

The Ethiopian [National] Human Rights Commission and its Contribution to Constitutionalism

By Wondemagegn T. Goshu*

Introduction

National Human Rights Institutions (NHRIs) as are known today may have never occurred to the originators of the idea of constitutionalism in the 18th century or before.¹ Original ideas and practices of constitutionalism paid attention to law-making, adjudication and execution, leading to constitutional doctrines such as parliamentary supremacy, judicial review, and separation of powers. Even in those times, however, the idea of natural rights was part of a constitutional design. Natural rights and freedoms were considered (and rightly so) to be major limits on the powers of the state in favour of its ‘subjects’.² These rights were intended to constrain actions of governments through self-restraint or a government organ checking encroachments by another.

Two centuries after those original ideas of constitutionalism, almost all states in the world have found their own constitutions, with an impressive list of rights: civil, political, social, economic, cultural, development and environmental rights.³ To this list are also added lists of international and regional human rights. Faced with delinquent governments, which are supposedly the guardians of rights, however, constitutional and international human rights and institutions in many cases have failed to ensure enjoyment in practice. As will be noted later, this relative failure of existing national and international institutions for the protection of human rights has brought about the conception of NHRIs. Today, unlike in the past, discussion of human rights comes with NHRIs. Many modern constitutions, especially in Africa, have assigned NHRIs to take part in the promotion of constitutionalism and human rights, making NHRIs part of a constitutional structure.

*Addis Ababa University, School of Law and Governance Studies [This article is published in Ethiopian Constitutional Law Series, Vol. VI, College of Law and Governance Studies, School of Law, AAU Printing, 2014/2015?]

¹ On the history and major concepts on ancient and modern constitutionalism, see Charles Howard McIlwain, Constitutionalism: Ancient and Modern (1947), Revised Edition

² For a brief discussion on limiting the power of the state as one of the principal components of constitutionalism, see Richard S. Kay, ‘American Constitutionalism,’ in Larry Alexander (ed), Constitutionalism: Philosophical Foundations (1998)

³ On the development and prevalence of constitutionalism in various regions of the world, see Saïd Amir Arjomand (ed), Constitutionalism and Political Reconstruction (2007)

The role of the Ethiopian Human Rights Commission (EHRC) in promoting constitutionalism should be seen in this light. The EHRC's 'constitutional status' and crucial role in protecting constitutional rights would place the EHRC in the category of players of constitutionalism. The EHRC's shared responsibility in promoting constitutionalism becomes all the more important in view of the perceived (and actual) failure of relevant governmental organs to enforce human rights and the numerous restrictions on civil societies to promote human rights.

In this article, the contribution of the EHRC to constitutionalism is assessed. To that end the literature on NHRIs (including international resolutions and decisions), statements by the UN bodies regarding the EHRC, and the EHRC's reports and press releases were reviewed. For several years and long before this article, the writer has observed the operation of the EHRC both in official and unofficial capacity and had informal discussions with a number of experts at the EHRC. For this article, a list of questions was also sent to three experts, whom the writer knew to be fully engaged in the EHRC's activities. The objective of the questions was to solicit information regarding matters on which official statements of the EHRC were silent or unclear. Unfortunately, however, the three experts were not willing or able to reply or meaningfully reply. Hence the article, with few exceptions, substantially relies on publicly available documents regarding the performance of the EHRC. Owing to ethical and methodological challenges, information obtained through personal observation and informal discussion is not used unless to corroborate publicly available documents.

The objective of the article is to evaluate tentatively the EHRC's role in the protection of constitutional rights, thereby assessing the EHRC's contribution to fostering constitutionalism in Ethiopia. Hence the first section will review the literature on NHRIs and their effectiveness. In the subsequent two sections, the EHRC's role in the protection of human rights, fostering constitutionalism and its effectiveness will be investigated. Critique of the EHRC's performance will be made at length in these two sections. In the final section, a brief comparison and concluding remarks will be made.

1. National Human Rights Institutions

What Are They?

The NHRIs are commonly defined as *constitutional* (or statutory) bodies established and funded by *government*, with powers to promote and protect *human rights*.⁴ The common definition adds another crucial element of NHRIs, which is independence. Despite the role of government in establishing and funding, NHRIs are independent and autonomous institutions.⁵ Government departments and civil societies are excluded even when their sole mandate is protection and

⁴ Anne Smith, "The Unique Position of National Human Rights Institutions: A Mixed Blessing?" Human Rights Quarterly, Vol. 28, No. 4 (2006), p909

⁵ UNDP-OHCHR, Toolkit for Collaboration with National Human Rights Institutions (2010), pXVII

promotion of human rights.⁶ Although the word ‘national’ may appear to embrace such governmental and non-governmental human rights organs operating at a national level – as opposed to international, the term “NHRIs” as used today does not apply to such human rights departments and organizations.⁷

The history of NHRIs is usually traced back to the promotion by the UNs Economic and Social Council (ECOSOC) of the establishment of national human rights committees in 1946 to collaborate with the then Commission on Human Rights (now the Human Rights Council).⁸ After reference to these committees by ECOSOC, what followed for decades were conference reports, proposals, resolutions and recommendations by various organs of the UNs on the establishment of *national institutions for the protection and promotion of human rights*.⁹ Anti-discrimination commissions, whose mandate was limited to issues of discrimination, also appeared in the 1970’s and 1980’s. The first NHRIs were the human rights commissions of the United Kingdom (1976), Canada (1977), New Zealand (1977), and Australia (1981), which were established to combat mainly discrimination.¹⁰ But the landmark event for NHRIs as we know them today was the UN International Workshop on National Institutions for the Promotion and Protection of Human Rights, held in Paris in 1991 that resulted in the drafting of the *Principles Relating to the Status of National Institutions* (usually called the Paris Principles).¹¹ The Paris Principles (PPs) were later adopted by the UN General Assembly (GA), paving the way for their later international acceptance.¹²

It should be clear that the emergence of NHRIs is closely associated with the international human rights movement. The failure of international institutions to adequately enforce international human rights standards is said to have underscored the need for national mechanisms including NHRIs to oversee the enforcement of international standards.¹³ International organizations, particularly the UNs, have played decisive role in the development and spread of NHRIs in the world through “standard setting, capacity building, network facilitating, and membership granting.”¹⁴ The PPs, adopted by the UN GA, for example, are today the benchmark for assessing the legitimacy of NHRIs. The recommendations of the World

⁶ International Council on Human Rights Policy [ICHRP], Performance & Legitimacy: National human rights institutions, Second edition (2004), p3

⁷ Brian Burdekin, National Human Rights Institutions in the Asia-Pacific (2007), note 6

⁸ Thomas Pegram, ‘Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions,’ Human Rights Quarterly, Volume 32, Number 3, (2010), p739

⁹ Ibid

¹⁰ Anna-Elina Pohjolainen, The Evolution of National Human Rights Institutions - The Role of the United Nations (2006), p16

¹¹ Burdekin, cited above at note 7, note 6

¹² Resolution Adopted by the General Assembly, 48/134: National institutions for the promotion and protection of human rights (20 December 1993), A/RES/48/134. Paragraph 11 welcomes “the Principles relating to the status of national institutions, annexed to the present resolution.”

¹³ Obiora Chinedu Okafor and Shedrack C. Agbakwa, ‘On Legalism, Popular Agency and “Voices of Suffering”’: The Nigerian National Human Rights Commission in Context,’ Human Rights Quarterly, Vol. 24, No. 3 (Aug., 2002), pp. 662-720, p663

¹⁴ Pegram, cited above at note 8, p739

Conference on Human Rights (1993), addressed to the UNs and others to assist states in establishing and strengthening NHRIs, have arguably caused to this day extensive network of assistance by the UNs to NHRIs.¹⁵ For decades, organs of the UNs including the GA have been issuing numerous resolutions regarding establishment, operation and assistance of NHRIs.¹⁶

NHRIs today are found in all corners of the world including Africa, Asia-Pacific, Latin America, and the Middle East.¹⁷ The history of NHRI in Africa, like in the rest of the world, has been only a quarter of a century. The first African NHRI was the Togolese National Human Rights Commission, established in 1987.¹⁸ NHRIs are also found in almost all types of political systems ranging from established democracies to dictatorships.¹⁹ One may wonder as to how NHRIs are so widespread to become a global phenomenon in such a short span of time. Writers have provided three “diffusion” theories explaining NHRIs’ spread throughout the world: *coercion* leading to compliance (which arguably may include soft forms of coercion coming from varied sources such as the international community); *acculturation* leading to conformity (i.e. adopting the culture of neighbors, the international community, or any segment of the world believed to be important) accounting for most of the diffusion of NHRIs in the world; and *persuasion* leading to habituation (i.e. persuaded policy makers forming NHRIs for the benefit of society).²⁰

Legal Basis

The critical contribution of the international community for the establishment and spread of NHRIs has mostly followed soft approaches by “calling,” “encouraging,” “reaffirming,” “stressing,” “recommending,” etc of the establishment, strengthening, and effectiveness of NHRIs. The World Conference on Human Rights of 1993 – a land mark event in the international human rights movement in several aspects, for example, ‘recognized’ the role of NHRIs in the protection and promotion of human rights.²¹ It also ‘encouraged’ the establishment and strengthening of NHRIs complying with the PPs.²² Still there are few regional and international instruments going beyond soft approaches and requiring the establishment of NHRIs. One such instrument relevant to Ethiopia is the African Charter, which obliges state

¹⁵, World Conference on Human Rights, Part II, Para 84

¹⁶ See for example Resolution adopted by the General Assembly, National institutions for the promotion and protection of human rights (12 March 2010), A/RES/64/161, In the resolution, the GA recognizes, welcomes, stresses, encourages or urges the role of NHRIs in the follow-up to recommendations of international mechanisms; NHRIs’ support to the cooperation between the UN and Governments; the right of states to determine the nature of NHRIs; states establishing or strengthening effective, independent and pluralistic NHRIs; NHRIs to play active role to prevent and combat violations of human rights, their role at in the UN mechanisms, and the importance of financial and administrative independence; and *the Secretary-General to assist States in the establishment and strengthening of NHRIs.*

¹⁷ Pegram, cited above at note 8, p730

¹⁸ Chinedu Idike, Deflectionism or Activism? The Kenya National Commission on Human Rights in Focus, Essex Human Rights Review Vol. 1 No. 1 (2004), p40

¹⁹ Pegram, cited above at note 8, p730

²⁰ For detailed on the models of diffusion and examples, see Pegram, cited above at note 8

²¹ World Conference on Human Rights, Vienna Declaration and Programme of Action, Part I, para 36

²² Ibid

parties to “allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”²³ Article 33 of the Convention on the Rights of Persons with Disabilities (to which Ethiopia is a party) also requires the designation or establishment, inter alia, of an independent mechanism (s), which should take into account “the principles relating to the status and functioning of national institutions for protection and promotion of human rights,” meaning the PPs.²⁴

Hence, despite the international community’s contribution to formation and strengthening of NHRIs, NHRIs are basically national organs and their legal basis lies at national level. This means that NHRIs are created by national law, either by constitution, statute or decree. World-wide, it is reported that one-third of existing NHRIs are created by constitutions, about similar number by statutes (ordinary laws), and a further 15% having both constitutional and statutory bases.²⁵ In some States, NHRIs are established by decrees or other executive decisions without the involvement of the legislature.²⁶ The ideal type of a NHRI is one established by a constitution that should provide the NHRI’s fundamental features including independence.²⁷

The Paris Principles (PPs)

It is said that since the World Conference of 1993, which recommended the establishment and strengthening of NHRIs based on the PPs, the PPs are accepted generally as the test for legitimacy of NHRIs.²⁸ Almost all international, regional and national instruments dealing with NHRIs refer in one way or another to the PPs. As will be indicated at the end of this section, the accreditation of NHRIs, which has enormous consequences for the operation of NHRIs, is based on the PPs. International assistance for capacity building, international and regional participation at the UNs and other forums, and credibility as a national partner for the protection and promotion of human rights are mostly reserved to NHRIs complying with the PPs. Risking false comparison, it is possible to state that as judicial independence, competence, and many others are for judicial effectiveness, so are the PPs for NHRIs.

