-risk AI applications. We analyse how police forces use remote biometric identification, including facial recognition technology, and later this year, we will publish a report on the digitalisation of our justice systems and compliance with fundamental rights. Based on hundreds of interviews with practitioners and technicians in the justice

In conclusion, the findings of this paper also invite a broader reflection on the evolving constitutional identity of the European Union. Freedom of expression and the rule of law, long considered domains reserved to Member States and primarily safeguarded through the Council of Europe, are now increasingly subject to EU regulatory intervention, particularly in the digital sphere. In this transition, the FRA plays a subtle yet significant role: by analysing EU policy in light of ECtHR standards while simultaneously reinforcing an autonomous dimension of EU fundamental rights, it contributes to the construction of a distinct EU voice in digital technology regulation. This “Europeanisation”¹⁸⁴ of digital regulation does not represent a departure from the ECHR system, but rather a gradual layering of EU-specific instruments and practices on top of a shared normative foundation. The FRA’s mediating presence is thus emblematic of the Union’s broader trajectory: one that does not seek to replace existing human rights architectures but to adapt and reframe them in accordance with the EU’s institutional and regulatory ambitions¹⁸⁵.

ABSTRACT: Building on the existing literature on the European Union Agency for Fundamental Rights (FRA) and its impact on the protection of fundamental rights within the European Union, this article examines whether, and to what extent, the FRA has contributed to the development of EU digital constitutionalism and the shaping of EU digital regulatory policies. In particular, it explores the conception(s) of fundamental rights underpinning the FRA’s interventions and assesses how these have informed both the evolution of EU digital constitutionalism and the design of public policies in the field of digital regulation. The article is structured as follows. Section 1 provides an introduction and outlines the methodological considerations underpinning the analysis. Section 2 examines the understanding of freedom of expression and information advanced by the FRA, as well as its role in shaping EU digital policies in this domain, with reference to what may be termed “digital constitutionalism 1.0.” Section 3 turns to the FRA’s work on artificial intelligence, analysing its rights-based approach and the safeguards it proposes for the protection of fundamental rights within the framework of “digital constitutionalism 2.0.” Finally, Section 4 offers concluding remarks and reflects on the FRA’s broader role in promoting fundamental rights in EU digital regulation.

field, the findings focus on real applications of digital tools and the fundamental rights considerations that emerge when we examine them in practice”.

¹⁸⁴ A. Bradford, *Europe’s Digital Constitution*, in *Virginia Journal of International Law*, 64, 2023.

¹⁸⁵ A. Bradford, *Digital Empires*, cit.

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KEYWORDS: EU Fundamental Rights Agency – National Human Rights Institutions – European Union Agency for Fundamental Rights – Digital constitutionalism – Artificial Intelligence – Freedom of expression.

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Functions and Responsibilities of the German Institute for Human Rights: Promoting Human Rights Education in the Public Sphere*

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1. Introduction

In 2000, through a motion unanimously approved by all parliamentary groups (see below § 2), the German *Bundestag* endorsed the establishment of the *Deutsches Institut für Menschenrechte* (German Institute for Human Rights – GIHR)¹. At that time, Germany expressed its intention to comply with the commitment – legally non-binding under international law, but undoubtedly politically significant – to align with the set of *Principles relating to the Status of National Institutions (the Paris Principles)*,² which were reaffirmed in the Vienna Declaration of 25 June 1993³.

From the outset, within the traditional classification of National Human Rights Institutions (NHRIs), it was clear that Germany opted for the Institute model, despite

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¹ Deutscher Bundestag, 14. Wahlperiode, Druksache 14/4801 of 28.11.2000: Antrag der Fraktionen SPD, CDU/CSU, BÜDNIS 90/DIE GRÜNEN und F.D.P. (Einrichtung eines Deutschen Instituts für Menschenrechte).

² The Principles date back to 1991, when they were elaborated at the First International Workshop on National Institutions for the Promotion and Protection of Human Rights (Paris, 7–9 October 1991), and were subsequently formally adopted by the UN General Assembly in Resolution 48/134 of 20 December 1993 (Principles relating to the Status of National Institutions (the Paris Principles)).

³ Vienna Declaration and Programme of Action del 25 June 1993 (the World Conference on Human Rights in Vienna). See, R. Goodman - T. Pegram (eds.), *Human Rights, State Compliance, and Social Change. Assessing National Human Rights Institutions*, Cambridge, NY, 2012.

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minor variations⁴. It therefore rejected both the Commission model, adopted by the Netherlands,⁵ and the Ombudsman model, chosen by Spain and Poland⁶. Germany thus established a body without quasi-judicial powers. The GIHR does not have the authority to receive or handle individual complaints. In a role primarily focused on providing institutional and “evidence-based”⁷ support, the GIHR was entrusted with tasks of research and monitoring. Its main aim is, in this respect, to strengthen a culture of fundamental and human rights in the public sphere through constant dialogue with institutions and civil society. Such a configuration is entirely consistent with the explicit possibility, provided for in the Paris Principles, of deciding whether to assign quasi-judicial functions to NHRIs.⁸ It also aligns with paragraph 36 of the Vienna Declaration, which states that each State may “choose the framework best suited to its particular needs at the national level”⁹.

⁴ For a general overview, see *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, New York and Geneva, 1995, pp. 7 ff.; see also S. Cardenas, *Chains of Justice. The Global Rise of State Institutions for Human Rights*, Philadelphia, 2014, pp. 8 ff. and G. de Beco, *National Human Rights Institutions in Europe*, in *Human Rights Law Review*, 2007, p. 332; A. Eren, *National Human Rights Institutional Models in Comparative Law and the Case of Turkey*, in *Gazi University Faculty of Law Review*, 2011, pp. 171 ff. and V. Aichele, *Die Nationale Menschenrechtsinstitution: eine Einführung*, Berlin, Deutsches Institut für Menschenrechte, 2009, available at <https://nbn-resolving.org/urn:nbn:de:0168-ss0ar-328263>. On this issue, see L.F.M. Besselink, *Types of National Institutions for the Protection of Human Rights and Ombudsman Institutions: an Overview of Legal and Institutional Issues*, in *Human Rights Commissions and Ombudsman Offices*, The Hague-London-Boston, 2000, pp. 157-164.

⁵ For the Netherlands, see Y. Donders - M. Olde Monnikhof, *The Newly Established Netherlands Institute for Human Rights: Integrating Human Rights and Equal Treatment*, in J. Wouters - K. Meuwissen (eds.), *National Human Rights Institutions in Europe*, Cambridge, 2013, pp. 83 ff.; for a comparative perspective including the United Kingdom, see F. Nania, *National Human Rights Institutions through the Prism of Human Rights Protection: A Comparison between the United Kingdom and the Netherlands*, in *Rivista di Diritti Comparati*, 2025, pp. 1 ff.

⁶ For a European overview, see V. Aichele, *Nationale Menschenrechtsinstitutionen in Europa*, Deutsches Institut für Menschenrechte, 2004.

⁷ C. Badse, *The Danish Experience: The Danish Institute for Human Rights*, in J. Wouters - K. Meuwissen (eds.), *National Human Rights Institutions in Europe*, cit., p. 30.

⁸ *Principles relating to the Status of National Institutions* (The Paris Principles), General Assembly resolution 48/134, 20 December 1993. These prerogatives are included in the section titled “Additional principles concerning the status of commissions with quasi-judicial competence”, where it is clarified that “[a] national institution may be authorized to hear and consider complaints and petitions concerning individual situations” (emphasis added). For an overview on this point, see G. Arditto, *La competenza para-giudiziarica delle istituzioni nazionali per i diritti umani: modelli e prassi in prospettiva comparata*, in L. Manca (a cura di), *Le istituzioni nazionali per la promozione e la tutela dei diritti umani*, Napoli, 2021, pp. 11-47. The aforementioned essay also notes that, from a terminological perspective, the use of the term *quasi-judicial* instead of *quasi-judicial* is actually considered an error, as identified by the SCA-GANHRI in 2018 (p. 15).

⁹ *Vienna Declaration and Programme of Action* Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, § 36: “The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the “Principles relating to the

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Considering that the purpose of this flexible approach is to enable the creation of NHRIs appropriate to the national legal and cultural framework, Germany's decision is unsurprising. At least two contextual factors should be considered. First, although there is no equivalent of a true Ombudsman at the federal level, Article 17 of the Basic Law already provides for a right of petition, which is largely handled by the *Petitionsausschuss* (Petitions Committee) established in the *Bundestag*. Moreover, at the level of the *Länder* (states), some state constitutions explicitly provide for the presence of an Ombudsman, the *Bürgerbeauftragte*, notably in the state of Rhineland-Palatinate.¹⁰

Second, one cannot overlook the deep-rooted judicialization of fundamental rights protection that has always characterized the very idea of the rule of law in Germany. This culminates in Article 19(4) of the Basic Law, which states: "If a person's rights are violated by public authority, legal recourse shall be available". The individual's right to take legal action to protect their fundamental rights is further safeguarded through the recognition of an explicit right to file individual constitutional complaints for violations of fundamental rights by public authorities (Article 94(1), sentence 4a). This framework also reflects the fact that, historically, in Germany, the promotion of a culture of fundamental rights has been closely tied to the educative function of the individual constitutional complaint.¹¹ Such an observation may help explain why the Federal Constitutional Tribunal has come to be regarded – though it is not formally a court of appeal – as the apex body ensuring the highest level of constitutionalization within the legal system. This is due, in particular, to the role played by the instrument of the *Urteilsverfassungsbeschwerde* (constitutional complaint against judgments).¹² It also sheds light on why the website of the Federal Government Commissioner for Human Rights Policy once explicitly stated: "Protection of individual human rights in Germany is in principle the responsibility of the courts".¹³

From a comparative perspective, the experience of the German Institute for Human Rights may represent a valuable reference point for the Italian debate on the

status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level".

¹⁰ See B. Kofler, *Germany*, in G. Kucsko-Stadlmayer (ed.), *European Ombudsman-Institutions. A Comparative Legal Analysis Regarding the Multifaceted Realisation of an Idea*, Wien-New York, 2008, pp. 203-213.

¹¹ See K. Zweigert, *Die Verfassungsbeschwerde*, in JZ, 1952, 321 ff., cited in BVerfG, 28.06.1972 - 1 BvR 105/63, 1 BvR 275/68, Rn. 34.

¹² See F. Saitto, *Il ricorso individuale diretto: assetti del sistema di giustizia costituzionale e rapporti tra giurisdizioni in Germania*, in G. Repetto - F. Saitto (eds.), *Temi e problemi della giustizia costituzionale in Germania. Una prospettiva comparativa alla luce del caso italiano*, Napoli, 2020, pp. 43-85.

¹³ S. Cardenas, *Chains of Justice. The Global Rise of State Institutions for Human Rights*, cit., p. 292. It has been argued that the GIHR should still be considered "relatively young," and that the reasons for its delayed establishment lie in the traditional view that the protection of fundamental rights fell within the remit of the courts and the Federal Constitutional Tribunal: see H. Bielefeldt - M. Krajewski - M. Krennerich - B. Rudolf, *Deutsches Institut für Menschenrechte (Germany)*, in S. López Escarcena - M.A. Núñez Poblete - J. Wouters (eds.), *National Human Rights Institutions in Europe and Latin America. International and Comparative Perspectives*, Cambridge, 2024, p. 245; pp. 260 ff.

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possible establishment of a National Human Rights Institution. As this paper will show, the GIHR exemplifies a model of NHRI that, despite the absence of quasi-judicial powers, is capable of exercising significant influence within the public sphere through research, policy advice, strategic engagement with constitutional adjudication, and sustained dialogue with political institutions and civil society. In this sense, the German experience confirms that an NHRI may effectively contribute to the constitutionalization of the legal order even without being entrusted with individual complaint mechanisms or adjudicatory functions. At the same time, however, any attempt to draw inspiration from the GIHR must take into account the profound structural differences between the German and the Italian constitutional systems. In particular, the central role played in Germany by the *Bundesverfassungsgericht* – characterized by the broad accessibility of constitutional review through individual constitutional complaints and by a highly judicialized model of fundamental rights protection – creates a context in which an institution such as the GIHR can interact with constitutional adjudication in a manner that is difficult to replicate in Italy. Accordingly, while the GIHR may serve as a compelling abstract model for demonstrating how an NHRI can function as a bridge between international human rights standards, constitutional interpretation, and public discourse, its concrete modes of operation cannot be mechanically transposed into the Italian context. Any Italian NHRI would necessarily have to be tailored to the specific dynamics of the Italian constitutional system, particularly with regard to the role of constitutional adjudication, the forms of access to constitutional justice, and the channels through which international human rights norms are internalized within the domestic legal order¹⁴.

This paper focuses on the GIHR and is structured as follows. It begins by examining the founding phase (§ 2). It then turns to the Institute's evolution and governing bodies (§§ 3-3.5). Subsequently, it addresses its structure and principal fields of activity (§ 4). Finally, the functions and the nature of the GIHR are contextualized within the broader processes of the constitutionalization of international law and the internationalization of constitutional law (§ 5). In anticipation of what will be addressed in the conclusion, it may already be observed that, in light of the GIHR's experience, NHRIs can be regarded as key instruments in shaping an "open constitutional state".¹⁵ They may contribute to strengthening a process that limits sovereignty while simultaneously reinforcing state authority, acting as intermediaries capable of coordinating the interaction between state and society, and fostering in the public sphere an interpretation of fundamental rights consistent with international commitments.¹⁶ From this vantage point, NHRIs do more than merely "bridge"

¹⁴ With regard to the Italian debate, see G. Repetto (ed.), *Una National Human Rights institution per l'Italia. Problemi e prospettive*, Torino, 2025.

¹⁵ For a general overview on the topic, see S. Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz*, Berlin, 1998.

¹⁶ See B.-O. Bryde, *Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts*, in *Der Staat*, 2003, pp. 61-75.

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international and domestic law, inasmuch as they actively influence the constitutionalization of the legal order, contributing to enhanced protection for fundamental rights, which takes into account both the national and international levels.¹⁷

2. The 2001 Parliamentary Motion and the Establishment of the GIHR: Issues Concerning the Founding Source

On the initiative of all parliamentary groups then represented in the *Bundestag* – SPD, CDU/CSU, Bündnis 90/Die Grünen, and FDP – a motion was adopted on 28 November 2000 calling for the establishment of the GIHR. In the final section of the motion, the decision to set up the GIHR expressly cited the Danish institution¹⁸ as a model for Germany, thereby clearly confirming the intention not to assign any quasi-judicial powers. With regard to the timing of its establishment, legal scholarship has noted a certain “reluctance” across Europe to establish NHRIs. However, this attitude was not due to fundamental opposition, but rather to a degree of indifference or a lack of real incentives.¹⁹

¹⁷ See § 5; and R. Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, in *Human Rights Law Review*, 2010, pp. 1-32.

¹⁸ The Danish institution, originally called the Danish Center for Human Rights, was established by parliamentary vote in 1987. It served as a loose model for the creation of NHRIs in Norway and Luxembourg during the same period (S. Cardenas, *Chains of Justice. The Global Rise of State Institutions for Human Rights*, cit., p. 291). However, it was only in 2002 – following considerable controversy and narrowly avoiding permanent closure – that the institute was formally established by law as part of a broader reform. The founding act was subsequently revised in 2012. Notably, for a brief period between 2003 and 2009, the Danish institute also served as the designated national equality body and was granted competence to handle individual complaints under Article 13 of Directive 2000/43/EC (C. Badse, *The Danish Experience: The Danish Institute for Human Rights*, cit., 31 ff.). Although it retained its status as a national equality body under the Directive, the authority to rule on individual complaints was later transferred to an *ad hoc* body, the *Ligebehandlingsnævnet* (Equal Treatment Board). The 2012 reform aimed to better ensure the institute’s independence and to clarify its mandate as an NHRI. In Denmark, the organizational structure includes a Board, which appoints the Directors of the Institute; the Board itself is appointed by the universities of Denmark, the Council for Human Rights in Denmark and Greenland, and the employees of the Danish Institute for Human Rights. The Council for Human Rights also assesses the design and implementation of the Institute’s activities and may submit proposals for new initiatives to the Board (available at <https://www.humanrights.dk/about-us>).

¹⁹ See i.e. S. Cardenas, *Chains of Justice. The Global Rise of State Institutions for Human Rights*, cit., 291 ff., p. 293: “Germany’s government seems to have created an NHRI quite reluctantly, only following calls from civil society. The unanimous parliamentary acclaim that greeted it may have been more akin to a collective sigh of relief from skeptics: satisfying a proposal for an NHRI with a minimalist institution, which matched Germany’s interest in portraying an image of itself as a country pursuing a “moral foreign policy,” including through extensive development assistance”. It has been stressed that, in Germany, “the central impetus for an NHRI came from civil society, not from a particular political party or governmental body” (J.A. Mertus, *Straddling Checkpoint Charlie. The German Human Rights Institute*, in Id., *Human Rights Matters*, Stanford, 2009, p. 118).

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The founding motion highlighted from the outset the need to ensure the independence of the GIHR. To this end, the government was requested to take the necessary steps to establish the Institute in close coordination with representatives of non-governmental organizations and the academic community. Nonetheless, while the mandate was outlined, it was not detailed at this early stage. The motion merely stated that the Human Rights Institute was to operate in a practice-oriented manner, complementing the work of existing governmental and non-governmental institutions and playing a complementary and cooperative role. It was also established that the Institute should be able to act on its own initiative and remain independent of instructions or directives from the federal government or any other public or private entity.²⁰ Specifically, the Institute was to focus on providing information on the human rights situation both domestically and internationally. Its activities were intended to prevent human rights violations and to promote and protect human rights. From this perspective, it has been noted that the choice of location near Checkpoint Charlie was no coincidence, as one of the Institute's most sensitive domestic tasks was not only to engage with the country's past, but also to address potential disparities between different parts of Germany and monitoring the reunification process.²¹

Based on these principles, six areas of activity were defined. First, the Institute was tasked with providing information and documentation, including the creation of databases and the collection of human rights materials such as international treaties and case law from supranational courts. A second area involved conducting research. The third area outlined a role in political advisory work. While research was intended to prevent, address, or manage human rights violations, political advisory work was to include concrete policy proposals and promote continuous dialogue between science and politics. The Institute's mandate also encompassed human rights education in Germany, international cooperation, and the promotion of dialogue and collaboration on human rights within Germany.

In line with the Paris Principles, it was clarified that the Institute's bodies should be composed predominantly of individuals representing civil society, with specific expertise in human rights, in order to ensure pluralism. In addition to some provisions concerning financial matters, the motion also specified, however, that the federal government – represented by the Federal Foreign Office, the Federal Ministry of Justice, and the Federal Ministry for Economic Cooperation and Development – as well as members of the *Bundestag*, representatives of the *Länder*, and representatives of non-governmental organizations, academia, the legal profession, business, trade

²⁰ Mertus notes, quoting a 2004 study conducted by Rikke Frank Jørgensen, a staff member of the Danish Institute for Human Rights, that while the parliamentary decision fails to explicitly refer to the Paris Principles, the Institute's statutes do contain such a reference, thereby opening the door to a broader interpretation of its mandate (J.A. Mertus, *Straddling Checkpoint Charlie. The German Human Rights Institute*, cit., pp. 120-121).

²¹ J.A. Mertus, *Straddling Checkpoint Charlie. The German Human Rights Institute*, cit., p. 123.

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unions, and various religious communities, could all become members of the association.

As later detailed in the preamble of the GIHR's founding law, the motion led to the establishment of a private-law association by several stakeholders.²² This form was chosen to emphasize the Institute's distance from other public-law bodies and to ensure its autonomy, which was to be guaranteed through its private legal status. The clear aim was to strengthen the GIHR's independence and political neutrality.²³

From the outset, certain shortcomings could be identified in light of the few binding requirements set forth in the Paris Principles. The most evident issue concerned the legal basis on which the *Bundestag* mandated the establishment of the GIHR. The Paris Principles require that the mandate of an NHRI "shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence".²⁴ A parliamentary motion – even one adopted unanimously and supported by strong political will, as explicitly mentioned in the coalition agreement of 20 October 1998 (Part XI, 8), which expressed the intention to implement the Paris Principles – does not seem to provide the same level of legitimacy. Nor does it adequately safeguard the requirement of independence.²⁵ Moreover, the provisions regarding the composition of the governing bodies of the GIHR did not appear sufficiently clear to comply with even the broadly defined international standards. It is no coincidence that, although the GIHR was granted A-status following accreditation procedures, reports by the Sub-Committee on Accreditation of GANHRI (SCA)²⁶ stressed the need to revise the

²² B. Rudolf, *The German Institute for Human Rights*, in *Nova Acta Leopoldina*, 2011, pp. 19-24. As stated in the preamble of the law (see § 3): "Taking up this resolution by the *Bundestag*, two members of the parliamentary Committee for Human Rights and Humanitarian Aid of the *Bundestag*, three distinguished representatives of the Forum *Menschenrechte*, one independent expert each from the field of international organisations, academia and the media, as well as one distinguished personality designated by the Federal Government of Germany, on 8 March 2001, together founded the German Institute for Human Rights as a non-profit registered association. The founding members were Friederike Bauer, Rudolf Bindig (MP), Hermann Gröhe (MP), Prof. Dr. Eckart Klein, Barbara Lochbihler, Werner Lottje, Klaus Stoltenberg, Bruno Thiesbrummel and Barbara Unmüßig", available at <https://www.institut-fuer-menschenrechte.de/en/institute/mandate-tasks-functions/legal-basis>.

²³ See on this point A. Würth, *The German Institute for Human Rights*, in *EBPOAIIJAAOT Cnycauue za eepoHcky npaauaHa*, 2012, p. 216: "The GIHR is a Registered Association (in German: Verein), a predominant legal form for civil society and non-profit organisations. Registered Associations are largely autonomous, issue their own statute, and are regulated by law. GIHR's purpose, mandate, composition of bodies, competences and obligations were laid down in the Statutes of the GIHR Association (henceforth: GIHR Statutes), adopted on 8 March 2001 by the Founding Assembly. Later, the Statutes were amended several times, mainly due to inner-organisational needs; the last amendment was made in 2009".

²⁴ Paris Principles, Competence and responsibilities, paragraph 2

²⁵ See on this topic J.A. Mertus, *Straddling Checkpoint Charlie: The German Human Rights Institute*, cit., pp. 120 ff.

²⁶ Available at <https://ganhri.org/sub-committee-on-accreditation/>. As noted, although this accreditation process does not have a formal legal basis that makes it binding, it is becoming increasingly

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applicable legal framework. In several reports, the SCA called for the adoption of a law to regulate the DIMR comprehensively.²⁷ Additional concerns included the need to clarify the criteria governing the dismissal of members of the Institute.²⁸

Moreover, in the first months following the establishment of the GIHR, in parallel with some early-stage tensions,²⁹ the United Nations Economic and Social Council (ECOSOC) directly addressed the Institute's most characteristic feature: the absence of any quasi-judicial powers. In this regard, Germany was encouraged to introduce a mechanism allowing individuals to bring complaints directly to the GIHR.³⁰

relevant at the political level; see on this topic V. Aichele, *Die Nationale Menschenrechtsinstitution: eine Einführung*, cit., p. 2.

²⁷ <https://ganhri.org/sub-committee-on-accreditation/>

²⁸ See D. Langtry- K. Roberts Lyer, *National Human Rights Institutions*, Oxford, 2021, pp. 53–54 and 84; regarding the dismissal process later established by law, see p. 151. Over the years, concerns have also been raised about the guarantee of pluralism: D. Langtry and K. Roberts Lyer, *National Human Rights Institutions*, cit., p. 105. See also G. de Beco, *National Human Rights Institutions in Europe*, cit., p. 342: “Composition is one of the most critical aspects of NHRIs, since it directly affects two fundamental principles underlying these institutions, that is, pluralism and independence”. On the need to establish the GIHR by law, see A. Würth, *The German Institute for Human Rights*, cit., p. 216.

²⁹ J.A. Mertus, *Straddling Checkpoint Charlie: The German Human Rights Institute*, cit., pp. 121 ff., focused on the “early challenges” of the German Institute for Human Rights, reconstructing the events surrounding the resignation of the first director, Percy MacLean, which was followed by some controversy. According to Mertus, “[t]he critical stories contended that MacLean was pushed out because he sought to place more emphasis on the monitoring of human rights in Germany, whereas his opponents at the Institute favored a greater emphasis on international human rights promotion. The controversy over MacLean’s firing illustrates an important challenge for the Institute: the need to demonstrate its relevance at home”. In the 2002 annual report, it is stated that: “On May 15th, 2002, the governing board appointed Percy MacLean, formerly presiding judge at the Administrative Court of Berlin, as director of the Institute. He assumed office in August 2002 and resigned on January 17th, 2003. The director’s position will be filled by Dr. Heiner Bielefeldt from August 1st, 2003. In the meantime, Barbara Unmüßig, one of the two vice presidents of the governing board, is acting director on a volunteer basis” (see German Institute for Human Rights, Annual Report 2002, 7). See also, regarding the Institute’s early years of activity, H. Bielefeldt - M. Krajewski - M. Krennerich - B. Rudolf, *Deutsches Institut für Menschenrechte (Germany)*, cit., pp. 259 ff.

³⁰ This recommendation was made by the Economic and Social Council, Committee on Economic, Social and Cultural Rights, in its *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant. Concluding Observations of the Committee on Economic, Social and Cultural Rights* (Report on Germany), E/C.12/1/Add.68, 24 September 2001. See, in particular, paragraph 12, which states: “While welcoming the recent establishment of the DIMR, the Committee notes that the Institute’s functions appear to be limited to research, education and the provision of policy advice, and that it does not enjoy the powers often associated with national human rights institutions, such as the power to investigate complaints, conduct national inquiries and formulate recommendations for employers and other actors. In the context of the Covenant, these limitations are especially regrettable because economic, social and cultural rights receive less attention and enjoy fewer safeguards than civil and political rights in the State party”. Later, in its 2017 report, the Sub-Committee also raised a similar concern: see D. Langtry - K. Roberts Lyer, *National Human Rights Institutions*, cit., p. 224.

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In order to respond – at least partially – to these concerns, the *Bundestag* passed a law in 2015 specifically regulating the Institute’s legal status, composition, structure, functions, and competences. Nevertheless, the absence of concrete powers to protect fundamental rights confirmed, at least formally, that the GIHR was conceived as “a minimalist institution” and – at least *prima facie* – a “weak NHRI”.³¹

3. The 2015 Founding Law of the GIHR

Following repeated calls, which culminated in a message from the then Foreign Minister Steinmeier – now President of the Federal Republic of Germany –, the *Bundestag* finally passed a law in 2015 regulating the GIHR’s mandate, objectives, and functions. This came after the October 2014 deadline set during the reaccreditation process had passed without any action being taken, amid the threat of losing A-status and the associated rights. As noted above, the Paris Principles highlight one requirement in particular: an NHRI should be established by law or constitutional amendment. In Germany, however, a “solid legal basis” was still lacking³².

The law, ultimately approved by the *Bundestag* on 18 June 2015 and by the Bundesrat on 10 July 2015, is divided into 8 Articles and is preceded by a preamble, already referenced, which outlines the reasons for the decision to establish the GIHR and retraces the history of its creation. More specifically, Article 1 is entitled “Legal status and funding”. Article 2 regulates “Mandate, tasks and functions”, while Article 3 identifies the “Organs of the Association,” and Articles 4, 5, 6, and 7 regulate, respectively, the “Membership,” the “General Assembly,” the “Board of Trustees,” and the “Board of Directors”. Article 8, finally, sets out the entry into force of the law.

As a private association, the Institute is also governed by its own statute – frequently referenced in the founding law – which, following a preamble, provides a detailed regulation of the GIHR’s operations, with particular emphasis on the organization and functioning of its organs.

3.1. Legal Nature and Status

As already pointed out, in Germany the GIHR is not a public entity. According to the 2015 law, the GIHR is a registered association governed by private law. The GIHR has therefore differed markedly from the Danish experience from the outset.

³¹ S. Cardenas, *Chains of Justice. The Global Rise of State Institutions for Human Rights*, cit., p. 293. On the “decisive six months” that led to the adoption of the law, see H. Bielefeldt - M. Krajewski - M. Krennerich - B. Rudolf, *Deutsches Institut für Menschenrechte (Germany)*, cit., pp. 266 ff.

³² President Steinmeier in his statement; available at: https://www.auswaertiges-amt.de/en/newsroom/news/150303-deutschesinstitutmenschenrechte-269768?utm_source=chatgpt.com.

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This reflects a deliberate decision not to establish a public-law body or an independent authority in the strict sense, as such a status would have implied inevitable dependence on a ministry. Its legal basis is thus “two-fold,” resting not only on the founding law but also on its Articles of Association.³³ This principle is clarified by Article 1 of the founding law itself. The point is further developed in Article 1 of the Statute, which states in its first two paragraphs: “The Association’s name is Deutsches Institut für Menschenrechte [German Institute for Human Rights], with DIMR as the official abbreviation,” and “The Association is registered in the Register of Associations. It operates under its name with the supplementary letters ‘e. V.’ [eingetragener Verein = registered association]”.

The issue was not merely one of independence³⁴, but also of conceptual clarity. A public-law status for the GIHR could have resulted in the Institute being fully absorbed into the state structure, thus limiting its ability to act as a “bridge” in the public sphere between state and civil society.³⁵ The associative model, in this sense, appeared preferable because it safeguarded the Institute’s capacity for self-determination and self-organization, enabling it to exercise its critical role toward institutions more freely and to engage society as broadly as possible. In this way, it was also believed that its function as a “bridge” in the realization of a harmonious balance between “the national and international human rights guarantees” would have been strengthened.³⁶

The final result, however, is that the GIHR is recognized as playing a significant role in the public sphere, frequently described as one of connecting and intertwining not only state and society, but also the national and international communities.

³³ See H. Bielefeldt - M. Krajewski - M. Krennerich - B. Rudolf, *Deutsches Institut für Menschenrechte (Germany)*, cit., pp. 246-247, where it is stated that “the double legal basis of the DIMR strengthens its legitimacy and independence”, since its associative nature, protected under Article 9 of the Basic Law, safeguards the Institute from potential arbitrary dissolution through legislation.

³⁴ The GIHR’s independence is also ensured through the regulation of its funding channels, to which the SCA always pays close attention. In this regard, Article 1 of the law provides that: “To fulfil the tasks under Article 2 Subsections 2, 4 and 5, the German Institute for Human Rights (registered association) is provided with funding insofar as it is included in the budget of the Federal Parliament (*Deutscher Bundestag*) and the current Statute of the Institute meets the minimum requirements laid down in Articles 2 to 7”. Article 5 of the Statute further specifies that: “The Association is funded through public grants according to § 1 paragraph 1 second clause of the Law. Additional sources of funding are membership fees, project-based public and private grants, as well as private donations,” and that “The Association may acquire assets to promote its aims. Third-party allowances intended for this purpose will accrue to the Association’s assets”.

³⁵ See P. Ridola, *Prime riflessioni sullo “spazio pubblico” nelle democrazie pluralistiche*, in Id., *Diritto comparato e diritto costituzionale europeo*, Torino, 2010, pp. 31-49.

³⁶ See DIMR, *Entwicklung der Menschenrechtssituation in Deutschland Januar 2015 – Juni 2016 Bericht an den Deutschen Bundestag gemäß § 2 Absatz 5 DIMRG*, p. 4: “eine Brücke zwischen den nationalen und internationalen Menschenrechtsgarantien zu schlagen”.

