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Op-ed

STRONG ENFORCEMENT NEEDED TO CURB HUMAN RIGHTS ABUSES Comparing the enforcement mechanisms of the NYCHRC and SAHRC

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In a changing world where human rights challenges remain significant, the protection and promotion of these rights are as crucial as ever. The South African Human Rights Commission (SAHRC) and the New York City Commission on Human Rights (NYCCHR) stand as two different models of how human rights bodies can fulfil their mandates. While operating in vastly distinct jurisdictions—one on a national level in Africa and the other in an American city—these two institutions share a common mission but face different obstacles and employ different enforcement strategies.

South Africa's SAHRC: A Broad Mandate, Limited Enforcement

The SAHRC was established under Chapter 9 of the South African Constitution, giving it a wide-reaching mandate to promote and protect human rights throughout the country. The SAHRC's recommendations currently lack binding legal authority, meaning that while the Commission can issue recommendations after investigating human rights violations, these recommendations require judicial endorsement to become enforceable. The SAHRC fosters human rights through its investigative role, findings, and recommendations, using its influence to shape public policy. This soft power includes conducting thorough investigations, advocating for changes, and issuing meaningful recommendations.

The *Agro Data v South African Human Rights Commission* case highlights this challenge. The South African High Court ruled that the SAHRC's findings lack binding effect unless affirmed by a court, a decision later upheld by the Supreme Court of Appeal. The SAHRC has since given notice of its intention to appeal to the Constitutional Court, demonstrating its commitment to gaining enforcement powers.

Despite these limitations, the SAHRC's role in investigating violations, making findings, and issuing recommendations remains crucial for guiding public policy and reform. This investigative function is a key aspect of the SAHRC's soft power, which extends beyond advocacy and education to shine a light on abuses and propose solutions. Even if unsuccessful in its Constitutional Court appeal, the SAHRC's role remains vital. Notably, most human rights commissions globally lack binding powers, yet they effectively promote and protect human rights through investigations and recommendations, proving that soft power is essential in shaping accountability in a democracy.

Another significant challenge is the SAHRC's overly cautious approach to using its subpoena powers. The Commission consistently seeks consultation from the National Prosecuting Authority (NPA) before issuing subpoenas, even when there is no risk of self-incrimination. This practice reduces the SAHRC's ability to gather evidence efficiently and potentially undermines its investigative authority.

Additionally, the SAHRC's broad mandate—covering socio-economic rights, civil liberties, and more—leaves it stretched thin, often limiting its effectiveness.

New York City's NYCCHR: Targeted Enforcement with Binding Authority

In contrast, the NYCCHR operates under the New York City Human Rights Law (NYCHRL) with a narrower, more focused scope. The NYCCHR deals exclusively with cases of discrimination based on protected characteristics such as race, gender, and disability. This more targeted mandate allows the NYCCHR to concentrate its resources and take decisive action on specific issues.

A key aspect of the NYCCHR is its Law Enforcement Bureau (LEB), which investigates complaints and, if probable cause is found, refers the case to the Office of Administrative Trials and Hearings (OATH). This independent body handles administrative hearings, ensuring impartiality in the decision-making process. Importantly, the NYCCHR has the authority to issue binding orders following investigations. It can compel policy changes, mandate training, and impose fines of up to \$250,000 for egregious violations. If respondents fail to comply, the NYCCHR can seek judicial enforcement, with the New York State Supreme Court treating these decisions as it would lower court rulings—thus ensuring compliance without the need for a full retrial.

Contrasting Enforcement Powers

The NYCCHR's ability to issue binding orders provides it with immediate enforcement power, which contrasts with the SAHRC's current reliance on advisory recommendations. While the SAHRC's soft power—including its investigations, findings, and recommendations—remains crucial for building a culture of human rights and fostering voluntary compliance, its efforts to obtain binding powers through judicial avenues demonstrate its commitment to expanding its impact.

Subpoena Powers: A Tale of Two Approaches

Both bodies have subpoena powers, but their use differs significantly. The NYCCHR employs its subpoena powers assertively to support thorough investigations, while the SAHRC's cautious approach—seeking often-unnecessary consultation from the NPA—can delay its processes. Clarifying the legal requirements for issuing subpoenas would enhance the SAHRC's ability to gather evidence effectively.

Resource Challenges and Socio-Economic Contexts

The SAHRC's broad mandate places significant strain on its limited resources, which hampers its ability to conduct in-depth investigations, awareness campaigns, and compliance monitoring. The NYCCHR, with its narrower scope, is better able to focus its resources on achieving meaningful outcomes. Moreover, the socio-economic challenges in South Africa—including widespread inequality, poverty, and unemployment—further complicate the SAHRC's ability to enforce human rights protections effectively. These challenges are compounded by the fact that the SAHRC is responsible for an entire country and all rights enshrined in the Bill of Rights, whereas the NYCCHR operates within a single city and focuses exclusively on discrimination cases. This difference in jurisdiction and mandate naturally influences the enforcement powers and resources available to each body.

Opportunities for Strengthening the SAHRC

Despite these challenges, there are opportunities to bolster the SAHRC's enforcement powers. Establishing an internal, yet independent, tribunal within the SAHRC to handle cases where binding

orders are necessary could be a significant step forward. Such a tribunal would operate independently from the Commission's investigative functions, issuing enforceable decisions similar to the NYCCHR's Law Enforcement Bureau, while retaining the benefits of soft power, particularly through the SAHRC's investigative functions, findings, and recommendations.

Another opportunity lies in enhancing collaboration between the SAHRC and the judiciary. Protocols for expedited judicial review of SAHRC recommendations could help speed up the enforcement process, ensuring timely compliance. Additionally, legislative amendments to clarify the use of subpoena powers would remove current obstacles, enabling the SAHRC to gather evidence more effectively and enforce compliance without unnecessary hindrances.

Mutual Learning: Lessons for Both NYCCHR and SAHRC

Both institutions could benefit from adopting elements of each other's approaches. The NYCCHR's enforcement mechanisms highlight the value of having a direct path to compliance, ensuring that violators are held accountable swiftly and without prolonged judicial processes. The SAHRC could expand its toolkit to include binding measures, while the NYCCHR could learn from the SAHRC's comprehensive mandate to address broader human rights issues, thereby enhancing its impact on community well-being.

Conclusion: Moving Forward Together

Each of these two commissions operates in a unique context, and their differing mandates, resources, and jurisdictions shape their approaches to promoting and protecting human rights. While the NYCCHR's binding enforcement mechanisms offer immediacy and authority, the SAHRC's soft power, based on comprehensive investigations and advocacy, plays an equally important role in fostering systemic change and promoting human rights on a broader scale.

The way forward lies in recognising that both hard and soft enforcement mechanisms are essential components of effective human rights protection. The SAHRC, even without binding powers, remains crucial to holding institutions accountable through its investigative work and public influence. The pursuit of binding authority by the SAHRC should be seen as complementary rather than as a replacement for its current soft power approach.

Ultimately, human rights bodies must be dynamic and responsive to the needs of their societies. The NYCCHR and SAHRC can learn from each other's experiences, adapting tools and strategies that best suit their respective environments. By doing so, they can strengthen their capacity to uphold human rights, ensure accountability, and contribute to the ongoing global struggle for equality and justice.

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