The PPs (formally called *Principles relating to the Status of National Institutions*) provide a number of standards for NHRIs to follow. Because of their relevance to a later assessment of the

²³ African Charter on Human and Peoples' Rights (1982), Article 26. Considering the nascent stage of NHRIs at the time, it may be contested that the Charter has not intended the NHRIs of today.

²⁴ In Ethiopia, although Article 3 of the ratification proclamation identifies the Ministry of Labour and Social Affairs as a government organ “to undertake all acts necessary for the implementation of the Convention,” it is not clear how the government intends to establish an independent national mechanism (or assign the EHRC) to be the mechanism envisaged in the Convention. See The Convention on the Rights of Persons with Disability Ratification Proclamation No 676/2010

²⁵ UNDP-OHCHR, cited above at note 5, p4

²⁶ Ibid, p5

²⁷ Burdekin, cited above at note 7, P43

²⁸ A Brief History of NHRIs, available at <http://nhri.ohchr.org/EN/AboutUs/Pages/HistoryNHRIs.aspx> (accessed on 6/23/2013)

EHRC, the standards are listed below. For the sake of brevity, statements of the PPs are either rephrased or omitted. Hence the original document should be consulted to fully appreciate the PPs. The standards in the PPs are classified into four: competence and responsibilities, composition and independence, methods of operation, and settlement of disputes.²⁹

Regarding **competence and responsibilities**, the standards for NHRIs are³⁰:

- Formation by constitution or ordinary law;
- Competence to promote and protect human rights;
- As broad mandate as possible specified by law;
- Responsibilities to advise or recommend to all government organs, and publish where necessary, on matters relating to:-
 - Any legislative or administrative provision relating to human rights;
 - Any situation of violation of human rights;
 - Preparation of status reports on national human rights;
 - Harmonization of national laws and practices with international human rights and their implementation;
 - Ratification of international human rights instruments;
 - State reports to international and regional bodies;
- Cooperation with the UN system, regional institutions and other NHRIs;
- Assistance to formulation of programmes for teaching and research in human rights; and
- Publication of human rights and efforts to combat all forms of discrimination;

Regarding **composition and independence**, the PPs require³¹:

- A procedure for pluralist representation of all social forces;
- Infrastructure and funding that ensure independence of NHRIs with their own staff and premises;
- Stable mandate for members of NHRIs [commissioners and others in charge of NHRIs] through official acts and predetermined duration of mandate;
- Pluralism of membership;

Regarding **methods of operation**, the PPs require NHRIs to³²:

- Freely consider any question within their competence;
- Hear any person and obtain all evidence necessary;
- Address public opinion directly or through any press;
- Set up local or regional sections to assist in discharging its functions;
- Maintain consultation with other relevant bodies and institutions;
- Develop relations with relevant non-governmental organizations;

Regarding NHRIs authorized to consider individual **complaints and petitions**, the PPs envisage:-

- Petitions by *anyone* including individuals, representatives, third parties, non-governmental organizations, trade unions or any representative organizations;

²⁹ General Assembly Resolution 48/134, Principles relating to the Status of National Institutions (The Paris Principles), 20 December 1993

³⁰ Ibid

³¹ Ibid

³² Ibid

- An amicable settlement through conciliation or binding decisions;
- Informing petitioners of their rights including remedies available and promoting access to those remedies;
- Hearing all petitions or transmitting them to a competent authority within limits prescribed by law; and
- Making recommendations to competent authorities, especially by proposing amendments or reforms of laws, regulations and administrative practices.

Accreditation of NHRIs

While the PPs provide the substantive standards for NHRIs to comply, accreditation by the International Coordinating Committee (ICC) offers the assurance that NHRIs abide by the PPs. Paragraph 5 of the Rules of Procedure for the ICC Sub-Committee on Accreditation (SCA) provides three classes of accreditation: “A” status (Voting Member), which recognizes full compliance by the NHRI with the PPs; “B” status (Non-Voting Member), which implies either the NHRI is not in full compliance or there is insufficient information to determine; and “C” status, which indicates the non-compliance of the NHRI with the PPs.³³ A NHRI which does not have accreditation (i.e. “A” status accreditation) is mostly considered to have no independence, effectiveness or other qualities identified in the PPs.³⁴

According to accreditation figures existing on the 11th of February 2013, from the 103 NHRIs listed at the ICC, 69 (18 of them are from Africa including Kenya, Nigeria, and South Africa) have “A” status, 24 (6 of them from Africa) have “B” status, and 10 (2 of them from Africa) have “C” status.³⁵ Apart from telling whether a NHRI is actually playing a role in the protection and promotion of human rights, status accreditation has enormous practical consequences in terms of assistance for capacity building particularly by the UNs and its organs.³⁶ Accordingly, international, regional and other bodies that recognize the role of NHRIs in the protection of human rights have frequently called for NHRIs to apply for accreditation. For example, the UN Human Rights Council, as recently as 2012, has issued a resolution on NHRIs *reaffirming* the importance of having a NHRI complying with the PPs in the protection of human rights and *encouraging* NHRIs to seek accreditation.³⁷ It should be noted that an accreditation status is not something a NHRI can keep forever once granted. As the performance of a NHRI, like any other

³³ International Coordinating Committee [ICC], Rules of Procedure of ICC Sub-Committee on Accreditation, (14 September 2004), available at <http://nhri.ohchr.org/EN/Pages/default.aspx> (accessed 6/24/13)

³⁴ UNDP-OHCHR, cited above at note 5, p260

³⁵ ICC, Chart of the Status of National Institutions: Accreditation Status as of 11 February 2013, available at <http://nhri.ohchr.org/EN/Pages/default.aspx> (accessed 6/24/13)

³⁶ On the types of assistance to NHRIs including capacity building and collaboration with the international human rights system by OHCHR, in collaboration with other UN agencies and relevant international and regional organs and networks, see the web site of OHCHR concerning NHRIs: <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>

³⁷ Human Rights Council Resolution 20/14, National institutions for the promotion and protection of human rights A/HRC/RES/20/14, 16 July 2012

institution, may vary from time to time, re-accreditation every five-year is required for “A” and “B” status accreditations.³⁸ As will be clear later, the EHRC has not yet received a status.

Types of NHRIs

There are various types of NHRIs in the world. As a matter of fact “there are as many types of national institutions as there are states.”³⁹ This is because states are normally free to determine the type of their NHRIs based on, inter alia, their legal tradition, history, political and economic situation, and the examples of other states. The discretion of states to determine their own NHRIs based on their peculiar circumstances has been underlined in major international instruments dealing with NHRIs. The World Conference on Human Rights for itself did not even suggest any type or model for NHRIs, instead recognizing the right of each state to choose the framework of its NHRI.⁴⁰ Empirical reviews of NHRIs in the world have revealed disparities in legal foundation, jurisdiction, mandate, structure, and membership of NHRIs.⁴¹

Despite such divergence, four broad categories of NHRIs are identified: the *commission* model, the *advisory* model, the *ombudsman* model, and the *institute* model.⁴² The human rights *commission* model is the classic type of NHRIs, which exhibits all the features in the PPs.⁴³ Although powers and responsibilities in the commission model vary from country to country, these commissions generally have the most comprehensive mandate of NHRIs including advising the government, monitoring compliance, education and carrying out investigations of human rights violations.⁴⁴ Majority of African NHRIs fall under this category. The EHRC, which is the subject of this article, falls within this category. The South African and Kenyan NHRIs to be identified later are also examples. NHRIs falling under the *advisory* model, on the other hand, do not normally investigate and monitor implementation of human rights instead focusing on providing expert advice to the government.⁴⁵ The French National Consultative Human Rights Commission with its predominantly advisory function is an example of the advisory model.⁴⁶ The human rights *ombudsmen* type combines “features of the classic ombudsman [i.e. ensuring legality and fairness at public administration] and the human rights commission model,” the human rights protection role being generally limited to public administration.⁴⁷ The Spanish Ombudsman (*Defensor del Pueblo Espanol*) “entrusted with the functions of protecting, promoting and guaranteeing rights and liberties of any person against any actions of the Spanish public authorities,” is an example for this model.⁴⁸ The *institute*

³⁸ Art. 15 of the ICC Statute states “All NHRIs that hold ‘A’ status are subject to re-accreditation on a five-year cyclical basis.”

³⁹ Pohjola, cited above at note 10, p16

⁴⁰ World Conference on Human Rights, Vienna Declaration and Programme of Action, Part I, para36

⁴¹ Pohjola, cited above at note 10, p16

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid, p17

⁴⁶ European Union Agency for Fundamental Rights, National Human Rights Institutions in the EU Member States: Strengthening the fundamental rights architecture in the EU I (2010), p31

⁴⁷ Pohjola, cited above at note 10, p18

public authorities,” is an example for this model.⁴⁸ The *institute* model, instead of investigation and monitoring, focuses on human rights “education, information, research and documentation” and in many cases on making assessment of draft laws.⁴⁹ The Danish Institute for Human Rights is an example for the institute model.⁵⁰

It should also be noted that apart from the four categories identified, there may also be “hybrid” NHRIs with multiple mandates of tackling maladministration, combating corruption, and dealing with environmental matters in addition to protection and promotion of human rights.⁵¹ A question may also arise as to the number and types of NHRIs for a state. It is possible that a state has two or more NHRIs with one or more of the models or with mandates limited to safeguarding rights of special categories of people such as minorities.⁵² Since there are not international rules regarding the number of NHRIs, the decision is left to each state, which may determine based on effectiveness.⁵³ Despite their differences, categorization and number, however, there are, as indicated already, threads connecting all types of NHRIs: they are established by government for the protection and promotion of human rights and they are (ought to be) independent of government.⁵⁴

Effectiveness

Like any organization, the performance of a NHRI is assessed by its effectiveness. Hence, the contribution of NHRIs for the protection and promotion of constitutional rights is measured by their effectiveness. But there is the difficulty of defining and assessing effectiveness of NHRIs. For example, is the effectiveness of a NHRI related to ending all human rights violations? That arguably is impossible and if that is the criterion of effectiveness, no NHRIs (for that matter courts and any other institutions) are effective and will ever be. Would a decrease in human rights violations or an increase in the overall satisfaction in the enjoyment of human rights be indicative of NHRIs’ effectiveness? After all, aren’t “benchmarks” and “indicators” used to assess improvements in human rights?⁵⁵ Setting aside the complexity of measuring improvements in human rights enjoyment, how can one tell the contribution of a NHRI to improvements separately from several other actors in protection of human rights? A list of such actors would include courts, parliaments, civil societies, international mechanisms, and governmental human rights units. Moreover, NHRIs should not be expected to be effective in all