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3.2. Organizational Structure and Governing Bodies

Articles 3–7 of the Law, further detailed in the Statute (Articles 7–31)³⁷, establish that the organs of the Association are the General Assembly, the Board of Trustees, and the Board of Directors, composed of the Director and the Deputy Director. Article 3 also provides that “advisory boards may be established when needed for specific subjects or projects” and that it is prohibited to serve simultaneously on both the Board of Trustees and the Board of Directors.³⁸

Article 4, which governs Membership, states that the founding members form part of the registered association and that “a pluralistic representation of civil society actors involved in the promotion and protection of human rights” must be ensured. It is specified that “additional members who either professionally or on a voluntary basis work for the protection and promotion of human rights may be – upon their application – accepted by a decision of the Board of Trustees”.

More detailed provisions are set out in the Statute, for instance regarding the possibility of rejecting applications for membership, which is permitted only “in well-founded exceptional cases, e.g. due to incompatibility with the purposes of the Paris Principles,” and the Board of Trustees’ authority to admit or expel members. Membership, including possible expulsion procedures, is governed in detail by Articles 8–11 of the Statute. A specific prerogative of the General Assembly is to “give advice as to the guidelines for the work of the German Institute for Human Rights (registered association)” and “follow its activities in view of the legal requirements and the Paris Principles”. The Statute provides a more detailed set of rules to define the Assembly and its powers, particularly in Articles 12–23, where the body’s functions are outlined, including the power to elect six members to the Board of Trustees. The Assembly also has the power to amend the Statute (Article 18). Amendments affecting the “aims and purposes” of the association require a four-fifths majority of all members.³⁹

The Board of Trustees is specifically regulated under Article 6 and consists of eighteen members with voting rights and nine without.⁴⁰ Once again, the law seeks to reflect and comply with the Paris Principles, distinguishing between members with voting rights and those without. The term of office for voting members is four years, renewable once. The law states: “The Statute must provide for the appointment of the

³⁷ See H. Bielefeldt - M. Krajewski - M. Krennerich - B. Rudolf, *Deutsches Institut für Menschenrechte (Germany)*, cit., pp. 249-250, where it is specified that although the law must formally be considered superior, in reality the two sources should be regarded as mutually interdependent.

³⁸ Recently, it has been noted that around 80 people work at the GIHR: H. Bielefeldt - M. Krajewski - M. Krennerich - B. Rudolf, *Deutsches Institut für Menschenrechte (Germany)*, cit., p. 246.

³⁹ For a detailed overview, see H. Bielefeldt - M. Krajewski - M. Krennerich - B. Rudolf, *Deutsches Institut für Menschenrechte (Germany)*, cit., pp. 251-252.

⁴⁰ See again H. Bielefeldt - M. Krajewski - M. Krennerich - B. Rudolf, *Deutsches Institut für Menschenrechte (Germany)*, cit., pp. 252 ff., where the criticism, raised in the latest reaccreditation decision by the SCA, is reported that the composition of the Board is marked by an excessive number of government representatives.

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following members of the Board of Trustees with voting rights”. Specifically, voting rights are held by: “six members appointed from among the General Assembly; one member appointed by the German Disability Council (*Deutscher Behindertenrat*); two members appointed from among the Federal Parliamentary Committee on Human Rights and Humanitarian Aid; three members representing academic institutions pertaining to human rights appointed by the Federal Parliament (*Deutscher Bundestag*); three members representing civil society appointed by the Federal Parliament; and three members appointed by the Forum Human Rights (*Forum Menschenrechte*)”.

Non-voting members include “one each from the Office of the Federal Government Commissioner for Migration, Refugees and Integration; the Office of the Federal Government Commissioner for Human Rights Policy and Humanitarian Aid; the Office of the Federal Government Commissioner for Human Rights Matters; the Office of the Federal Government Commissioner for Matters Related to Ethnic German Resettlers and National Minorities; the Office of the Federal Government Commissioner for Matters Related to Persons with Disabilities; the Federal Ministry for Economic Cooperation and Development; the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth; the Ministry of Defence; and the Federal Council (*Bundesrat*)”.

According to Article 7, the Board of Directors consists of a Chair and a Deputy, appointed by the Board of Trustees for a term of four years, renewable once. Article 23 of the Statute outlines the “Duties of the Board of Trustees,” notably the authority to decide on the admission and, especially, expulsion of members, as well as the appointment and oversight of the Board of Directors. Regarding the composition of the Board of Directors, Article 31 of the Statute requires that one member be a lawyer and that at least one be a woman.

3.3. Mandate, Functions and Competences

With regard to “Mandate, Tasks and Functions,” reference should be made to Article 2 of the Law and to Article 2 of the Statute, titled “Purpose and Mandate”. In general terms, and in full alignment with the Paris Principles, it is established that the GIHR “shall inform the public on the situation of human rights in Germany and abroad and shall contribute to the prevention of human rights violations and to the protection and promotion of human rights”.

More specifically, a range of tasks is listed, which, in addition to the duty of “informing the public,” includes conducting “academic research,” providing “policy advice,” carrying out “educational work at the domestic level,” and “facilitating dialogue as well as national and international cooperation with relevant human rights actors”.

Additional tasks include “supporting the Federal Government in drafting reports on human rights in third countries, country analyses and questionnaires on

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human rights-related shortcomings in third countries” and “analyzing the impact of European and German policies on the human rights situation in partner countries, with particular regard to development policies”.

Of particular significance and public visibility is the obligation to submit “to the *Bundestag* an annual report on its work and activities, as well as on developments with respect to the human rights situation in Germany,” with a corresponding duty on the *Bundestag* to provide a response.

In its reports, as will be discussed further (below, § 4), the Institute fosters public discourse and identifies research areas, often making extensive reference to the case law of the *Bundesverfassungsgericht* and taking positions on the need for constitutional or legislative reform. As stated by Director Beate Rudolf in her interview on the Institute’s twentieth anniversary, and reiterated by her deputy, the GIHR may, in fact, engage in debates on proposals to amend the Basic Law.

3.4. Additional Mandates

The GIHR is specifically entrusted with performing additional tasks of particular relevance, often in fulfilment of international treaties or European directives that expressly require the designation of a body responsible for monitoring their proper implementation.

It should first be noted that the GIHR acts as the independent monitoring mechanism under Article 33(2) of the UN Convention on the Rights of Persons with Disabilities. Pursuant to Article 1(2) and Article 2(4) of the founding law, the German Institute for Human Rights (GIHR) operates “as an independent monitoring mechanism under Article 33(2) of the UN Convention on the Rights of Persons with Disabilities of 13 December 2006”⁴¹. The GIHR is thereby entrusted with the tasks outlined in the Convention, which provides that: “States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights”⁴².

As indicated on the Institute’s website, the federal structure of the German state is particularly relevant in the performance of this function. It is emphasized that “independent monitoring mechanisms in the sense of Article 33(2) of the UNCRPD

⁴¹ For an overview of the reports published in this field, see <https://www.institut-fuer-menschenrechte.de/en/topics/rights-of-persons-with-disabilities>.

⁴² See G. de Beco, *Article 33(2) of the Un Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions?*, in *Netherlands Quarterly of Human Rights*, 2011, pp. 84–106.

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for all 16 states are essential for the implementation of the UNCRPD throughout Germany". To that end, "a legal basis and permanently secured funding" are deemed necessary. From an operational perspective, the GIHR recommends that "all federal states enact legal regulations for the establishment of an independent monitoring mechanism at the state level, in accordance with the Paris Principles for National Human Rights Institutions," and that the exercise of these mandates be entrusted to the Institute "with the provision of sufficient funds for this purpose". In the performance of this monitoring function, the Institute conducts research on the situation of persons with disabilities in Germany and produces scientific analyses and publications concerning the implementation of the UN Convention on the Rights of Persons with Disabilities (UNCRPD). It organizes events on key issues addressed by the Convention and promotes public awareness through media outreach and public engagement. Furthermore, it regularly consults with persons with disabilities and their representative organizations ("association consultations"), and maintains dialogue with both federal and state disability commissioners. Where appropriate, it provides guidance to policymakers at the federal and state levels, as well as to officials in ministries, public authorities, courts, non-governmental organizations, and associations regarding the Convention's implementation. The National CRPD Monitoring Mechanism also issues statements and recommendations on political, administrative, and judicial decisions, and advocates for full compliance with the Convention.⁴³

According to information currently available on the GIHR's website, statutory regulations concerning CRPD monitoring mechanisms at the state level exist in five *Länder*: North Rhine-Westphalia, Berlin, Saarland, Rhineland-Palatinate, and Schleswig-Holstein, reflecting a differentiated and decentralized implementation of Article 33(2) CRPD within Germany's federal system. The Institute has been performing its monitoring functions in Berlin since 2012, in North Rhine-Westphalia since 2017, and in Saarland since 2020.⁴⁴

Furthermore, the GIHR acts as the National CRC Monitoring Mechanism. Within the framework of the monitoring mandate concerning the UN Convention on the Rights of the Child, since 2015 the Institute has been entrusted with the task of "promoting, supporting and monitoring the implementation of the UN Convention on the Rights of the Child in Germany".⁴⁵ The website of the Institute states that the

⁴³ <https://www.institut-fuer-menschenrechte.de/en/institute/departments/national-crpd-monitoring-mechanism>. Here are also outlined the main areas of intervention: Action plans; Education; Guardianship law; Health; Housing; Mobility; Participation; Protection against; Discrimination; Protection against violence; Women; Work.

⁴⁴ <https://www.institut-fuer-menschenrechte.de/en/institute/departments/national-crpd-monitoring-mechanism/about-the-national-crpd-monitoring-mechanism>. See H. Bielefeldt - M. Krajewski - M. Krennerich - B. Rudolf, *Deutsches Institut für Menschenrechte (Germany)*, cit., p. 273.

⁴⁵ <https://www.institut-fuer-menschenrechte.de/en/institute/departments/national-crc-monitoring-mechanism/about-the-national-crc-monitoring-mechanism>

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Monitoring Mechanism plays a key role in raising awareness about children's rights and, when necessary, encourages organizations to comply with the UN Convention. Based on thorough research, it provides advice to policymakers at the federal, state, and local levels, as well as to members of the judiciary, legal professionals, and civil society actors, assisting them in understanding and implementing the Convention in a child-friendly manner. It also exchanges information with national human rights institutions in other countries and regularly updates the UN Committee on the Rights of the Child regarding the status of children's rights in Germany. The Mechanism works closely with civil society organizations, government agencies, and research institutions. Crucially, it directly involves children and young people, as their participation – as stipulated in Article 12 of the UN Convention – is fundamental to its mandate. According to the website, Hesse is the first state to regulate this task. The website also indicates that the main areas of intervention concern “Raising Awareness of Children's Rights, Advising on CRC Interpretation, Reporting to the United Nations, Collaboration with civil society organizations, government bodies, and research institutions”.⁴⁶ In addition, the GIHR operates as the National Rapporteur Mechanism on gender-based violence. As the National Rapporteur Mechanism on gender-based violence, the Institute is tasked with enhancing the implementation of the Istanbul Convention, specifically the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.⁴⁷

In this capacity, the Institute contributes to the fulfilment of state obligations to improve support and protection services for victims, raise public awareness, and ensure effective investigation and prosecution. Article 10 of the Convention, in particular, requires the establishment of bodies responsible for coordinating, implementing, monitoring, and evaluating its implementation.

Since its establishment, the Institute has contributed to the development of effective protection strategies. On 1 November 2022, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth entrusted the Institute with monitoring and assessing the implementation of the Convention in Germany. The National Rapporteur Mechanism on gender-based violence operates independently of the federal government.⁴⁸

⁴⁶ <https://www.institut-fuer-menschenrechte.de/en/institute/departments/national-crc-monitoring-mechanism>; Key Focus Areas: Best interests of the child; Non-discrimination; Participation and views of the child; Incorporating children's rights into the German Basic Law; Child-friendly justice; Children of incarcerated parents; Complaints mechanisms; Custodial measures; Rights of refugee and migrant children; Monitoring at the federal state level.

⁴⁷ <https://www.institut-fuer-menschenrechte.de/en/das-institut/abteilungen/national-rapporteur-mechanism-on-gender-based-violence/about-the-national-rapporteur-mechanism-on-gender-based-violence>.

⁴⁸ According to the website, in this case, the main areas of focus are domestic violence; sexualized violence; digital violence; and the promotion of political debates and public discourse on annual themes: custody and visitation rights (2023); protection and support services (2024).

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According to the GIHR's website, in August 2020 Germany submitted its first state report to GREVIO, the Group of Experts on Action against Violence against Women and Domestic Violence. This body, composed of 10 to 15 experts, is responsible for monitoring States' implementation of the Istanbul Convention. In September and October 2021, GREVIO conducted its first visit to Germany to assess the Convention's implementation. The initial evaluation report on Germany's compliance was published in October 2022. While the report highlights some positive developments, such as the reform of sexual offence legislation, it also outlines several recommendations – including some urgent ones (see “key concerns” below) – which are considered insufficiently implemented.⁴⁹ The GIHR's website also provides access to the first Report on the Implementation of the Istanbul Convention in Germany, available for download.⁵⁰

Ultimately, the Institute is also specifically tasked with evaluating compliance with the treaty aimed at combating human trafficking. This international obligation stems not only from the Council of Europe Convention on Action Against Trafficking in Human Beings, which has been in force in Germany since 2013, but also from the EU Trafficking in Human Beings Directive of 2011. Since November 2022, the German Institute for Human Rights has been entrusted by the Federal Government with the responsibility of providing ongoing and independent national reports on the implementation of both the Convention and the EU Directive. This work is financially supported by the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) through a four-year funding project.⁵¹

The Independent National Rapporteur Mechanism on trafficking in human beings, as part of the German Institute for Human Rights, is responsible for critically assessing the implementation of the Convention and the EU Directive. Through data-driven and evidence-based monitoring, as well as the analysis of legislation and judicial decisions, it develops practical recommendations for policymakers, public authorities, and the judiciary to improve efforts to prevent and combat human trafficking, and to enhance protection and support for victims.⁵²

According to the Institute's website, the Mechanism collaborates closely with civil society and promotes public dialogue on the issue of human trafficking. By publishing its findings and insights, it supports the Federal Government in fulfilling its

(<https://www.institut-fuer-menschenrechte.de/en/das-institut/abteilungen/national-rapporteur-mechanism-on-gender-based-violence>).

⁴⁹ <https://www.institut-fuer-menschenrechte.de/en/topics/gender-based-violence>

⁵⁰ <https://www.institut-fuer-menschenrechte.de/en/monitoring-report-violence-against-women>

⁵¹ <https://www.institut-fuer-menschenrechte.de/en/institute/departments/independent-national-rapporteur-mechanism-on-trafficking-in-human-beings/about-the-independent-national-rapporteur-mechanism-on-trafficking-in-human-beings>

⁵² Further information and the first Report are available at the following link: <https://www.institut-fuer-menschenrechte.de/en/topics/trafficking-in-human-beings>

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national and international reporting obligations. The first Periodic Report on human trafficking in Germany was published in October 2024.⁵³

3.5. Cooperation Duties of the GIHR within the National and International Human Rights Framework

National Human Rights Institutions (NHRIs) have a specific duty to “cooperate with the United Nations and any other organization within the United Nations system, regional institutions, and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights.”⁵⁴ Moreover, NHRIs should “maintain consultation with other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators, and similar institutions),” and “in view of the fundamental role played by non-governmental organizations in expanding the work of national institutions, develop relations with NGOs devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, persons with physical and mental disabilities), or to specialized areas”⁵⁵.

Within the GANHRI system (Global Alliance of National Human Rights Institutions), the German Institute for Human Rights (GIHR) holds a prominent position, as it does within Europe through the European Network of National Human Rights Institutions (ENNHRI). Indeed, it has consistently been recognized with A-Status, along with the attendant rights of participation.⁵⁶

Given the significant commitment demonstrated by the GIHR in engaging both nationally and internationally with other human rights actors, this work focuses on its relations with the Fundamental Rights Agency (FRA), the Federal Anti-Discrimination Agency (ADS), and the Federal Commissioner for Data Protection and

⁵³ <https://www.institut-fuer-menschenrechte.de/en/institute/departments/independent-national-rapporteur-mechanism-on-trafficking-in-human-beings>. According to the Institute’s website, the main areas of focus include: All forms of human trafficking and exploitation in Germany; Protection and support for trafficked persons; Trafficking in human beings and exploitation of refugees; Trafficking in human beings and exploitation of minors; Annual focus topics for the promotion of political debate and public discourse: 2023: Establishment of the National Referral Mechanism for Trafficked Persons; 2024: Labour Exploitation; 2025: Trafficking in and exploitation of children and adolescents.

⁵⁴ Principles relating to the Status of National Institutions (the “Paris Principles”), UN General Assembly resolution 48/134, 20 December 1993.

⁵⁵ Principles relating to the Status of National Institutions (the “Paris Principles”), UN General Assembly resolution 48/134, 20 December 1993.

⁵⁶ <https://ganhri.org/membership/>. See D. Langtry, K. Roberts Lyer, *National Human Rights Institution*, cit., *passim*.

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Freedom of Information (BfDI).⁵⁷ These bodies illustrate different models of interaction between the GIHR and specialized human rights institutions at the European and domestic levels.

The GIHR serves as the official “focal point” for the FRA. With regard to its relationship with the FRA, a guideline document exists, but is not publicly available. This document regulates the interaction between the Fundamental Rights Agency, established at the European level by Regulation (EC) No 168/2007, and the GIHR. More specifically, the website states that since 2011, the German Institute for Human Rights has acted as Germany’s official focal point for the European Union Agency for Fundamental Rights (FRA), headquartered in Vienna. This role is part of the FRA’s FRANET research network, which brings together multidisciplinary research partners from all EU member states, as well as candidate countries such as Albania, North Macedonia, and Serbia. Under a framework agreement with the Agency, the Institute regularly provides comprehensive legal and social scientific analyses on the human rights situation in Germany. These studies address a wide range of key topics within the FRA’s multi-year thematic program, including access to justice, victims’ rights, data protection in the digital age, Roma integration, and legal cooperation. Other focal areas include children’s rights, non-discrimination, migration and integration, visa and border policies, asylum, and racism.

The reports produced by the Institute constitute essential components of the FRA’s comparative analyses, which aim to identify common challenges and trends in fundamental rights across the European Union. Through its participation in the FRANET network, the German Institute for Human Rights contributes to strengthening the FRA’s role as a central actor in regional human rights protection, while simultaneously expanding its own expertise and influence within the broader context of European fundamental rights monitoring.⁵⁸ This role significantly enhances the GIHR’s capacity to act as a conduit between national human rights practice and EU-level fundamental rights monitoring.

At the national level, as previously noted, two additional bodies can be identified whose competencies potentially overlap with those of the GIHR. First, in

⁵⁷ The examples mentioned do not exhaust the topic. For instance, within the framework of implementing the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), in order to fulfill the commitment to establish a National Preventive Mechanism, the Nationale Stelle zur Verhütung von Folter was created, taking into account the federal structure of the Federal Republic of Germany. See: <https://www.institut-fuer-menschenrechte.de/menschenrechtsschutz/deutschland-im-menschenrechtsschutzsystem/vereinte-nationen/vereinte-nationen-menschenrechtsabkommen/umsetzung-cat-in-deutschland> and <https://www.nationale-stelle.de/nationale-stelle.html>. In other countries, this function has instead been assigned to the NHRI: see L.C. Reif, *The Shifting Boundaries of NHRIs Definition in the International System*, in R. Goodman – T. Pegrām (eds.), *Human Rights, State Compliance, and Social Change. Assessing National Human Rights Institutions*, cit., pp. 61 ff.

⁵⁸ <https://www.institut-fuer-menschenrechte.de/en/monitoring/reports/reporting-to-the-eu-agency-for-fundamental-rights>

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implementation of Directives 2000/43/EC (racial equality) and 2004/113/EC (gender equality in access to goods and services), which require the establishment of equality bodies, specific anti-discrimination responsibilities have not been assigned to the GIHR but rather to the Federal Anti-Discrimination Agency (Antidiskriminierungsstelle des Bundes - ADS). However, the ADS has faced considerable criticism and various reform proposals, primarily because it lacks sanctioning powers to resolve individual complaints.⁵⁹ Nevertheless, the law recognizes the ADS as the national equality body in Germany.

Among specialized bodies, then, the Federal Commissioner for Data Protection and Freedom of Information (BfDI) has been established as an independent and autonomous supervisory authority responsible for federal-level data protection. Its duties are defined under Article 57 of the General Data Protection Regulation (GDPR) and Article 14 of the Federal Data Protection Act (Bundesdatenschutzgesetz – BDSG). The BfDI is empowered to provide official opinions to the German *Bundestag*, its committees, the *Bundesrat*, the Federal Government, other public authorities, and the general public. Upon request of the *Bundestag*, its committees, or the Federal Government, the BfDI conducts examinations of data protection practices within federal public authorities. Pursuant to Article 77 of the GDPR, and within the framework of the Law Enforcement Directive as stipulated in Article 60 of the BDSG, any individual may submit a formal complaint to the BfDI if they consider that their rights have been violated by an entity under the BfDI's supervisory jurisdiction.

Taken together, these forms of cooperation illustrate how the GIHR operates within a dense and multi-layered human rights architecture, both at the European and domestic levels, without overlapping with or duplicating the functions of specialized authorities. Rather than exercising direct enforcement powers, the Institute positions itself as a coordinating and knowledge-producing actor, capable of connecting different institutional spheres and facilitating the circulation of human rights standards across governance levels. This structural positioning provides the necessary background for examining, in the following section, the substantive thematic areas in which the GIHR has been most actively engaged, as reflected in its annual reports and public interventions.

⁵⁹ See *Das Antidiskriminierungsrecht in der Kritik internationaler Menschenrechtsorgane*; available at <https://www.institut-fuer-menschenrechte.de/publikationen/detail/das-antidiskriminierungsrecht-in-der-kritik-internationaler-menschenrechtsorgane>. The reference is, of course, to the statute law Allgemeines Gleichbehandlungsgesetz vom 14. August 2006 (BGBl. I S. 1897). In particular, see Art. 27.

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*Functions and Responsibilities of the German Institute for Human Rights:
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The German Institute for Human Rights (GIHR) focuses on a wide and diverse range of topics. According to the website, its areas of work range from “Asylum and Migration” to “Business and Human Rights”. Other themes include “Development Policy,” “Gender-Based Violence,” “Children’s Rights,” “Climate Change and Sustainability,” “Trafficking in Human Beings,” “Human Rights Education,” “Rights of Older Persons,” “Rights of Persons with Disabilities,” “Rule of Law,” and “Economic, Social and Cultural Rights”.

The GIHR actively participates in public discourse on these issues through various means: it takes positions on the desirability and substance of potential constitutional reforms, intervenes in legal proceedings via *amicus curiae* briefs⁶⁰, produces reports, and publishes research papers that inform policymakers, courts, and the general public.

One example is the debate on removing the word “race” from Article 3 of the Basic Law, which had already been raised by the Institute in 2010⁶¹. In 2021, the GIHR’s *Stellungnahme* supported the removal of the term “Rasse” from Article 3(3) of the Basic Law and proposed its replacement with an explicit reference to racist discrimination, in order to clarify the content of the provision without reducing the level of constitutional protection and in a manner consistent with the case law of the Federal Constitutional Tribunal and international human rights standards.⁶² Another significant example concerns the GIHR’s engagement in the debate on the inclusion of children’s rights in the Basic Law. While opposing the specific text proposed, the Institute strongly argued for the need for constitutional reform. According to the GIHR, an insufficient constitutional recognition risked lowering the level of protection currently guaranteed by constitutional jurisprudence and prevailing international and supranational standards.⁶³ Finally, particular attention should be drawn to the

⁶⁰ The Institute has frequently submitted *amicus curiae* briefs before various courts, including the *Bundesverfassungsgericht*, the European Court of Human Rights, and several United Nations bodies and they are available since 2010 here: <https://www.institut-fuer-menschenrechte.de/menschenrechtsschutz/stellungnahmen-vor-gericht-amicus-curiae>

⁶¹ As stated by the Director in the interview marking the Institute’s twentieth anniversary, available here <https://www.institut-fuer-menschenrechte.de/20-jahre#c2472>

⁶² Deutsches Institut für Menschenrechte, *Stellungnahme zum Diskussionsentwurf des Bundesministeriums der Justiz und für Verbraucherschutz – Entwurf eines Gesetzes zur Ersetzung des Begriffs „Rasse“ in Artikel 3 Absatz 3 Satz 1 des Grundgesetzes* (Feb. 2021), available at https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Stellungnahme_Zum_Diskussionsentwurf_des_Bundesministeriums_der_Justiz_und_fuer_Verbraucherschutz.pdf?utm_source=chatgpt.com.

⁶³ See <https://www.institut-fuer-menschenrechte.de/en/publications/detail/childrens-rights-into-the-basic-law> and Deutsches Institut für Menschenrechte, *Monitoring-Stelle UN-Kinderrechtskonvention. (2021). Kinderrechte ins Grundgesetz: Aktualisierte Stellungnahme zum*

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Institute's critical stance on the proposal to allow the Government to designate "safe countries of origin" by means of a regulation rather than through a formal legislative procedure. The Institute raised constitutional concerns, stressing that, in light of the significant procedural consequences for asylum seekers, such determinations should continue to be adopted by statute with parliamentary involvement.⁶⁴

Noteworthy is the Institute's increasing focus on climate change in recent years. Since 2020, several reports have increasingly emphasized the nexus between climate change and the capacity to ensure respect for human rights. Within this framework, particular attention is devoted to the recognition of a right to a healthy environment through a resolution of the United Nations Human Rights Council. More recently, attention has turned to biodiversity, in particular in connection with a constitutional complaint filed with the German Federal Constitutional Tribunal by the *Bund für Umwelt und Naturschutz Deutschland*, which criticizes the inadequate protection of biodiversity and calls for a judicial mandate compelling legislative action.⁶⁵ In this context, the GIHR decided to prepare a comprehensive dossier on the subject.⁶⁶ Particular importance should also be attributed to the Institute's strategic work on human rights governance. In this regard, the document titled "Applying a Human Rights-Based Approach to the Challenges of Our Time. Strategy 2024–2028" is particularly significant. It refers to the need to further strengthen the Institute, despite its considerable growth in recent years, and to "shape fundamental changes in people's

Gesetzesentwurf der Bundesregierung zur Änderung des Grundgesetzes zur ausdrücklichen Verankerung der Kinderrechte. (Stellungnahme / Deutsches Institut für Menschenrechte), Berlin, available at <https://nbn-resolving.org/urn:nbn:de:0168-ss0ar-73304-8>.

⁶⁴ See *Zum Entwurf eines Gesetzes zur Bestimmung sicherer Herkunftsstaaten durch Rechtsverordnung und Abschaffung des anwaltlichen Vertreters bei Abschiebungshaft und Ausreisegewahrsam*, available at <https://www.institut-fuer-menschenrechte.de/publikationen/detail/zum-entwurf-eines-gesetzes-zur-bestimmung-sicherer-herkunftsstaaten-durch-rechtsverordnung-und-abschaffung-des-anwaltlichen-vertreter-bei-abschiebungshaft-und-ausreisegewahrsam>. At present, an *Organstreit* proceeding is pending before the Federal Constitutional Court (see H. Bourenane, *Exekutive Selbstermächtigung: Wieso die Einstufung der sicheren Herkunftsstaaten durch Rechtsverordnung gegen Art. 16a GG verstößt*, in *VerfBlog*, 2026/3/30, <https://verfassungsblog.de/exekutive-selbstermaechtigung/>).

⁶⁵ See on the BVerfG's website: *Verfassungsbeschwerde unmittelbar gegen das Unterlassen der Bundesrepublik Deutschland, ein umfassendes gesetzliches Schutzkonzept für den Erhalt der Biodiversität zu schaffen, soweit dies zum Schutz von Freiheit, Leben, Gesundheit sowie zur Erhaltung der natürlichen Lebensgrundlagen auch für künftige Generationen erforderlich ist. Betr.: Öffentliches Umweltrecht; Natur und Landschaftsschutzrecht (Erhaltung der Biodiversität). Art. 2 Abs. 2 Satz 1; 14 Abs. 1 GG. Berichterstatter: BVR Prof. Dr. Eifert*, available at https://www.bundesverfassungsgericht.de/DE/Aktuelles/AusgewaehlteNeueingaenge/vs_2024/_documents/november-2024.html.

⁶⁶ *Biodiversity, Conservation and Human Rights*: available at <https://www.institut-fuer-menschenrechte.de/en/publications/detail/biodiversity-conservation-and-human-rights>

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livelihoods in accordance with human rights”. Special emphasis is given to the impact that climate change and artificial intelligence will have on human rights.⁶⁷

Reports produced since 2016 pursuant to Article 2, paragraph 5, of the GIHR founding law are extensive and detailed. They demonstrate a high level of technical expertise and frequently reference the case law of the German Federal Constitutional Tribunal to indicate the concrete standards currently applicable in Germany that legislators must observe. For instance, one of them focuses in particular on the 2021 Federal Constitutional Tribunal decision on decarbonization⁶⁸. The reports also devote substantial attention to the *Verfassungsbeschwerde* concerning triage during the COVID-19 pandemic.⁶⁹

Significant attention is also devoted, for example in the 2023 Report, to safeguarding the right to assembly in the context of climate change protests⁷⁰. Moreover, positive reference is also made to the Federal Constitutional Tribunal’s decision declaring unconstitutional the law that imposed restrictions on the voting rights of persons with disabilities.⁷¹ This issue had received specific attention since the GIHR’s first Report⁷².

It should be noted that the GIHR’s focus on the Federal Constitutional Tribunal’s case law also stems from its involvement, at times prompted by the Court or undertaken autonomously, in submitting observations within constitutional complaints and constitutional law proceedings. In the triage ruling, already mentioned, for example, the Court explicitly referred to the GIHR’s position after consulting

⁶⁷ See <https://www.institut-fuer-menschenrechte.de/en/publications/detail/applying-a-human-rights-based-approach-to-the-challenges-of-our-time-strategy-2024-2028>; BVerfG, Beschluss des Ersten Senats vom 24. März 2021 - 1 BvR 2656/18 -, Rn. 1-270.

⁶⁸ Entwicklung der Menschenrechtssituation in Deutschland Juli 2021 – Juni 2022. Bericht an den Deutschen Bundestag gemäß § 2 Absatz 5 DIMRG, pp. 63 ff.

⁶⁹ The topic is explored in particular in Entwicklung der Menschenrechtssituation in Deutschland Juli 2020 – Juni 2021. Bericht an den Deutschen Bundestag gemäß § 2 Absatz 5 DIMRG, pp. 64 ff. and subsequently, in relation to that decision, in Entwicklung der Menschenrechtssituation in Deutschland Juli 2021 – Juni 2022. Bericht an den Deutschen Bundestag gemäß § 2 Absatz 5 DIMRG, pp. 89 ff. See the decision: BVerfG, Beschluss des Ersten Senats vom 16. Dezember 2021 - 1 BvR 1541/20, Rn. 1-131. Most recently, following that decision, the Court declared the legislative framework adopted in this field unconstitutional. In those proceedings, the GIHR submitted its written observations; see BVerfG, Beschluss des Ersten Senats vom 23. September 2025 - 1 BvR 2284/23, Rn. 1-141, Rn. 29. The decision was grounded in particular in the constitutional allocation of legislative competences.