⁴⁸ European Union Agency for Fundamental Rights, cited above at note 46, p28

⁴⁹ Pohjolainen, cited above at note 10, p19

⁵⁰ UNDP-OHCHR, cited above at note 5, p26

⁵¹ Ibid, p25

⁵² Richard Carver, ‘One NHRI or Many? How Many Institutions Does It Take to Protect Human Rights? –Lessons from the European Experience,’ Journal of Human Rights Practice Vol 3, No. 1 (2011), p2

⁵³ Ibid

⁵⁴ Pohjolainen, cited above at note 10, p19

⁵⁵ ICHRP, cited above at note 6, p122

aspects of human rights since no single institution is capable of handling all issues of human rights. Some NHRIs are effective in raising awareness instead of monitoring; some are effective in resolving non-political issues; some excel in providing remedies for complaints; some are successful in making public statements against politically-motivated violations of human rights challenging the government; some are fruitful in engaging gross violations of human rights and so on.⁵⁶

Instead of overall assessment, some NHRIs also use their complaints handling system (i.e the number of complaints, the sensitivity of complaints, the recommendations provided, etc) and the number and intensity of their trainings, reports and press releases to measure effectiveness.⁵⁷ Despite their usefulness, however, such criteria of assessment are likely to fail because of the challenge posed earlier. How can one conclusively attribute an increase in the number of complaints to improvements caused by a NHRI? An increase in complaints may be because of an increase in human rights violations. A decrease in complaints may also be simply because of lack of confidence in the complaints system.

Nevertheless, based on organizational theories and practical researches on NHRIs, writers have developed indicators that tend to identify effectiveness of NHRIs. Those indicators revolve around formal legitimacy (closely related to the legal framework), public legitimacy (related to the practice), and practical factors related to both. Based on the works of Richard Carver, Anne Smith, and International Council on Human Rights Policy, the following outline of these indicators is made.

Formal Legitimacy is obtained where a NHRI is granted independence by law. It relates to the constitutional or statutory basis of NHRIs, which should provide the NHRI “a degree of formal independence,” making it less likely to abolish, less vulnerable to governmental influence, more difficult to change its mandates, and easier to spot and react to proposed legislative changes against the NHRI.⁵⁸ In other words, if the law establishing a NHRI enshrines the standards in the PPs, the NHRI enjoys formal legitimacy. Having a mandate to protect and promote all human rights without restriction, a jurisdiction to address the conduct of all government and private actors, and the power to monitor compliance of recommendations by a NHRI contribute to public legitimacy.⁵⁹ The NHRI should also have the power to initiate investigations independently, the ability to demand the production of evidence, and the ability to publish investigative and other reports.⁶⁰ Formal legitimacy is important in two ways: first, it shows how the normative framework integrates independence, composition, and mandate of the NHRI and

⁵⁶ Ibid, pp105-106

⁵⁷ Ibid, pp122-123

⁵⁸ Smith, cited above at note 4, p913-4

⁵⁹ Carver, cited above at note 52, pp 8&9

⁶⁰ Smith, cited above at note 4, p914

second, public legitimacy to some extent depends on formal legitimacy (i.e. the perception of legitimacy by the public depends mostly on the criteria of formal legitimacy).⁶¹

Public Legitimacy refers to “the perception that ... [a NHRI]... is independent and prepared to defend human rights impartially,” especially of the rights of the vulnerable and persecuted.⁶² Hence public legitimacy substantially depends on the practice of NHRIs. The actual composition or membership of NHRIs, their actual independence from government, their willingness to take up politically sensitive issues in practice, and their determination to criticize government would indicate public legitimacy.⁶³ The publication of the work of a NHRI especially its work on monitoring, investigation, and recommendations contributes to its public legitimacy.⁶⁴ In addition to the general formal and public legitimacy, the following are used to assess effectiveness of NHRIs.

Membership and Staff: Another indicator of effectiveness relates to the composition of a NHRI. To be effective, the membership and staff ought to be diverse and have the personal qualities of “integrity, expertise and dynamism.”⁶⁵ Diversity or pluralism requires that the membership, i.e. commissioners, directors, staff, and so on of NHRIs, should be “representative of a society’s social, ethnic and linguistic composition,” while maintaining merit-based appointment and recruitment.⁶⁶ Moreover, the quality of commissioners, leaders, and staff of NHRIs influences effectiveness, which may be ensured by placing proper procedure for election and appointment.⁶⁷ Appointment procedure is among the most telling indicators of independence. Transparency, political neutrality, and participation should be the hallmarks in appointing commissioners in order for a NHRI to enjoy public legitimacy.⁶⁸ In theory and practice, the composition should ensure diversity, where “both members and staff should be drawn from a broad cross-section of society, ensuring multiplicity of opinion.”⁶⁹ The NHRI should also be competent to hire its own staff without government interference.⁷⁰

Budget: Another indicator of effectiveness relates to the adequacy of budget from the state “to meet both capital and operational costs.”⁷¹ This budget should also be controlled by NHRIs independently of the government.⁷² The funding should allow the NHRI to administer its staff and premises and to discharge its responsibility through monitoring, investigation, publicity, etc independently.

⁶¹ ICHRP, cited above at note 6, p57

⁶² Carver, cited above at note 52, pp 8&9

⁶³ Smith, cited above at note 4, p906

⁶⁴ ICHRP, cited above at note 6, p105

⁶⁵ Carver, cited above at note 52, pp 8&9

⁶⁶ ICHRP, cited above at note 6, p8

⁶⁷ Ibid

⁶⁸ Smith, cited above at note 4, p923

⁶⁹ Ibid, p928

⁷⁰ Ibid, p914

⁷¹ Carver, cited above at note 52, pp 8&9

⁷² ICHRP, cited above at note 6, p8

Coordination: There are a number of players in the protection of human rights. In order to be effective, a NHRI has to coordinate its work with civil societies, the government, and international organizations. The unique nature of NHRIs puts them in between civil societies and governmental organs.⁷³ This affords them an opportunity to connect with both in order to effectively enhance the protection and promotion of human rights. As indicated in the literature, effective working relationships with interested civil societies are indicators for effectiveness.⁷⁴ The strength of the relationship of NHRIs to civil societies is inherently connected with public legitimacy.⁷⁵ Non-governmental organizations especially those involved in human rights may easily link NHRIs with marginalized communities deserving protection.⁷⁶ Though keeping the balance between independence and cooperation is challenging, NHRIs should cultivate their relationship with government organs.⁷⁷ It is through government organs that many of the tasks of NHRIs are performed. Legislative recommendations are to be acted upon by a government organ; monitoring and investigative recommendations are mostly addressed by the executive; and violations of human rights are mostly redressed by courts. The strength of coordination formed by NHRIs with international and regional mechanisms is also another indicator for effectiveness.⁷⁸ With the ever-increasing power of the international community in standard setting and enforcement, NHRIs' participation in international forums has significant implication for national enforcement of human rights. Situational reports to the UN bodies, follow-up to recommendations of treaty bodies, and other activities may be effectively carried out by NHRIs.

Core Human Rights Issues: Performance on “core protection mandate” is also one of the most important factors for both national and international credibility of NHRI.⁷⁹ Some of the core protection areas identified by the OHCHR include freedom from arbitrary arrest, freedom of assembly, freedom of association, limits on derogations from fundamental rights and freedoms, freedom from arbitrary detention, right to be treated humanely during detention, *habeas corpus*, fair trial rights, right to life, freedom of movement, presumption of innocence, access to justice, and the right to be free from torture.⁸⁰

Accessibility: Accessibility includes awareness of the public and civil societies about NHRIs and their mandate, accessibility of offices, and accessibility to sectors susceptible to violations of human rights.⁸¹ Opening regional and local offices is among the first step to ensure accessibility. But some innovative methods may be devised to ensure accessibility. A typical example is the method employed by the Permanent Commission of Enquiry in Tanzania, which “used to be

⁷³ Ibid, p91

⁷⁴ Carver, cited above at note 52, pp 8&9

⁷⁵ Smith, cited above at note 4, p935

⁷⁶ ICHRP, cited above at note 6, p8

⁷⁷ Smith, cited above at note 4, p935

⁷⁸ ICHRP, cited above at note 6, p8

⁷⁹ UNDP-OHCHR, cited above at note 5, p55

⁸⁰ Ibid

⁸¹ ICHRP, cited above at note 6, p7

almost permanently on the road, hearing complaints and conducting education in villages throughout the country.”⁸²

2. The Ethiopian Human Rights Commission

Article 55(14) of the Federal Democratic Republic of Ethiopia (FDRE) Constitution envisions the establishment of the EHRC obliging the House of Peoples Representatives (HPR) to establish “a Human Rights Commission and determine by law its powers and functions.” That is the only clause in the Constitution that refers to the EHRC. Article 55 is not normally about human rights or NHRIs. It is about the numerous “powers and functions” of the HPR, which is the federal legislature. What this means precisely is that no independence, autonomy, composition, pluralism or any feature of the EHRC is specifically determined by the Constitution. Hence arguably, the EHRC is not granted powers independently of powers granted (or to be granted) to it by the HPR. Exercising its power under the Constitution, the HPR established the EHRC with broad powers to protect the human rights in the Constitution.⁸³ What is the implication of this constitutional design (i.e. letting the HPR virtually determine the nature of the EHRC) on the constitutional status of the EHRC and its contribution to constitutionalism? This point will be discussed at some length in subsequent sections but before proceeding to that discussion it will be important to address the relationship of constitutionalism in Ethiopia and the EHRC.

2.1 Constitutionalism and Human Rights in Ethiopia

Here is not to provide a wider discussion on constitutionalism and human rights. It is simply to locate the place of human rights and the EHRC in the overall discussion of constitutionalism. Beginning with the simplest term, the modern constitution – the supreme law of a state – consists of rules which identify and explain⁸⁴:

- (a) Organs of the government [the legislature, courts, the executive, electoral commissions, national human rights institutions, national-regional organs, etc];
- (b) The nature, extent, distribution, and how-to-exercise of powers within and/or among those institutions [list of powers for each organ, methods of checks and balances, if any, voting or decision-making procedure in each, etc]; and
- (d) The relationship between the institutions of government and the individual citizen, often expressed in terms of a “Bill of Rights.”

But having such kind of modern constitution is not equivalent to constitutionalism. That may be *documentary constitutionalism*, which acknowledges the existence of a document called *constitution* embracing the rules above but without answering “the question of whether or how a

⁸² Ibid, p83

⁸³ the Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000, Article 6

⁸⁴ Alex Carroll, Constitutional and Administrative Law (4th ed., 2007), p3. Components of the definition are reformulated and examples are added in brackets for clarity and coherence with subsequent paragraphs.

government implements that constitution in whole or part.”⁸⁵ Neither is constitutionalism about “the systematic study of constitutions and various constitutional provisions”.⁸⁶ The crucial component of constitutionalism in addition to the constitution is “limited government,” i.e. placing limits on the power of government.⁸⁷ The limits are not only in the Constitution, which is documentary constitutionalism, but also in practice. It is widely agreed that where ‘the will of the government has no check upon it from the constitution, there is in reality no constitution,’ i.e. no constitutionalism, rather ‘despotism.’⁸⁸ Likewise, if a government is not constrained in practice despite constitutional limits, the government is despotic in fact.