⁷⁰ Entwicklung der Menschenrechtssituation in Deutschland Juli 2022 – Juni 2023. Bericht an den Deutschen Bundestag gemäß § 2 Absatz 5 DIMRG, pp. 83 ff.

⁷¹ Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 29. Januar 2019 - 2 BvC 62/14, Rn. 1-142; see moreover, Urteil des Zweiten Senats vom 15. April 2019, Az. 2 BvQ 22/19, Rn. 1-53.

⁷² Entwicklung der Menschenrechtssituation in Deutschland Januar 2015 – Juni 2016. Bericht an den Deutschen Bundestag gemäß § 2 Absatz 5 DIMRG, pp. 114 ff.

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multiple third parties.⁷³ Moreover, the GIHR's stance on the unconstitutionality of the rule providing for the automatic invalidity of marriages involving minors contracted abroad – emphasizing the protection of the rights of those involved and the need to consider individual circumstances – was also detailed and ultimately reflected in the Court's reasoning.⁷⁴ The GIHR also submitted an opinion on voting rights for persons with disabilities upon the Court's request,⁷⁵ which the Court extensively referenced.⁷⁶ Moreover, a significant acknowledgment of the GIHR's work was made in the ruling concerning the recognition of the so-called third gender in cases of intersexuality.⁷⁷ Its involvement seems likewise notable on issues concerning compulsory medical treatment⁷⁸ and parental authority related to the right to education, even though the GIHR's initiatives are not explicitly mentioned or are only briefly cited.⁷⁹

Finally, a concluding remark is in order. It has been noted that for “research-oriented” bodies “reports and documentation feature centrally in the institution's mandate,” with documentation often being specialized and an opportunity to examine issues in depth. However, a certain ambivalence has been observed: while institutions without complaint mechanisms may use research to remain “informed of the situation on the ground,” critics might argue that research documents abuses in a top-down manner, detached from street-level realities.⁸⁰ Nevertheless, even if this critique has some force in the abstract, it fits the German case only partially. The GIHR's technical expertise and its capacity to intervene before the Federal Constitutional Court enable it to influence actors involved in the ongoing constitutionalization of the legal order and, more generally, the constitutional debate, by promoting interpretations more open to the supranational dimension.

⁷³ BVerfG, Beschluss des Ersten Senats vom 16. Dezember 2021 - 1 BvR 1541/20, Rn. 1-131, Rn. 62 ff.

⁷⁴ BVerfG, Beschluss des Ersten Senats vom 1. Februar 2023 - 1 BvL 7/18 -, Rn. 1-194, Rn. 83.

⁷⁵ Zu den Wahlrechtsausschlüssen nach dem Bundeswahlgesetz (BWahlG) im Wahlprüfbeschwerdeverfahren (2 BvC 62/14). See, <https://www.institut-fuer-menschenrechte.de/publikationen/detail/zu-den-wahlrechtsausschluesen-nach-dem-bundeswahlgesetz-bwahlg-im-wahlpruefbeschwerdeverfahren-2-bvc-6214>.

⁷⁶ BVerfG, Beschluss des Zweiten Senats vom 29. Januar 2019 - 2 BvC 62/14, Rn. 1-142, Rn. 19 ff.

⁷⁷ BVerfG, Beschluss des Ersten Senats vom 10. Oktober 2017 - 1 BvR 2019/16, Rn. 1-69, Rn. 22. See, H. Bielefeldt, M. Krajewski, M. Krennerich, B. Rudolf, *Deutsches Institut für Menschenrechte (Germany)*, cit., p. 257.

⁷⁸ Stellungnahme an das Bundesverfassungsgericht im Rahmen des Verfahrens 1 BvL 1/24.

⁷⁹ An das Bundesverfassungsgericht im Rahmen der Verfassungsbeschwerde 1 BvR 1525/20 Amicus-Curiae-Stellungnahme eingereicht am 26. August 2021.

⁸⁰ S. Cardenas, *Chains of Justice. The Global Rise of State Institutions for Human Rights*, cit., pp. 332-333.

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In light of the foregoing, it becomes clear why, despite repeated calls, the GIHR has not been granted quasi-judicial functions. Above all, this exclusion is attributable not only to the deep-seated conviction regarding the privileged role that must be reserved for specialized jurisdictions in this respect, but also to the inherent difficulties of entrusting a fundamentally public power – such as the power to adjudicate disputes between two or more parties – to an institution that, despite its independence, is legally characterized by a private-associative nature.

This, however, does not diminish the authority of the GIHR or its capacity to exert influence in the public sphere precisely because of the limitations of its specific mandate. As it has rightly been noted, the Institute has played both a reactive and a proactive role, particularly in public debates on whether to accede to certain international treaties.⁸¹ An analysis of the GIHR's activities partly confirms the view that NHRIs can serve as advisory counterparts to constitutional courts. More generally, the GIHR can engage directly in the public arena connecting institutions – starting with the *Bundestag* and the *Bundesverfassungsgericht* – to society, involving various associative actors and non-governmental institutions, as well as multiple international stakeholders. Although its principal objective remains the promotion of greater awareness regarding the standards of protection imposed by Germany's adherence to international treaties, its human rights education work is too substantial to be dismissed as merely formal or ineffective. It is therefore possible to argue that the GIHR exemplifies a functional model of NHRI capable of shaping constitutional interpretation despite the absence of pure adjudicatory powers. This feature is particularly significant, as the Institute may make a decisive indirect contribution to the constitutionalization of the legal order.

The GIHR can intervene at all levels, helping to constitutionalize the legal order and to ensure that this constitutionalization aligns with Germany's international commitments. The Institute plays a distinctive role because it can engage across the entire process: from political debate to judicial implementation, to sustained interaction with societal actors. In doing so, the GIHR bridges different levels of governance with a degree of manoeuvrability rarely found in other actors. It has therefore been rightly argued that “[w]hat makes the Institute's approach uniquely valuable [...] is its record of engaging with a wide range of governmental and nongovernmental participants for policy-oriented discussions that are sustained in follow-up meetings”.⁸²

The ultimate aim is to foster, at all levels, a broad and practical awareness of the need to guarantee a substantive level of rights. This is achieved primarily through engagement with institutions, but also by educating citizens in the exercise of

⁸¹ J.A. Mertus, *Straddling Checkpoint Charlie: The German Human Rights Institute*, cit., pp. 123 ff.

⁸² J.A. Mertus, *Straddling Checkpoint Charlie: The German Human Rights Institute*, cit., p. 124.

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fundamental rights and strengthening an informed debate in the public sphere. In this context, it is unsurprising that the GIHR's technical capacity to submit interventions before courts – even upon direct invitation – represents a decisive asset. Equally important is its participation in an extensive international network of supranational human rights organizations, as well as its sensitivity to grassroots pressures that call for recognition of new rights or potential amendments to the Basic Law.⁸³

In this context, precisely due to the high degree of judicialization characterizing fundamental rights protection in Germany and the traditional doctrine of *Völkerrechtsfreundlichkeit*, the particular “bridge” role the GIHR seeks to embody may hold specific relevance when fundamental rights are applied by national judges: as the GIHR itself rightly emphasized since its first Report, its bridging action can significantly influence not only political guidance and legislative reforms, but also the judicial interpretation of federal norms. It was noted, in fact, that this “bridge” function is specifically grounded in the “international openness of the Basic Law, as expressed in the commitment to the inviolable and inalienable human rights (Article 1(2) of the Basic Law), and in the constitutional requirement to interpret the fundamental rights of the Basic Law in light of international human rights”.⁸⁴

A final, conclusive reflection concerns the thesis that, “as neither state representatives, nor NGOs, nor international organizations, [NHRIs] occupy a “4th space”“. If such a fourth space exists, it is described as “one which has been enhanced through the activities of NHRIs in a broad range of contexts, and which primarily exists due to the engagement of NHRIs in what were previously the existing key actors within the international human rights framework: international human rights mechanisms, NGOs, and the states themselves”⁸⁵“. In some sense, this function of

⁸³ Regarding how this function is performed by the GIHR, see also G. de Beco, *National Human Rights Institutions in Europe*, cit., p. 357, where, in comparison with the Danish Institute, it is stated that it “aims to communicate human rights information through research, analysis, information, education and documentation at both national and international levels. At the national level, the DIHR develops training programmes in collaboration with NGOs to improve human rights awareness. At the international level, the DIHR collaborates with regional organisations and partner countries to disseminate international human rights standards among target groups. The GIHR is developing similar promotional activities. The fact that some European NHRIs specialise in promotional activities, however, does not imply that their function is limited to research, nor that other European institutions focus solely on monitoring and advising. On the one hand, research conducted to communicate human rights information does not, with regard to the DIHR, exclude monitoring and advising state authorities on human rights issues. On the contrary, large-scale research undertaken by the DIHR serves as a basis for legislative and practical changes in Denmark. Moreover, there is a clear connection between the activities of monitoring and advising and those of promoting human rights, since the former contribute to the dissemination of human rights standards, in this case, to state (political) authorities.”

⁸⁴ See DIMR, *Entwicklung der Menschenrechtssituation in Deutschland Januar 2015 – Juni 2016 Bericht an den Deutschen Bundestag gemäß § 2 Absatz 5 DIMRG*, p. 4

⁸⁵ See K. Roberts, *The Role and Functioning of the International Coordinating Committee of National Human Rights Institutions in International Human Rights Bodies*, in J. Wouters - K. Meuwissen (eds.), *National Human Rights Institutions in Europe*, cit., p. 228. On the peculiar and promising position of NHRIs, see A.

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creating a “fourth space” aimed at “linking the international human rights system to the national level⁸⁶” appears consistent with the idea of a public sphere that continually contributes to shaping the concretization of the Basic Law. At this level, the actions of the GIHR are undoubtedly consistent with the effort to give effect to constitutional principles, implementing a version aligned with the requirements set by international law. This idea is confirmed by the fact that it is through constitutional interpretation carried out by an “open society of interpreters,⁸⁷” who are both aware and responsible, that the need to constitutionalize the legal order can be strengthened and effectively implemented.⁸⁸

In this process, the society itself remains the key reference, as the constitution should reflect, not just highlight, a shared sense of cohesion.⁸⁹ In this process – and NHRIs seem to confirm it – the opening of statehood appears to push the boundaries even further in terms of constitutional interpretation.

ABSTRACT: The article examines the German Institute for Human Rights (GIHR) as a National Human Rights Institution that, despite lacking quasi-judicial powers, plays a significant role in promoting human rights in Germany. It reconstructs the Institute’s development from the 2000 parliamentary motion to the 2015 founding law, focusing on its legal status, structure, mandate, and additional monitoring functions. The article argues that the GIHR influences constitutional interpretation and public debate through research, policy advice, cooperation with courts and institutions, and human rights education, thereby acting as an instrument of the open constitutional state.

Smith, *The Unique Position of National Human Rights Institutions: A Mixed Blessing*, in *Human Rights Quarterly*, 2006, pp. 904-946.

⁸⁶ K. Roberts, *The Role and Functioning of the International Coordinating Committee of National Human Rights Institutions in International Human Rights Bodies*, cit., p. 228.

⁸⁷ P. Häberle, *Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und „prozessualen“ Verfassungsinterpretation*, in *JZ*, 1975, pp. 297-305.

⁸⁸ P. Häberle, *Zeit und Verfassung. Prolegomena zu einem „zeit-gerechten“ Verfassungsverständnis*, in *Zeitschrift für Politik*, 1974, pp. 111-137.

⁸⁹ See P. Häberle, *Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und „prozessualen“ Verfassungsinterpretation*, cit., p. 301: “Verfassung ist in diesem Sinne Spiegel der Öffentlichkeit und Wirklichkeit. Sie ist aber nicht nur Spiegel, sie ist auch Lichtquelle, wenn dieser etwas bildhafte Vergleich erlaubt ist”. Regarding the significance of human rights in the process of defining the constitutional state in Europe, where the close link between society and rights is highlighted, see also the considerations of M. Rask Madsen, *International Human Rights and the Transformation of European Society: from “Free Europe” to the Europe of Human Rights*, in M. Rask Madsen - C. Thornhill (eds.), *Law and the Formation of Modern Europe*, Cambridge, 2014, pp. 245-274.

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*Functions and Responsibilities of the German Institute for Human Rights:
Promoting Human Rights Education in the Public Sphere*

KEYWORDS: German Institute for Human Rights – National Human Rights Institutions – human rights education – constitutional interpretation – open constitutional state.

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Enhancing fundamental rights in the public sphere: the *Defensor del Pueblo* in the Spanish constitutional experience*

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1. Introduction

The establishment and evolution of the *Defensor del Pueblo* in the Spanish constitutional experience provide an insightful vantage point from which to examine evolving trends concerning National Human Rights Institutions (NHRIs) in contemporary constitutional democracies, also in relation with the persistent lack of such an institution in Italy¹. This holds true, first, with respect to the relationship between NHRIs and ombudsman institutions. Secondly, and equally significantly, it brings into focus the constitutional relevance of NHRIs.

The Spanish *Defensor del Pueblo* is historically and legally linked to the traditional ombudsman institutions; nevertheless, its core constitutional function – protecting fundamental rights – qualifies it as one of the main actors in the promotion and protection of constitutional rule of law and it has naturally led to its identification as an NHRI.

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¹ G. Repetto, *National Human Rights Institutions e l'urgenza italiana*, in Id. (ed.), *Una National Human Rights Institution per l'Italia: problemi e prospettive*, Torino, 2025, p. 1 ff., p.11 ff. On the Paris Principles, see S. López Escarcena, *Fostering the Rule of Law. The Paris Principles on NHRIs*, in J. Wouters - M. Nuñez Poblete - S. López Escarcena (eds.), *National Human Rights Institutions in Europe and Latin America International and Comparative Perspectives*, Cambridge, 2024, p. 11 ff.; C. Sidoti, *National Human Rights Institutions and the International Human Rights System*, in R. Goodman - T. Pegram (a cura di), *Human Rights, State Compliance, and Social Change. Assessing National Human Rights Institutions*, Cambridge, 2012, p. 93 ff.; E. Santiemma, *Il fondamento giuridico internazionale delle Istituzioni Nazionali per la promozione e la protezione dei diritti umani*, in E. Santiemma - B. Terenzi - M. Gressi, *L'istituzione nazionale indipendente per la promozione e protezione dei diritti umani italiana: cos'è e perché serve*, Roma, 2020, p. 251 ff. and Ead., *Lo sviluppo delle Istituzioni nazionali indipendenti sui diritti umani a livello internazionale*, *ibid.*, p. 297 ff.

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In other words, the *Defensor del Pueblo*'s role as an NHRI is structurally linked to its functions as a human rights ombudsman within the domestic legal system. For the same reason, analysing the origins, functions and position of the *Defensor del Pueblo* in the Spanish constitutional experience is particularly useful in shedding light on the potential of NHRIs that also perform ombudsman functions.

In this vein, alongside with the Portuguese *Provedor de Justiça* the Spanish *Defensor del Pueblo* – having been entitled by Article 54 of the Constitution as the parliamentary commissioner to defend the rights protected by the Constitution – has established an archetype of the *human rights ombudsman*.

Scholarly discourse has traditionally emphasized the ombudsman's function in safeguarding legality in administrative action, conceptualizing it primarily as a parliamentary mechanism for overseeing executive power. In this context, the proliferation of ombudsman institutions has become “inextricably linked to the principles of democracy and the rule of law”².

This is undoubtedly true of the ombudsman institution in general, but also – more specifically – of those ombudsmen who, beginning with the democratic transitions in Southern Europe in the 1970s, decisively developed and elevated a concurrent function of protecting and promoting fundamental rights, thereby giving rise to the model of the *human rights ombudsman*. In other words, “by combining the basic concepts of both the rule of law and human rights the figure of the ombudsman was lifted up to a new level”³. As the Spanish case exemplifies particularly well, the evolution of the ombudsman institution – traditionally aimed at guaranteeing the rule of law – shows an increasingly close connection to enforcing the constitutional rule of law, above all because of the incorporation of the mandate to protect and promote rights.

The circulation and reception of the ombudsman institution⁴ have thus grown richer: from a circulation confined within national experiences and focused on the enforcement of the rule of law, it has gradually included the international dimension and the need to give substance and effect to international and regional standards for the protection of human rights. It is within this process that the traditional ombudsman institutions and the establishment of NHRIs appear to have intertwined.

Thus, locating the human rights ombudsman within the dynamics of the constitutional state requires taking account of the openness of the constitutional state itself, in at least two senses: openness to comparative influences and openness to

² G. Kucsko-Stadlmayer, *The Legal Structures of Ombudsman-Institutions in Europe – Legal Comparative Analysis*, in Id. (ed), *European Ombudsman-Institutions. A comparative legal analysis regarding the multifaceted realisation of an idea*, Vienna, 2008, p. 1 ff.

³ G. Kucsko-Stadlmayer, *The Legal Structures of Ombudsman-Institutions in Europe*, cit., p. 2.

⁴ Recently, see E. Campelli, *L'ombudsman nel diritto comparato. Origine, esperienze, prospettive*, Milano, 2024.

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international and supranational legal experience, “across the multiple layers of the human rights system”⁵.

On this point, it should be noted that international standards are already integrated into the Spanish constitutional standard by virtue of Article 10.2 CE⁶; and the *Defensor del Pueblo* may enrich the benchmark for its assessments by extending the scope of the catalogue of fundamental rights to include “*el principio de dignidad de la persona y el Derecho internacional*”⁷.

In this vein, the *Defensor del Pueblo* has incorporated the growing imperative to enforce international and regional standards of human rights protection. Moreover, it has eventually been identified with the NHRI⁸.

Against this backdrop, the following sections focus on the constitutional position of the *Defensor del Pueblo*, its rights-protective and rights-promotive functions, and the specific implications of its access to constitutional justice.

2. *The constitutional position of the Defensor del Pueblo: a human rights ombudsman?*

As said, alongside the Portuguese *Provedor de Justiça*, the *Defensor del Pueblo* represents one of the earliest historical examples of the *human rights ombudsman* model. Notably, this institutional transformation was influenced by the specific historical and political circumstances that characterized the democratic transitions in both countries.

The political context of the democratic and constitutional transition has determined – and indeed oriented – the Spanish and Portuguese reception of the

⁵ K. Meuwissen, *European National Human Rights Institutions as multi-layered actors. Characteristics, challenges and opportunities*, in J. Wouters - M. Nuñez Poblete - S. López Escarcena (eds.), *National Human Rights Institutions*, cit., p. 28 ff., 29.

⁶ On this provision and its interpretation see A. Schillaci, *Diritti fondamentali e parametro di giudizio. Per una storia concettuale delle relazioni tra ordinamenti*, Napoli, 2012, p. 375 ff.; A. Saiz Arnaiz, *La apertura constitucional al derecho internacional y europeo de los derechos humanos. El art. 10.2 de la Constitución española*, Madrid, 1999.

⁷ G. Escobar Roca, *Interpretación y garantía de los derechos fundamentales por el Defensor del Pueblo (Análisis empírico, reconstrucción dogmática y propuesta del futuro)*, in *Teoría y realidad constitucional*, 26, 2010, p. 229 ff., p. 237.

⁸ According to S. Cardenas, *National Human Rights Institutions and State Compliance*, in R. Goodman - T. Pegram (eds.), *op. cit.*, p. 29 ff., 29, NHRIs can be described as a “bridge between international norms and local implementation”; J. Mertus, *Evaluating NHRIs. Considering Structure, Mandate, and Impact*, *ibid.*, p. 74, also observes that “it is the job of national human rights institutions (NHRIs) to connect the local with the international, making immediate and concrete what appeared previously to be far away and abstract”.

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ombudsman institution: in the two experiences, “the creation of the ombudsman was part of a broader democratic transition and new constitutions”⁹.

As La Pergola put it in one of the earliest analyses of the *Defensor del Pueblo*, its establishment confirms and somehow completes the framework of constitutional guarantees of fundamental rights in Spain¹⁰. And indeed, strengthening the guarantees of the Constitution and its legal force has been at the heart of the efforts of the *Cortes constituyentes* and has represented a key concern of the scholarship all through the Eighties and part of the Nineties¹¹. This provides another powerful insight for understanding the *Defensor*, its differences with the traditional institution of the ombudsman and – above all – its constitutional position. By strengthening the legal guarantee of the Constitution (that is, by implementing constitutional rule of law), the *Defensor del Pueblo* enforces democracy and has therefore contributed to supporting the legitimacy of the democratic transition.

In Spain, this explains both the choice to introduce the institution through a constitutional provision and its explicit functionalization to the protection of fundamental rights. Thus, the historical, constitutional and political context sheds light on specific functions of the *Defensor* – above all, the power to lodge an appeal of unconstitutionality.

Indeed, Article 54 of the Spanish Constitution¹² clearly indicates that the rationale of the *Defensor del Pueblo* is the protection of fundamental rights, within the broader framework of strengthening the constitutional rule of law. Thus, the *Defensor del Pueblo* is explicitly conceived as a rights-oriented ombudsman institution, rather than merely as a body addressing individual cases of maladministration. Accordingly, Spanish legal scholarship recognizes the institution as an additional mechanism for safeguarding fundamental rights, designed not only to remedy specific rights violations but also to enhance the broader accountability of institutional actors. The overall relationship between the *Defensor*, the other branches of the state, and the political process itself must be read in this broader perspective.

⁹ S. Cardenas, *Chains of Justice. The Global Rise of State Institutions for Human Rights*, Philadelphia, 2014, p. 82; C. Alza Barco, *The transposition of the ombudsman model to the human rights model domain: its role as a policy entrepreneur*, in M. Hertog - R. Kirkham (eds.), *The Ombudsman*, Cheltenham, 2018, p. 188 ff., 188 and L. C. Reif, *The Shifting Boundaries of NHRI Definition in the International System*, in R. Goodman - T. Pegram (eds.), *op. cit.*, p. 52 ff., 67.

¹⁰ See A. La Pergola, *Ombudsman y defensor del pueblo: Apuntes para una investigación comparada*, in *Revista de Estudios Políticos*, 7, 1979, p. 69 ff., p. 70.

¹¹ On this, see A. Schillaci, *Forza normativa della Costituzione, consenso e democrazia nella riflessione di Francisco Balaguer Callejón sulle fonti del diritto*, in A. D’Atena (a cura di), *Las Fuentes del Derecho, treinta años después*, Madrid, 2022.

¹² “An organic act shall regulate the institution of the Defender of the People (Defensor del Pueblo) as high commissioner of the Cortes Generales, appointed by them to defend the rights contained in this Part; for this purpose he or she may supervise the activity of the Administration and report thereon to the Cortes Generales” (Article 54 of the Spanish Constitution, official English translation).

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This, first, explains the intense link between the *Defensor* and the *Cortes*. Consistent with the tradition of the ombudsman institutions, the *Defensor* is put in a close relation with the Parliament. On the other hand – and innovatively – the traditional supervisory function is oriented not towards the generic examination of cases of maladministration but rather towards the defence of rights recognised by the Constitution. The organic act April 6th, 1981, no. 3 (*Ley orgánica del Defensor del Pueblo*, LODP) sets strong guarantees of independence of the *Defensor*, as the majority required for its appointment (three/fifths) is higher than the political majority¹³. Secondly, Article 6.1 LODP clearly reiterates that the *Defensor* acts without explicit mandates, thus establishing an “*independencia de criterio prácticamente ilimitada en el marco de sus facultades*”¹⁴. In line with what happens with ombudsmen¹⁵, even for the *Defensor del Pueblo*, the need for a close relationship with Parliament does not undermine the equally necessary independence of the body (not only from the executive but also) from the legislature. The *Defensor* therefore engages in a complex and dynamic relation with the political process. On the one hand, it has a strong power to supervise the activity of the executive power; on the other hand, it acts in cooperation with the *Cortes* but neither the *Cortes* – nor any other authority – shall provide the *Defensor* with an imperative mandate.

For this reason, following the approval of the Constitution, La Pergola observed – albeit critically questioning some of the potential developments of the rules implementing Article 54 EC – that the *Defensor* constituted almost a sort of “*interpoder*”¹⁶ and that for this reason, it should have been avoided to attribute decision-making powers to it, instead emphasizing its persuasive function, in line with the tradition of the ombudsman¹⁷.

Along these lines, subsequent doctrine has therefore reconstructed the relationship between the *Defensor del Pueblo* and other constitutional bodies in terms of persuasion¹⁸ and mediation, highlighting the absence of decisive¹⁹ or coercive²⁰ powers.

¹³ It is confirmed, for example, by the fixed term of office of the body, which is not dependent on the activities of the parliamentary body: see G. Kucsko Stadlmayer, *The Legal Structures of Ombudsman-Institutions in Europe*, cit., p. 14-15.

¹⁴ F. Fernández Segado, *El estatuto jurídico-constitucional del Defensor del Pueblo en España*, in *Anuario de derechos humanos*, 2, 2001, p. 223 ff., p. 233.

¹⁵ G. Kucsko Stadlmayer, *The Legal Structures of Ombudsman-Institutions in Europe*, cit., p. 10-11.

¹⁶ A. La Pergola, *Ombudsman y defensor del pueblo*, cit., p. 91.

¹⁷ *Ibidem*, p. 79.

¹⁸ Among those who describe the Ombudsman in terms of a *persuasive* institution, see – in addition to C. Alza Barco, *The transposition of the ombudsman model*, cit., p. 99 – also J. L. Pérez Francesch, *El Defensor del Pueblo en España: balance de veinticinco años de experiencia constitucional*, in *Revista de Estudios Políticos*, 128, 2005, p. 59 ff., 60.

¹⁹ Oscar Alzaga Villaamil defines it as a “*magistratura de opinión*”, not “*resolutiva*” (*Derecho político español según la Constitución de 1978*, with I. Álvarez Rodríguez, Madrid, 2021, vol. II, p. 263).

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Far from limiting the relevance of the *Defensor's* role, these reconstructions help to frame the complexity of its relationship with the political process: through persuasion and mediation, in fact, the *Defensor* can foster the connection between different institutional bodies, as empowering institutional actors by raising awareness of the need to protect rights. Finally, it can promote the development of a widespread culture of rights, thereby strengthening the very foundations of democratic coexistence.

This has led to classify the *Defensor* as a constitutional body, auxiliary to the *Cortes*²¹ and with supervisory functions²². However, the auxiliary status must be reconciled with the *Defensor's* autonomy with respect to political dynamics (majority/minority)²³; as it has been correctly observed, the institution is entitled with “*función estatal sostenida por el Parlamento, pero no instrumentalizada por el mismo*” (a state function supported by Parliament, but not instrumentalised by it) as demonstrated, ultimately, by the explicit exclusion of any binding directive by the *Cortes*²⁴.

However, the definitional difficulties can be overcome by smoothing the relevance of the relationship with the traditional model of the ombudsman and, instead, emphasizing the function of promoting and protecting fundamental rights. From this perspective, the *Defensor del Pueblo* emerges as an institution for the guarantee of fundamental rights, supplementing ordinary legal and constitutional guarantees. It grants specific oversight in relation to potential rights violations and fosters, through that, the accountability of institutional actors²⁵. In other words, it results in an “*órgano de relevancia constitucional*”²⁶ and “*a purely democratic institution*”²⁷; an actor that – while remaining focused on rights protection – connects different institutional spheres as it grants control and promotes rights, thereby enhancing the quality of democracy.

²⁰ L. Rebollo Delgado, *La institución del Ombudsman en España*, Madrid, 2013, p. 122, defines the *Defensor* as a “*poder mediador, no coactivo*”.

²¹ According to J. Varela Suanzes Carpegna, *La naturaleza jurídica del Defensor del Pueblo*, in *Revista española de Derecho constitucional*, 8, 1983, p. 63 ff., p. 67, the one between the *Defensor* and the *Cortes* is a non-equal fiduciary relationship.

²² On the supervisory functions see P. Carballo Armas, *El Defensor del Pueblo. El Ombudsman en España y en el derecho comparado*, Madrid, 2003, p. 139 ff., p. 142-143 and p. 164.

²³ On the discussion regarding this issue, see L. Rebollo Delgado, *op. cit.*, p. 62 ff.

²⁴ P. Carballo Armas, *op. cit.*, pp. 143-144.

²⁵ F. L. De Andrés Alonso, *op. cit.*, p. 75 ff.

²⁶ F. Fernández Segado, *El estatuto jurídico-constitucional*, cit., p. 232.

²⁷ C. Alza Barco, *The transposition of the ombudsman model to the human rights model domain*, cit., p. 188 ff., p. 194.

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*Enhancing fundamental rights in the public sphere:
the Defensor del Pueblo in the Spanish constitutional experience**3. Enhancing fundamental rights' protection in the public sphere: the protective and promotive nature of the Defensor del Pueblo*

In the case of the *Defensor del Pueblo*, as said, the function of control on the administration – typical of the ombudsman – is aimed at the protection of fundamental rights (and not just at the guarantee of the rule of law). Thus, differently from the traditional ombudsman institution, the core mission of the *Defensor* is that of promoting and protecting fundamental rights.

The issue traces back to the *travaux préparatoires*, as the first draft of Article 54 clearly separated the two fields of action while in the final text they merge²⁸. This has sparked lively debate in legal theory, particularly regarding the autonomy of the function of oversight of the administration, as opposed to the function of defending rights²⁹.

Part of the scholarship has stressed – also considering the practice followed by the institution and giving weight to Article 9.1 LODP³⁰ – that the *Defensor* has progressively dealt with maladministration beyond the borders of rights protection³¹. Also, the text of Article 9.1 has been taken as evidence that oversight (*fiscalización*) of the administration constitutes an autonomous and specific function conferred by the LODP in addition to the Constitution-conferred function of protecting fundamental rights³². The issue is not minor, since it may affect the very classification of the *Defensor* within comparative ombudsman typologies, including or excluding it from the human rights ombudsman model.

Anyway, comparative observation shows that in many cases the legality and maladministration control traditionally attributed to ombudsmen already includes the standard of respect for fundamental rights, to the extent that it concerns the normative framework of administrative action³³. It is somehow confirmed by the

²⁸ F. Fernández Segado, *El estatuto jurídico-constitucional*, cit., p. 227 ff., F. L. De Andrés Alonso, *op. cit.*, p. 63 ff.; M. Díaz Crego, *Defensor del Pueblo y justicia constitucional: entre la declaración de intenciones y el exceso competencial*, in *Teoría y realidad constitucional*, 26, 2010, p. 307 ff., p. 317 ff.

²⁹ Among the earliest commentators, A. Pérez Calvo, *Rasgos esenciales del Defensor del Pueblo según la Constitución y la ley orgánica 3/1981 de 6 de abril*, in *Revista de Derecho Político*, 11, 1981, p. 67 ff., p. 71 explicitly recognized that the Spanish *Defensor* departs from the traditional profile of the ombudsman precisely because of the centrality of the rights-protection function, which informs the remaining traditional functions.

³⁰ See Art. 9.1 LODP: “El Defensor del Pueblo podrá iniciar y proseguir de oficio o a petición de parte, cualquier investigación conducente al esclarecimiento de los actos y resoluciones de la Administración pública y sus agentes, en relación con los ciudadanos, a la luz de lo dispuesto en el artículo ciento tres, uno, de la Constitución, y el respeto debido a los Derechos proclamados en su Título primero”.

³¹ A. Jiménez Rodríguez, *Algunas consideraciones sobre el Defensor del Pueblo*, in E. Pajares Montolío - M. Salvador Crespo - L. Herrera Díaz-Aguado (eds.), *Una nueva gobernanza para el siglo XXI*, Madrid, 2024, p. 115 ff., p. 117.

³² See P. Carballo Armas, *op. cit.*, p. 148-149.

³³ See G. Kucsko Stadlmayer, *The Legal Structures of Ombudsman-Institutions in Europe*, cit., p. 36 ff.

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very drafting of article 9.1 LODP, that reiterates the parametric relevance – also in the oversight of the administration – of the “due respect” owed to the rights in Title I of the Constitution; and, ultimately, by Article 54 CE, in which the oversight of the administration is functionally subordinated to the protection of rights, as is particularly evident from the phrase “*a cuyo efecto*”.

Thus, Article 9.1 LODP must be interpreted harmoniously with Article 54. This does not mean that the oversight of the administration lacks an autonomous (and prominent, as practice shows) role in the *Defensor’s* activity, but that it must be framed teleologically within the protection of fundamental rights. This, after all, is consistent with Article 103.1 CE³⁴ and, more generally, with the need to situate the traditional forms of the administrative state – including legality and good-administration controls – within the broader contours of the constitutional state, allowing the Constitution (and fundamental rights) to ‘breathe’ even in the administrative activity³⁵.

La Pergola also noted this, emphasising that the transformation of the ombudsman institutions is strongly connected to the shift from a traditional concept of the rule of law – formally understood as the mere subordination of administrative acts to the law – to a broader concept that includes the political demands of freedom and justice “*que encuentran satisfacción adecuada en una fase más moderna y progresista de la experiencia liberal, en la que [...] el Estado de Derecho se transforma claramente en el Welfare State, dirigido a garantizar, además del imperio del derecho, la igualdad social de los particulares*”³⁶.

Consistent with its nature as a human rights ombudsman, the *Defensor del Pueblo* has thus progressively moved beyond the traditional function of handling and mediating individual complaints, evolving instead toward a role focused on identifying systemic vulnerabilities and proposing policy recommendations.

This is made clear by the different competences of the *Defensor*, that gather protection – through the exam of the *quejas* (complaints) and the lodging of appeals of unconstitutionality – and promotion of fundamental rights – through the *informes*, *recomendaciones*, *sugerencias*, *recordatorios de deberes legales*.

The *Defensor del Pueblo* – as a human rights ombudsman and, therefore, an NHRI – is thus not only the recipient of complaints, responsible for managing and mediating individual cases, but also has the task of identifying, based on these cases,

³⁴ Article 103.1 of the Spanish Constitution states that “The Public Administration shall serve the general interest in a spirit of objectivity and shall act in accordance with the principles of efficiency, hierarchy, decentralization, deconcentration and coordination, and in full subordination to the law” (English official translation).

³⁵ According to F. Fernández Segado, *El estatuto jurídico-constitucional*, cit., p. 253 ff., p. 254, the practice of the institution follows a “*visión funcional monista de acuerdo con la cual, la única función que el Defensor está llamado a cumplir es la defensa de los derechos, siendo su actividad supervisora de la Administración un instrumento al servicio de su función primigenia*”. Accordingly, J. Varela Suanzes Carpegna, *La naturaleza jurídica del Defensor del Pueblo*, cit., p. 79 and L. Rebollo Delgado, *op. cit.*, p. 99.

³⁶ A. La Pergola, *Ombudsman y defensor del pueblo*, cit., p. 76.

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the weaknesses in the system and proposing *policy-making* guidelines, gradually shifting from a complaint-based to a policy-oriented approach³⁷. Consistent with that, it acts for the promotion of a culture of fundamental rights nudging on the administration and raising awareness.

Particularly, in the final acts of *queja* proceedings, the *Defensor* suggests to the subject under investigation the opportunity for a regulatory change aimed at overcoming the detected violation of the fundamental right invoked. Through this approach, moreover, it achieves “*la garantía objetiva o colectiva de los derechos, yendo así más allá de la función típica de los tribunales, normalmente circunscrita (más por tradición que por naturaleza de la función judicial) a la tutela de posiciones jurídicas individuales*”³⁸.

The protective and promotive nature of the *Defensor* is consistent with its nature of NHRI. As highlighted by the literature, indeed, the NHRIs “combine a reactive and a proactive approach”³⁹ through the interaction of “regulative” and “constitutive” functions⁴⁰. The latter are particularly “intended to transform the identity of state or societal actors”⁴¹. Despite the absence of binding powers, therefore, the actions of NHRIs can have an impact on the accountability of institutional actors.⁴² Their role is also affected by the state of guarantees in each context, as pointed out by those who highlight the importance of NHRIs – in the context of the rise of authoritarian populism in Europe (and beyond) – in countering the intolerance of authoritarian populist forces towards constitutional guarantees⁴³. In this vein, NHRIs – especially when considering their networked operations – can act as watchdogs in relation to the degeneration of democracy: in the European context, this appears as a particularly urgent and sensitive issue⁴⁴.

Accordingly, as the most recent scholarship observes⁴⁵, the nexus between the *Defensor’s* role and the safeguarding of processes of integration in the constitutional state concerns not only traditional instruments for the protection of rights but also wider dynamics within the public sphere⁴⁶.

³⁷ C. Alza Barco, *The transposition of the ombudsman model*, cit., p. 189, p. 204 ff.

³⁸ G. Escobar Roca, *Interpretación y garantía de los derechos fundamentales*, cit., p. 248.

³⁹ K. Meuwissen, *European National Human Rights Institutions as multi-layered actors*, cit., p. 33.

⁴⁰ S. Cardenas, *Chains of Justice*, cit., p. 10.

⁴¹ *Ibidem*.

⁴² S. Cardenas, *Chains of Justice*, cit., p. 13.

⁴³ K. Meuwissen, *European National Human Rights Institutions as multi-layered actors*, cit., p. 34-35; J. Jařab, *Perspectives on the need for national human rights institution in Europe and the world*, in J. Wouters – K. Meuwissen (eds.), *National human rights institutions in Europe: comparative, European and international perspectives*, Cambridge, 2013, p. 287 ff., p. 291-292.

⁴⁴ K. Meuwissen, *European National Human Rights Institutions as multi-layered actors*, cit., p. 47-48, 50; G. Repetto, *National Human Rights Institutions*, cit.

⁴⁵ J.J. Fernández Rodríguez, *Defensor del Pueblo (Spain)*, in J. Wouters - M. Nuñez Poblete - S. López Escarcena (eds.), *National Human Rights Institutions*, cit., p. 225 ff., p. 226.

⁴⁶ About the role of civil society see B. Terenzi, *Il ruolo della società civile*, in C. Hein (ed.), *La protezione dei diritti umani. Le istituzioni nazionali indipendenti a confronto*, Roma, 2021, p. 43 ff.

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Indeed, it has been noted that the *Defensor* “has, at times, been highly influential in shaping public opinion”, which is consistent with the role – ascribed to ombudsmen and NHRIs – of promoting a culture of rights through awareness-raising. From this broader perspective, the *Defensor* (and, more generally, NHRIs and ombudsmen) may initiate “strategies that increase the democratic quality of the public system”⁴⁷. In the crisis of constitutional democracy, in other words, ombudsmen and NHRIs enhance their role as counter-powers and critical voices⁴⁸ and thus their constitutive connection to the quality of democracy.

In this domain, the *Defensor*’s persuasive capacities are fundamental. The *Defensor*’s contribution to building a culture of rights and transforming public opinion cannot be separated from the communicative and dialogic dynamics typical of a democratic public sphere⁴⁹; here too the *Defensor*’s *auctoritas* – more than *potestas* – manifests itself⁵⁰.

At the same time, the orientations on the protection of specific rights formulated by the *Defensor* in the course of its investigative activity (*recomendaciones, sugerencias, recordatorios de deberes legales*), together with the methods and arguments used in articulating its positions, can enrich the traditional doctrinal approach to rights (mediated above all, including in scholarly elaboration, by the case-law of the Constitutional Tribunal). In other words, “*la doctrina del Defensor del Pueblo ofrece una perspectiva de la Constitución más amplia, por la extensión de sus ámbitos de su actuación, y menos legalista, por las formas de su argumentación*”⁵¹.

In this sense, in its dynamic relationship with citizens who address the institution and with the scholarly community, the *Defensor* appears to operate as an actor within the “open society of constitutional interpreters”⁵², demonstrating an ability to connect more effectively the civic and doctrinal definitions of rights⁵³. From this perspective, the study of the *Defensor del Pueblo*, its functions, and its orientations in matters of fundamental rights assumes particular significance also at a strictly

⁴⁷ *Ibidem*.

⁴⁸ Including in a “counter-democratic” sense, as in P. Rosanvallon, *Controdemocrazia. La politica nell’era della sfiducia*, Roma, 2017.

⁴⁹ See P. Ridola, *Costituzione stato e società nelle democrazie pluralistiche. Lo “spazio pubblico”*, in Id., *Stato e Costituzione in Germania*, Torino, 2021, p. 123 ff.

⁵⁰ See. L. Rebollo Delgado, *La institución del Ombudsman en España*, Madrid, 2013, p. 48; G. Escobar Roca, *Interpretación y garantía de los derechos fundamentales*, cit., 256.

⁵¹ G. Escobar Roca, *Interpretación y garantía de los derechos fundamentales*, cit., p. 230.

⁵² This concept was elaborated by Peter Häberle, starting in Id., *Verfassungsinterpretation als öffentlicher Prozeß*, in Id., *Verfassung als öffentlicher Prozess: Materialien zu einer Verfassungstheorie der offenen Gesellschaft*, Berlin, 1978, p. 121 ff.

⁵³ G. Escobar Roca, *Interpretación y garantía de los derechos fundamentales*, cit., p. 251.

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theoretical and methodological level, enriching the pathways for scientific understanding of fundamental-rights law⁵⁴.

Promoting knowledge – by a body that, indeed, “has socially recognized knowledge or expertise in this area, rather than legal power in itself”⁵⁵ – is thus equally crucial, both with respect to dynamics in the public sphere and to improving the quality of the actions of other public authorities, beginning with the legislature. The policy-centred approach of NHRIs – in place of an exclusively complaint-centred approach – thus proves fundamental for enriching the stock of knowledge available not only in the public sphere (in terms of building a culture of rights) but also to the legislature: knowledge that is – in complex societies and in the face of increasingly intricate legislative challenges – a precious asset for deepening the legitimacy of legislatures and of the political process itself. An analogous utility could attach to the role of NHRIs in *ex ante* human-rights-centred impact assessment of legislation⁵⁶.

In this vein, the *Defensor* acts in the public sphere as a bridge between society and institutions: and, as already mentioned, acting as a bridge – between the national and supranational levels, but also between society and institutions – is a function widely recognised for NHRIs.

4. *Defensor del Pueblo, Constitutional Tribunal and political process*

This bridging function is visible also when one turns to the relationship between the *Defensor del Pueblo*, constitutional adjudication, and the legislative process.

Attention must be devoted, then, to the authority of the *Defensor del Pueblo* to lodge an appeal of unconstitutionality (*recurso de inconstitucionalidad*), alongside direct constitutional appeals for fundamental rights protection (*recurso de amparo*). These

⁵⁴ As highlighted by G. Escobar Roca, p. 232: “*esta doctrina, la dogmática podría aprender a salir de sí misma, a construirse (la ciencia progresa día a día) de forma más democrática y socialmente útil, teniendo a la vista las aspiraciones de los ciudadanos (si la dogmática no sirviera para solucionar los problemas reales de las personas reales, renunciaría a su principal cometido), y para conocer cuáles son éstas el Defensor del Pueblo puede ofrecer una imagen bastante fiel*”.

⁵⁵ J.J. Fernández Rodríguez, *Defensor del Pueblo (Spain)*, cit., p. 227.

⁵⁶ On this point, with reference to Italy and, in general, to the importance of providing parliamentary bodies with adequate knowledge in order to improve the substantive quality of legislation, see most recently Senate of the Republic, *Critical aspects of legislative production and proposals for improving the quality of legislation* (document approved by the Legislation Committee on 11 June 2025, at the conclusion of the fact-finding investigation on the same subject), especially on pp. 28 ff. and 80 ff. With specific reference to NHRIs, it has been observed that they can play an important role in assessing the impact of legislation, based on a human rights-centred approach (on this point, see, for example, J. Wouters - K. Meuwissen - A.S. Barros, *The European Union and National Human Rights Institutions*, in J. Wouters - K. Meuwissen (eds.), *National human rights institutions in Europe*, cit., p. 187 ff., especially p. 194 ff.

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competences likewise point back to the centrality of the rights-protection function and help to frame the *Defensor del Pueblo* as an institution aimed at guaranteeing the Constitution rather than merely mediating the relationship between legality and fundamental rights.

The *Defensor* shares this competence – among Western European states – with the Portuguese *Provedor de Justiça* and the Austrian *Volksanwaltschaft* (which, however, may challenge only regulatory acts). Standing to bring the two types of actions falls within a broader understanding of the oversight functions, related to the soundness of the constitutional architecture of rights.

Of the two types of competences, that relating to *recursos de amparo* has had little practical application: throughout its history, only ten have been filed, concentrated in the first decade⁵⁷. This is due to the very nature of *amparo*, which is characterized by broad direct standing for the individuals concerned and strict admissibility requirements under the LOTC, such as the exhaustion of ordinary remedies and the necessary special constitutional relevance of the appeal.

For this reason, the *Defensor* has interpreted this competence in a subsidiary sense⁵⁸, reserving the right to resort to *amparo* only when the individual is unable to do so⁵⁹ or in exceptional cases of constitutional significance: violations of fundamental rights with a collective impact⁶⁰ or new situations aimed at guiding constitutional interpretation⁶¹. Although rarely used⁶², the way in which the *Defensor* has construed the possibility to lodge an *amparo* helps framing its role in the systemic protection of rights, enhancing wider interpretative processes in cooperation with the Constitutional Tribunal.

The practice developed with regard to appeals of unconstitutionality is more complex: during the first forty years of its history, the *Defensor del Pueblo* lodged 34 appeals, of which 26 resulted in a ruling (in particular, in 14 cases the appeal was

⁵⁷ This is reconstructed by M. Díaz Crego, *Defensor del Pueblo y justicia constitucional*, cit., p. 335 ff. See the appeals decided by judgment no. 178/1987, which rules on seven joined appeals brought by the *Defensor* against seven decisions of the labour court of Huelva concerning trade union elections; judgment no. 209/1987, concerning unemployment benefits; and judgment no. 132/1992, concerning the right of defence.

⁵⁸ See, for example, the statement in the *Informe* (Report) to Parliament on activities carried out in 1983, p. 21 (all the documents issued by the *Defensor* are published on www.defensordelpueblo.es).

⁵⁹ These are the so-called cases of *indefensión*. On this point, the case of the appeal for *amparo* that gave rise to *Auto* no. 94/1984 of the Constitutional Tribunal is interesting. As reported by I. Torres Muro, *Los recursos del Defensor del Pueblo ante el tribunal constitucional. Una revisión*, in *Teoría y realidad constitucional*, 26, 2010, p. 95 ff., p. 112, in that case, the *Defensor* withdrew the appeal as soon as the appeal lodged by the persons concerned was declared admissible.

⁶⁰ Again, from *Informe* 1983, p. 21.

⁶¹ As reported, for example, in the *Report* to Parliament on activities carried out in 2021, Annex D.5, p. 246.

⁶² This has led some authors – such as I. Torres Muro, *Los recursos del Defensor del Pueblo*, cit. – to highlight the uselessness of this power (p. 124).

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upheld in whole or in part; in 11 cases it was rejected and in one case it was declared extinct due to the repeal of the contested provisions); in five cases, the judgment was declared extinct by order (*Auto*) due to withdrawal of the appeal or mootness, and the remaining three appeals are, at the time of writing, still pending.

As for the scope of review – that is, the applicable parameter – until 2000 the literature was divided between those who considered that the *Defensor* could only invoke violations of fundamental rights, privileging the functional nexus set in Article 54⁶³; and those who considered that the *Defensor* could challenge violations of any constitutional provision (also noting that Article 162 CE sets no limits of content), while nonetheless suggesting a measure of self-restraint mindful of Article 54⁶⁴. The issue was settled by the Constitutional Tribunal in STC 274/2000 in favor of a general standing. This strengthens the image of the *Defensor del Pueblo* as *Defensor de la Constitución*⁶⁵, seemingly confirmed by the change in practice from 1997 onward, when the *Defensor* began bringing challenges whose subject matter did not directly coincide with the protection of fundamental rights⁶⁶.

Setting aside the concrete effectiveness of the device in practice⁶⁷, the possibility of vindicating the principle of constitutional legality in general – that is, of protecting the principle of the supremacy of the Constitution under Article 9.1 CE⁶⁸ – aims at strengthening rights protection in its institutional and systemic dimension. The effectiveness of rights protection also depends on the more general guarantee of constitutional legality and, therefore, on a review in the interest of the objective constitutional order and not only filtered through the protection of the individual position⁶⁹.

⁶³ As in J. Varela Suanzes Carpegna, *La naturaleza jurídica del Defensor del Pueblo*, cit., p. 78.

⁶⁴ See A. Pérez Calvo, *Rasgos esenciales del Defensor del Pueblo*, cit., p. 72; F. Fernández Segado, *El estatuto jurídico-constitucional*, cit., p. 271-272 and M. Díaz Crego, *Defensor del Pueblo y justicia constitucional*, cit., p. 323.

⁶⁵ See I. Torres Muro, *Los recursos del Defensor del Pueblo*, cit., p. 115, evoking, albeit sceptically (“*le viene un poco grande*”, p. 117), Kelsen’s doctrine.

⁶⁶ On this point, see M. Díaz Crego, *Defensor del Pueblo y justicia constitucional*, cit., p. 334-335. It should be noted that, since 1997, the *Defensor del Pueblo* has indeed begun to bring appeals that do not directly concern the protection of fundamental rights (*ibidem*, p. 330 ff.), although without compromising its general tendency towards moderation. It should be remembered, however, that in 2006 the *Defensor del Pueblo* lodged an appeal against the Catalan Statute (one of the appeals that would later be decided by STC no. 31/2010), raising concerns in legal doctrine (e.g. in I. Torres Muro, *Los recursos del Defensor del Pueblo*, cit., p. 117).

⁶⁷ According to M. Díaz Crego, *Defensor del Pueblo y justicia constitucional*, cit., p. 325-326, the *Defensor del Pueblo* has followed a path of “*evidente moderación*”; L. Rebollo Delgado refers to a prudent use of this power, *op. cit.*, p. 104. Significantly, J. L. Pérez Francesch, *El Defensor del Pueblo en España*, cit., p. 82 observes that such moderation also serves to “*no mostrar ante la opinión pública una actuación parcial y partidista sino realmente defensora de los derechos de los ciudadanos*”.

⁶⁸ See J.J. Fernández Rodríguez, *Defensor del Pueblo (Spain)*, cit., p. 231.

⁶⁹ See L. Rebollo Delgado, *op. cit.*, p. 106.

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Besides that, the impact of the appeal on the relation with the political process – and therefore with the quality of democracy – is also quite relevant and must be considered. A direct action of unconstitutionality entails taking a position on the outcome of a political process recently concluded⁷⁰ (according to art. 33 LOTC the appeals must be lodged *within three months* from the approval of the statute). Like constitutional challenges initiated by parliamentary minorities or other constitutional organs, such procedures inherently involve a prompt evaluation of politically sensitive legislative outcomes and therefore inevitably implicate the *Defensor del Pueblo* in political processes. For the *Defensor del Pueblo* – which is constitutionally and legally designed as a politically neutral body – this is a sensitive issue.

Indeed, this places the *Defensor* in the very delicate position of *taking sides* on potentially conflictive issues and shows well how involved is this institution in the dynamics of the constitutional state, as it is well exemplified – in the first decade – by the appeals regarding trade union freedom⁷¹ and conscientious objection⁷².

On the one hand, this may affect the *Defensor's* systemic position, potentially turning it into a destabilizing factor⁷³. On the other hand, this unusual proximity to the political process may help to deepen and enhance the *Defensor's* role as an actor in the construction of rights policies and – more widely – in dealing with social conflict on rights, thus carving deeper processes of integration.

Furthermore, an action of unconstitutionality by the *Defensor* can give voice – as has in fact occurred – to ultra-minoritarian claims that find no room in the action of other subjects legitimated under Article 162⁷⁴, thus representing – even in the face

⁷⁰ As highlighted by F. Fernández Segado, *El estatuto jurídico-constitucional*, cit., p. 272, reporting the position of Caamaño Domínguez; similarly, M. Díaz Crego, *Defensor del Pueblo y justicia constitucional*, cit., p. 326.

⁷¹ Decisions no. 20, 26 and 72 of 1985, which upheld three appeals by the *Defensor* aimed at ensuring greater protection for less representative trade unions; Constitutional Tribunal, decision no. 101/1991, which rejected an appeal aimed at guaranteeing greater protection for the trade union freedom of civilian employees of the military administration; and Constitutional Tribunal dec. no. 75/1992, which rejected an appeal aimed at eliminating the differential treatment of trade unions (depending on their representativeness) in terms of access to public assets forming part of the so-called *Patrimonio Sindical Acumulado*.

⁷² STC no. 160/1987. Although the appeal was rejected, it is interesting to note that the *Defensor* took action on a highly debated and conflictive issue, questioning the compromise that been reached in Parliament. In doing so, the *Defensor* gave a further voice to those who did not agree with the compromise reached, considering it too restrictive with regard to the issue of individual freedom of conscience. Furthermore, by putting forward arguments that were also relevant on a theoretical level and prompting a substantial decision by the Constitutional Tribunal, the institution has at least contributed to further deepening and enriching the public debate on a highly sensitive and contentious issue. Rather than focusing solely on the potential conflict with the legislature and the political process, this case highlights the role of the *Defensor del Pueblo* in stimulating and enriching public debate, even when appeals are unsuccessful.

⁷³ I. Torres Muro, *Los recursos del Defensor del Pueblo*, cit., p. 117.

⁷⁴ L. Rebollo Delgado, *op. cit.*, p. 106.

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of legislative provisions resulting from broad parliamentary consensus – an “alternative” or “safety valve”⁷⁵ or, in other words, “*la voz de los sin voz*”⁷⁶. In addition, it has been noted that the *Defensor’s* standing to bring an *acción de inconstitucionalidad* may indirectly allow citizens to gain access to constitutional review⁷⁷: as the annual reports show, the *Defensor’s* decision to appeal to the Constitutional Tribunal always follows an evaluation of requests received from the citizenry to that effect (and in its reports the *Defensor* gives an account of the decision to bring or not to bring an action, thus tracing the citizen requests⁷⁸).

From this angle, the *Defensor* can strengthen processes of political integration as enhancing pluralism⁷⁹, thus safeguarding the constitutional order. Moreover, its relationship with the other powers of the state (and with the political process itself) is not one of opposition or substitution, but rather one of cooperation⁸⁰.

In this vein, consider the two recent appeals lodged by the *Defensor del Pueblo* against laws passed by the Regions (*Comunidades autónomas*) of Madrid and Valencia on gender identity and the protection of LGBTQIA+ persons. These regional laws have been approved by local governments led by the *Partido Popular* (opposition party at the national level), in the context of an intense political conflict following the passage of law no. 4/2023 (*ley trans*)⁸¹. They introduce restrictive requirements for access to pharmacological treatment for transgender minors, imposing the mandatory involvement of mental health professionals and, in cases of comorbidity, other specialists⁸².

⁷⁵ I. Torres Muro, *Los recursos del Defensor del Pueblo*, cit., p. 118.

⁷⁶ *Ibidem*, p. 115. A similar virtuality in relation to “under-represented, vulnerable groups” is emphasized – in general for NHRIs – by K. Meuwissen, *European National Human Rights Institutions as multi-layered actors*, cit., p. 33, who also points out that, compared to specialized bodies, NHRIs can promote a broad and intersectional approach to issues relating to the protection of rights thanks to their general expertise in the field of law.

⁷⁷ P. Carballo Armas, *op. cit.*, p. 159.

⁷⁸ Regarding the specific value of making public the positions taken by the *Defensor del Pueblo*, see J. L. Pérez Francesch, *El Defensor del Pueblo en España*, cit., p. 60.

⁷⁹ Even among critics, it is acknowledged that in this case the *Defensor del Pueblo* performs the function of “*consolidar un pluralismo siempre en peligro*” (I. Torres Muro, *Los recursos del Defensor del Pueblo*, cit., p. 120).

⁸⁰ According to L. Rebollo Delgado, *op. cit.*, p. 55, the *Defensor* constitutes “*un elemento colaborador más en un Estado de Derecho*”.

⁸¹ Regarding the Bill, see A. Aguilar Calahorra, *Sobre la ley trans: no se priva de derechos a unos por reconocérselos a otros*, in F. Balaguer Callejón - J.F. López Aguilar - M.L. Balaguer Callejón (eds.), *Estudios sobre el estado social y democrático de derecho. “Liber amicorum” Gregorio Cámara Villar*, Madrid, 2024, vol. I, p. 375 ff. and E. Atienza Macías, *La protección jurídica de las personas trans a la luz del nuevo escenario normativo en España*, in *BioLaw Journal – Rivista di Biodiritto*, 4, 2024, p. 352 ff.

⁸² This is a much-debated issue in numerous legal systems, as demonstrated, for example, by the recent ruling of the United States Supreme Court in the case of *United States v. Skrmetti*, 605 U.S. ____ (2025), on which see A. Schillaci, *Oblivio dei diritti e deferenza verso il legislatore: identità di genere e discrezionalità politica nella decisione United States v. Skrmetti*, in www.diariodidirittopubblico.it, July 21st,

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The *Defensor*, explicitly acting *also* as an NHRI, considers these provisions to be detrimental to the dignity, privacy and self-determination of minors, referring to the Constitution, the case-law of the Constitutional Tribunal (STC 99/2019) and international standards. It also criticises the use of the concept of *comorbidity*, which it considers to be an expression of an outdated pathologizing view. It is important to highlight the caution with which the *Defensor* intervened on a highly contentious issue, severing the aspects of constitutional illegitimacy from those of political inappropriateness; and, with equal clarity, the way in which it takes a position in the debate – with particular reference to the tension between self-determination and legislative constraints on it – emphasising the point of view of the Constitution. What emerges, then, is the specific potential of the *Defensor's* persuasive function in stimulating and enriching public debate – and constitutional practice – on fundamental rights.

5. Conclusions

The analysis has shown that the role of the *Defensor del Pueblo* is not only that of safeguarding a traditional conception of the rule of law, but rather that of enhancing the constitutional rule of law.

It has resulted clearly from the focus on the following aspects: (i) the relationship between the *Defensor* and the political process, including the use of the power to bring cases before the Constitutional Tribunal; (ii) the *Defensor's* potential counter-democratic role and (iii) the *Defensor's* role as a potential actor in processes of integration within the constitutional public sphere, and hence as a guarantor of the constitutional rule of law, (v) also by enriching the pathways for scientific understanding of fundamental-rights law.

It is especially the authority to lodge an appeal of unconstitutionality – extending to the entire constitutional text rather than solely fundamental rights provisions – that situates the *Defensor del Pueblo's* role within the domain of constitutional guarantees.

Nevertheless, the constitutional appeal represents a way to engage with the political process, potentially strengthening the *Defensor del Pueblo's* role in shaping rights-based public policies. Additionally, the *Defensor del Pueblo's* constitutional appeals have historically facilitated expression for minority concerns otherwise lacking representation, as it is well exemplified by cases involving rights of foreigners, trade union issues, electoral matters, and the recent appeal against local legislation

2025. In Italy, too, the Social Affairs Committee of the Chamber of Deputies is currently discussing Bill C. 2575, a government initiative containing provisions for appropriate prescribing and correct use of drugs for gender dysphoria (*Disposizioni per l'appropriatezza prescrittiva e il corretto utilizzo dei farmaci per la disforia di genere*, <https://www.camera.it/leg19/126?leg=19&idDocumento=2575>).

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affecting transgender rights. Furthermore, given that appeals originate from citizen requests addressed to the *Defensor del Pueblo*, the institution can indirectly facilitate public access to constitutional adjudication. Practice indicates a moderate and prudent use of this power, suggesting that the institution's relationship with other state authorities is characterized by cooperation rather than competition.

Focusing on the constitutional appeals lodged by the *Defensor del Pueblo* helps highlight its potential counter-democratic role and its contribution to constitutional interpretation within the *open society of constitutional interpreters*, as well as its role in enhancing constitutional integration processes. Alongside other NHRIs and ombudsman institutions, the *Defensor del Pueblo* can thus enhance democratic quality and reinforce processes of political integration together with the safeguard of the constitutional rule of law.

In this vein, the *Defensor del Pueblo* represents – in line with the institutional mission of NHRIs – a bridge between society and institutions, thereby helping to structure and strengthen the integration processes typical of a pluralistic constitutional state, also giving voice to marginalised groups excluded from the representative circuit.

As it has been observed, the *Defensor del Pueblo*, free from the constraints of jurisdiction, “*es un buen mediador entre la sociedad y el Estado, un instrumento de participación ciudadana, y el análisis de su doctrina es una buena forma de conocer las inquietudes actuales, reales y concretas, de la sociedad española*”⁸³.

This mediation takes place within the framework of balanced support for the political process, which relies on the resources of knowledge and empowerment through persuasion. This is demonstrated, at least in part, by the practice of appealing on grounds of unconstitutionality. Such a competence could help to temper the extreme polarization that characterizes – even in this area – the public sphere in contemporary democracies.

ABSTRACT: The establishment and evolution of the *Defensor del Pueblo* within Spanish constitutional experience provide an insightful vantage point from which to examine evolving trends concerning National Human Rights Institutions (NHRIs) in contemporary constitutional democracies. In this vein, the essay analyses the relationship between Defensor del Pueblo, NHRIs and ombudsman institutions, focusing on the constitutional relevance of the Defensor del Pueblo, as specifically

⁸³ See G. Escobar Roca, *Interpretación y garantía de los derechos fundamentales*, cit., p. 231-232.

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resulting from its relationship with the political process, including the power to bring cases before the Constitutional Tribunal.

KEYWORDS: National Human Rights Institutions - Ombudsman – Defensor del Pueblo – Fundamental Rights – Constitutional Adjudication – Constitutional Rule of Law.

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**National Human Rights Institutions as instruments for integrating rights protection:
a comparative analysis of the United Kingdom and the Netherlands***

Federico Nania

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1. Introduction: National Human Rights Institutions through the lens of human rights protection

The need to protect human rights has not remained confined to the international sphere in which their specific codification may be found. The difficulty in disentangling the relationship between the category of human rights and the notion of fundamental rights¹—prevalent at least in European constitutionalism in the immediate post-war

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¹ This is not the appropriate forum to address the question of whether fundamental rights possess an ontological foundation—a question that has also concerned the dogmatic meaning of the category of “human rights” and its philosophical grounding. See J. Hersch, *I diritti umani da un punto di vista filosofico* (1990), Milano, 2008; R. Nania, *Sui diritti fondamentali nella vicenda evolutiva del costituzionalismo*, in R. Nania (a cura di), *Diritti fondamentali. Aspetti teorici e temi attuali*, Torino, 2024; V. Baldini, *I diritti*

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period—has not prevented States from undertaking, within their domestic legal systems, the establishment of specific mechanisms of protection aimed at fostering the development of democratic principles and the rule of law², particularly in terms of their increasing effectiveness within social life.