Specifically to human rights, constitutionalism means that the constitution provides “substantive constraints on the exercise of public authority – in the form of constitutional rights.”⁸⁹ At the root of constitutionalism, there is “the idea of protecting the rights of individuals and minorities from majoritarian actions.”⁹⁰ Considered in this light, the FDRE Constitution has one of the basic components of constitutionalism, namely the list of rights. The “fundamental freedoms and rights” chapter of the Constitution (Articles 13-44) provides for a whole range of rights, demonstrating documentary constitutionalism in Ethiopia. But the question is of actual constitutionalism, i.e. the degree to which the constitutional rights have limited in practice the will of the government. There may or may not be constitutionalism in Ethiopia. The actual practice of government organs, the actual behavior of the legislature in ensuring respect for human rights, judicial and administrative enforcement of human rights, the constitutional culture of federal and regional units of the state, and so forth have to be investigated before declaring that there is or is not constitutionalism. Investigation of these factors is way beyond the scope of this article. However, from several actors of constitutionalism, the article assesses the contribution of the EHRC in fostering constitutionalism.

2.2 The Ethiopian Human Rights Commission and Constitutionalism

As can be seen from the definition earlier, a modern constitution has two general parts: structural part creating the institutional infrastructure and substantive part dealing with rights (and others) as constraints against the government.⁹¹ Chapter three of the EFDRE Constitution could be

⁸⁵ Lafayette College, Human Rights constitutionalism in Japan and Asia: The Writings of Lawrence W. Beer (2009), p11

⁸⁶ Jeremy Waldron, ‘Constitutionalism – A Skeptical View’ in Thomas Christiano and John Christman, Contemporary Debates in Political Philosophy (2009), p367

⁸⁷ Russell Hardin, ‘Constitutionalism,’ in Barry R. Weingast and Donald A. Wittman (eds.), the Oxford Handbook of Political Economy (2006), p289

⁸⁸ Fortunato Musella, ‘Constitutional Law’ in George Thomas Kurian (ed), The Encyclopedia of Political Science (2011), p314

⁸⁹ Alec Stone Sweet, "Constitutionalism, Rights, and Judicial Power" (2008), Faculty Scholarship Series, Paper 77. http://digitalcommons.law.yale.edu/fss_papers/77, p221

⁹⁰ Gary C. Bryner, ‘Constitutionalism and the Politics of Rights’ in Gary C. Bryner and Dennis L Thompson (eds.), the Constitution and Regulation of Society (1987), p7

⁹¹ Daryl J. Levinson, ‘Parchment and Politics: the Positive Puzzle of Constitutional Commitment,’ Harvard Law Review, Volume 124, No. 3, (2011), p717

considered a component of the substantive part. It provides the substantive provisions of human and democratic rights constraining the will and action of the government. To ensure the enforcement of these constraints, the Constitution provides an obligation on government organs to observe fundamental rights and freedoms. Article 13(1) states “All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter [of Fundamental Rights and Freedoms].” These are the institutions that enforce the fundamental rights and freedoms in the Constitution. The Constitution creates and elaborates those institutions. It creates, for example, an independent judiciary vested with judicial powers (Articles 78 and 79).

But interestingly, the Constitution does not identify the EHRC under Article 13 where it imposes obligations on government organs in relation to human rights. This may be attributed to a couple of factors. One factor could be that the provision is not accurate: naturally it is not only government organs but also all organs and individuals that are obliged to observe fundamental rights and freedoms. Again it could be said that the EHRC being a NHRI is different in a sense described above and leaving it out is appropriate. The important thing, however, in all these is “All citizens, organs of state, political organizations, other associations as well as their officials have the duty to ensure observance of the Constitution.”⁹² In that sense the EHRC has a clear role in the observance of constitutional human rights, contributing to constitutionalism. But again one may find it strange how the Constitution has failed to relate the EHRC to the “fundamental rights and freedoms” of the Constitution. As indicated elsewhere, the Constitution simply empowers the HPR to establish the EHRC without defining it and even without linking its formation to rights’ provisions of the Constitution. What this means is that determination of the nature of the EHRC is virtually left to the HPR, raising doubts on the EHRC’s constitutional entrenchment.⁹³

A hypothetical but important question regarding the constitutional status of the EHRC should be raised: what would constrain the HPR from issuing a law that would make the EHRC subservient to the executive? By application of some sort of constitutional interpretation such as the ‘original intention,’ one may arguably arrive at a conclusion that the EHRC is required by the FDRE Constitution to comply with the PPs, which should have been known to the drafters of the Constitution. If this argument is accepted, a major departure from the PPs in the formation of a NHRI in Ethiopia would be unconstitutional. This argument also allows us to assert that the EHRC is a constitutional organ with the responsibility to foster constitutionalism in Ethiopia. Moreover it is not the constitutional status that should determine our assessment of the EHRC’s role in constitutionalism. Rather its extensive mandate in monitoring the enforcement of the constitutional rights and freedoms. As will be explained later, the EHRC has the mandate of education, investigation, monitoring and reporting of human rights that are crucial for

⁹² Article 9(2) of the FDRE Constitution

⁹³ Entrenched institution or rule in a constitution is not subject to regular change by the legislature (p318) John R. Vile, ‘Constitution Amending Procedures’ in George Thomas Kurian (ed), The Encyclopedia of Political Science (2011)

constitutionalism. The role of the EHRC in constitutionalism is magnified because of the never-ending argument over who interprets the Constitution compounded by the absence of constitutional review of legislative actions.⁹⁴ In this zone of confusion, the EHRC, based on its mandate, may review all proposed and enacted laws for compatibility with constitutional rights in effect carrying out a kind of constitutional review in abstract or concrete cases.⁹⁵

2.3 Critical Assessment of the EHRC

Now we turn to the role the EHRC has played so far in fostering constitutionalism. Obviously, the nature of the EHRC, its mandate, composition, and, most important the EHRC's practice determine its effectiveness in promoting constitutionalism. From the EHRC's strategic plans, annual and monitoring reports, advisory services, training programs, promotional works, etc, and feedbacks from stakeholders, one should be able to tell the performance of the EHRC in fostering constitutionalism. To be exact, the effectiveness of the EHRC determines its contribution to constitutionalism. Based on standards outlined in the previous sections, subsequent paragraphs of this section will assess the EHRC's contribution towards the protection and promotion of human rights, which are essential components of modern constitutionalism.

Formal Legitimacy

The EHRC is established by the HPR through the *Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000* (the Proclamation), which identifies the EHRC as “one of the organs that play a major role in enforcing” the rights and freedoms in the Constitution.⁹⁶ Article 3 identifies the EHRC as “an autonomous organ of the Federal Government, accountable to the House [i.e. the HPR].” The mandate of the EHRC extends in scope to any part of Ethiopia (Article 4(1)). Objectives of the EHRC as enumerated in Article 5 are to “educate the public be aware of human rights, ensure protection, respect and enforcement of human rights, [and] ensure [that] necessary measures are taken where violations occur.” Among the powers and duties of the EHRC include (Article 6):

- Ensuring constitutional rights are respected by all;
- Ensuring laws and government decisions do not contravene constitutional rights;
- Educating the public to enhance the tradition of human rights;
- Investigation of human rights violations;
- Making recommendations for revision, enactment and formulation of laws and policies;
- Providing consultancy services on matters of human rights;
- Providing opinion on human rights reports to be submitted to international organs;
- Translation and dissemination of international human rights instruments adopted; and
- Participation in international human rights meetings;

⁹⁴ To the writer's knowledge there are not any legislative actions found to be unconstitutional on the basis of constitutional rights and freedoms either by the HoF or Courts.

⁹⁵ On the various types of constitutional review such as judicial review, ‘abstract’ review, and concrete review, see Sweet, cited above at note 89, pp231 and 232

⁹⁶ Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000, preamble

Moreover, in Article 19, the Chief Commissioner as the top executive of the EHRC is empowered to:

- Undertake study of recurrent cases of rights' violations and propose remedies to the HPR;
- Give opinion on human rights reports prepared by the Federal Government;
- Prepare draft laws on human rights for submission to the HPR;
- Report on matters of human rights and activities of the EHRC to the HPR,
- Establish working relations with government and non-governmental organizations;

Given the powers and duties of the EHRC listed above, it is easy to see that as far as the normative framework is concerned, the EHRC with its autonomy and mandate to educate, investigate, and provide legislative recommendations is the comprehensive *commission* type of NHRIs envisioned in the PPs. As indicated elsewhere, the PPs serve as yardsticks to assess the mandate and performance of NHRIs. Hence, the performance of the EHRC should be assessed accordingly. It should be admitted that neither the Constitution nor the Proclamation mentions the PPs. One wonders how a Proclamation, after apparently borrowing extensively from them, fails to mention the PPs. In any case, three general arguments may be forwarded on why the EHRC should be assessed based on PPs for its formal legitimacy. First, the emergence of NHRIs as already explained is mainly a result of the international human rights movement. The movement's principal instrument relating to NHRIs is the PPs. Second, upon the admission of the EHRC, the PPs are presently the standards to measure the effectiveness and legitimacy of the NHRIs.⁹⁷ Among the fundamental principles of its operation, the EHRC identifies the PPs together with the Constitution as guiding the ways of the EHRC.⁹⁸ Third, particularly relevant to Ethiopian context, the Constitution has not given us standards to assess the nature of the EHRC. As argued earlier, the kind of commission envisioned by the framers of the FDRE Constitution is the one conforming to the PPs. While the autonomy and broad mandate of the EHRC are in compliance with the PPs, other factors of effectiveness in the Proclamation as well as practice will be considered below.

Public Legitimacy

Public legitimacy relates to the actual performance of the EHRC and how it is perceived by stakeholders. It is widely believed that the EHRC does not meet the PPs in practice.⁹⁹ Records from the UNs indicate that many international organs are not satisfied with the EHRC's compliance with the PPs. An important factor is accreditation by the ICC. As accreditation chart

⁹⁷ Inaugural Report of the Ethiopian Human Rights Commission (February, 2011, Addis Ababa), p3; The inaugural report covered the first five years of the EHRC's operational life

⁹⁸ Ibid

⁹⁹ Pierre Robert and Yoseph Endeshaw, Evaluation Report: Enhancing the Functional Protection of Human Rights in Ethiopia (30 May 2012), p6. This is a report to evaluate the project "Enhancing the Functional Protection of Human Rights in Ethiopia" implemented from October 2009 to September 2011 by the International Development Law Organization (IDLO) in partnership with the EHRC. The project's aim was enhancing the EHRC into becoming "a functional institution able to protect and enforce human rights in line with Ethiopian laws and international norms and standards."

shows, the EHRC is not granted accreditation despite its application sometime ago. According to ICC documents, the application of the EHRC is deferred for next session (18-22 November 2013) of the SCA to obtain more information on the EHRC's law and practice.¹⁰⁰ Given the EHRC's Proclamation is easy to locate, the ICC's request for further information on the law probably extends to other substantive and procedural laws relevant to the EHRC's performance.