In Europe, this development has entailed the complementing of traditional liberal mechanisms designed to protect citizens' fundamental rights—first and foremost judicial enforceability, which is characteristic of the rule of law—with new bodies known as National Human Rights Institutions (NHRIs). These are institutions operating at the national level, entrusted with the promotion and protection of human rights through modes of intervention and operational tools which, as will be shown below, differ from those provided by systems of legal protection and are instead primarily directed towards fostering the growth of a culture of respect for rights within civil society, as well as concerning the practices of public authorities.

From this perspective, the subject matter of the present contribution may be situated within that line of scholarship which conceives the realisation of personal rights—both constitutional and universal—as a process that is also, if not predominantly, of a “cultural”³ nature, and which therefore requires a plurality of techniques and interpretative and applicative approaches.⁴

fondamentali in movimento: dalla prospettiva storico-dogmatica all'esperienza, in V. Baldini (ed.), *Cos'è un diritto fondamentale?*, Napoli, 2017, p. 3 ff.; L. Di Santo, *Diritti dell'uomo e diritti fondamentali. Profili ermeneutici*, in *Cos'è un diritto fondamentale?*, cit., p. 395 ff.; G. Palombella, *From Human Rights to Fundamental Rights. Consequences of a conceptual distinction*, in *EUI Law*, 34, 2006. About the link between fundamental rights and the paths of constitutionalism see P. Ridola, *Il principio libertà nello Stato costituzionale. I diritti fondamentali in prospettiva storico-comparativa*, Torino, 2018 as well as *Il costituzionalismo e i diritti*, in Id., *Esperienza, Costituzioni, Storia. Pagine di storia costituzionale*, Napoli, 2019, p. 91 ff. About the fundamental rights “dimensions” in the development of constitutionalism A. Di Martino, *La doppia dimensione dei diritti fondamentali*, in V. Baldini (ed.) *Cos'è un diritto fondamentale?*, cit., p. 123 ff.

² The close connection between the rule of law, democracy, and the protection of human rights is expressly emphasised by the European Network of National Human Rights Institutions (ENNHRI), namely the organisation bringing together NHRIs operating across the European continent. In the document entitled *Democracy & Rule of Law*, it is stressed that “given the close interconnection and mutually reinforcing relationship between the rule of law, democracy and human rights, NHRIs are well placed to report and participate in rule of law monitoring initiatives as an integral part of their mandate to promote and protect human rights. This is crucial given the persisting rule of law challenges and structural human rights issues that Europe faces”. On the relationship between the rule of law and the protection of rights in the European context, see M.G. Rodomonte - L. Durst (eds.), *Judicial Review, Fundamental Rights and Rule of Law. The Construction of the European Constitutional Identity*, London, 2025.

³ Reference must inevitably be made to P. Häberle, *Per una dottrina della Costituzione come scienza della cultura*, Roma, 2001 as well as Id., *Cultura dei diritti e diritti della cultura nello spazio costituzionale europeo*, Milano, 2003. See also P. Ridola, *La Costituzione della Repubblica di Weimar come “esperienza” e come “paradigma”*, in *Rivista AIC*, 2, 2014, par. 2, p. 5 ff. and footnote 16; A. Di Martino, *Verfassungs-Kultur. A proposito di un recente volume su Peter Häberle*, in *Diritti Comparati*, 10 October 2016.

⁴ On the “universalisation” of rights see N. Bobbio, *L'età dei diritti*, Torino, 1992, esp. p. 23-24. Without forgetting recent contributions that propose a strongly disenchanting view of codified constitutionalism; in particular, Loughlin (M. Loughlin, *Against Constitutionalism*, Cambridge, 2022,

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It is not possible within the scope of this article to retrace in analytical detail the developments that led to the establishment of NHRIs in numerous countries (including those outside the European continent), nor would it be feasible to provide an exhaustive account of the extensive scholarly reflection that has accompanied the emergence of these new bodies⁵.

The paper will thus focus specifically on two experiences of national National Human Rights Institutions - the Equality and Human Rights Commission of the United Kingdom and the Netherlands Institute for Human Rights - analyzing their genesis within the respective national legal systems and examining the instruments available to them for pursuing their institutional objectives.

Nevertheless, it is worth recalling that the genesis of NHRIs coincides with Resolution No. 48/134 adopted in 1993 by the United Nations General Assembly, through which Member States were called upon to establish their own “national institutions for the promotion and protection of human rights”. The Resolution also set out detailed guidance—stemming from a preparatory conference held in Paris in 1991—concerning the functions, composition and guarantees of independence of national commissions, while expressly reserving to States the “right ... to choose the structure best suited to their particular needs at the national level”. In this way, States were

especially p. 183 ff.) considers the very concept of constitution – as a product of modern constitutionalist ideology – to be outdated (or surmountable). This reconstruction can also be included in one of the strands of criticism of global constitutionalism on which see A. Di Martino, *Circolazione delle soluzioni giuridiche e delle idee costituzionali. Questioni di metodo comparativo e prassi tra culture costituzionali e spazi globali*, in *DPCE Online*, 50, 2021, p. 774 ff., where is nevertheless specified that when the adjective “global” is used as a “synonym for the universalistic projection of the principles and rights of liberal-democratic constitutionalism”, its “generalising force is based on the aspiration for the broadest possible realisation of the coexistence of individuals and groups in conditions of freedom” (867).

⁵ On NHRIs, with particular reference to the European experiences as well as in comparative terms with other international human rights bodies, see at least M. Nowak, *National Human Rights Institutions in Europe: Comparative, European and International Perspectives*, in J. Wouters - K. Meuwissen (eds.), *National Human Rights Institutions in Europe: Comparative, European and International Perspectives*, 2013; L. Manca (ed.), *Le istituzioni nazionali per la promozione e la tutela dei diritti umani. Profili teorici, comparativi e prassi*, Napoli, 2021; G. De Beco, *National Human Rights Institutions in Europe*, in *Human Rights Law Review*, 7, 2007, p. 331–370; D. Langtry - K. Roberts Lyer, *National Human Rights Institutions: Rules, Requirements and Practice*, Oxford, 2021; L.C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, in *Harvard Human Rights Journal*, 13, 2000; R. Murray, *National Human Rights Institutions: Criteria and Factors for Assessing Their Effectiveness*, in *Netherlands Quarterly of Human Rights*, 25, 2, 2007, p. 189–220. Among the most recent Italian doctrine see G. Repetto, *Le National Human Rights Institutions: una nuova frontiera nella protezione sistemica dei diritti fondamentali e l'urgenza italiana*, in G. Repetto (ed.), *Una National Human Rights Institution per l'Italia: problemi e prospettive*, Torino, 2025 as well as - from a comparative perspective - the contributions within the focus on *National Human Rights Institutions. Alcune esperienze comparate* edited by A. Di Martino in *Diritti Comparati Journal*, 2, 2025. With specific reference to the contribution that these institutions can make in the context of climate change litigation see A. Baraggia, *Contenzioso in materia climatica e separazione dei poteri: il ruolo delle National Human Rights Institutions*, in *DPCE Online*, 2, 2023, p. 313.

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granted a certain margin of autonomous discretion in the establishment of such bodies⁶.

The delay with which European countries proceeded to establish these institutions, as compared with developing countries—given that their creation would not occur until the new century⁷—appears particularly striking. It has plausibly been suggested that this delay was due to doubts as to the potential “added value” that such bodies could contribute to the protection of fundamental rights already safeguarded by domestic constitutional frameworks (whether written or unwritten) aligned with international standards and supported by effective systems of legal and judicial guarantees.⁸

However, the experience of NHRIs highlights their potential contribution compared to traditional liberal mechanisms for the protection of fundamental rights, especially in promoting a culture of human rights and respect for them.

In this respect, Italy represents a particularly significant case. In fact, it should be noted that Italy—the only European country among those monitored by ENNHRI—still lacks an accredited institution or, in any case, a national body performing the functions of an NHRI.⁹

⁶ It may be recalled that, as regards competences, the Paris Principles annexed to UN General Assembly Resolution 48/134 state that “a national institution shall be vested with the competence to promote and protect human rights” and that, to this end, it must be entrusted with “as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence”.

Among the tasks expressly referred to are, in particular, those of “submitting to the Government, Parliament or any other competent body, on an advisory basis or at the request of the authorities concerned, or through the exercise of its power to conduct independent inquiries, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights”; of “promoting and ensuring the harmonisation and implementation of national legislation, regulations and practices with the international human rights instruments to which the State is a party”; and of “assisting in the dissemination of information on human rights and on efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of the media”.

As regards composition, a high degree of pluralism should be ensured, for example, through the inclusion within NHRIs of representatives of non-governmental organisations active in the field of human rights protection, as well as suitably qualified experts. With respect to funding, it is stated that it must be “adequate” so as to enable the institution to be independent of the Government and not subject to financial control.

⁷ This was also prompted by Recommendation No. 14 of 1997 adopted by the Committee of Ministers of the Council of Europe on the establishment of national institutions for the promotion and protection of human rights. At EU level, a reference to NHRIs appears in Recital n. 20 of Regulation No. 168/2007 establishing the Fundamental Rights Agency (FRA), which states that this body should cooperate with “governmental organizations and public bodies competent in the field of fundamental rights at Member State level, including national human rights institutions.”

⁸ G. De Beco, *cit.*, 339 ff.

⁹ For all the matters concerning the establishment of an Italian NHRI see now the contributions in the volume *Una National Human Rights Institution per l'Italia: problemi e prospettive*, edited by G. Repetto, Torino, 2025.

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Therefore, after analyzing the two institutions mentioned above, an attempt will be made to identify which “lessons” from these two experiences of national human rights institutions may be taken into consideration for the establishment of an Italian NHRI.

2. The need for a Human Rights Commission in the United Kingdom: the 2004 Government White Paper

The intention to establish a national human rights institution—later to become the Equality and Human Rights Commission (hereinafter, EHRC)—emerged in the United Kingdom during the Labour government led by Tony Blair, only a few years after the entry into force of the Human Rights Act 1998.¹⁰ That Act had already marked, through the incorporation of the European Convention on Human Rights, a fundamental step in the evolution of the protection of fundamental rights, including—albeit not without controversy—their re-situating within the ahistorical domain of humanity. This development also occurred in parallel with the so-called equality directives adopted by the European Union, beginning with the 2000 Directive on equal treatment between persons irrespective of racial or ethnic origin (Directive 2000/43/EC).

It should also be noted that, within the United Kingdom—structured, as is well known, according to the model of devolution—a human rights institution already existed, namely the Northern Ireland Human Rights Commission, established in 1999 as part of the Good Friday Agreement between the British government and the Northern Irish Nation. Moreover, almost contemporaneously with the establishment of the EHRC, Scotland likewise endowed itself with its own human rights institution, the Scottish Human Rights Commission, created by the Parliament at Holyrood in 2006 and becoming operational in 2008.

Accordingly, the British framework is characterised by the presence of three authorities: the commissions of the Northern Irish and Scottish Nations, and the “central” Authority—the EHRC. The latter functions as the national human rights institution for England and Wales, as well as for all Nations in relation to the protection of equality.

Within this institutional configuration, the local commissions may ensure closer attention to issues more directly connected to matters within the competence of the devolved Nations, whereas the presence of a central Authority makes it possible to address, in a cross-cutting manner, issues that fall within the competence of the UK Government as well as within devolved matters, while also ensuring a degree of uniformity in approaches to human rights protection. Confirmation of this will be

¹⁰ On the consequences of the HRA on the British constitutional system F. Nania, *Le garanzie dei diritti fondamentali e le trasformazioni costituzionali nel Regno Unito. Corti e Parlamento tra common law e Human Rights Act*, Roma, 2023.

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provided below through the examination of a recent case in which the EHRC intervened in judicial proceedings that originated before the Scottish courts and ultimately reached the UK Supreme Court.

Turning back to the process that led to the establishment of the British Commission, mention must be made of the significant contribution of the Joint Committee on Human Rights (JCHR), the bicameral parliamentary committee on human rights. Particular reference should be made to its 2003 report entitled *The Case for a Human Rights Commission*, in which the Committee emphasised the need for the United Kingdom to establish an independent body, structured in accordance with the Paris Principles, and entrusted with the promotion of human rights.

On that occasion, the Committee also stressed that the Human Rights Act, approved only a few years earlier, while representing a crucial advancement for a legal system that had previously lacked a formal catalogue of fundamental rights, was nevertheless insufficient—especially in terms of “spreading knowledge and awareness” of human rights.

Given the traditional British approach to the protection of rights, centred on their articulation through judicial decision-making, it may appear surprising that the parliamentary Committee continued to emphasise the need not to entrust the protection of human rights exclusively to the courts. The Committee observed that “litigation is an essential last resort in protecting the rights of the individual or groups, but it is not the most effective means of developing a culture of human rights”.

Through these words, the Committee made it clear that the development of an attitude of respect for human rights requires the promotion of a human rights culture through the establishment of an ad hoc body, so that the possibility of formal judicial litigation concerning rights violations—while appropriately preserved—would come to play the role of a last resort, in the hopefully increasingly rare and limited event of the failure of the socio-cultural process of internalising the value of respect for human dignity and the rights deriving from it.

Consistently with this approach, the Committee also called for a genuine ethical and cultural paradigm shift on the part of public authorities: no longer a “defensive” stance towards human rights, but rather a proactive approach aimed at disseminating them as “core ethical values” of the State. Accordingly, the task of the proposed human rights body would be to “probe, question and encourage” all public bodies, in order to enhance their awareness of the potential impact of their actions on the development of a human rights culture. The institution was thus envisaged as having a dual role: with regard to public services, a role of assistance in “consolidating advice on compliance with rights”; and, with regard to the courts, a role of preventing rights violations through “the spread of best practice and greater awareness”.

Within this framework, the more specific considerations advanced by the JCHR concerning the relationship between the future institution and the courts are of particular interest, since—as will be shown—this relational aspect constitutes a distinctive feature of the British experience.

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In this respect, the Committee highlighted that the new body should play “a valuable role in assisting the courts in determining human rights questions”, especially by virtue of its “power to act as a friend of the court or as a third party intervener”. At the same time, the Committee did not exclude the possibility of conferring more incisive powers upon the Commission, including powers “in relation to litigation”, such as “supporting strategic cases” and, above all, “seeking judicial review”, namely bringing proceedings against acts adopted by public authorities or by private actors in the exercise of public functions.

As regards the degree of independence to be ensured to the proposed body, the Committee stressed the need for it to be perceived as a “fully independent body with the potential to exercise real influence”. To this end, it realistically emphasised two essential conditions: adequate financial resources, sufficient to enable the fulfilment of such a complex mandate, and rules governing appointments capable of ensuring democratic accountability.

With regard to the configuration of the operational tools available to the institution, the JCHR’s proposal was premised on the assumption that the body should not be conceived as “a body with an adversarial or litigious approach to its mission”, but rather as an entity primarily oriented towards fostering “a culture of respect for human rights”. This was to be achieved, in particular, through raising awareness of the need to promote human rights within public authorities in the delivery of services, as well as by making individuals aware of their rights and guiding them in asserting those rights, in cooperation with non-governmental organisations and with advisory bodies operating within the voluntary and professional sectors—without the institution being perceived as one “driven by the task of handling individual complaints”.

This confirms that, from the perspective of the Joint Committee, the proposed Commission was intended to operate within a broad horizon aimed at the promotion of human rights, giving particular prominence to cooperation with civil society organisations sharing the same ethical commitments in the field of rights, and thereby avoiding a reductive conception of its activity as mere support for individual grievances and complaints.

Following the bicameral Committee’s report, the Labour government published, in May 2004, the White Paper entitled *Fairness for All: a New Commission for Equality and Human Rights*. In that document, the need to establish a national human rights institution was primarily linked to the necessity of protecting the rights of minorities in order to ensure equality and equal opportunities among citizens: “The Government is responding to these challenges, both through new laws to advance equality, and programmes to tackle barriers to participation and reduce disadvantage (...). There is a clear need to provide coherent and integrated support to individuals who have rights under discrimination legislation, and to organisations which will have responsibilities for compliance”.

The document also highlighted the positive outcomes expected from the creation of a single national human rights institution: from the establishment of a body “strong

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and authoritative for equality and human rights” to the adoption of a “cross-cutting approach” as the Commission’s working method, enabling it to “better tackle barriers and inequalities affecting several groups, and identify and promote strategic solutions”; from the provision of “advice and support on all discrimination issues and information on human rights, in an accessible and user-friendly way” to an enhanced capacity to “address the reality of the many dimensions of an individual’s identity, and therefore tackle discrimination on multiple grounds”; from simplified coordination with employers and service providers through a single access point to greater effectiveness in “promoting improvements to the delivery of public services... guidance and support on human rights good practice and compliance... a cross-cutting seamless approach on the full breadth of equality issues on a sector-by-sector basis”, for example with health authorities, local government and education providers; and finally, from the possibility of achieving “a more coherent approach to enforcing discrimination legislation” to the capacity to combine the strengths of the three pre-existing commissions “with the expertise from key organisations representing the new equality strands, identifying and promoting creative responses”.

2.1. The Equality Act 2006 and the establishment of the Equality and Human Rights Commission: composition and appointment; autonomy, accountability and funding within the political-institutional framework

As anticipated, following the opinion of the Joint Committee on Human Rights, Parliament ultimately enacted the Equality Act (EA) in 2006. Through this Act, in addition to the formal recognition of equality and the harmonisation of anti-discrimination law in the United Kingdom, the Equality and Human Rights Commission was established through the merger of three previously existing British authorities operating in the field of human rights protection—namely the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission—which were simultaneously dissolved.

This reorganisation purpose is expressly set out in the preamble, in which the Act defines itself as “an Act to make provision for the establishment of the Commission for Equality and Human Rights; to dissolve the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission; to make provision about discrimination on grounds of religion or belief; to enable provision to be made about discrimination on grounds of sexual orientation; to impose duties relating to sex discrimination on persons performing public functions; to amend the Disability Discrimination Act 1995; and for connected purposes”.

Pursuant to Schedule 1 of the Act, the EHRC—classified as a non-departmental public body—is composed of between ten and fifteen Commissioners, appointed for a four-year term (subject to possible renewal), including the Chair and the Chief Executive. They are appointed by the Secretary of State (specifically, the Secretary of

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State for Education, who also currently serves as Minister for Women and Equalities), on the basis of the following criteria: that candidates possess experience and knowledge relating to the matters within the Commission's remit ("experience and knowledge relating to the relevant matters"), or that they are "suitable for appointment for some other special reason".

Additional requirements provide that the Commission's membership must include:

- (a) a Commissioner who is (or has been) a disabled person;
- (b) a Commissioner appointed with the consent of the Scottish Ministers, with knowledge of conditions in Scotland;
- (c) a Commissioner appointed with the consent of the Welsh Ministers, with knowledge of conditions in Wales.

With regard to the procedures for appointing the Chair and the other members of the Board of Commissioners, these take the form of an open and public selection process initiated by the Commission itself when a vacancy arises. Within this procedure, an Advisory Assessment Panel is tasked with objectively assessing which candidates meet the eligibility criteria for the position and, following interviews with shortlisted candidates, identifying those deemed suitable for appointment. The Panel's assessments are then submitted to the Secretary of State, who makes the final decision on the appointment from among the eligible candidates. It should be noted at the outset that the Secretary of State is also vested with the power to dismiss a Commissioner where, in his or her judgment, that person is "unable, unfit or unwilling to perform his functions" (Schedule 1, para. 3).

From this account, it is apparent that the appointment procedure is not free from certain ambiguities. On the one hand, the public selection process is intended to ensure that appointments are made on the basis of the highest standards of evaluative impartiality; on the other hand, the decisive role of the Secretary of State—an actor within the executive branch—remains intact, albeit within the confines of the shortlist drawn up by the Panel. This is further compounded by the Secretary of State's power to remove Commissioners, albeit subject to the broadly and somewhat generically framed grounds for dismissal set out in the legislation.

That said, the Commission also stands in a relationship with Parliament, which exercises a supervisory role over the EHRC's activities, including the use of public funds. This oversight is reflected in particular in the obligation placed upon the EHRC to submit a regular annual report to the representative body; the report is transmitted by the Secretary of State to the Scottish Parliament and the Welsh Parliament as well, pursuant to paragraph 32 of Schedule 1.

As regards funding, the Commission negotiates its annual budget with the Cabinet Office, and in particular with the Government Equalities Office, as part of the spending review conducted by the Chancellor of the Exchequer and the Chief Secretary to the Treasury. In this context, each government department submits its budgetary request for the following financial year, while Parliament—more precisely,

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the House of Commons—approves the allocation of resources as proposed by the Government through the Appropriation Act relating to the budgets of public departments.

In this respect, it is worth highlighting that at the time the Commission became operational in 2007, its funding amounted to approximately £70 million. Between 2010 and 2018, however, this figure was drastically reduced, falling to an annual budget of around £18 million and currently standing at approximately £17 million per year.

It is therefore unsurprising that, in a 2016 letter, a Member of the House of Commons expressed “deep concern” about a 25 per cent cut to the EHRC’s budget—also in connection with staff reductions decided by the Government and accepted by the Commission—emphasising the need to counter the “slow dismantling of that which is key to the cause of equality and human rights in our country”. It cannot be denied, then, that the Government’s power to determine the level of resources allocated to the Commission constitutes a potential constraint on its ability to discharge its functions effectively under conditions of autonomy and self-sufficiency vis-à-vis the executive.

Indeed, it has been widely observed that a persistent issue for all NHRIs lies in the fact that “Governments can endow NHRIs with strong mandates, to indicate compliance with external requirements imposed by international organisations, but they do not necessarily have to support their NHRIs to carry out their mandates”, retaining the power to “allocate insufficient funds, or no resources beyond minimum requirements, making them unable to enforce the mandated powers they hold”. This concern underscores, on the one hand, that theoretical commitments remain ineffectual in the absence of adequate means for their implementation; on the other hand, it betrays the suspicion that governments themselves may not be fully convinced of the importance of the mandate of such bodies, or may even be reluctant to give full effect to the protection of human rights.

2.2. The powers of the EHRC between general powers and enforcement powers

The general duty of the Commission, set out in section 3 of the Equality Act, provides that it “shall exercise its functions with a view to encouraging and supporting the development of a society in which:

- (a) people’s ability to achieve their potential is not limited by prejudice or discrimination;
- (b) there is respect for and protection of each individual’s human rights;
- (c) there is respect for the dignity and worth of each individual;
- (d) each individual has an equal opportunity to participate in society; and
- (e) there is mutual respect between groups based on understanding and valuing diversity and on shared respect for equality and human rights”.

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As is apparent from the repeated use of the term, “respect” constitutes the core around which the Commission’s mission is structured. The objective entrusted to the body is undoubtedly desirable, yet equally ambitious: namely, to contribute to the development of a social environment in which an attitude of mutual respect between individuals and between groups is able to take root.

Against this teleological background are situated, first, the Commission’s general powers, which encompass a broad range of tasks and competences of a markedly promotional, educational and persuasive nature, aimed at the social internalisation of human rights. These include, above all, the Commission’s activities consisting in its power to “publish or otherwise disseminate ideas or information, undertake research, provide education or training, [and] give advice or guidance” (section 13). Alongside these, and more incisively, stand the enforcement powers conferred upon the Commission. These include the power to conduct inquiries, whether following complaints or on its own initiative (section 16), as well as the power to carry out investigations (section 20) and to issue unlawful act notices (section 21).

Turning first to inquiries, it is worth noting that Schedule 2 of the Equality Act, in regulating their conduct, imposes a number of procedural obligations on the Commission with regard to adversarial fairness. In particular, it requires that the persons concerned be informed of the opening of the inquiry, of “the nature of the unlawful act which the Commission suspects”, and be afforded “an opportunity to make representations about the proposed terms of reference”.

However, as regards the outcomes of inquiries, the Act—albeit not without a degree of logical inconsistency—appears to exclude the possibility that specific allegations of responsibility for the violation under investigation may be made in the course of the inquiry. Section 16(2)(a) provides that “in continuing the inquiry the Commission shall, so far as possible, avoid further consideration of whether or not the person has committed an unlawful act”; even more explicitly, it is stipulated that, in the report issued at the conclusion of the inquiry, the Commission “may not state (whether expressly or by necessary implication) that a specified or identifiable person has committed an unlawful act” (para. 3(a)). The consequence is that, whatever the findings reached at the conclusion of the inquiry, the Commission may not establish the responsibility of those who have engaged in conduct contrary to the rights protected by the Equality Act, not even implicitly—an evident attempt to preclude any circumvention of the prohibition.

Indeed, if one considers the most recent inquiries conducted by the Commission in relation to adult social care in England and Wales (health and social services being a devolved matter in Scotland and Northern Ireland) and to access to legal aid for discrimination cases, it may be observed that the Commission’s final reports do not attribute specific responsibility to any particular actor. Rather, they elaborate recommendations, primarily addressed to the relevant public authorities, aimed at fostering improved protection of the rights concerned in light of the harmful situations revealed by the inquiry.

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Significantly different from inquiries are the investigations that the Commission may conduct pursuant to section 20 of the Equality Act. This power is of greater substantive weight, as it entails the possibility of attributing to a specific subject either positive responsibility for having committed an unlawful act, or negative responsibility for having failed to take the actions that would have been necessary to prevent a violation of the rights protected by the Equality Act.

Moreover, whereas at the conclusion of an inquiry the Commission may, at most, issue recommendations, in the case of investigations—once it has been established “that a person has committed an unlawful act or has failed to comply with a requirement”—the Commission is empowered to issue an unlawful act notice under section 21. This is done for the purpose of requiring the subject concerned “to prepare an action plan for the purpose of avoiding repetition or continuation of the unlawful act”, as well as to “recommend action to be taken by the person for that purpose”.

It should also be added that, where the Commission considers that a person “is likely to commit an unlawful act”—for example because no action plan has been put in place to bring discriminatory conduct to an end—it may make use of the power conferred upon it by section 24 of the Equality Act. This consists in the power to bring proceedings directly before a County Court or, in Scotland, before the Sheriff, in order to seek an injunction or an interdict preventing the commission of an unlawful act, and thus of discrimination within the meaning of the Equality Act. Paragraph 3 of the same provision further empowers the Commission to apply to the courts so that the subject investigated may be compelled to comply with the Commission’s decision or with what has been ordered by the court.

Confirmation of the distinction outlined above may be found in the fact that, whereas inquiries are not subject to judicial challenge, investigations—or more precisely, the unlawful act notices resulting from them—may be appealed, in view of their potential consequences, before employment tribunals (where they concern discrimination in the context of employment relationships) or before a County Court (or the Sheriff in Scotland). In such cases, the courts retain the power to “affirm, annul or vary a notice or requirement for the preparation of an action plan” issued by the Commission.

Still with reference to the judicial dimension, it should be specified that, pursuant to section 28, the Commission may “assist an individual who is or may become a party to legal proceedings”, providing support, under paragraph 4, in the form of legal advice, legal representation, or any other form of assistance.

Finally—and by no means least in terms of significance—mention must be made of the power conferred by section 30, which provides that the Commission “shall have capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function”. This provision formally establishes the Commission’s capacity to intervene as *amicus curiae* in judicial proceedings concerning matters falling within its remit, and also recognises its full

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standing to initiate legal proceedings itself, thus acting as a bearer of collective interests capable of justifying its locus standi before the courts.

2.3. The Equality Act 2010 and the “protected characteristics”

A few years after the enactment of the Equality Act 2006, a new statute was adopted which reshaped the scope of the Commission’s activity, particularly with regard to the identification of the situations on which its rights-protection mandate is to focus. This reform entailed the repeal, in this respect, of the relevant provisions of the earlier Act, while leaving unaffected the range of powers already conferred upon the Commission in 2006 and discussed in the preceding section.

More specifically, the Equality Act 2010 sets out an explicit list of the “protected characteristics” to be safeguarded and imposes upon public authorities a duty to act “in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage” (section 1).

The protected characteristics are listed in section 4 of the Act and include, in particular: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

As regards the objectives to be pursued, these are specified in section 8, which provides that “the Commission shall, by exercising the powers conferred by this Act: (a) promote understanding of the importance of equality and diversity; (b) encourage good practice in relation to equality and diversity; (c) promote equality of opportunity; (d) promote awareness and understanding of rights under the Equality Act 2010; (e) enforce the Equality Act; (f) work towards the elimination of unlawful discrimination; and (g) work towards the elimination of unlawful harassment”.

As is apparent, the Commission’s mandate remains oriented towards the general promotion of the values of equality and diversity and of good practices connected with those values. At the same time, it introduces a more precise delineation of the areas in which the risk of discrimination is particularly acute and where the Commission’s contribution is most needed. This specification is articulated across different sectors in which discriminatory situations based on protected characteristics may arise, ranging from broad fields such as employment and education to more circumscribed contexts, such as access to transport for persons with disabilities.

With regard to the situations capable of giving rise to an unlawful act, the Act draws a distinction between two forms of discrimination. “Direct discrimination”, which is always prohibited under section 13, occurs where “a person, because of a protected characteristic, treats another less favourably than they would treat those without the characteristic”. By contrast, “indirect discrimination”, governed by section 19, arises where “a person applies a ‘provision, criterion or practice’ which, although applied to persons with different protected characteristics (for example, males and females), puts one group at a particular disadvantage (for example, disadvantages

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females but not males)”. Given the indirect nature of its effects and the absence of intentional harm, such conduct may nevertheless be regarded as lawful where it is “proportionate” to the pursuit of a “legitimate aim”.

As has been noted in British scholarship, the Equality Act 2010 constitutes a “detailed anti-discrimination legislation” which “codified the law in this regard in Britain, after decades of incremental development”. Scholarly analysis has also highlighted the differences between the Equality Act and the European Convention on Human Rights, incorporated through the Human Rights Act, and in particular Article 14 ECHR. Whereas the Equality Act 2010 prohibits discrimination only on the basis of a more limited and specified set of “protected characteristics”—such as race or ethnicity, sex, sexual orientation, disability, and religion or belief—Article 14 ECHR enshrines a more general principle of equality.

From the perspective of the effectiveness of anti-discrimination clauses, the comparison further reveals that, while the Human Rights Act operates primarily in a vertical dimension and has only an “indirect horizontal effect” on laws governing relations between private parties, the provisions of the Equality Act apply not only to public bodies—upon which there rests in any event a “positive duty” to eliminate discrimination and promote equality of opportunity—but also to private bodies.¹¹

¹¹ Among British scholars, Jeffrey Jowell has argued that the principle according to which “persons should be treated as having ‘equal worth’ and not be discriminated against without adequate justification” is “constitutive of democracy” (J. Jowell, *Is Equality a Constitutional Principle?*, in *Current Legal Problems*, 47, 1994, p. 7). In Jowell’s view, it was necessary in particular to move beyond a formalistic conception of equality as a component of administrative rationality review, and instead to regard equality as a core structural common law norm of the British constitutional order. On this understanding, the principle of “equal worth” could serve as an autonomous basis for judicial review. The incorporation of the European Convention on Human Rights through the Human Rights Act 1998 subsequently introduced Article 14 ECHR into domestic law, prohibiting discrimination in the enjoyment of other Convention rights, while the Equality Act 2010 provided the principle with a more organic and coherent statutory framework. Nevertheless, even though courts have “repeatedly emphasised the constitutional significance of the equality principle”, they have remained reluctant to recognise equality as an autonomous ground of review of administrative action, instead subsuming it within the broader framework of reasonableness review, under the general rubric of *Wednesbury unreasonableness*. This approach was reaffirmed in the recent decision of the Supreme Court in *R (Gallagher Group Ltd) v Competition and Markets Authority*, where Lord Sumption stated that “the common law principle of equality is usually no more than a particular application of the ordinary requirement of rationality imposed on public authorities” ((2018) UKSC 25, [50]). On these issues, see also C. O’Cinneide, *Equality – A Core Common Law Principle, or ‘Mere’ Rationality?*, in M. Elliott - K. Hughes (eds.), *Common Law Constitutional Rights*, Oxford, 2020.

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2.4. Notes on the EHRC's practice

An examination of the practice of the EHRC reveals that the Commission categorises its activities under a variety of headings, reflecting the multifaceted nature of its mandate.

In particular, the Equality and Human Rights Monitor section brings together the reports published by the Commission on the state of human rights. In its most recent report, published in 2023—five years after the previous one—the Commission focuses primarily on the impact of Brexit and the COVID-19 pandemic on persons with protected characteristics. It is also worth noting that, while the Commission does carry out several inquiries and investigations—albeit in smaller numbers than one might expect—legal actions are even rarer. By way of illustration, in 2025 there was only a single case in which legal assistance was provided pursuant to section 28 of the Equality Act, concerning proceedings relating to the obligation of railway companies to assist disabled passengers.

More significantly, at least in quantitative terms, it appears to be the Commission's activity in providing advice to Parliament and Government in relation to legislative proposals affecting the protection of protected characteristics.

Among the most recent instances of such advice, mention may be made of the Commission's intervention in response to the call for views issued by the Scottish Health, Social Care and Sport Committee in relation to the Assisted Dying for Terminally Ill Adults (Scotland) Bill. This is an area that is particularly sensitive in terms of potential discriminatory risks and has already been the subject of debate and several legislative initiatives in the Westminster Parliament, as well as of intervention by the Supreme Court. In that context, the Commission's submission focused on the potential impact of assisted dying legislation on the rights of disabled people, including with specific reference to the definition of terminal illness.

Reference may also be made to the investigation concluded in February 2024 concerning alleged acts of ethnic discrimination committed by the company Pontins in the management of its holiday parks. At the conclusion of the investigation, the Commission found that the service provider had indeed engaged in direct discrimination, by affording less favourable treatment to certain categories of persons on the basis of race, a protected characteristic under section 9 of the Equality Act 2010. Accordingly, the Commission issued an unlawful act notice pursuant to section 21 of the Equality Act, requiring the company to draw up and submit to the Commission an "action plan for the purpose of avoiding repetition or continuation" of the discriminatory conduct.

2.5. An explicative case: the legal definition of "woman" between the EHRC and the UK Supreme Court

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The recent case decided by the UK Supreme Court concerning the legal definition of “sex” under the Equality Act 2010 saw the active involvement of the Commission throughout the various stages of the judicial *iter*.

Given the significant public resonance of the case, it is useful to recall that the issue was brought before the Court following an application lodged by the association For Women Scotland, challenging the Gender Representation on Public Boards (Scotland) Act 2018. The applicant argued that section 2 of the Act was incompatible with the Equality Act 2010—while also alleging a violation of the legislative competence settlement between the devolved Nation and the United Kingdom under the Scotland Act—insofar as it provided that the term “woman” included “a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010) if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female”.

Before the matter came before the Judges of Middlesex Guildhall, the Commission had set out its position on the correct interpretation of the Equality Act provisions concerning the protected characteristics of sex and gender reassignment (sections 7, 11 and 212 of the Equality Act 2010) in a statement issued on 3 April 2022. In that statement, the Commission emphasised in particular that the term “sex” as used in the Act “is understood as binary—being male or female—with a person’s legal sex being determined by what is recorded on their birth certificate, based on biological sex”. Consequently, it stated that “a trans woman who does not hold a Gender Recognition Certificate is legally male and is treated as a man for the purposes of the sex discrimination provisions”, whereas “a trans woman with a Gender Recognition Certificate” should be treated under the Act “as a woman”.

The Commission thus distinguished transgender persons who hold a Gender Recognition Certificate pursuant to section 9(1) of the Gender Recognition Act 2004—who are to be regarded as belonging to their “acquired” gender (“where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman)”—and those who do not hold such certification, who remain identifiable by the biological sex recorded on their birth certificate, while nevertheless remaining protected as men and women under the Equality Act about the forms of sex discrimination specified therein.

In a subsequent letter dated 3 April 2022, addressed to the Secretary of State for Business, Energy and Industrial Strategy and to the Minister for Women and Equalities, the Commission—responding to a request as to whether parliamentary intervention was advisable concerning the definition of the term “sex” used in the Equality Act—further emphasised that identifying “sex” as biological sex would lead to “greater legal clarity”, particularly in certain areas identified by the Commission, and in particular with reference to occupational requirements (namely, requirements that

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may be imposed on employers and other organisations to ensure gender equality). This position did not, however, exclude the possibility that transgender persons holding a full Gender Recognition Certificate under the Gender Recognition Act 2004 could be recognised as belonging, in legal terms, to the sex acquired upon completion of the transition process.

The position articulated in the two documents referred to above was subsequently reiterated by the Commission in the proceedings before the UK Supreme Court, in which it participated as *amicus curiae*, submitting written observations pursuant to the power conferred upon it by section 30(1) of the Equality Act 2006 to intervene in proceedings relevant to matters falling within its remit.

As recorded by the Supreme Court in the judgment under consideration, the Commission in particular drew the Justices' attention to its interpretation of the terms "sex", "man" and "woman" as used in the Equality Act 2010, reiterating that those terms should be understood as encompassing individuals whose sex had been legally certified under the Gender Recognition Act following the transition process.

On this point, the Court observed that such a "wider definition" could give rise—drawing on the concerns expressed by the Commission itself in the aforementioned letter to the Secretary of State and the Minister for Women and Equalities—to several difficulties in the application of the Equality Act, particularly in the areas of: (i) discrimination on the grounds of pregnancy and maternity; (ii) protection against discrimination on grounds of sexual orientation, and in particular the risk that lesbians and gay men, for whom the biological aspect of same-sex attraction is defining, might be prevented from forming associations which exclude trans women and trans men respectively; (iii) single-sex services; and (iv) communal accommodation.

Such uncertainty in the application of the Act, the Court stressed, was a matter that "Parliament should urgently resolve" (para. 33).

For present purposes, it is noteworthy that the Court paid close attention to the position adopted by the EHRC in support of its interpretation of the Equality Act (paras. 247 ff.). At the same time, it is equally significant that the Court was careful to clarify that, notwithstanding the Commission's mandate and the powers conferred upon it in the field of human rights protection, "it is not for the EHRC to determine the meaning of sex in the EA 2010. That is for the courts to do" (para. 247). Through these words, the Court drew a clear line of demarcation between the Commission's role in advocacy—and, at most, in prompting legislative intervention in the field of rights—and the power and duty of statutory interpretation, which, within the common law tradition, can only lie with the courts for the purpose of resolving concrete cases brought before them.

On the basis of this premise, the Justices—once again departing from the Commission's interpretative approach (para. 250)—held that, to give effect to the

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Equality Act's provisions on the protected characteristic of sex, the most reasonable reading of the statute is one grounded in biological sex.¹²

Without entering further into the merits of the case, it should be noted that, in the immediate aftermath of the judgment, the EHRC adopted an interim guidance—likely to evolve into a Code of Practice pursuant to section 14 of the Equality Act 2006—addressed to a range of organisations, and in particular to workplaces and services open to the public (including hospitals, restaurants, shops, associations with more than twenty-five members, schools, and similar bodies). Through this guidance, the Commission sought to clarify the implications of the Court's decision, while also indicating practical measures to be adopted in order to avoid potentially discriminatory conduct on grounds of sex.

It is difficult to assess whether this initiative is also capable of reinforcing the obligation—laid down in section 15(4) of the Equality Act 2006—requiring all courts and tribunals, including the Supreme Court, to “take into account a relevant statutory code of practice published by the EHRC in any case in which it appears to the court or tribunal to be relevant”. What is clear, however, is that, as shown above, the force of this requirement is significantly circumscribed by the Supreme Court's firm assertion of the judiciary's primary role in the interpretation of legislation, even vis-à-vis bodies specifically entrusted with the protection of human rights and the combating of discrimination.

3. The process leading to the establishment of the Netherlands Institute for Human Rights

Turning now to the other national institution for the promotion and protection of human rights examined in this contribution, the analysis may begin with the genesis of the Netherlands Institute for Human Rights (hereinafter also referred to as the Institute or NIHR), which became operational in 2012.

The first step towards the establishment of a human rights body in the Netherlands was represented by a document produced in 1999 by the Dutch Section of the International Commission of Jurists.

It was not until 2005 that the Government, in the context of its campaign for membership of the United Nations Human Rights Council, formally declared its intention to endow the country with a national human rights institution, explicitly modelled on the Paris Principles and on the resolution of the European Parliament concerning NHRIs.

The fruitless passage of several subsequent years prompted the National Ombudsman, the Data Protection Authority, the Equal Treatment Commission (the

¹² For a more specific approach to the Court's arguments and for the British and Italian bibliography about the judgment see F. Nania, *La derogabilità/disapplicazione del diritto ad essere riconosciuti con il proprio “certificata sex” in una recente pronuncia della Corte Suprema del Regno Unito*, in *Diritti Comparati*, 18 novembre 2025.

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body which, as will be seen, constituted the institutional basis upon which the new Authority was built), and the Netherlands Institute of Human Rights to take the initiative in drafting specific reports. Through these reports, the need for the establishment of a human rights Authority was presented to the Government as no longer deferrable.

Of particular interest—both for understanding the reasons advanced in favour of creating the new body and for gaining insight into the constitutional context within which the prospective Institute for Human Rights was to be situated—is the Explanatory Memorandum of the House of Representatives of the States General (the Dutch Parliament), entitled Establishment of the Netherlands Institute for Human Rights, published in the course of the parliamentary process leading to the adoption of the Act.

A reading of the document first of all reveals with particular clarity the close relationship of derivation that was identified between the establishment of the NIHR and the principle enshrined in the amended Article 90 of the Constitution of the Netherlands, according to which “the Government shall promote the development of the international legal order”. The Constitution itself was thus understood to require such a form of implementation of the international rule of law in the field of human rights protection.

At the same time, it is well known that, within Dutch constitutional experience, international law plays a role of such significance that it may prevail even over the Basic Law itself. Suffice it to note that constitutional scholarship does not hesitate to assert that “the Constitution does not play the lead role”, to the extent that “issues of constitutionality of legislation are often downplayed as they are not justiciable in any case”, with the result that “compatibility with fundamental principles is often phrased in terms of compatibility with human rights treaties”. Accordingly, it has been argued in equally categorical terms that “the legal and political Authority of the Constitution is thus overshadowed by European and international (human rights) law (mainly ECHR and EU law), which operates as a substitute constitution”. From this follows the inevitable conclusion that “the limits of governmental and legislative action are found in international treaties”,¹³ without any reservation as to the modalities through which international law—whether customary or treaty-based—is incorporated into the constitutional system, and without any claim to preserve the priority of the national constitution in terms of the superior normative force of its fundamental principles.¹⁴

¹³ L.F.M. Besselink, *The Kingdom of the Netherlands*, in L.F.M. Besselink - P. Bovend'Eert - H. Broeksteeg - R. de Lange - W. Voermans (eds.), *Constitutional law of the EU Member States*, Alphen aan den Rijn, 2014, p. 1207.

¹⁴ It is always useful to recall that, within the Italian constitutional framework—where, as is well known, the effectiveness of customary and treaty-based international law is recognised by Articles 10(1) and 117(1) of the Constitution—the issue of “controlimiti” has been addressed by the Constitutional Court. This doctrine has been developed with specific reference to the operation of the fundamental principles enshrined in Articles 2 and 24 of the Constitution in relation to State immunity from civil

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Further observations concerning the role of the NIHR and the configuration of its competences and duties may also be drawn from the document produced by the parliamentary assembly.

First, the Memorandum under consideration set out the main features that were to characterise the newly established Authority. It emphasised, above all, the need to endow the new body with a broad mandate in the field of the promotion of human rights protected not only by the national Constitution, but also by international and European instruments in this area. These ranged from more “general” sources—such as the Charter of Fundamental Rights of the European Union, the United Nations Universal Declaration of Human Rights and the European Convention on Human Rights—to instruments specifically aimed at the protection of the rights of particular categories of individuals.

As regards the statutory duties incumbent upon the Authority, the Memorandum referred to the power to conduct investigations; to produce reports and recommendations; to provide advice to political and administrative bodies in relation to draft legislation and ministerial orders liable to affect human rights; to encourage research in the field of human rights; and to call for the ratification and implementation

jurisdiction for war crimes and crimes against humanity, most notably in judgment no. 238 of 2014 (see M. Luciani, *I controlimiti e l'eterogenesi dei fini*, in *Questione Giustizia*, 1, 2015, p. 84 ff.). The “controlimiti” doctrine has also arisen in constitutional case law concerning the limits to the direct applicability of European Union law—at least in its self-executing dimension—within the Italian legal order pursuant to Article 11 of the Constitution. Beginning with judgment no. 183 of 1973 and extending to order no. 24 of 2017, the Constitutional Court has developed the specific countervailing category of the “supreme principles” (*principi supremi*) of the Constitution. On the “controlimiti” doctrine in constitutional jurisprudence see at least M. Cartabia, *Principi inviolabili e integrazione europea*, Milano, 1995; P. Faraguna, *Ai confini della Costituzione. Principi supremi e identità costituzionale*, Milano, 2015, p. 63 ff.; A. Ruggeri, *Rapporti tra Corte costituzionale e Corti europee, bilanciamenti interordinamentali e “controlimiti” mobili, a garanzia dei diritti fondamentali*, in *Rivista AIC*, 1, 2011, p. 8 ff.; A. Celotto - T. Groppi, *Diritto UE e diritto nazionale: primauté vs. controlimiti*, in *Rivista italiana di diritto pubblico comunitario*, 2004, p. 1309. On the doctrine of “controlimiti” and on the relationship between the Constitutional Court and the Court of Justice of the European Union, see also the volume edited by A. Bernardi, *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali*, Acts of the Conference of the PhD Programme European Union Law and National Legal Orders, Department of Law, University of Ferrara, 7–8 April 2016, Napoli, 2017, in particular the contributions—reflecting the diversity of scholarly positions on the issue—by M. Luciani, *Il brusco risveglio. I controlimiti e la fine mancata della storia costituzionale*, p. 63 ff.; A. Ruggeri, *Primato del diritto sovranazionale versus identità costituzionale? (Alla ricerca dell'araba fenice costituzionale: i “controlimiti”)*, p. 19 ff.; F. Viganò, *Il caso Taricco davanti alla Corte costituzionale: qualche riflessione sul merito delle questioni, e sulla reale posta in gioco*, p. 233 ff.; R. Bin, *Taricco, una sentenza sbagliata: come venirne fuori?*, p. 291 ff.; O. Chessa, *Meglio tardi che mai. La dogmatica dei controlimiti e il caso Taricco*, p. 301 ff.; N. Lupo, *The Advantage of Having the “First Word” in the Composite European Constitution*, in *Italian Journal of Public Law*, 2, 2018, (Special Issue on *Constitutional Adjudication in Europe between Unity and Pluralism*, edited by P. Faraguna, C. Fasone and G. Piccirilli), p. 194 ff.; F. Salmoni, *Unità nella diversità o diversità nell'unità?*, in *Rivista AIC*, 2, 2019, p. 539 ff.; O. Pollicino - M. Bassini, *When Cooperation Means Request for Clarification, or Better for “Revisitation”*, in *Verfassungsblog*, 30 January 2017.

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of international treaties aimed at the protection of human rights. All these competences were to be exercised in a manner conducive to cooperation with civil society, and in particular with non-governmental organisations active in the field of human rights.

3.1. The NIHR: composition, appointment and funding

The proposal set out in the Memorandum was ultimately taken up by the Government, which presented an initial draft in 2008, followed by the bill that was to become the Netherlands Institute for Human Rights Act, namely the statute establishing the Netherlands Institute for Human Rights. The Institute thus became operational as of 2012, inheriting the functions of the pre-existing Equal Treatment Commission and extending its field of competence to encompass the full spectrum of human rights.

As stated in Chapter 6 of the Act, concerning transitional and concluding provisions, a “conversion” was effected of the members of the former Commission, as well as of all staff members, pursuant to section 36, into members of the Institute. Section 35 provides in this respect that “the appointments of the members and alternate members of the Equal Treatment Commission, including the chair and two assistant chairs, are converted by operation of law into appointments of the members and alternate members of the Netherlands Institute for Human Rights”.

Turning now to an examination of the institutional configuration of the Institute under the Act just referred to, it should be noted at the outset that it largely mirrors the British model analysed in the preceding section. This is so notwithstanding the importance—when identifying the scope of action of the new Institute—of the long-standing presence in the Netherlands of a body such as the Ombudsman, which may be regarded, *ante litteram*, as a precursor of those institutions entrusted with the protection of fundamental rights through forms of intervention distinct from the judicial remedy aimed at the restitution of infringed rights.¹⁵

¹⁵ In the Dutch context, a national Ombudsman had in fact been in place since 1982, entrusted with the protection of fundamental rights—including those deriving from international human rights instruments—with particular regard to relations between individuals and the public administration. The National Ombudsman constitutes an independent, single-member and impartial body to which citizens may turn where they consider that a public Authority has acted in violation of their fundamental rights. Although the Ombudsman’s decisions and recommendations are not legally binding, the institution is endowed with extensive investigative powers, enabling it to conduct investigations either on its own initiative or in response to individual complaints. The Ombudsman’s activity is grounded in a specific statute—the *Wet Nationale Ombudsman*—and is further regulated by the *Algemene wet bestuursrecht* (General Administrative Law Act), as well as by the Dutch Constitution (Article 78a). On the role of the Ombudsman, see in particular J.B.J.M. ten Berge, *The National Ombudsman in the Netherlands*, in *Netherlands International Law Review*, 32, 2, 1985, p. 204 ff.; and J.B.J.M. ten Berge - P. M. Langbroek, *Surplus Value of the Ombudsman*, in *The Danish Ombudsman 2005*, Part III, Copenhagen, 2005, p. 103 ff. In that latter contribution, with specific reference to the Ombudsman’s “persuasive” role in the Dutch context, it is observed that “in almost 90% of cases the administrative authorities do follow

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Having concluded this preliminary observation, attention may now turn to sections 14 and following of the Act, which provide that the NIHR is composed of a minimum of nine and a maximum of twelve members, including a chair and two assistant chairs. Members are appointed for a term of six years, which is renewable, the statute not laying down any explicit limitation on reappointment.

Article 4 of the establishing Act states that “the Institute is independent in the performance of its duties”, a status that is reflected above all in the procedures governing the appointment of its members and the circumstances in which they may be removed.

Members of the Institute are appointed by royal decree upon the recommendation of the Minister of Security and Justice, who in turn receives an opinion from an Advisory Council composed of the National Ombudsman, the President of the Data Protection Authority, the President of the Council for the Judiciary, and between a minimum of four and a maximum of eight members. These latter members, appointed for a term of four years and eligible for a maximum of two terms, are selected from among non-governmental organisations active in the field of human rights protection, workers’ organisations, and academia (sections 15 and 16). The Advisory Council—also in consultation with the serving members of the Institute—formulates its advice having regard to “the need for an expert and independent Institute and to the wish to ensure diversity in its membership” (section 16).

As may be seen, this is a complex procedure in which, to counterbalance the role of the executive (apart from the formal designation of appointment by royal decree), provision is made for the involvement of an ad hoc consultative body intended to be representative of civil society and thus external to the political-institutional circuit. This is so although the members of the Advisory Council are themselves appointed by the Minister of Security and Justice in agreement with the Minister of the Interior and Kingdom Relations, following mandatory consultation with the serving members of the Institute, the National Ombudsman, and the Chairs of the Data Protection Authority and the Council for the Judiciary.

Turning now to the regulation governing the removal of members of the Institute, the establishing Act refers to section 13 of the Autonomous Administrative Authorities Framework Act. This statute governs the legal regime applicable to independent administrative authorities and, in particular, entrusts the power of removal to the Government—specifically, in the case of the NIHR, to the Minister of Security and Justice—subject to the safeguard that “suspension and dismissal” may occur only where “the person concerned is unsuited or incompetent to do the job in question, or for other compelling reasons relating to the person concerned”.

the decision of the ombudsman. The conclusion is that, although the ombudsman is not a judge, his decisions have an important effect as far as the complainant is concerned” (p. 8).

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Having addressed the appointment of members, attention may now be given to the funding arrangements of the Institute. In this respect, it may be observed that funding is likewise regulated in accordance with the general principles laid down in the Autonomous Administrative Authorities Framework Act. In particular, pursuant to section 29 of that Act, the decision regarding the budget of an independent Authority is subject to ministerial approval—in the present case, by the Ministry of Justice and Security—which may be refused only where the financial resources are “incompatible with the law or the public interest”.

As regards the management of resources, the Institute retains—by virtue of the principle of independence enshrined in section 4 of the establishing Act—autonomy in the administration of the funds allocated to it, particularly in setting its own priorities in the pursuit of its institutional objectives. Nevertheless, like other independent administrative authorities, it remains subject to financial oversight pursuant to section 27 of the Autonomous Administrative Authorities Framework Act.

3.2. The institutional mandate of the Institute

As regards the institutional mandate of the Authority, section 1(3) of the Act provides that “the object of the Institute is to protect human rights, including the right to equal treatment, in the Netherlands, to increase awareness of these rights and to promote their observance”.

This formulation largely mirrors that found in the British legislation, and reference may therefore be made to the analysis already conducted concerning the task of protecting and promoting the plurality of human rights, albeit with particular emphasis placed on equal treatment. At the same time, as clarified in the Memorandum, the NIHR “does not concern itself with all rights to the same extent”, it being within the Authority’s discretion “to decide on its work and activities and also therefore to set priorities”.

Turning to the statutory duties, section 3 sets out a list that largely reflects the guidelines previously outlined in the Memorandum and which, in view of its specificity, is worth reproducing in full. The Institute is empowered:

- (a) to conduct investigations into the protection of human rights, including investigating whether discrimination has taken or is taking place and publishing its findings on this as referred to in section 10;
- (b) to report on and make recommendations about the protection of human rights, including annual reporting on the human rights situation in the Netherlands;
- (c) to provide advice as referred to in section 5;
- (d) to provide information and encourage and coordinate education about human rights;
- (e) to encourage research into the protection of human rights;

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(f) to cooperate on a systematic basis with civil society organisations and with national, European and other international institutions engaged in the protection of one or more human rights, for example by organising activities in partnership with civil society organisations;

(g) to press for the ratification, implementation and observance of human rights treaties and for the withdrawal of reservations to such treaties;

(h) to press for the implementation and observance of binding resolutions of international organisations on human rights;

(i) to press for observance of European or international recommendations on human rights.

This enumeration undoubtedly displays a greater degree of accuracy and completeness than its British counterpart, particularly in light of the central role accorded to the task of “pressing” entrusted to the Institute. This, in itself, appears to confer upon the NIHR a broad form of legitimacy, at least insofar as it enables the Authority to undertake unnamed activities and initiatives vis-à-vis those interlocutors whom it deems necessary to sensitise in order to implement human rights standards, especially by giving effect to the guidance issued by international organisations.

3.3. The powers of the Institute, with particular reference to the power to conduct investigations

As regards the specific powers conferred upon the Institute, these range from the general power to provide advice to political and institutional bodies in the process of adopting legislative and administrative measures “that relate directly or indirectly to human rights” (section 5), to the power to conduct investigations under section 10, and to the power to initiate legal proceedings provided for in section 13.

It scarcely needs to be emphasised that the power to provide advice enables the Institute to assert its views vis-à-vis the government–parliament circuit as well as the public administration. This is all the more significant given that such advice may be issued either in response to a request from the competent Ministers or from both Chambers of Parliament, or on the Institute’s own initiative.

Concerning investigations, section 10 provides that the Institute may, in response to a formal request, “conduct an investigation to determine whether discrimination as referred to in the Equal Treatment Act, the Equal Treatment (Men and Women) Act or Article 646, Book 7 of the Civil Code has taken or is taking place” (para. 1), and publish its findings. It is further specified that an investigation may also be initiated by the Institute on its own motion “to determine whether such discrimination is systematically taking place”. Not coincidentally, an examination of the Institute’s practice reveals that investigations initiated on the Institute’s own initiative are by far the most numerous.

In any event, a request for the initiation of an investigation by external actors may be submitted by:

- (a) a person “who believes that he or she is a victim of discrimination within the meaning of the Equal Treatment Act, the Equal Treatment (Men and Women) Act or Article 646, Book 7 of the Civil Code”;
- (b) a “natural or legal person or competent Authority wishing to know whether it is discriminating within the meaning of the Equal Treatment Act, the Equal Treatment (Men and Women) Act or Article 646, Book 7 of the Civil Code”;
- (c) a “person responsible for deciding on a dispute concerning discrimination within the meaning of the Equal Treatment Act, the Equal Treatment (Men and Women) Act or Article 646, Book 7 of the Civil Code”; (d) a “works council or comparable employee participation body which believes that discrimination within the meaning of the Equal Treatment Act, the Equal Treatment (Men and Women) Act or Article 646, Book 7 of the Civil Code is taking place in the organisation for which it was appointed”; (e) an “association having full legal capacity or a foundation which, in accordance with its constitution, represents the interests of those whose protection is the objective of the Equal Treatment Act, the Equal Treatment (Men and Women) Act or Article 646, Book 7 of the Civil Code”.

It follows that the possibility of submitting complaints with a view to triggering an investigation by the Institute is not confined to legal persons or associations, but may also originate from individuals who consider themselves to have been subjected to discrimination within the meaning of the Equal Treatment Act, the Equal Treatment (Men and Women) Act, or Article 646 of Book 7 of the Civil Code (which governs various types of contracts, including contracts of employment).

Given the reference to anti-discrimination legislation, the Institute, in its capacity as an equality body, may entertain complaints alleging a wide range of discriminatory practices: from discrimination on grounds of race or ethnic origin, religion or belief, and political opinion, to discrimination based on sex or gender (including pregnancy), sexual orientation, marital status, nationality, age, disability or chronic illness. It should be emphasised, however—as already noted in the discussion of the British system—that such forms of discrimination fall within the Institute’s competence only insofar as they arise in specifically identified areas, such as employment, education, housing, healthcare, and similar fields.

It is also worth drawing attention to the fact that the Institute is precluded from dealing with complaints concerning the conduct of public administrative authorities. This limitation, already highlighted in the Memorandum, is clearly intended to avoid overlaps between the powers of the NIHR and those of the National Ombudsman in the field of human rights protection. While borderline situations cannot be entirely ruled out—as evidenced by the establishment of a coordination mechanism between the two bodies—it nevertheless remains the case that only the Ombudsman “is the appropriate Authority to hear complaints about administrative authorities, even where they concern human rights” (Memorandum, at 18).

In light of the foregoing, it should further be noted that, outside the aforementioned sectors, the role of the Institute is essentially reduced to that of an

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information and guidance point, in the sense that it directs individuals who complain of other types of grievances—particularly those of a different nature—towards the competent bodies, and in particular to the Data Protection Authority or to the National Ombudsman.

Returning to the procedural framework of investigations, following a preliminary assessment the NIHR may request additional information and hear the parties concerned. At the conclusion of the investigation, the Institute issues a reasoned decision which, although not legally binding in a strict sense, is intended to rely on its moral Authority and public support in order to ensure effective follow-up to any recommendations aimed at securing the cessation of the discriminatory conduct (section 11).

As anticipated, the Authority is also vested with the power to initiate legal proceedings (section 13)—again, within the scope of situations deemed to be in breach of the Equal Treatment Act, the Equal Treatment (Men and Women) Act or Article 646 of Book 7 of the Civil Code—in order to seek a judicial declaration that the impugned conduct is unlawful and that its effects be brought to an end.

3.4. Notes on the NIHR's practice: the META case

Among the most recent cases addressed by the NIHR, the decision adopted in February 2025 concerning the algorithm used by the social network META is particularly emblematic.¹⁶

The case originated from a petition submitted to the Institute jointly by two non-governmental organisations, Global Witness and Bureau Clara Wichmann. The petition alleged that the algorithm employed by META resulted in gender-based discrimination, in particular with regard to the publication and dissemination of job advertisements on the Facebook platform.

Following the complaint, the Authority initiated an investigation pursuant to section 13 of the Act, ultimately concluding that META was indeed engaging in gender discrimination in the Netherlands in the operation of its job advertising system. Specifically, the Institute found that the management of a job recruitment system allowed META's activity to be classified as the provision of a service within the meaning of equal treatment legislation, thereby imposing on the service provider an "obligation to refrain from discriminating on the ground of gender".

As has just been noted, the Authority thus framed the discriminatory practice resulting from META's algorithm not under the Netherlands Institute for Human Rights Act as a general violation of human rights, but rather within the scope of a breach of the principle of equal treatment of persons irrespective of religion, belief,

¹⁶ <https://oordelen.mensenrechten.nl/oordeel/2025-17/4a575c22-d4b0-499f-8811-6b5e6720344d>

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political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status, as laid down in the Equal Treatment Act. In particular, reliance was placed on section 5 of that Act, which provides that “it is unlawful to discriminate in or with regard to: (a) advertisements for job vacancies and procedures leading to the filling of vacancies; (b) job placement; (c) the commencement or termination of an employment relationship; (d) the appointment and dismissal of civil servants; (e) terms and conditions of employment; (f) permitting staff to receive education or training during or prior to employment; (g) promotion; and (h) working conditions”.

The same provision further lays down a series of exceptions to the prohibition, for example in cases concerning “the freedom of an institution founded on religious or ideological principles to impose requirements which, having regard to the institution’s purpose, are necessary for the fulfilment of the duties attached to a post”, or “the freedom of an institution founded on political principles to impose requirements which, having regard to the institution’s purpose, are necessary for the fulfilment of the duties attached to a post”.

In the case at hand, once the investigative phase had been completed, the Authority adopted its final opinion, finding that META had violated the law on the ground that “the algorithm, without monitoring and potential measures, can enhance stereotyping”. Accordingly, the Institute concluded that “the indirect discrimination based on gender is not necessary and thus is not objectively justified. The Institute therefore rules that the respondent has made prohibited discrimination based on gender when showing job advertisements to Facebook users in the Netherlands”, given that META had failed to adduce sufficient elements to demonstrate that it had put in place the necessary monitoring of the algorithm, as well as appropriate “measures to neutralize its reinforcing effects”.

It can thus be confirmed that—consistent with other cases decided by the Authority (such as the Childcare Benefits Discrimination Affair, the Pregnancy and Maternity Discrimination Case, or the Disability and Reasonable Accommodation Case)—the META case likewise resulted in an opinion devoid of legally binding effects for the party found responsible for violating the human rights protection framework falling within the NIHR’s sphere of competence.

Nevertheless, the non-binding nature of such opinions should not lead to conclude for their ineffectiveness. As already noted, the persuasive force of the determinations issued by these bodies operates on a plane distinct from that of legal coercion, relying instead on voluntary compliance, even where such compliance is prompted by reputational considerations.¹⁷

Furthermore, it is to be noticed that - after the opinion led by the NIHR - the Amsterdam Court of Appeal ruled¹⁸ that Meta must let dutch users easily choose a

¹⁷ This is truer if one considers that the investigation conducted by the NIHR in the META case attracted wide international attention, as evidenced by the coverage devoted to it by CNN (see *Facebook Enables Gender Discrimination in Job Ads, European Human Rights Body Rules*, 28 February 2025).