Despite its request for further information, the SCA expressed a number of concerns on independence and effectiveness, shading light on the SCA's present understanding of the EHRC.¹⁰¹ Having noted reservations by various UN treaty bodies regarding the EHRC's performance, the SCA inquired whether the EHRC had provided advice on contentious laws particularly on the charities and societies proclamation and the anti-terrorism law, which the SCA said were identified by human rights organizations and experts as having negative impact on freedom of expression, speech, association and related rights.¹⁰² The EHRC admitted that it did not provide any legislative advice to the government despite its wishes.¹⁰³ Another concern of the SCA related to a lack of express mandate to monitor all places of detention especially unannounced, a concern which led the SCA to "encourage" legislative amendment to that effect.¹⁰⁴ Another concern raised was staff turnover, which the EHRC argued was caused by differences in salary scale in private and public sectors.¹⁰⁵ In the end, the SCA recommended for the EHRC to work with the OHCHR and UNDP to implement the recommendations of Capacity Gaps Assessment conducted in 2011.¹⁰⁶

Many of the concerns of the SCA are concerns already expressed by UN human rights treaty bodies. According to CERD, the EHRC lacks clarity on its remedies, its unit if any dealing with issues of racial discrimination, and publicity of remedies including remedies for racial discrimination.¹⁰⁷ CERD recommended the Ethiopian government to strengthen the EHRC in

¹⁰⁰ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights [ICC], Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), (19 - 23 November 2012), available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20Report%20November%202012%20%28English%29.pdf> (accessed 6/23/13)

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Ibid. The concern however seems misplaced since although no specific provision to that effect is in the Proclamation, the extensive mandates of the EHRC should be understood to allow unannounced visits. Besides, the EHRC in its prison reports has expressly indicated that it had carried out unannounced visits to detention centers, although it is unclear how a national monitoring of more than 100 prisons is carried out without prior knowledge of officials. On the EHRC's claim of unannounced visit, for example, see Ethiopian Human Rights Commission, Human Rights Protection Monitoring in Ethiopian Prisons Primary Report, July 2012, Addis Ababa, p6

¹⁰⁵ ICC Report and Recommendations, cited above at note 100

¹⁰⁶ Ibid. The Capacity Gaps Assessment in August 2011 was carried out in collaboration with the OHCHR, UNDP and the Network of African NHRIs to assess the capacity of the EHRC. See National institutions for the promotion and protection of human rights, Report by the Secretary-General, 8 August 2011, A/66/274. The efforts of the writer to obtain the report and ascertain the content of the document were unsuccessful.

¹⁰⁷ Concluding observations of the Committee on the Elimination of Racial Discrimination, CERD/C/ETH/CO/7-16, 7 September 2009, paragraph 20

line with the PPs, to provide it with adequate resources, disseminate information on the EHRC's mandate, and ensure accessibility of the EHRC to rural or other peripheral areas.¹⁰⁸ CAT's concerns are lack of follow-up on the EHRC's prison recommendations and the EHRC's limited powers to initiate prosecutions where violations are found.¹⁰⁹ CAT recommended strengthening the mandate of the EHRC to include regular and unannounced visits to places of detention, to give due weight to investigative reports of the EHRC (to the extent of providing the reports to public prosecutors), and to ensure that the EHRC complies with the PPs.¹¹⁰ The Human Rights Committee is even explicit in finding that the EHRC "is not yet compliant with the Paris Principles," noting "[the EHRC] has not made any recommendation regarding existing or new laws, it has undertaken very few investigations on alleged human rights violations, and its recommendations and suggestions following its monitoring of correctional facilities were not implemented by the State Party," and recommending for the Ethiopian government to ensure that the independence of the EHRC is in line with the PPs.¹¹¹ A similar statement is made by the CESCR which recommended for Ethiopia to "take all the necessary steps in order to ensure that the status of the Ethiopian Human Rights Commission, including mandate, independence, and capacities, fully complies with the Paris Principles."¹¹²

Budget

There are two sources of budget of the EHRC, which are the government (budget and subsidy) and any other source (assistance, grant, etc).¹¹³ Regarding budget from the government, Article 19 allows the EHRC to prepare and submit its budget for approval by the HPR. However, the practice seems different. In 2008, the EHRC had identified three budgetary concerns as affecting the EHRC's effectiveness: insufficient budget, the inability of the EHRC to influence its budget, and the controlling power of a government ministry in charge of government finance.¹¹⁴ From annual reports reviewed, the annual budget of the EHRC for 2009/10 was Birr 8,404,900.00 (by the government) and Birr 21,520,242.00 (project funding through Democratic Institutions Program - DIP), which is three-times the budget allocated by the government.¹¹⁵ For 2010/11, the figures are comparable: Birr 7,890,000 from government and Birr 27,426,032 from DIP.¹¹⁶ There were also other external sources of funding.

¹⁰⁸ Ibid

¹⁰⁹ Concluding observations of the Committee against Torture, Ethiopia, CAT/C/ETH/CO/1, 20 January 2011, parag25

¹¹⁰ Ibid

¹¹¹ Concluding observations of the Human Rights Committee, Ethiopia, CCPR/C/ETH/CO/1, 19 August 2011, para 6

¹¹² Concluding observations of the Committee on Economic, Social and Cultural Rights, Ethiopia, E/C.12/ETH/CO/1-3, 31 May 2012, para 6

¹¹³ Article 36 of Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000

¹¹⁴ Federal Republic of Ethiopia, Ethiopian Human Rights Commission, United Nations Development Programme: Strengthening the Capacity of the Ethiopian Human Rights Commission, (2008-2012), January 2008, p11

¹¹⁵ Inaugural Report of the EHRC, p58

¹¹⁶ Ethiopian Human Rights Commission, Annual Performance Report, June 2010-July 2011, p79

The funds obtained from external sources (DIP and others) were used for human rights education, organization of workshops, human rights monitoring, and free legal aid services. Many of the collaborative activities with government as well as were also carried out through DIP funding.¹¹⁷ This extensive reliance on external sources has had two implications. First, the government has not been willing and capable of providing adequate funds to the EHRC, which would contravene financial self-sufficiency that would impinge on the independence of the EHRC. Second, excessive reliance on external funding would increase the vulnerability of many of the activities of the EHRC to reduction or termination of funding by external actors, who are under no obligation of permanent assistance. This is exactly the risk that has materialized when the project funding of DIP has expired last year (2011/12).¹¹⁸ According to EHRC's report, a number of major activities of the EHRC could not be implemented for lack of funds.¹¹⁹ The EHRC had to request a subsidy (additional funding) from the government which may have helped a little bit but could not have matched the enormous funding the EHRC used to enjoy through the DIP project.¹²⁰ Now hundreds of legal aid centers that used to be assisted by the EHRC, a number of research projects, and others have to be suspended exposing the acute shortage of funds the EHRC has yet to face.

It is also interesting to notice that in practice, it seems, the EHRC's budget proposal is presented not directly to the HPR, as the literal reading of the Proclamation implies, rather to a government ministry in charge of government financing. As recent as this year, the EHRC reports that its budget request for 2013/14 is sent to the Ministry of Finance and Economic Development, a government organ that allocates and administers government finance.¹²¹ The writer does not have information on the ratio of budget-request to budget-grant to the EHRC by the government. However it is not difficult to imagine the negative effect of the executive's budgetary scrutiny upon the final allocation of budget to the EHRC.

Membership and Staff

Membership and staff of a NHRI are crucial for legitimacy and effectiveness. One crucial organ of the EHRC in this regard is the Council of Commissioners composed of the Chief Commissioner, the Deputy Chief Commissioner, and other Commissioners.¹²² The Council's powers and duties include adoption of directives and by-laws, discussion on the EHRC's draft budget, issuance of staff regulations, appointment of department heads, and decisions on cases and complaints relating to staff administration.¹²³ The position of Chief Commissioner is the most important in the operation of the EHRC. The appointment of the present Chief

¹¹⁷ See annual reports of the EHRC

¹¹⁸ Ethiopian Human Rights Commission, Annual Report: 2012/13, June 2013

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ Ibid

¹²² Article 30 of Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000

¹²³ Ibid, Article 31

Commissioner in 2010 – which was said to have complied with the legislative procedure of public announcement, nomination, etc – was unanimous.¹²⁴ One of the EHRC’s reports also refers to an extensive participation of the nations, nationalities and peoples in the selection of the first Commissioners in 2005.¹²⁵ But in all cases, no explanation was offered on who the other candidates were, what human rights related qualities of the Commissioners made them stand out from other candidates and so on. Considering the fact that the EHRC is run in its day to day activity by the Commissioners, their background, contributions to human rights causes, and so on should have been explained in comparison with the other candidates not selected. Also remained unexplained was how representative the Commissioners were of the religious, ethnic and political diversity in Ethiopia.

According to Article 10 of the EHRC’s Proclamation, all commissioners are appointed by the HPR (by two-thirds vote) upon the recommendation by a Nomination Committee (by two-thirds vote). The Nomination Committee consists of the Speaker of the HPR, the Speaker of the House of the Federation (HoF), seven members from the HoF, two members from the HPR to be elected by opposition parties having seats in the HPR, the President of the Federal Supreme Court, and four members representing each the Ethiopian Orthodox Church, the Ethiopian Islamic Council, the Ethiopian Evangelical Church, and the Ethiopian Catholic Church.¹²⁶ Although the Nomination Committee looks representative that ensures diversity in the selection of candidates, there are numerous problems in the process. First, civil societies are not represented at all in the Committee. Second, the representation of opposition parties with a *maximum* of 2 out of 16 members of the Committee makes little impact on the final outcome. Third, considering the dominance of the ruling party in the HPR and the HoF, it is unrealistic to expect members coming from these houses to recommend candidates representing diversity of voices.

The criteria for appointment, which seem ideal, include loyalty to the Constitution, respect for human rights, training in law or other relevant discipline or extensive knowledge through experience, reputation for diligence, honesty and good conduct, and good health.¹²⁷ Nevertheless, there is little evidence to show that past as well as present commissioners were elected based on these criteria. Although the Chief Commissioner is made accountable to the HPR in compliance with the PPs, the exclusive control of the HPR by the ruling party provides little guarantee to ensure diversity of opinion in the accountability of the EHRC.¹²⁸

Capacity Building

Lack of capacity has been consistently raised as an obstacle to discharging the EHRC’s mandate under the law. As a result, building the EHRC’s internal capacity has been a priority to the

¹²⁴ Press Releases, available at <http://www.ehrc.org.et/> (accessed 6/20/13)

¹²⁵ Inaugural Report of the EHRC, p29

¹²⁶ Article 11 of Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000

¹²⁷ Ibid, Article 12

¹²⁸ Ibid, Article 13

EHRC as indicated in its major reports.¹²⁹ For example in 2011, the EHRC has seen the development of an investigation procedure, a study and monitoring guideline, a communication strategy and an operational guideline.¹³⁰ A uniform investigation manual was also prepared in 2011 with the help of USAID and International Development Law Organization.¹³¹ In addition to systems development, capacity building of staff was carried every year since the EHRC begun operation.¹³²

Many international partners took part in the capacity building activities of the EHRC. A significant capacity building support worth mentioning here came from a multi-donor support program to institutions including the EHRC identified to play crucial roles in strengthening democracy in Ethiopia.¹³³ The EHRC's part of the program was intended to enhance the capacity of the EHRC, inter alia, in the publication of investigation works, translation and dissemination of international human rights instruments, media education in local languages, establishment of regional offices, enhanced system of complaints handling, effective outreach to citizens and relevant government institutions, and automated complaints management system.¹³⁴ The OHCHR is also said to have "provided advice on the process of accreditation before the International Coordinating Committee, and provided training to staff and commissioners on the Paris Principles."¹³⁵

Whether these and other efforts have borne fruit to the effectiveness of the EHRC is not yet clear. One major problem noted by the EHRC itself is staff turnover. Staff turnover has been one of the challenges identified in all of the EHRC's annual reports. Even in international forums, the EHRC has recognized this challenge as obstructing the discharge of the EHRC's mandate.¹³⁶ This is a serious concern since many of the capacity building activities of the EHRC relate to staff development, which would be lost if the rate of employee turnover remains high.