¹⁸ Case C/13/774725.

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non-profiling recommendation system and keep that choice in place until the user changes it. This ruling, although not directly connected to the issue decided by the NIHR, nevertheless could constitute a safeguard also against algorithmic discrimination based on the profiling of sex as requested by the Institute.

3.5. The establishment of the State Commission against Discrimination and Racism: an unusual overlap of roles?

In light of the considerations set out above—particularly with regard to the Institute’s broad mandate and its role as a body entrusted with the promotion of human rights—it may appear at least somewhat curious that, in 2022, the Dutch Government decided to establish a National Coordinator against Discrimination and Racism. This office was tasked with “bonding and bridging, boosting policy efforts and overseeing their implementation when it comes to tackling discrimination and racism”, as well as with promoting “equality, justice and inclusivity in the European and Caribbean Netherlands”. In addition, at the request of the Tweede Kamer (the lower House of Parliament), a new body was created: the Staatscommissie Discriminatie en Racisme (State Commission against Discrimination and Racism).

As stated on its official website, “the State Commission against Discrimination and Racism examines discrimination and racism across all sectors of Dutch society. In addition, it investigates instances of discrimination and ethnic profiling within, and by, the public administration. Based on its investigations, the Commission informs the Government about the current state of discrimination and racism in the Netherlands. Furthermore, it advises the Government on how to improve policies, laws and regulations, to combat discrimination and racism”.¹⁹

Within the scope of its activities, the Commission was in particular entrusted with conducting an investigation covering “all sectors of society”, including an audit aimed at identifying ethnic profiling and discrimination within government.

In the course of its work, the Commission addressed in particular three recommendations to the Government aimed at improving the public approach to combating discrimination, while the National Coordinator pursued parallel activities of awareness-raising and public dissemination on issues of racism and discrimination.²⁰

Without entering into a detailed analysis of the activities of the Commission and of the National Coordinator, it is difficult not to observe that their respective mandates appear, at least in part, to overlap with that of the Netherlands Institute for Human Rights.

¹⁹ <https://www.staatscommissietegendiscriminatieenracisme.nl>

²⁰ <https://www.bureauncdr.nl/actueel/nieuws/2024/03/04/ncdr-on-tour#:~:text=21%20maart%20is%20het%20de,ervaringen%20met%20racisme%20en%20discriminatie>.

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As shown above, the NIHR has long been entrusted with the task of monitoring, promoting and protecting human rights—including those relating to equal treatment—and is empowered to receive and handle individual complaints alleging discriminatory situations. The decision to establish a new ad hoc State Commission may therefore appear redundant, if not even symptomatic of a lack of confidence in the existing Institute. Such an institutional choice also carries the risk of fragmenting public action in the field of equal treatment, potentially leading to a dispersion of resources as well as to a degree of confusion on the part of those concerned.

4. Concluding remarks on National Human Rights Institutions and the transformations in the landscape of fundamental/human rights protection: suggestions for the establishment of an NHRI in Italy

The analysis carried out above confirms that NHRIs are entrusted with the task of complementing the “classical” judicial remedies established to protect citizens’ rights. By virtue of their specific specialisation in the field of human rights, they are able to act as interlocutors of institutional actors, and of the courts themselves, as “domestic non-judicial institution(s) for the implementation of international human rights law”.²¹ It further follows that the protection of rights simultaneously assumes a multilevel configuration—insofar as claims for protection may be addressed to judicial bodies operating at national, regional and international levels, engaged in dialogue with one another—but also a “diffuse” articulation.²²

²¹ See L.C. Reif, *The Ombudsman, Good Governance and the International Human Rights System*, Nijhoff, 2004. It has also been observed that NHRIs “by their very nature are capable of multiple activities ... and in that sense provide an exciting vehicle for the delivery of ESR in those societies in which they operate”. This is because, inter alia, thanks to their “institutional flexibility”, they can make a significant contribution to the protection of fundamental rights, and in particular of economic and social rights (ESR), which “require multiple strategies for their realization, ranging from litigation to budget monitoring to advocacy and awareness-raising” (see M. Gomez, *Advancing Economic and Social Rights through National Human Rights Institutions*, in J. Dugard et al. (eds.), *Research Handbook on Economic, Social, and Cultural Rights as Human Rights*, Cheltenham, 2020, 327).

²² Among the extensive doctrine on this subject, see S. P. Panunzio, *I diritti fondamentali e le Corti in Europa*, in Id. (ed.), *I diritti fondamentali e le Corti in Europa*, Napoli, 2005; P. Ridola, *Diritto comparato e diritto costituzionale europeo*, cit., p. 187 ff., p. 240 ff., p. 273 ff.; P. Ridola, *Il “dialogo tra le Corti”: comunicazione o interazione?*, in Id., *Esperienza Costituzioni Storia. Pagine di storia costituzionale*, Napoli, 2019, 61 ff.; G.F. Ferrari (ed.), *Corti nazionali e Corti europee*, Napoli, 2006; M. Luciani, *Costituzionalismo irenico e costituzionalismo polemico*, in *Giurisprudenza costituzionale*, 2, 2006, esp. para. 5; G. Zagrebelsky, *Corti costituzionali e diritti universali*, in *Rivista trimestrale di diritto pubblico*, 2, 2006, p. 297 ff.; G. de Vergottini, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione*, Bologna, 2010; C. Pinelli, *Trapianti, innesti, dialoghi. Modalità di trasmissione e circolazione del diritto straniero*, in *Rivista trimestrale di diritto pubblico*, 2, 2011, p. 495 ff.; G. Repetto, *Argomenti comparativi e diritti fondamentali in Europa. Teorie dell’interpretazione e giurisprudenza sovranazionale*, Napoli, 2011; A. Schillaci, *Diritti fondamentali e parametro di giudizio. Per una storia concettuale*

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From a more specific perspective, it is likewise confirmed that the bodies under consideration, in view of the powers they possess (or, if preferred, of those they lack), cannot be subsumed—for classificatory purposes—within any of the traditional categories of public power, and in particular neither within the administrative nor within the judicial sphere.

In light of these considerations, it appears persuasive to locate such bodies within the category of the “fourth branch institutions”²³, that is among those autonomous and independent actors which cannot be ascribed to any of the classical branches of power and yet are empowered to interact with each of them through modes of intervention and dialogue that are non-binding in nature. Through these forms of engagement, NHRIs articulate a human rights-based perspective by virtue of coordination with other actors—whether institutionalized or not—that are proactively active in the field of human rights.

Moving on to the Italian context, it is at present characterized by a fragmentation with a multitude of bodies and organizations competing (such as the National Guarantor for the Rights of Persons Deprived of Liberty, the Authority for Children and Adolescents, the National Office Against Racial Discrimination), most of which are part of the government structure and are bound by a limited sectoral mandate.²⁴

An Italian NHRI with specific guarantees of independence, whereas, might and should be capable of acting as a single interlocutor with supranational and international institutions as well as with civil society and with courts (this was as well the situation, as mentioned earlier, especially in the UK where the EHRC has been indeed constituted by the Equality Act through the merger of a series of public bodies that were engaged in the promotion of rights of certain minorities).

As mentioned in the introduction of this paper, one reason for a kind of scepticism towards such an institution could stem from the idea that an Italian NHRI could even be “useless” within a context characterized by rights protected at constitutional level and guaranteed by independent judges (as well as by international courts) and in which the supremacy of the Constitution and fundamental rights are also upheld by a Constitutional Court.

However, the suggestions and the “good practices” from the British EHRC and the Dutch Institute prove - on the contrary - that these kind of institutions are certainly able to make a contribution in protecting human rights, complementing the traditional framework of rights’ protection without of course taking an alternative stance with respect to judicial’s safeguards. As discussed above, they are indeed capable to move on different levels: fostering a culture of human rights performing rights-promotion

delle relazioni tra ordinamenti, Napoli, 2012; F. Saitto, *Giurisdizione costituzionale e protezione dei diritti fondamentali in Europa. I sistemi accentrati di fronte alle sfide della legalità costituzionale europea*, Milano, 2024.

²³ Following the definition by M. Tushnet, *The New Fourth Branch. Institutions for Protecting Constitutional Democracy*, Cambridge, 2021.

²⁴ G. Repetto, *Le National Human Rights Institutions: una nuova frontiera nella protezione sistemica dei diritti fondamentali e l’urgenza italiana*, cit., p. 14.

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activities, conducts researches and investigations, intervenes before courts and creating a connection with judicial sphere, adopt acts that may affect protection of fundamental/human rights of individuals and minorities.

In this regard, it should be recalled that steps have been taken - as known - towards the creation of an Italian NHRI, with different bills under discussion in Parliament at date.²⁵

It can only be mentioned here that while two of these projects envisage assigning the functions of NHRI to the Data Protection Authority²⁶, others (esp. C 426 in the Chamber of Deputies, S 424 in the Senate and the constitutional bill C 580) provide for the establishment of a new body (whether in the form of a Commission or an Authority) but not through a merger - as in the British experience which had embraced a criterion of “simplification” on this point - with the other bodies already operating in the field of human rights.

The solution proposed, if it might allow to maintain a separate set of institutions to protect more effectively the rights of various vulnerable groups²⁷, could on the other hand lead to the dispersion of enforcement efforts across multiple actors specialising in specific groups. With the risk, without underestimate the different identities²⁸ of the persons seeking equal protection, that such fragmentation could ultimately weaken the legitimacy of the NHRI itself.

Finally, with regard to competences, the Italian bills follow the model of the two NHRIs examined in this paper in terms of independence, promotional function, collaboration with other institutions and civil society, power to receive and assess notices of human rights violations or restrictions. But a gap in terms of functions compared to the EHRC and the NIHR could be identified with regard to the fact that no litigation powers - such as the powers to provide legal assistance, bring legal proceedings before courts or intervene in legal proceedings brought by others - are provided for. It should also be noted that the constitutional amendment bill C 580 provides for the possibility for the Authority to raise the question of constitutional legitimacy when it considers that a state or regional law violates human rights. Although, in this respect, it is more realistic to assume that a prospective NHRI would

²⁵ On the different bills see V. Tudisco, *La creazione di un'istituzione nazionale per i diritti umani in Italia*, in G. Repetto (ed.), *Una National Human Rights Institution per l'Italia: problemi e prospettive*, cit., p. 49 ff.

²⁶ G.C. Feroni, *I tentativi di istituire una NHRI nel contesto istituzionale italiano: quale ruolo per il Garante per la protezione dei dati personali?*, in G. Repetto (ed.), *Una National Human Rights Institution per l'Italia: problemi e prospettive*, cit., p. 19 ff.

²⁷ R. Carver, *One NHRI Or Many? How Many Institutions Does It Take To Protect Human Rights? – Lessons From The European Experience*, in *Journal of Human Rights Practice*, 3, 1, 2011.

²⁸ On the paths of “recognition” of identities that articulate the social body see A. Schillaci, *Le storie degli altri. Strumenti giuridici del riconoscimento e diritti civili in Europa e negli Stati Uniti*, Napoli, 2018. On the relationship between identity and rights in the private sphere P. Ridola, *Cittadinanza, identità, diritti*, in *Osservatorio costituzionale*, 1, 2022, par. 2, p. 20 ff.

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rather be able to intervene before the Constitutional Court as *amicus curiae*²⁹ —as well as before the ECtHR— nonetheless establishing an important channel of dialogue in relation to human rights protection.

ABSTRACT: The paper compares two National Human Rights Institutions created on the basis of the Paris principles - the UK Equality and Human Rights Commission and the Netherlands Institute for Human Rights - focusing on their legal mandates, powers, and activities. Particular attention is devoted to the promotional role these institutions are meant to fulfil in advancing equality and human rights, and to the key differences between the two models.

It is also discussed - even through the analysis of some practices - if these kinds of bodies, acting beyond traditional powers and especially judiciary power, may play a relevant role in integrating the protection of rights and equality in modern democracies as fourth branch's institutions.

Finally, the article considers whether these experiences may offer useful suggestions and “good practices” for the establishment of a National Human Rights Institution in Italy, in light of the draft bills currently under examination in Parliament.

KEYWORDS: National Human Rights Institutions – equality – fourth branch – UK – Netherlands – integrating.

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²⁹ Following the amendment of the Supplementary Rules for the Proceedings before the Constitutional Court in 2020 and the introduction of article 4 *ter*.

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

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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.

Shaping the Italian National Human Rights Institution: Legislative Initiatives and Institutional Architecture *

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1. Introduction

Despite European and international recommendations¹ and the submission of several bills², Italy is one of the few Member States of the European Union that has not yet established a National Human Rights Institution (NHRI) on the basis of the “Principles relating to the Status of National Institutions” (Paris Principles)³, which establish minimum standards for the international accreditation of NHRIs by the Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRI). The Paris Principles cover competence and responsibilities, composition and guarantees of independence and pluralism, methods of operations, and the additional principles concerning the status of commissions with quasi-

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¹ See, for instance, Commissioner for Human Rights of the Council of Europe Dunja Mijatović, *Report following her visit to Italy from 19 to 23 June 2023*, Strasbourg, 21 November 2023, section 3.2.1. “National Human Rights Institution (NHRI)”; Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Italy*, 27 February 2024, para. 21-22; European Commission, *2025 Rule of Law Report: Country Chapter on the rule of law situation in Italy*, p. 2.

² For more information concerning previous bills on the establishment of an NHRI in Italy, see Commissione straordinaria per la tutela e la promozione dei diritti umani del Senato della Repubblica, *Autorità nazionale indipendente per i diritti umani: il lavoro svolto dalla Commissione diritti umani del Senato (XIV-XVIII legislatura)*, ottobre 2023.

³ Principles relating to the Status of National Institutions (The Paris Principles) adopted on 19 December 1993 by General Assembly resolution 48/134.

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jurisdictional competence. The SCA developed General Observations that are authoritative interpretative statements of the Paris Principles⁴.

With regard to institutional architecture, States have a wide margin of appreciation that allows them to adapt the structure of an NHRI to their national context. In this regard, the General Assembly Resolution that adopted the Paris Principles “Encourages the establishment and strengthening of national institutions having regard to those principles and recognizing that it is the right of each State to choose the framework that is best suited to its particular needs at the national level”⁵.

This margin of appreciation has led to the development of different models, which include commissions, ombudsman institutes, hybrid institutions, consultative and advisory bodies, research institutes and centres, civil rights protectors, public defenders, and parliamentary advocates⁶. Given the existence of different types of NHRIs, it has been observed that it is necessarily a generalisation to consider NHRIs as a homogeneous group, although this is justified on the fact that they are based on common international principles, they are members of a global network, they are reviewed by the GANHRI SCA on the basis of common standards, they have common modes of interaction at the international level, and (especially for those accredited on the basis of the Paris Principles) they undertake similar activities⁷. In general, NHRIs may be classified in four main types:

- Human Rights Commissions (diffused globally) are multi-mandate boards with a broad mandate covering protection, promotion, and monitoring, and are commonly tasked with reports and inquiries, legislative reviews, awareness, and education.
- Ombuds Institutions/*Defensores del Pueblo* (common in South America and in Poland, Portugal, and Spain) are led by single ombudspersons and traditionally handle individual complaints.
- Human Rights Institutes’ main tasks are research, education, and advisory functions which are often combined with a limited protection mandate (for example, the NHRIs in Denmark, Germany, and the Netherlands).
- Advisory/Consultative Committees (such as in France, Greece, Luxembourg, and Morocco) commonly envisage many commissioners or board members and an advisory council, and have advisory functions⁸.

⁴ General Observations of the Sub-Committee on Accreditation, adopted on 21 February 2018 by the Global Alliance of National Human Rights Institutions.

⁵ UN General Assembly, Resolution A/RES/48/134, 20 December 1993, para. 12. See also Vienna Declaration and Programme of Action adopted on 25 June 1993 by the World Conference on Human Rights in Vienna, I 36.

⁶ List contained in the General Observations of the Sub-Committee on Accreditation, para. 7.

⁷ D. Langtry - K. Roberts Lyer, *National Human Rights Institutions: Rules, Requirements, and Practice*, Oxford, 2021, p. 22.

⁸ *Ibid.*, p. 24. For more information about models of NHRIs, see United Nations Office of the High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, Professional Training Series No. 4, New York and Geneva, 2010, p. 15-19.

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In Italy five bills concerning the establishment of an NHRI are pending in Parliament. Two of these bills propose to assign the human rights mandate to the Personal Data Protection Authority (Bills S. 303 and S. 505). Three bills contemplate the establishment of an *ad hoc* institution: a Commission (Bill S. 424 and Bill C. 426) or an Advisory body (Bill C. 580).

This article focuses on Italy's current situation by first describing the legislative bills. After exploring current potential advantages and potential disadvantages of *ad hoc* institutions or multi-mandate institutions, specific sections concern the Personal Data Protection Authority and the opportunities offered by the implementation of the EU Directives on Standards for Equality Bodies, due by June 2026. The conclusion highlights that, irrespective of the institutional structure, it is crucial that clear legislation, full independence, appropriate resources, and systemic cooperation and coordination are guaranteed.

2. Italy's bills for the establishment of an NHRI

In order to address the need to establish an NHRI, five legislative initiatives are pending in Italy. Three bills (S. 303⁹, S. 424¹⁰, S. 505¹¹) are currently jointly examined by the Parliamentary Committee on Constitutional Affairs of the Senate of the Republic.

Bills S. 303 and S. 505 foresee to assign the human rights mandate to the Personal Data Protection Authority (*Garante per la protezione dei dati personali*), which will be renamed "Personal Data and Human Rights Protection Authority" (*Garante per la protezione dei dati personali e dei diritti umani*). In particular, Article 1 of the two bills, changes Article 153, para. 1 of the Personal Data Protection Code¹² so that two out of the four members of the collegial body have proven competence and experience in the field of the protection and promotion of human rights. While, however, Bill S. 303 formulates this requirement by stating that candidates are required to ensure

⁹ Senato della Repubblica, disegno di legge S. 303 d'iniziativa della senatrice Pucciarelli, *Istituzione del Garante per la protezione dei dati personali e dei diritti umani attraverso l'assegnazione al Garante per la protezione dei dati personali dei compiti di istituzione nazionale indipendente per la protezione e promozione dei diritti umani*, XIX legislatura, comunicato alla Presidenza il 9 novembre 2022.

¹⁰ Senato della Repubblica, disegno di legge S. 424 d'iniziativa dei senatori Valente, Giorgis, Parrini e Zampa, *Istituzione della Commissione nazionale per la promozione e la protezione dei diritti umani fondamentali*, XIX legislatura, comunicato alla Presidenza il 21 dicembre 2022.

¹¹ Senato della Repubblica, disegno di legge S. 505 d'iniziativa delle senatrici Bevilacqua, Maiorino e Barbara Floridia, *Disposizioni per l'assegnazione al Garante per la protezione dei dati personali dei compiti di istituzione nazionale indipendente per la protezione e promozione dei diritti umani*, XIX legislatura, comunicato alla Presidenza il 26 gennaio 2023.

¹² Legislative decree No. 196 of 30 June 2003.

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independence and experience in the area of data protection “or” of promotion and protection of human rights, Bill S. 505 substitutes “or” with “and”, therefore better ensuring that expertise in human rights is represented. Bill S. 505 further requires that among the four members of the College, “at least two shall possess the necessary human rights expertise, and in making appointments the following shall be considered: gender balance; ethnic diversity of society; range of vulnerable groups; respect for diversity; pluralistic representation of the social forces involved in the promotion and protection of human rights”¹³.

The appointment procedure is a public procedure which consists in a public call, the publication of candidates’ *curricula vitae*, and the election of two members by the Chamber of Deputies and two members by the Senate of the Republic for a non-renewable term of seven years.

The Personal Data Protection Authority will have new staff for the new mandate: 30 additional units for Bill S. 303 (current 200 units would be reduced to 192); 80 additional units for Bill S. 505 (for a total of 280 units).

The reasons justifying the proposal to assign the human rights mandate to the Personal Data Protection Authority are based on the fact that the authority operates in many areas and in different contexts and is fully independent¹⁴. Moreover, a multi-mandate body would require the use of less financial resources¹⁵.

In contrast, Bill S. 424 envisages the establishment of an *ad hoc* institutions, the “National Commission for the promotion and protection of fundamental human rights” (*Commissione nazionale per la promozione e la protezione dei diritti umani fondamentali*). The Commission would be a collegial body composed of a president and four members, chosen from among persons of the highest moral standing, recognised independence, integrity and high professionalism, as well as having proven competence and experience in the field of human rights, rights of the child and human sciences in general, with many years of experience in the promotion and protection of human rights and in the management of complex organisational structures in the public or private sectors. The four members of the Commission are elected by the Senate of the Republic (two) and by the Chamber of Deputies (two) by a two-thirds majority vote of their members following an examination procedure of the candidates based on the principles of merit and transparency. The procedure requires the assessment of candidates’ *curricula vitae* and public hearings by competent parliamentary

¹³ My translation.

¹⁴ Bill S. 303, p. 1.

¹⁵ *Ibid.*

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committees of the two Houses of Parliament. The president of the Commission is appointed by means of a decision taken in agreement between the Presidents of the two Houses of Parliament after a public hearing. The term is non-renewable and lasts five years.

The comparison of the three bills between them and in light of the Paris Principles shows that, for some aspects, the three bills are similar¹⁶. For instance, the three bills envisage:

- parliamentary appointment;
- similar powers for accessing documents, data, archives, minutes (public administration);
- the power to receive reports of violations; and
- the duty of cooperation at the international and European levels that includes the United Nations, the European Union, the Council of Europe, and bodies from other States that are competent for the promotion and protection of Human Rights (Bill S. 505 also mentions the Organisation for Security and Co-operation in Europe, OSCE).

Other provisions are similar but there are relevant differences. For instance, the NHRI may submit opinions and recommendations to the Houses of Parliament and to the Government but, according to Bills S. 424 and S. 505, this power also applies to laws and regulations. In addition, Bill S. 424 foresees the possibility to also formulate proposals and, according to Bill S. 505, recommendations may also be directed to public administrations. Bill S. 424 specifies that the Commission formulates opinions, recommendations, and initiatives on its own initiative.

In some parts of their texts, focus is on different issues. For instance, with regard to monitoring activities, Bill S. 303 pays particular attention to the rights of women and minors in the digital society and on revenge porn, Bill S. 424 expressly mention the rights of persons deprived of their liberty and asylum seekers, and Bill S. 505 specifies that monitoring activities are conducted also in light of EU law (besides national and international law).

The comparison of the bills in the Senate seems to suggest four potential points that could be further considered. First, the role of research and cooperation with universities could be made more explicit. Second, the “regular and constructive engagement” with civil society could be guided by an interpretation that (besides

¹⁶ For a more detailed analysis of the three bills in light of the Paris Principles, see V. Tudisco, *La creazione di un'istituzione nazionale per i diritti umani in Italia*, in G. Repetto (ed.), *Una National Human Rights Institution per l'Italia: problemi e prospettive*, Torino, 2025, p. 47-69.

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NGOs, associations, and foundations) encompasses all the stakeholders mentioned by the Paris Principles such as trade unions, concerned professional organisations, trends in philosophical and religious thought, universities and qualified experts. Third, the interaction between the NHRI and courts (for instance, the NHRI could act as an *amicus curiae*) and mediators could be made clearer and more proactive. Fourth, local or regional sections of the National Human Rights Institution could be established.

The bills of the Chamber of Deputies (Bills C. 426¹⁷ and C. 580¹⁸) have been assigned, but the examination has not yet begun. Bill C. 426 proposes the establishment of the “National Commission for the Promotion and Protection of Fundamental Human Rights” (*Commissione nazionale per la promozione e la protezione dei diritti umani fondamentali*). Under Article 1, the Commission is a collegial body composed of a president and six members of the highest moral standing, recognised independence, integrity, courage, and high professionalism ensuring adequate gender representation. The members are required to possess proven competence and experience in the area of human rights, rights of the child, and human sciences as well as many years of experience in the promotion and protection of human rights and in the management of complex organisational structures in the public or private sectors. Three members are elected by each House of Parliament, having each senator or deputy the possibility to express only two names. The elected candidates are appointed by a decree of the President of the Republic. The president of the Commission is also appointed by a decree of the President of the Republic on the proposal of the President of the Council of Ministers, after deliberation by the Council of Ministers, having obtained the opinion of the competent parliamentary committees. In contrast to the bills examined in the Senate, one member of the Commission would therefore be chosen by the executive branch. The term of the members of the Commission is non-renewable and lasts five years. The four points identified from the comparison of the bills of the Senate also apply to Bill C. 426 and, therefore, the bill could add:

- a role for research and cooperation with universities;
- a reference to a regular and constructive engagement with civil society that also includes trade unions, concerned professional organisations, trends in philosophical and religious thought, universities and qualified experts;

¹⁷ Camera dei deputati, proposta di legge C. 426 d’iniziativa dei deputati Quartapelle Procopio, Della Vedova, Boldrini, Istituzione della Commissione nazionale per la promozione e la protezione dei diritti umani fondamentali, XIX legislatura, presentata il 21 ottobre 2022.

¹⁸ Camera dei deputati, proposta di legge costituzionale C. 580 d’iniziativa del deputato Laus, Istituzione dell’Autorità nazionale per i diritti umani, XIX legislatura, presentata il 15 novembre 2022.

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- an interaction between the NHRI and courts (for instance, as *amicus curiae*) and mediators; and
- the establishment of local or regional sections of the National Human Rights Institution.

Another bill, Bill C. 580, foresees a constitutional amendment that adds to the Constitution a new article, Article 100 bis, about the “National Authority for Human Rights” (*Autorità nazionale per i diritti umani*). The Authority is designed as an advisory body of the Houses of Parliament and of the Government and is composed of seven members, chosen in accordance with gender equality for a non-renewable mandate of seven years. Two members are appointed by the President of the Republic from among national and regional authorities for the rights of persons deprived of their liberty with at least four years of experience. Three members are elected by Parliament in joint session from among members of human rights associations operating at the national level. Two members are elected by the supreme ordinary and administrative courts from among magistrates, including retired magistrates, of the higher ordinary and administrative courts, full professors in law at universities, and lawyers with at least twenty years of experience. The proposed constitutional reform envisages a power of legislative initiative in the area of human rights for the NHRI, regional sections, and the possibility for the President of the Republic to send a reasoned message to the Houses of Parliament (in the case of statutes) or to the Government (in the case of legislative decrees) when the opinions of the NHRI have been disregarded. In addition, the National Authority for Human Rights would have the power to file constitutional complaints¹⁹. A constitutional law would regulate the internal organisation of the NHRI, the grounds for ineligibility and incompatibility of its members, and the election system, so that pluralism is ensured.

It is worth mentioning that, concerning the legal foundation of the NHRI, the Paris Principles require that the NHRI must be “clearly set forth in a constitutional or legislative text”²⁰. The Sub-Committee on Accreditation of the Global Alliance of National Human Rights Institutions further specifies that the legal text must be sufficiently detailed for ensuring that the NHRI has a clear mandate and independence, and should cover “NHRI’s role, functions, powers, funding and lines of accountability, as well as the appointment mechanism for, and terms of office of, its members”²¹.

¹⁹ For the functioning of this power in Spain, see A. Schillaci, *Diritti fondamentali e stato costituzionale di diritto: l’esperienza del Defensor del pueblo in Spagna*, in *Diritti comparati*, 2021, p. 27 ss.

²⁰ Paris Principles, Competence and responsibilities, 2.

²¹ G.O. 1.1, General Observations of the Sub-Committee on Accreditation, adopted on 21 February 2018 by the Global Alliance of National Human Rights Institutions.

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However, generally, a constitutional basis is deemed to be the best guarantee for the independence of an NHRI. According to the European Union Agency for Fundamental Rights (FRA), the legal foundation would be “ideally secured with a constitutional provision”²². Referring to independent Equality Bodies, the European Commission against Racism and Intolerance (ECRI) of the Council of Europe considered that constitutional provisions offer “strong and additional guarantees” for independent bodies given that it is more difficult to abolish or to weaken them and, therefore, ECRI expresses a preference for the use of constitutional provisions²³. ECRI GPR No. 2 further clarifies that if the legal basis is not constitutional, States should adopt an organic or ordinary law passed by Parliament and establish comprehensive and clear legislation²⁴.

3. *Institutional architecture: ad hoc institution or multi-mandate institution*

As it emerges from the description of the five bills, the institutional structure for Italy’s NHRI represents one of the most pressing issues especially with regard to the choice between establishing an *ad hoc* institution or assigning the human rights mandate to a multi-mandate institution. This is even more relevant taking into account the number of institutions/bodies that exists in Italy for the promotion and protection of human rights²⁵. In fact, some bodies are responsible for the promotion of equal treatment and for countering discrimination²⁶. The National Office Against Racial Discrimination (*Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni fondate sulla razza o sull’origine etnica*, UNAR)²⁷ is formally responsible for

²² FRA, *Strong and Effective National Human Rights Institutions: Challenges, Promising Practices And Opportunities*, Luxembourg, 2020, FRA Opinion 8, p. 17.

²³ ECRI General Policy Recommendation No. 2 (revised) on Equality Bodies to combat racism and intolerance at national level - adopted on 13 June 1997 and revised on 7 December 2017, Explanatory Memorandum, para. 9-10.

²⁴ *Ibid.*

²⁵ For human rights compliance in Italy, see G. Repetto, *Changing Me Softly? Actors, Tools and Techniques of International Human Rights Compliance in Italy*, in R. Grote - M. Morales Antoniazzi - D. Paris (eds.), *Research Handbook on Compliance in International Human Rights Law*, Cheltenham, 2021, p. 121-135.

²⁶ For more information, see A. Guariso - M. Militello, *La tutela giurisdizionale*, in M. Barbera - A. Guariso (eds.), *La tutela antidiscriminatoria: fonti, strumenti, interpreti*, Torino, 2019, p. 445-500.

²⁷ UNAR is regulated by Legislative decree 9 July 2003 No. 215, which implements Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin) and by decree of the President of the Council of Ministers, 11 December 2003 on the institution and organisation of the National Office Against Racial Discrimination.

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the promotion of equal treatment and the contrast to discrimination based on race and ethnic origins although, *de facto*, the Equality Body also works on discrimination based on religion and belief, age, disability, sexual orientation, and gender identity²⁸. More recently, UNAR was given the task of promoting equal treatment and of removing forms of discrimination against workers who exercise free movement in the European Union²⁹. The National Equality Adviser (*Consigliera Nazionale di parità*) is regulated by the Code of Equal Opportunities between Men and Women³⁰ and is competent for the promotion and control of the implementation of the principles of equal opportunities and non-discrimination between women and men in the field of employment. In addition, the National Authority of the Rights of Persons with Disabilities (*Autorità Garante nazionale dei diritti delle persone con disabilità*)³¹ is responsible for the promotion and protection of the rights of persons with disabilities and for monitoring the implementation of the UN Convention of the Rights of Persons with Disabilities (CRPD)³². There are also the Authority for Children and Adolescents (*Autorità garante per l'infanzia e l'adolescenza*)³³ and the National Authority for the Rights of Persons Deprived of their Liberty (*Garante nazionale dei diritti delle persone private della libertà personale*)³⁴, Italy's National Preventive Mechanism (NPM) of the Optional Protocol to the Convention Against Torture (OPCAT)³⁵.