Monitoring

¹²⁹ Inaugural Report of the EHRC, p46

¹³⁰ Ethiopian Human Rights Commission, Annual Performance Report, June 2010-July 2011, p10

¹³¹ Ibid, p71

¹³² Inaugural Report of the EHRC, p55

¹³³ Democratic Institutions Program [DIP], Government of Ethiopia (Ministry of Finance and Economic Development) and United Nations Development Programme, Multi-Donor Support for Democratic Institutions Program (August 2007). DIP was a five-year, multi-donor program with the purpose of supporting several democratic institutions principally being the EHRC, the Ethiopian Institute of Ombudsman, the Federal Ethics and Anti-Corruption Commission, the HoF and Regional Councils of Nationalities, the HPR and Regional State Councils, and National Electoral Board of Ethiopia, which would play crucial roles in democratic governance in the Country. Three broad objectives as envisaged in the Programme were: 1) Promoting human rights and good governance; 2) Enhancing the capacity of these democratic institutions to be effective, sufficient and responsive in promoting and protecting rights of citizens; and 3) Empowering citizens to be active and effective participants in the democratic process as well as respect for the rights of others. The Program ended by 2012

¹³⁴ Ibid

¹³⁵ National institutions for the promotion and protection of human rights, Report by the Secretary-General (8 August 2011), A/66/274

¹³⁶ ICC Report and Recommendations, cited above at note 100

Regarding monitoring, since its establishment, the EHRC has carried out a series of visits to detention facilities, observed the general election of 2010 and monitored more than 30 children's homes across the country. An apparently successfully monitoring activity of the EHRC has been prison monitoring. The EHRC had carried out two sets of prison monitoring in 2008/09 and another in 2010-11. These monitoring reports are among the few useful works of the EHRC. The reports identified problems at detention centers such as shortage and poor quality of food, scarcity of clean water, disciplinary measures violating human rights, shortage of medical facilities, congestion of detainees, lack of separate accommodation for special groups of people, and long detention without court judgment. According to the EHRC, its first prison monitoring in 2009 has caused the adjustment of budget allocation for food in several detention centers, in many cases doubling the amount.¹³⁷ That makes the EHRC's monitoring activity a success story. The EHRC has also indicated that senior government officials and heads of prison administrations have been positive about many of the findings in the reports.¹³⁸

However, a note of reservation should be made on the scope of the monitoring activities. In the second prison monitoring, for example, 96% of the country's detention centers were monitored.¹³⁹ As indicated in the report, 14 to 28 experts with involvement by the Commissioners and Directors performed the monitoring.¹⁴⁰ The methods used included observation, discussion, interview, etc. One may wonder if a cost-benefit analysis was made before going into monitoring almost all detention centers, compared probably to monitoring half or one-third or even substantially small size of the prison population. As will be noted later, the EHRC has often expressed acute shortage of qualified staff it could not avoid. If that is true, prison monitoring, which consumed majority of the professional staff and Commissioners for months (years?), could not have come without costs to other crucial mandates of the EHRC.

Another monitoring activity worth noting is the EHRC's election observation in 2010. In this monitoring activity, the EHRC reported to have received complaints from a number of opposition parties regarding arrest and intimidation of their candidates but to have found the complaints to be factually unsubstantiated.¹⁴¹ It also reported that few of the "genuine incidents" were satisfactorily handled by the National Electoral Board of Ethiopia (NEBE) and that the "minor incidents" witnessed had no "adverse effects" on the electoral process. Other allegations by the opposition, the EHRC found, were either not evidence-based or without "any hard fact."¹⁴² Election monitoring is one important function for NHRIs to be effective and as such the EHRC's efforts have to be acknowledged and encouraged. However, in its observation, the EHRC seems to leave out the most important questions, instead focusing on what anyone can

¹³⁷ Ethiopian Human Rights Commission, Human Rights Protection Monitoring in Ethiopian Prisons Primary Report, July 2012, Addis Ababa, p176

¹³⁸ Ibid, p180

¹³⁹ Ibid, p8. According to the report, 114 out 119 detention centers were monitored.

¹⁴⁰ Ibid, p6

¹⁴¹ Details on the findings, see its report on the FDRE, The Fourth General Elections to the House of Peoples Representatives and State Councils (23 May 2010), Nov. 2011, pIII-V

¹⁴² Ibid

easily find from NEBE. For example, in its election report, the EHRC notices the total absence of voter education except by NEBE and expresses its hope for the future where others will take part in voter education.¹⁴³ This situation was obvious for anyone following the run-up to the election. However, the EHRC fails to explore why NGOs (and other national actors) were unable to observe the election. Again for an election result which heralded a one-party extraordinary dominance of all federal and regional legislative houses in such a vast and diverse country as Ethiopia, the EHRC begins “to congratulate the electorate, the government bodies as well as many of the political parties contesting the elections for their resolve to ensure the entire election process was conducted peacefully, legally and democratically.”¹⁴⁴ Moreover, it was doubtful if the EHRC had the required expertise to arrive at such sweeping conclusions. According to its own report, the election observation was its first on the matter and all the staff of the EHRC and 216 newly-recruited temporary staff took part in the monitoring.¹⁴⁵

Investigation

According to Article 24 of the Proclamation to establish the EHRC’s, investigation mandate of the EHRC may be initiated upon complaints or on its own initiation. The EHRC has the mandate to investigate all human rights violations except where the cases are already brought before the HPR, the HoF, Regional Councils, or courts of law.¹⁴⁶ The procedure before the EHRC is attractive since a complaint may be lodged by any person; anonymous complaints are allowed; no fees are charged; complaints may be lodged in writing or in any other form; and complaints may be submitted without evidence.¹⁴⁷ Article 25 empowers the EHRC to order the appearance of ‘those complained against’ for questioning or defense, witnesses for testimony, or any person for production of evidence.

Regarding remedies, amicable settlement is a priority (Article 26). The EHRC is also required to notify its recommendations to the head of the concerned organ and the complainant detailing in the remedy that “the act having caused the grievance be discontinued, that the directive having caused the grievance be rendered inapplicable and that the injustice committed be redressed or that any other appropriate measure be taken.” One important weapon for the EHRC to enforce its power of compelling evidence is Article 41. According to this article, failure to appear or to produce evidence as required by the EHRC may entail imprisonment or fine. Harm to persons

¹⁴³ Ibid

¹⁴⁴ Ibid. Despite concerns raised by outside observers, the EHRC has declared that “the Fourth Ethiopian General Elections have been conducted in compliance with domestic and international standards and, were free, fair and democratic.” (p7). On some of the concerns on lack of level playing field and imprisonment of opposition parties negatively impacting on the outcomes of the election, see the European Union Election Observation Mission, Ethiopia: Final Report, House of People’s Representatives and State Council Elections May 2010, available online at <http://www.eueom.eu>

¹⁴⁵ Election Report, cited above at 141, pp6-8

¹⁴⁶ Article 7, the Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000

¹⁴⁷ Ibid, Articles 22 and 23

with evidence and unjustified failure to act upon the EHRC's findings also entail imprisonment, fine or both. But it is not clear if the EHRC has ever resorted to such penalty measures.

Annual and some situational reports of the EHRC indicate that the EHRC has been handling hundreds of petitions every year. However, the facts of those petitions, the remedies recommended, the follow-up, and the wider impact of those remedies for future similar cases remain unpublished. In few high profile investigations reported, the EHRC have been quick to find no violations.¹⁴⁸ The usual procedure of investigation, as routinely explained in each of EHRC's investigative reports, begins with setting up an investigative team. The team takes field trips, carries out "detailed investigations" with concerned parties, consults the authorities, and finally makes the findings public. While claims of opposition parties and human rights activists may sometimes be misinformed or outright wrong, the EHRC's consistent finding on the government side, rejecting complaints by activists and international players, raises doubts on the credibility of the EHRC.

In two sensitive cases involving treatments of detained opposition figures charged with inciting violence and religious leaders charged with 'Islamic extremism,' the EHRC's only concern was speedy trial. In a visit in 2011 to Addis Ababa Federal Police Crime Investigation Sector, for example, the EHRC found no evidence of media reports that the suspects were 'brutalized' except the need for speedy trial.¹⁴⁹ Delay in trial is nothing new in the country and probably stating the obvious is not much of use. Probably measurable recommendations targeting specific departments of the police and follow-up of those recommendations relating to the pace of trials would have been useful instead of its ritual of no-violations-but-delay-in-trial. Actionable legislative and policy recommendations to alleviate the rampant delay in justice may have been legitimate expectations from the EHRC. Again the EHRC need not have preponderance of evidence to air many of the concerns relating to the perceived arbitrary and politically motivated arrests of government critiques.

Education and Awareness Raising

As far as awareness-raising is concerned, the EHRC's work has been extensive although the outcomes of human rights education have yet to be felt.¹⁵⁰ Since its operations have started, the

¹⁴⁸ For a couple of high profile cases investigated but no violations were found, see Inaugural Report of the EHRC, pp93-94

¹⁴⁹ Press Release, The Ethiopian Human Rights Commission Visits Suspected Detainees at the Federal Police Crime Investigation Sector, September 2011, available at <http://www.ehrc.org.et/> (accessed 6/20/13)

¹⁵⁰ It is the writer's opinion that human rights trainings have not brought meaningful results on officials' perception of human rights probably caused by high profile direct and indirect campaigns against human rights, for example through portrayal of human rights as irreconcilable with 'development.' Human rights students and researchers are routinely mistaken for people obstructing 'development.' The government message to the public regarding human rights is sometimes confusing. An incident worth mentioning: in a rally organized against Human Rights Watch, the writer had witnessed on a government radio a voice denouncing 'Human Rights' missing out the 'Watch' in an apparent failure to distinguish an international NGO from the fundamental precepts upon which the country presumably stands.

EHRC has provided trainings to legislators, law enforcement officers, officers in the military, children's rights committees, government professionals, youth leaders, and others through face-to-face training, the media, workshops, celebrations and observance of numerous human rights days.¹⁵¹ The EHRC also conducted studies to integrate of human rights education in the curricula of police training institutions and secondary schools.¹⁵² If human rights education alone improved the situation of human rights, the EHRC's performance in this regard would bring about dramatic improvements. But as is often said, people do what others do and not what others say others do. The EHRC's awareness-raising activities need to be assisted by remedial actions for violations of human rights. If violations of human rights are not met with penalties that would serve as deterrent, the education of human rights will have no meaningful results. It should be admitted that the EHRC's efforts of disseminating human rights information through, for example, educating mid-level police officers are positive. But this education is laudable to the extent these officers obey the human rights of citizens. If these officers continue violating human rights owing to a misinformed government policy of disregarding human rights, their human rights education would bring nothing but contempt to the idea of human rights. This is a dangerous trend which would pose an enormous challenge for the future protection and promotion of human rights.