In this fragmented system, assessing the arguments for and against an *ad hoc* or a multi-mandate institution is useful for the establishment of an NHRI.

The possibility that NHRIs are part of National Preventive and National Monitoring Mechanisms is considered under General Observation 2.8 of the Subcommittee on Accreditation. In the review of an institution, the SCA assesses, among others,

“- whether the staff of the NHRI possess the appropriate skills and expertise;

²⁸ See UNAR's 2024 Annual Report, “*Relazione al Parlamento sull'attività svolta e sull'effettiva applicazione del principio di parità di trattamento sull'efficacia dei meccanismi di tutela*” (anno 2024)”.

²⁹ Legislative decree 9 July 2003, No. 216, as modified by Law 23 December 2021, No. 238.

³⁰ Legislative decree 11 April 2006, No. 198.

³¹ Legislative decree 5 February 2024, No. 20.

³² United Nations Convention on the Rights of Persons with Disabilities, adopted on 12 December 2006, G. A. Res. A/RES/61/106. The National Authority of the Rights of Persons with Disabilities is designated as an independent mechanism envisaged under Article 33, para. 2 of the CRPD.

³³ Law 12 July 2011, No. 112.

³⁴ The Authority was established by Article 7 of Decree law 23 December 2013, No. 146, transposed with changes by Law 21 February 2014, No. 10. Article 7 of the said decree law has been later amended in 2015 (Law 28 December 2015, No. 208) and in 2017 (Law 27 December 2017, No. 205).

³⁵ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002, G. A. Res. A/RES/57/199.

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- whether the NHRI has been provided with additional and adequate resources;
- whether there is evidence that the NHRI is effectively undertaking all relevant roles and functions as may be provided in the relevant international instrument.”

While the SCA’s role is to review NHRIs in accordance with the Paris Principles, some suggestions may be drawn with regard to multi-mandate institutions: first, staff must collectively possess appropriate skills and expertise in each of the mandates of the institutions; second, if a new mandate is assigned, additional and adequate resources must be provided; third, it must be assessed whether the institution is effectively able to exercise all the roles and functions resulting from the mandates.

It is also interesting to read the explanatory memorandum of General Policy Recommendation (GPR) No. 2 of the European Commission against Racism and Intolerance (ECRI)³⁶ on independent Equality Bodies to combat racism and intolerance. The Recommendations contain observations concerning stand-alone bodies or multi-mandate bodies, which consist in some States in the combination of an equality mandate with a human rights mandate (NHRI) and/or an Ombudsperson mandate (Ombudsperson Institution). The Recommendations especially provide guidance on multi-mandate bodies, highlighting that legislation should explicitly envisage the mandate(s); appropriate human and financial resources should be allocated to each mandate; governing, advisory, and management structures should provide clear leadership, promotion, and visibility of the mandate; reporting arrangements should give adequate prominence to the concerns and the work under the mandate³⁷. GPR No. 2 adds that competences and powers of all mandates should be, as far as possible, harmonised and levelled up in order to ensure that each mandate has the broadest competences and powers that are enjoyed by the other mandates³⁸. In addition to levelling up, coordination should be guaranteed so as to address overlaps, to favour joint action, and to make the use of resources more efficient³⁹.

Potential advantages and requirements for an effective functioning of the body are further clarified in the explanatory memorandum of ECRI GPR No. 2. Stand-alone bodies have the advantage of focusing on their specific mandate, have a dedicated budget for issues they are competent in, and develop specific expertise and visibility in

³⁶ ECRI General Policy Recommendation No. 2 (revised) on Equality Bodies to combat racism and intolerance at national level - adopted on 13 June 1997 and revised on 7 December 2017.

³⁷ Para. 7.

³⁸ Para. 8.

³⁹ Para. 9.

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the field⁴⁰. In contrast, multi-mandate bodies could potentially address issues more comprehensively and effectively thanks to the use of all their mandates, provided that “strong and innovative leadership in achieving efficient co-ordination and integration between the different mandates” is exercised⁴¹. The explanatory memorandum warns that “Within such multi-mandate institutions there can be tensions, particularly in the aftermath of a merger. Each mandate comes with its own tradition, approach and objectives. It is important to simultaneously respect and sustain this diversity and to progress integration of the merged mandates, in order to improve the impact of the body”⁴².

In order to pursue focus on a specific mandate, it would be necessary to establish a leadership structure that guarantees ownership for each mandate, to develop a strategic plan for the mandate, and to guarantee visibility for the mandate during the implementation of the activities⁴³. ECRI further recommends that merging mandates in a multi-mandate body should ensure that mandates are not weakened, and that appropriate focus and resources are ensured, concluding that, if this is not possible, “it is preferable to establish or retain a stand-alone body”⁴⁴.

The issue of establishing *ad hoc* institutions or multi-mandate institutions has been analysed by scholars who have clarified the advantages and disadvantages of each choice. Richard Carver raises the question as to whether to it is preferable to establish one NHRI with a broad mandate or multiple specialized institutions. The arguments in favour of separate and multiple institutions are three:

- “that a single institution may not provide sufficiently for the specific needs of different vulnerable groups;
- that competing priorities in a single institution will result in competition for resources and attention to different vulnerable groups;
- that separate institutions provide a valuable focal point for vulnerable groups”⁴⁵.

The author identifies an additional argument related to poor leadership: in fact, if this were the case for a single institution, this would affect human rights protection as a whole. Thus, fragmented systems with multiple leaders would prevent this risk.

⁴⁰ ECRI GPR No. 2, Explanatory Memorandum, para. 31.

⁴¹ *Ibid.*, para. 33.

⁴² *Ibid.*, para. 34.

⁴³ *Ibid.*, para. 35.

⁴⁴ *Ibid.*, para. 36.

⁴⁵ R. Carver, *One NHRI or Many? How Many Institutions Does It Take to Protect Human Rights? – Lessons from the European Experience*, in *Journal of Human Rights Practice*, 3, 2011, p. 9 ss.

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The arguments for single institutions are placed by Carver in five areas: legal framework, institutional effectiveness, relationship with vulnerable groups, relationship with the authorities, and public profile⁴⁶. In fact, a single founding law would provide a consistent protection to the rights of groups and individuals. In the area of institutional effectiveness, a single institution may contribute to productive cross-fertilisation between individuals, teams, and departments within the same institution. In addition, a single institution can offer consistence of service and be more cost-effective. With regard to vulnerable groups, a single institution is easier to identify, it offers a better service (for instance, it reduces the number of misdirected complaints), and it equally covers all vulnerable groups (therefore avoiding the risk that, in a context of multiples institutions, some vulnerable groups do not have their own NHRI). A single institution is more likely to easily and authoritatively relate with government and with other authorities. Finally, in the area of public profile, a single NHRI could be more effective in raising awareness of the institution itself and of human rights in general.

Carver concludes that, provided that the national and institutional contexts must be considered for each State, although there is “a strong presumption in favour of a single institution, there may on occasions be an equally strong desire not to disrupt functioning and effective multiple institutions by merging them”⁴⁷.

Scholarly literature has confirmed the advantages and disadvantages for single or for multiple/thematic NHRIs. With regard to advantages, multi-mandate bodies are more authoritative and influential⁴⁸ and offer more comprehensive overview of human rights especially if established in constitutional law⁴⁹. Fragmented systems with multiple institutions bring expertise, visibility, and focused advocacy⁵⁰, and all their resources are devoted to specific vulnerable groups⁵¹.

Concerning disadvantages, concentrating mandates in a single NHRI could bring risks for the protection of human rights not only in case of poor leadership but also in the case of a flawed legal framework⁵². Multiple NHRIs may be more easily

⁴⁶ *Ibid.*, p. 12 ss.

⁴⁷ *Ibid.*, p. 22.

⁴⁸ L. C. Reif, *The Future of Thematic Children's Rights Institutions in a National Human Rights Institution World: The Paris Principles and the UN Committee on the Rights of the Child*, in *Houston Journal of International Law*, 37, 2015, p. 459.

⁴⁹ A. Petričušić - L. Vidović, *Human Rights and Equality Institutions in Europe: Increasing Efficacy by Finding a Balance between Centralisation and Fragmentation*, in *Croatian and Comparative Public Administration*, 24, 1, 2024, p. 140.

⁵⁰ *Ibid.*, p. 139.

⁵¹ L. C. Reif, *op. cit.*, p. 459.

⁵² *Ibid.*, p. 460.

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marginalised (through underfunding and physical location of their premises)⁵³ and be subjected to political influence⁵⁴. In addition, gaps and overlaps in the protection may exist⁵⁵.

What emerges from the literature is that it is unclear as to whether a single *ad hoc* institution or a multi-mandate institution is preferable. The disadvantages listed above are therefore potential issues and food for thought when adapting the institutional architecture to a specific national context. Irrespective of the choice to adopt an *ad hoc* institution or a multi-mandate institution, a particular recommendation consists in adopting clear legislative texts, ensuring full independence and sufficient resources, facilitating systemic cooperation, and prioritising issues faced by vulnerable groups⁵⁶.

These observations concerning *ad hoc* institutions and multi-mandate institutions are interesting for the Italian case because three bills establish an *ad hoc* institution (a Commission or an Advisory body) and two bills assign the human rights mandate to the Personal Data Protection Authority. In addition, these observations are useful in view of the opportunities that may come from Italy's implementation of the 2024 EU Directives on standards for Equality Bodies.

4. *The Personal Data Protection Authority*

Data protection supervisory authorities⁵⁷, such as Italy's Personal Data Protection Authority, are established for the enforcement of the General Data Protection Regulation (GDPR), which, under Article 57, lists their tasks including monitoring and enforcement, public awareness, advice to national institutions, providing information to data subjects, cooperation with other supervisory authorities, complaints-handling, investigative powers, the adoption of standard contractual clauses, the establishment and maintenance of a list in relation to the requirement of data protection impact assessment, and tasks related to codes of conduct⁵⁸. Data

⁵³ *Ibid.*, p. 459.

⁵⁴ Petričušić - Vidović, *op. cit.*, p. 139.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, 140.

⁵⁷ For a comparison between Equality Bodies, data protection supervisory authorities, and consumer protection competent authorities, see V. Tudisco - E. Lantschner, *Preventing and Reacting to Discrimination through Sanctions and Remedies*, An Equinet Report, 2022.

⁵⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

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protection supervisory authorities have investigative powers (such as audits), corrective powers (such as warnings and orders), and authorisation and advisory powers (such as opinion and approval of draft codes of conduct)⁵⁹.

If the decision will be to embed the Personal Data Protection Authority⁶⁰ with the human rights mandate, it is undoubtful that interesting powers could be available for the protection of human rights (and possibly prevention). According to Bill S. 303 and to Bill S. 505, the Personal Data and Human Rights Protection Authority would have powers of investigation, control, and reporting. Particularly interesting is data protection supervisory authorities' power to impose administrative fines. Under Article 83 of the GDPR, administrative fines may be up to 10,000,000 euro or, in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year. Sanctions may be up to 20,000,000 euro, or in the case of an undertaking, up to 4 % of the annual turnover in the case of non-compliance with an order by the supervisory authority. Bill S. 505 envisages that the power to issue administrative fines will be applicable also for the human rights mandate in addition to injunctions and prescriptive orders.

Data protection is a fundamental right⁶¹ but a potential issue could consist in the fact that embedding the Personal Data Protection Authority with the human rights mandate would be a novelty in the European context, as there is no precedent, and this could raise technical questions also concerning the extent to which the GDPR allows Member States to assign the human rights mandate to data protection supervisory authorities. Before the GDPR was adopted FRA had expressed the opinion that a Data Protection Authority (as well as an Equality Body) could “effectively” become “a specialised section of their national human rights institution”⁶². The Italian case would be different because the contrary is foreseen. In the “Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union”, FRA later added that where “no NHRI exists, the EU and its Member States should jointly support all national monitoring bodies, including equality bodies and data protection authorities, to explicitly comply with the relevant Paris Principles and their authoritative

⁵⁹ Article 58 GDPR.

⁶⁰ See also G. Cerrina Feroni, *I tentativi di istituire una NHRI nel contesto istituzionale italiano: quale ruolo per il Garante per la protezione dei dati personali?*, in G. Repetto (ed.), *Una National Human Rights Institution per l'Italia: problemi e prospettive*, Torino, 2025, p. 19-30.

⁶¹ See, for instance, Article 8 of the Charter of Fundamental Rights of the European Union.

⁶² FRA, *Data Protection in the European Union: the role of National Data Protection Authorities: Strengthening the fundamental rights architecture in the EU II*, Luxembourg, 2010, p. 8.

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interpretation”⁶³. Compliance with the Paris Principles is not mentioned as full but only with the “relevant” parts. Given this potential issue, it could be important to consult with the European Data Protection Supervisor⁶⁴ and with FRA in order to assess to what extent and under what conditions merging human rights and data protection mandates is in line with EU law and to further assess whether this would ensure that the NHRI mandate is as broad as possible, as required by the Paris Principles. In addition, it should be considered to what extent combining the mandates is beneficial both for data protection and for the promotion and protection of human rights. For instance, this could be useful when thinking (as there is no previous case to learn from) on how synergy would be pursued between the two mandates, taking into account the different expertise required in data protection and in human rights and their coexistence in the collegial body.

One of the reasons justifying the decision to assign the human rights mandate to the Personal Data Protection Authority is that, by doing so, less financial resources would be required⁶⁵. In this regard, it is interesting to compare the budgets of the bills⁶⁶. The two bills for the Personal Data and Human Rights Protection Authority (Bills S. 303 and Bill S. 505) envisage a budget of 3.5 million euro (Bill 505 increases the budget to 8 million euro in later years). The budget of the two bills for the Commission is 1,735,150 euro (Bill S. 424) and 3.5 million euro (Bill C. 426). As a result, either the amount for a new institution is underestimated or costs would not be reduced in the multi-mandate institution.

⁶³ FRA, *Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union*, Luxembourg, 2012, p. 76.

⁶⁴ As suggested in K. Meuwissen, *Un’istituzione nazionale per i diritti umani per l’Italia: prospettive dall’ENNHRI*, in G. Repetto (ed.), *Una National Human Rights Institution per l’Italia: problemi e prospettive*, Torino, 2025, p. 85-92, p. 91.

⁶⁵ Bill S. 303, p. 2.

⁶⁶ Constitutional Bill C. 580 does not specify the budget.

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An opportunity of reflection is offered by the new 2024 EU Directives on standards for Equality Bodies⁶⁷ (Standards Directives)⁶⁸. The Standards Directives, to be implemented by June 2026, provide minimum standards on independence, (human, technical, and financial) resources, awareness raising, prevention and promotion, assistance to victims, alternative dispute resolution, inquiries, opinions and decisions, litigation, procedural safeguards, equal access, accessibility and reasonable accommodation for persons with disabilities, cooperation, consultation, data collection and access to equality data, reports and strategic planning. The two Standards Directives are almost identical and differ for the personal and material scope of their application and for the procedure for their adoption⁶⁹.

Reform in Italy is necessary also given that Italy's Equality Bodies (UNAR and the National Equality Adviser) are not generally deemed to be independent⁷⁰. In February 2026, the Italian Government began discussions concerning the implementation of the Standards Directives. The preliminary document⁷¹ envisages the

⁶⁷ Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC; Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU.

⁶⁸ For UNAR's perspective, see M. Peradotto, *Il ruolo dell'UNAR nel contesto del rafforzamento degli organismi per la parità alla luce delle nuove direttive europee*, in G. Repetto (ed.), *Una National Human Rights Institution per l'Italia: problemi e prospettive*, Torino, 2025, p. 73-77.

⁶⁹ Directive 2024/1499 is based on Article 19, para. 1, TFUE; Directive 2024/1500 is based on Article 157, para. 3, TFUE. For more information, see J. Elizondo-Urrestarazu, *Equality bodies: New standards, new challenges*, in *IgualdadES*, 9, 2023, p. 256-260.

⁷⁰ See, for instance, ECRI Report on Italy (sixth monitoring cycle), 2024, p. 7-8. See also M. Barbera - A. Guariso, *Italy*, in M. Mercat-Bruns - D. B. Oppenheimer - C. Sartorius (eds.), *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law: Challenges and Innovative Tools*, Cham, 2018, p. 335-352, at p. 340.

⁷¹ *Schema di decreto legislativo recante attuazione della direttiva (UE) 2024/1499, sulle norme riguardanti gli organismi per la parità in materia di parità di trattamento tra le persone indipendentemente dalla razza o dall'origine etnica, tra le persone in materia di occupazione e impiego indipendentemente dalla religione o dalle convinzioni personali, dalla disabilità, dall'età o dall'orientamento sessuale e tra le donne e gli uomini in materia di sicurezza sociale e per quanto riguarda l'accesso a beni e servizi e la loro fornitura, e che modifica le direttive 2000/43/CE e 2004/113/CE, nonché attuazione della direttiva (UE) 2024/1500, sulle norme riguardanti gli organismi per la parità nel settore della parità di trattamento e delle pari opportunità tra donne e uomini in materia di occupazione e impiego, e che modifica le direttive*

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establishment of a new independent Equality Body (*Organismo per la parità*) composed of five members of proven experience in non-discrimination, appointed with a transparent procedure by the Presidents of the Houses of Parliament for a non-renewable term of seven years. Specific provisions cover incompatibility, status, and removal of the members of the Equality Body as well as functions, the Office of the Equality Body, and budget. The (mere) possibility to establish local sections is contemplated. The new Equality Body would replace the two existing Equality Bodies: UNAR and the National Equality Adviser.

The beginning of the debate concerning the implementation of the Standards Directives offers food for thought for the establishment of an NHRI. There is a close link between the Standards Directives, NHRIs, and the Paris Principles. The recitals of the Standards Directives expressly contain that, among others, they were inspired by the Paris Principles⁷² and, therefore, some of their rules might inform the debate about the establishment of an NHRI in Italy. In addition, the work for the implementation of the Standards Directives could offer the possibility to strengthen both equality and human rights promotion and protection. According to the European Network of Equality Bodies (Equinet), establishing a link between Equality Bodies and NHRIs may lead to the reduction of costs, increase effectiveness for their impact, and contribute to efficiency by reducing overlaps and duplication⁷³. The link may take shape as mutual exchange, joint action, joint planning, and merger⁷⁴. As a matter of fact, many institutions in EU Member States are both Equality Bodies and NHRIs. This is the case, for instance, in Belgium, Bulgaria, Croatia, Cyprus, Denmark, Ireland, Latvia, the Netherlands, Poland, Slovakia, and Hungary. Merger has the advantage of potentially strengthening both mandates, enhancing their standing, strengthening the legal interventions on both equality and human rights, broadening the scope of intervention, and contributing to greater accessibility for victims and vulnerable groups⁷⁵. However, especially in the case that the only reason justifying the merger is costs reduction, the risks of a merger include having an impact on the emphasis on equality (expressed by the existence of an Equality Body) and on the more specific and

2006/54/CE e 2010/41/UE. The act (No. 382) was submitted to the Houses of Parliament on 19 February 2026.

⁷² Recital 13 of Directive 2024/1499 and Recital 10 of Directive 2024/1500.

⁷³ Equinet, *Equality Bodies and National Human Rights Institutions: Making the Link to Maximise Impact*, 2011, p. 7-8.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, p. 8.

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accurate focus that an NHRI and an Equality Body may provide in their respective areas⁷⁶.

6. Conclusion

One of the most pressing issues emerging from the bills for the establishment of an NHRI in Italy is institutional architecture and, in particular, whether to establish an *ad hoc* institution or to assign the human rights mandate to an existing institution or body. As the analysis has shown, there are good arguments and critical points for both options.

Ad hoc institutions focus on their mandate with a dedicated budget and with specific expertise, advocacy, and visibility. Nevertheless, it should be considered that, in fragmented system, gaps and overlaps could exist and that an *ad hoc* institution could be more easily marginalised and be subjected to political influence.

Multi-mandate institutions have the potential to address issues more comprehensively and effectively, to be founded on a single law that could ensure equal protection for all vulnerable groups and individuals, to facilitate exchange of good practices, to offer consistency of service, to be potentially more cost-effective, to be more easily identifiable, to be more authoritative *vis-à-vis* authorities, and to be more effective in raising awareness of their role and of human rights in general. Potential risks include tensions between the mandates and different powers for different mandates. In addition, if there is poor leadership or a flawed legal framework, this would have deleterious effects on the protection of human rights in general.

As a result, it is unclear as to whether an *ad hoc* institution or a multi-mandate institution is preferable. The decision to adopt an *ad hoc* institution or a multi-mandate institution should take into account the potentially critical points of both options while ensuring clear legislation, full independence, and appropriate human, financial, and technical resources. Given Italy's fragmented system, systemic cooperation and coordination between institutions and bodies is necessary in order to exchange good practices, to favour synergy, and to work for, as far as possible, homogenous protection of vulnerable groups and individuals. If the mandate is assigned to an existing institution, additional financial resources, skills, and expertise should be appropriate for ensuring that the institution effectively exercises all its mandates. As recommended by ECRI GPR No. 2, each mandate should have a leadership structure, adopt a strategic plan, and pursue visibility in the implementation of its activities.

⁷⁶ *Ibid.*

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In addition to these considerations, in the case of the Personal Data and Human Rights Protection Authority, technical issues may exist and it should be assessed to what extent a broad human rights mandate can be ensured and to what extent combining the mandates could be beneficial both for data protection and for the promotion and protection of human rights (even because there is no data protection authority that is also an NHRI). The comparison of the budgets contained in the bills pending in Parliament does not show a reduction of financial costs.

The implementation of the Directives on minimum standards for Equality Bodies offers food for thought for the establishment of an NHRI and opportunities for creating a link between an NHRI and an Equality Body/Equality Bodies.

Abstract: Despite European and international recommendations and several legislative initiatives, Italy is one of the few Member States of the European Union that has not yet established a National Human Rights Institution (NHRI) on the basis of the Paris Principles. After a description of the bills currently submitted and/or examined in the Senate of the Republic and in the Chamber of Deputies, this article focuses on the institutional architecture for the Italian NHRI, identifying arguments for and against the establishment of a new *ad hoc* institution or the conferral of the human rights mandate to an existing institution or body, therefore to a multi-mandate institution (as provided for by two bills pending in the Senate with reference to the Personal Data Protection Authority). After a section on the Personal Data Protection Authority, the article explores the opportunities that could arise from the implementation in Italy of the new EU Directives on Standards for Equality Bodies. The conclusion underlines that there are good arguments for both the establishment of a new NHRI and the assignment of the human rights mandate to an existing institution or body. The potential challenges that each of these options entails should however be considered and, regardless of the institutional architecture of the NHRI, clear legislation, full independence, appropriate resources, and mechanisms for cooperation and for coordination with other institutions and bodies should be ensured.

Keywords: National Human Rights Institutions – Italy – Institutional Architecture – Personal Data Protection Authority – Equality Bodies.

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*Shaping the Italian National Human Rights Institution:
Legislative Initiatives and Institutional Architecture*

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United in (national rights protection) diversity? Some reflections on how many roads could lead to (an NHRI in) Rome

John Morijn

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1. Introduction

The purpose of this volume is to problematise that Italy, a founding member of the European Union (EU), does not (yet) have a National Human Rights Institution (NHRI).¹ One of the paradoxical advantages of being one of the last countries to consider setting up an NHRI is that there is a lot of experiences across Europe to draw from. In that light, the different contributions aim to reflect on whether and, if so, how Italy should (finally) also get an NHRI. This contribution reflects on these questions from the perspective of an outsider with experience in both an NHRI and EU and international level human rights protection mechanisms. It offer three arguments.

First, it is important to be clear about the added value of an NHRI when there are very many human rights institutions, bodies and procedures already in existence at the international, EU and national level. An NHRI adds value precisely by being able to connect all of these dots for the specific context of Italy. But it is important to realise quite how (section 2). Second, to make good on this potential added value, the question becomes what toolbox of competences and organisational set-up would be appropriate for an NHRI to be newly set up. There is often a tendency to compare competences without comparing their lived contexts. In particular, the answer to this question should be based not on the formal existence of other actors or procedures at the international, European Union and national levels, but on what they have so far achieved in and for Italy, and why (section 3). Thirdly, and finally, a brief reflection is offered about why NHRIs that are comparable in competences and resources achieve different impacts. The answer is as overlooked as it is straightforward: courageous

¹ This contribution is an edited version of a speech delivered at Bocconi University (Milan, Italy) in the context of the conference “The role of National Human Rights Institutions in promoting rights and preventing rights-related litigation and conflicts”, 8 September 2025. It is dedicated to Adam Bodnar, former Ombudsman for Human Rights of the Republic of Poland – and one of the most consequential NHRI leaders Europe has ever witnessed.

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principled leadership (section 4). In other words, some reflections on the what, the how and the who.

2. The added value of an NHRI: filling the protection and translation gap

If a country is a member of the United Nations (UN), Council of Europe, and the EU, a signatory to (almost) all UN and Council of Europe human rights treaties and related treaty bodies and courts, and already has various national human rights protection mechanism such as a data protection agency and an agency focused on children rights, why add *yet another* layer or institution? This is not an unreasonable question. If one argues in favour of an NHRI, it is an argument for a tool to address a problem that is not yet properly covered.

As it happens, there are good reasons to add an NHRI even if the international, EU and national level already provide for a wide range of protection mechanisms. In particular, an NHRI is a crucial entity in a national human rights protection landscape for a double reason. First, it fills a *protection gap* between the national government, national courts and national NGOs. There is often a need for an authoritative independent body with privileged access to the government and parliament to provide advice on human rights protection issues based on a compilation and a selection of different contributions. Second, it fills a *translation gap* between these national level actors, on the one hand, and EU and international level actors (IOs, courts, INGOs), on the other.

The translation and protection function works in two directions: an NHRI can give independent and authoritative input to the EU/international level about the human rights situation in a Member State in which it is set up. But it can also just use, or help make for a soft landing or specific transposition, or a selection of EU/international level recommendations in the Member State, selecting the most relevant way and a good timing. Most NHRIs in Europe seem to spend most of their time on the first element (because you can spend your days filling out questionnaires sent out by international and EU bodies). My argument here would be that the second direction of the two-way street is in fact much more important if, as an NHRI, you are serious about filling the national protection gap. A recommendation to Italian friends would be to include this two-way street translation explicitly in any legal founding act of the Italian NHRI.

3. The competences toolbox and organisational set-up of an NHRI

In terms of searching for an optimal set of tasks, competence and substantive focus for a future Italian NHRI, there is *no ideal-type NHRI to serve as an inspiration*.

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Establishing and optimising an NHRI's role depends on the national, European Union, and international legal framework in which it is going to be set up. This is not an exercise that will start from scratch. You need to add to, rather than replace what is effective in the existing landscape when you are the protection/translation gap bridging business. Yet, there are a few lessons that can provide guidance in this effort.

Duplication is a common problem in human rights protection generally, including at the national level. If there is a super effective national data protection agency, there is no point duplicating it when setting up an NHRI with a more general mandate. If the policy field of equal treatment is really cluttered, when you do get competences in that field but limited resources, you will likely have good reasons to avoid going there yourself. If you have a well-resourced ombuds institution, an NHRI should cooperate rather than compete with it (and indeed, in countries like Spain it is the same thing). In the Netherlands, which I know well, the NHRI came out of an equality body, and stands next to a parliamentary Ombudsman. So starting with a mapping of what is good, and what is less functional, is a good idea. Of course, not everyone will be happy with that exercise. Of course, existing institutions will be protective of their own turf, inflating their scope of competence or relevance. But if an Italian NHRI with added value is the aim, this is a necessary exercise.

An issue that then follows is: is there an institution in Italy whose competences can be expanded to transform it into an NHRI? This is a typical trap of institutional thinking. I would reply to that question by posing my Italian friends a counterquestion: if you look at your total human rights protection landscape, what kind of competences and substantive areas are now not yet properly covered from the viewpoint of the NHRI protection/translation gap perspective, and what are the three to five most important issues in that respect? This might give you an honest first direction.

Make no mistake: there is no perfect solution. Both setting up something separate and new or creating an appendix to something existing comes with its own set of challenges. Just avoid the Dutch situation that you create something new and broad out of something existing and narrow *without* adding proper additional financial resources – that is recipe for disappointment, because you are starting with a promise you can hardly deliver on. It is almost worse than not having an NHRI at all. Fortunately, in The Netherlands, that situation has now been gradually restored.

Then there is the perennial question of whether what you do or say as an NHRI or equality should have *legally binding* effects to be effective. The premiss is always that binding is better. In my experience in The Netherlands this question has, in fact, often been relatively irrelevant. The real issue is whether you are *seen* to be authoritative in terms of what you come up with. When I was solving equality conflicts the results were not formally binding. But, in reality, rulings by the Dutch Equality Body were being followed by public authorities and employers in over 80% of the cases. In fact, *not* issuing legally binding orders has many advantages too. For example, it gives more scope for creativity. And very often these non-binding rulings were used by judges or

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policy makers, just like with recommendations of UN and Council of Europe treaty bodies. So I would suggest a more useful focus is compliance records not the formal legal status of your output. If you are searching a hill to die on, look elsewhere.

There is a final, somewhat related issue. It is often thought that an NHRI's effectiveness can be measured by the number of court cases dealing with human rights elsewhere going down. I do not see much of a link. Sometimes NHRIs can bring court cases themselves, or intervene in them as an *amicus curiae*. That is a useful task to add to the toolbox. But that means that in setting up an NHRI the ambition cannot, and should not be to reduce the number of court cases. The focus in setting up an NHRI should be on bridging the protection/translation gap. Supporting litigation by others is often a very effective method to deliver on that aim.

4. The key component of courageous leadership and great staff

One of the most important elements of making an NHRI deliver on its added value is what typically gets *least* attention. People working for an NHRI – its leadership and staff – trump legal reality when it comes to achieving impact. They are much more important than formal competences or financial resources. But the leadership you pick is by far the most important consideration. They should understand that research findings do not explain themselves. They have to insist that these findings be transformed into something specific enough that they identify a clear actor, a clear target and clear means to reach that target. They have to be focused on optimal timing. And they need to be able to absorb strong criticism and pushback. We have to be honest — this is hard, and many human rights actors, at every level, are doing a suboptimal job.

This may sound obvious, but it is not. It is entirely possible to imagine a well-resourced and richly tasked NHRI not led by someone who dares to speak up. It will be ineffective. It is equally possible to imagine a courageous and principled leader achieving something real, even on a small budget, or with limited competences or under real strain – think, for example, of Adam Bodnar when he was the Ombudsman for Human Rights of the Republic of Poland (2015-2021).

So if – or rather: when! – one day Italy will see its own NHRI, the most important way to make it deliver on its mandate is recruitment of leadership and staff willing to fight for all Italians, and others on its territory, particularly those in a vulnerable position. Because human rights protection rides on principled grid, picking fights with a smile, and being singularly focused on achieving results for real people.

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The author with Adam Bodnar

ABSTRACT: With a view to providing input for the policy ambition to establish an National Human Rights Institution (NHRI) in Italy, this contribution will reflect on the great diversity of NHRIs models that are in operation in Europe. It will argue that rather than focusing on institutional design questions to explain or predict effectiveness, it may be more fruitful to consider and compare the wider national contexts in which they function. Form should follow function, and functionality is context specific. From that perspective it will be examined when, why and how NHRIs, as a proven model of nationally centralised independent and impartial rights protection mechanism, can add value for citizens.

Keywords: NHRI – international human rights – EU law – national added value – personal leadership.

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