Government Advice

The EHRC has not yet made use of its mandate to provide government advice. The controversial anti-terrorism, civil societies and freedom of information laws that have restricted the operation of political activists, civil societies, the media and others offered the EHRC the opportunity to critically assess legislative acts and government decisions in terms of constitutional rights and freedoms. In a project assessment relating to the EHRC, experts have described the disinterest of the EHRC relating to these laws as indicative of the EHRC's inability to implement its core mandate.¹⁵³ In its 5 year report, the EHRC had little to say regarding this crucial mandate except few statements regarding its efforts to promulgate the various international human rights instruments, to develop a national human rights action plan, and assisting the government in submission of periodic reports.¹⁵⁴ A two-day national workshop on the recommendations of the U.N Human Rights Council was also identified as government advice in the 2011 report of the EHRC.¹⁵⁵ But these activities are too little in discharging the EHRC's badly needed mandate to review legislative actions.

¹⁵¹ The reports of the EHRC detail these and related training activities. See for example EHRC, Annual Performance Report, June 2010-July 2011, pp23-26 and Inaugural Report of the EHRC, p61-62

¹⁵² EHRC, Annual Performance Report, June 2010-July 2011, pp56-57

¹⁵³ Robert and Endeshaw, cited above at note 99, p8

¹⁵⁴ Inaugural Report of the EHRC, p109

¹⁵⁵ EHRC, Annual Performance Report, June 2010-July 2011, p58

Lack of human resources was identified as a ground for the EHRC's inability to conduct researches and provide advice on existing and new laws.¹⁵⁶ However considering the enormous resources spent (and sometimes wasted) in the observation of elections and monitoring detention population, the EHRC's argument seems implausible.

Collaboration

The EHRC in discharging its mandated has attempted to collaborate with NGOs, government organs and international organizations. Collaboration with NGOs focused on signing memorandums of understanding with civil societies such as the Ethiopian Women Lawyers' Association.¹⁵⁷ In these memos, the EHRC's contribution is mostly limited to provision of financial assistance to local civil societies unable to finance their activities owing to restrictive finance laws. Likewise the EHRC has signed memorandums of understanding with the Ministry of Education, with more than 15 public universities and the Justice and Legal System Research Institute (JLSRI) of the FDRE.¹⁵⁸ Although the agreement with the JLSRI is special in a sense that it will assist the EHRC's mandate of providing advisory services to the government, it is not clear how the JLSRI – a government institution established by the executive – will function independently of the government to promote legislative reforms on human rights. The legal aid services especially to vulnerable groups agreed upon with public universities (and civil societies) had resulted in the opening of more than 100 free legal aid centers.¹⁵⁹ While this is an important undertaking in the protection of human rights, these legal aid programs are either suspended or terminated at least as far as the EHRC is concerned for lack of funds, which raises doubts on the strategic thinking of the EHRC.

The international human rights system is increasingly relying on NHRIs to oversee the enforcement of international human rights, to obtain information on national implementation of these rights, and to ensure the follow-up of recommendations of treaty bodies. It is true that the EHRC has invoked international standards in its monitoring activities regarding detention centers and elections. Other than these, there is little the EHRC has done to systematically monitor the implementation of international human rights instruments in Ethiopia. Moreover, the EHRC has provided no report to international bodies on the situation of human rights in Ethiopia. While its efforts in organizing a national workshop on the follow-up of UPR recommendations and its assistance in the preparation of national human rights action plan are laudable, it is not clear how the EHRC is pressing the government to wholeheartedly implement the recommendations of treaty bodies and other mechanisms. It seems international cooperation has so far been unidirectional, where the international system provides capacity building and other assistance to the EHRC when actually the EHRC contributes little to the international system.

¹⁵⁶ Inaugural Report of the EHRC, p120

¹⁵⁷ EHRC, Annual Performance Report, June 2010-July 2011, p64

¹⁵⁸ Ibid, pp67-69

¹⁵⁹ Ibid, pp15-16

3. Further Critique of the EHRC's Effectiveness

Let us begin with **accessibility**. Article 9 of the Proclamation states that the Head Office of the EHRC is in Addis Ababa with branch offices at any place as may be determined by the HPR. As late as 2011, the EHRC's only office was its headquarters in Addis Ababa and its accessibility may be measured through that lens. It is also interesting to note that the EHRC has not yet had its own permanent premises at its headquarters in Addis Ababa. It was in expensive rented floors in the beginning (2006/7?), moved to a building provided by the government (2009/10?), and now recently (2013) it has moved out of the government building allegedly another government organ sharing the building wanted more space.¹⁶⁰ One can only imagine how vulnerable the EHRC and the staff would feel and how the EHRC's accessibility is negatively impacted by this constant move in search of premises. To its credit, in 2010-11, the EHRC established branch offices in Mekele, Bahir-Dar, Jimma, Gambella, Hawassa and Jijiga.¹⁶¹ These offices with no doubt enhance the accessibility of the EHRC. However in the country where 85% of the population lives in the countryside, the accessibility of the EHRC leaves a lot to be desired even after the opening of these branch offices.

The EHRC has had for long a plan to produce its first ever **national human rights situational report**. The first draft of the report was said to be completed and to be published in due time in the EHRC's report in 2011.¹⁶² Before and during the drafting process, the EHRC had indicated to have carried out a national consultative conference, established an internal report team, developed terms of reference, identified sources of data from federal and regional public organs, begun data collection, deployed experts across the country for primary data, and prepared draft report.¹⁶³ However, the status of the final report, if it is finalized at all, is not yet known two years after the initial draft was said to be ready. Considering how comprehensive a national report should be and how several of the human rights issues to be reported controversial, preparation of a national human rights report should be open to the participation of all especially civil societies.¹⁶⁴ How much information the initial draft has drawn from works of civil societies and other media outlets is not clear. In the preparation process, it was indicated that governmental sources at federal and regional levels were identified. But if the information sources are only or substantially from government bodies, the usefulness of the report will diminish dramatically and it is not clear how the report will be a report of an independent body like the EHRC.

After several promises and consultative workshops and conferences regarding the publication of **international human rights instruments through the Negarit Gazette** since the beginning of

¹⁶⁰ The writer's personal observation and information obtained from experts.

¹⁶¹ EHRC, Annual Performance Report, June 2010-July 2011, p14

¹⁶² Ibid, p22

¹⁶³ Inaugural Report of EHRC, p79

¹⁶⁴ The recent Annual Performance Report (June 2013) does say anything about the whereabouts of the long awaited situational report.

its operation in 2007, the EHRC's efforts have borne little fruit.¹⁶⁵ Although there are no official reports on the situation, there are indications that the EHRC has given up on the effort.¹⁶⁶ The reason is said to be the adequacy of the existing legal framework as long as the ratified human rights instruments are translated to local languages.¹⁶⁷ If this is true, the EHRC seems to have failed to appreciate the vegetative state of international human rights in Ethiopia. There is no intention here to argue for one or another form of incorporation of international human rights instruments. However, there is no use in denying that in reality international human rights instruments in Ethiopia are of little use either to enforce one's rights before courts, the police, or as instruments of advocacy before policy makers. Moreover the EHRC's resignation on the agenda it has long espoused also seems to be indicative of its lack of determination on the face of a reluctant government, the legislature and the executive alike.

The EHRC frequently requires stakeholders to notice its **young age**,¹⁶⁸ in an attempt to counter any criticism of the perceived inadequacy or failure on its mandate. While the argument is understandable, it should not be forgotten that NHRIs came to the scene in most parts of the world in the 1990s, which coincided with the establishment of the EHRC. Almost all human rights commissions in Africa were established at around the same time with the EHRC, including those that garnered a considerable degree of international reputation and national legitimacy. Therefore the EHRC should consider other plausible reasons contributing to its lack of effectiveness such as lack of governmental commitment or a conspicuous absence of activism from the EHRC and its staff.

The EHRC claims that it is an institution that is constitutionally **entrenched**.¹⁶⁹ Without making any reference to any source for its statements, the EHRC asserts that the basic motivation for the establishment of the EHRC is to ensure "a permanent shift" from the autocracy of the past to "a just and democratic political arrangement in which the supremacy of law and good governance - as the enabling factors of sustainable and rapid development - reign supreme."¹⁷⁰ The report also declares that the birth of the EHRC "is a premeditated political decision on the part of the new polity and not a window-dressing move."¹⁷¹ However as indicated earlier, the EHRC's entrenchment is not straightforward. The HPR, if its past activities on human rights are any lesson, can anytime by a simple majority limit and restrict the mandate and operation of the EHRC. Moreover, unlike the EHRC's claim, the motive to mention the EHRC in the FDRE

¹⁶⁵ Inaugural Report of the EHRC, p80

¹⁶⁶ From replies by one of the respondents for this research

¹⁶⁷ The EHRC has succeeded in translating major international human rights instruments in at least three major national languages.

¹⁶⁸ Almost in all its general reports and press releases, the EHRC seems to quickly invoke its youth age seemingly to preempt any criticism against the EHRC. See for example, a statement by the Chief Commissioner recounting how young it is and still doing its best to educate and monitor. Speech by H.E. Ambassador Teruneh Zenna Chief Commissioner, EHRC Consultative Workshop on Human Rights Plan of Action for Ethiopia, Hilton Addis Ababa, Ethiopia, March 15, 2010

¹⁶⁹ Inaugural Report of the EHRC, p6

¹⁷⁰ Ibid, p27

¹⁷¹ Ibid, p28

Constitution is not clear either in the Constitution or subsequent practices of the government. Hence, the EHRC should have a realistic assessment of its legal foundation. After all, the EHRC was mentioned in the Constitution (1995), an enabling law was issued in 2000 (after 5 years), commissioners were appointed in 2005 (again after 5 years from the enabling law), and became operational in 2007 (12 years after the Constitution was adopted).

Mistaken or not, the EHRC should not read too much into the **original intention** of the drafters of the Constitution, who *named* it in this basic document, or the HPR, which enacted the Proclamation for its establishment. The EHRC should know that it is not the original intention that determines effectiveness or legitimacy of the EHRC or its contribution to constitutionalism. Historically, some NHRIs are said to have been established “to alleviate international pressure for reform or otherwise impress potential donors,” but ended up to be effective NHRIs.¹⁷² The original intention for the EHRC may have been to please international partners or a genuine commitment to human rights. But for now, it is the EHRC’s actual effectiveness and contribution to constitutional democracy in the country that should count.

The EHRC’s performance on **core issues of human rights** is not satisfactory. Of course, the EHRC has taken up many human rights issues considered core for a NHRI. For example, the EHRC has considered issues related to self-determination, border demarcation, ethnic clashes, ethnic identity claims, election, and rights of persons detained, rights of persons arrested, and so on.¹⁷³ But there are major problems in dealing with its core mandate. With the exception of the rights of persons detained, the EHRC does not systematically address these issues. It may have carried out investigation and monitoring based on complaints or media reports. But most of such monitoring activities are superficial and committed to the absolution of the government from any wrong in human rights.¹⁷⁴ Moreover, core issues of human rights arise not only in implementation but in the laws themselves. As indicated already, the EHRC has done little to investigate or research on some controversial laws that are said to have eroded constitutional rights and freedoms.

Some observers have for long noted that NHRIs may be used by governments to **deflect** criticisms of human rights abuses instead of actively pursuing the protection of human rights.¹⁷⁵ The EHRC has not been immune from this criticism. In 2011 and 2012, alluding to the assault by the government against independent activists, journalists and NGOs, Human Rights Watch (HRW), an international human rights NGO, claimed that the EHRC was affiliated to the ruling

¹⁷² Burdekin, cited above at note 7, p8

¹⁷³ Inaugural Report of the EHRC, pp69, 94

¹⁷⁴ The EHRC says that it is committed to *getseta gimbata* [literally, image building] of the country. This seems to mean telling stories of growth and development at the same time denying any wrong-doing of the government regarding human rights. On how the EHRC is committed to *getseta gimbata* to ‘development’ partners, see for example Annual Performance Report (June 2013), p30?

¹⁷⁵ Idike, cited above at note 18, p41. For an early critical assessment of potentials and failings of national human rights institutions in Africa, an assessment equally valid today, see Human Rights Watch Report, Protectors or Detractors? Government Human Rights Commissions in Africa (2002)

party (and the government) and had no independence.¹⁷⁶ Hence this deflection hypothesis may have some relevance for the EHRC's persistent finding in favour of government while rejecting claims by the media and civil societies. Let us take some examples. One was a response to HRW. The EHRC in 2011 issued a letter denouncing HRW, which has been criticizing the government and calling for 'developmental' assistance.¹⁷⁷ The EHRC's letter raised issues with methods used by the HRW, indicated the country's horrible past (apparently to justify the present situation), praising the country's rapidly growing economy (again apparently legitimizing the present government), and claiming that HRW wanted to appease its wealthy financiers. Moreover, the letter seemed to argue for the interdependence of civil-political rights with socio-economic rights neglecting the corresponding argument that socio-economic rights, if at all implemented through 'development,' are interdependent with civil and political rights. The accusations against HRW may or may not be true. There is also no intention here to analyze the choice of language by the EHRC. However, it is not the substance that should be important when a *national* human rights institution attacks another human rights institution. It is the form. A NHRI defending the government and condemning a reputable human rights organization is not the ideal strategy for a commission, especially when it has little story to tell in criticizing the government.

Another worrying sign that casts doubt on the independence of the EHRC among its narratives is repeated **condemnation of past** regimes and the “**developmental**” argument of the EHRC to legitimize the government. This is not to just refer to the letter sent by the EHRC to the HRW although the letter made reference impressive developmental records of the current government and atrocities of the past. Such references are found in almost all inaugural, annual, and other major reports of the EHRC. Sometimes it is hard to tell the distinction between the EHRC's statements on past and present regimes from the government's well-known public relations exercises. The EHRC claims for example that the FDRE is “an archetype developmental state with a clear popular mandate to act as the helmsman of the rapid and sustained socioeconomic progress and economic development of the nations, nationalities, peoples and individual citizens of Ethiopia.”¹⁷⁸ The EHRC's value or usefulness, the writer believes, depends not on presenting the developmental narrative of the government, which has shown its capacity to defend itself; rather on the scrutiny it exercises regarding serious violations of human rights allegedly committed by the government.¹⁷⁹

Strengthening the quasi-judicial power of the EHRC, the law provides a duty on all to provide assistance to the EHRC in discharging its responsibility.¹⁸⁰ However, it should be admitted that the power of the EHRC is moral in a sense that its decisions are just recommendations and that it

¹⁷⁶ Human Rights Watch, World Report 2011, p125 & Human Rights Watch, World Report 2012, p124, both available at <http://www.hrw.org>

¹⁷⁷ Letter from EHRC to HRW, EHRC Response on Human Rights Watch Reports on Ethiopia (27 January 2011), available at <http://www.ehrc.org.et/> (accessed 6/20/13)

¹⁷⁸ Inaugural Report of the EHRC, p26

¹⁷⁹ Of course the writer acknowledges the importance of historical lessons for peace, reconciliation and human rights and is in favour of historical investigations of human rights violations by neutral institutions and committees.

¹⁸⁰ Article 38

does not have any enforcers in its command. There is not much the EHRC can do if a belligerent executive acts contrary to the EHRC's recommendations. Interestingly, however, upon the EHRC's admission, the EHRC faces little resistance from public officials in accepting its recommendations.¹⁸¹ This leads one to suppose that the ineffectiveness of the EHRC is mostly its own doing and one may have reason to hope that in the future a dynamic set of commissioners and staff will use the good will of the government to ensure enforcement of rights. But one may on the contrary suppose that the positive replies by the government are simply because of the EHRC's findings, which are innocuous and conciliatory and which do not test the government on issues that matter. This latter supposition seems an accurate description. As indicated in a project evaluation, the EHRC may truly lack "the ability to be assertive because assertiveness would threaten its access to the government, and possibly its own existence."¹⁸²

4. Comparative Analysis

To highlight the situation of the EHRC in comparison with other NHRIs, a brief comparison is provided with two successful NHRIs in Africa, namely the Kenyan and South African NHRIs. Regarding constitutional entrenchment, the Kenyan and South African national human rights commissions provide good examples. The Constitution of Kenya establishes the Kenya National Human Rights (and Equality) Commission, lists the Commission's functions, and provides the right of every person to complain where a right or fundamental freedom in Constitution "has been denied, violated, or infringed, or threatened."¹⁸³ Like other commissions and independent offices in the Constitution, the Commission is made to "promote constitutionalism", to be "subject only to the Constitution and the law", and to be "independent and not subject to direction or control by any person or authority."¹⁸⁴ On the contrary, as indicated already, the power of the EHRC comes from a legislative act, which may easily be amended by the government.

In practice as well, the Kenya National Commission on Human Rights for example made its own report to the Committee on Human Rights in April 2012, identifying both the positive (for example the State's adoption of a new constitution embracing international human rights standards as part of the law of Kenya) and the negative (for example the failure of the government to bring the 2007 Post Election perpetrators of violence to account) developments

¹⁸¹ Inaugural Report of the EHR, p69

¹⁸² Robert and Endeshaw, cited above at note 99, p18

¹⁸³ The Constitution of Kenya 2010, Articles 59 and 249

¹⁸⁴ The Constitution of Kenya 2010, Articles 59 and 249; the Commission was restructured as permitted under Article 59.4 of the Constitution by Kenya National Commission on Human Rights Act, 2011, which provides comprehensive norms for the Commission.

with regard to human rights in Kenya.¹⁸⁵ But the EHRC has not so far provided any single report to the UNs or other mechanisms of human rights.

The South African Human Rights Commission (SAHRC) is also among the most constitutionally entrenched national commissions on human rights in Africa. Together with other institutions such as the Auditor-General and the Electoral Commission, SAHRC is established by the Constitution to, *inter alia*: support constitutional democracy, be independent, be subject only to the Constitution and the law, be impartial in exercising its powers without fear, favour or prejudice, be assisted and protected by all organs of state (which are required to ensure its independence), be free from any interference from any person or organ of state, and be accountable to the National Assembly.¹⁸⁶ The Constitution also details the functions and powers of SAHRC.

One interesting provision not found (expressly at least) in Ethiopia is the obligation, each year, of relevant organs of the state to provide information to SAHRC on measures for the realization of the rights concerning housing, health care, food, water, social security, education and the environment.¹⁸⁷ A separate act for the establishment of SAHRC provides additional powers including the power of SAHRC to request any organ of state to supply information on any legislative or executive measures adopted by it relating to human rights,¹⁸⁸ the power to monitor the implementation of international and regional human rights treaties, and the obligation of all organs of the state to consult with the Commission on all major policy matters affecting the promotion, protection and enforcement of human rights.¹⁸⁹ Investigative reports of SAHRC, which are available on SAHRC's website, are illustrative of SAHRC's review of actions of government organs in terms of the constitutional bill of rights, international human rights, and other laws including its enabling act.¹⁹⁰ Both the Kenyan and South African NHRIs enjoy an "A" status accreditation before the ICC, while the EHRC's application is deferred with no realistic prospect of accreditation given the fact that various sources do not depict the EHRC in good light.

Conclusion

As elaborated in this article, the performance of the EHRC is disconcerting. The EHRC's education and awareness may have been extensive. Its comprehensive prison monitoring may have been useful. However, for the most part, the EHRC has not been successful in its crucial mandates of checking the activities of the government. It has never made a single legislative

¹⁸⁵ Kenya National Commission on Human Rights, Report to the Human Rights Committee to inform its Review of Kenya's Third Periodic Report on implementation of the Provisions of ICCPR, April 2012, available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/KNCHR_Kenya_HRC105.pdf

¹⁸⁶ Article 181 of the South African Constitution of 1996

¹⁸⁷ Article 184 of the South African Constitution of 1996

¹⁸⁸ Act No. 54 of 1994: Human Rights Commission Act, 1994, Article 14

¹⁸⁹ Act No. 54 of 1994: Human Rights Commission Act, 1994, Article 14

¹⁹⁰ Those investigations with recommendations are available online at <http://www.sahrc.org.za/home/>

review. Neither has it ever made a meaningful policy advice to the government. Most of its investigative and monitoring mandates have left no marks that compel a committed implementation of human rights by the executive. It has repeatedly failed to be the voice of human rights. From these comes the picture: despite its responsibility, the EHRC has had little impact on the national implementation of human rights.

The purpose of the article has not been to suggest that the EHRC should or should not be in par with courts, parliaments and the executive in fostering constitutionalism. The EHRC, as explained in the article, is a different kind of institution but with crucial responsibility of overseeing the enforcement of human rights. The argument has been if the EHRC discharged its statutory mandate effectively, the EHRC had the potential of making a meaningful contribution to constitutionalism. As the discussion in this article makes abundantly clear, however, the EHRC has had so far little contribution to constitutionalism in Ethiopia.

It would be naïve to blame everything on the EHRC. It should not be denied that the EHRC is working under several challenges, many of which are familiar to NHRIs in Africa. The low level of literacy of the population at large, shortage of governmental funds to human rights (not a priority to Africa!), lack of political commitment to human rights, bad legislation regarding NHRIs, and commissioners that are ‘incompetent, biased and politically aligned’ are identified as obstacles to effectiveness of NHRIs in Africa.¹⁹¹ All or most of these same challenges may have inflicted damages to the performance and effectiveness of the EHRC. Lack of political commitment, however, may stand out as the primary culprit for the poor performance of the EHRC. What has the HPR done to make the EHRC effective say for example through acting upon the EHRC’s agenda of treaty incorporation or through ensuring the appointment of a dynamic set of commissioners? What has the executive done to encourage the independence of the EHRC, say for example by committing itself to all kinds of criticisms from the EHRC? These are the kinds of questions that should be asked if the EHRC will ever be effective in its not-so-constitutional mandate of fostering constitutionalism.

¹⁹¹ Chris Maina Peter, ‘Human Rights Commissions in Africa – Lessons and Challenges’ in Anton Bösl and Joseph Diescho (eds.), Human Rights in Africa: Legal Perspectives on their Protection and Promotion (2009), 369-70