Legal Routes to Undue Influence: Vulnerabilities in The Korean National Human Rights Commission Act

Douglas MacLean
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Abstract

The National Human Rights Commission of Korea has operated in the midst of considerable political and governmental opposition since its creation. Heralded early on as the strongest national human rights institute in Asia, the government bureaucracy and conservative political forces have challenged the organization's operation from the very beginning. The inauguration of the Lee administration brought opposition forces into power, bringing drastic cuts and drawing both domestic and international criticism over alleged political interference with the organization's operation. Missing from the political accounts of the situation, however, is an examination of the structural vulnerabilities to government influence built into the very foundations of the Commission's legal regime. This article addresses that gap. Guided by the UN supported international criteria for assessing the independence and efficacy of national human rights institutions, this article analyzes both the structural and operational parameters of the Commission's enabling legislation. Particular vulnerabilities to government influence are identified and discussed, with recommendations for strengthening the Commission's legal independence provided.

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I. INTRODUCTION

The National Human Rights Commission of Korea (NHRCK) has been cited as one of the strongest national human rights institutions in Asia. Established through the support of domestic civil society groups and an international push for national institutions to promote universal human rights in the 1990s, the Commission quickly gained international praise for its independence. However, the organization faces continued opposition from within the government, and domestic groups have long charged that government interference hobbles the agency. These complaints have grown stronger under the current Lee administration, and the agency has since faced domestic and international criticism for failing to follow through on its mandate.

However, while threats to the agency’s independence have been documented in English, almost no attention has been paid to the structural vulnerabilities to outside influence that are built into the agency's legal mandate. This article fills that gap by identifying structural and operational vulnerabilities to government influence that are built into the Commission's foundational legislation. Vulnerabilities identified include a lack of budgetary control, an appointment process dominated by the executive branch, and a lack of principles of interpretation to guide development of the Commission's legal mandate. Operationally, government agencies are able in many cases to decide when to respond to the Commission inquiries, creating a direct opening to influencing the agency's actions. At the same time, overly broad discretion in accepting or rejecting individual complaints of discrimination creates an indirect avenue for government influence.

In setting the stage for the legal analysis, part II examines the 10-year history of the Commission, discussing the impetus for the organization's creation, the political battle

1 My sincere thanks to Professor Kim Joongi of Yonsei University for his guidance on this topic and for his encouragement in publishing this article.
2 Koo Jeong-Woo, Origins of the National Human Rights Commission of Korea, in SOUTH KOREAN SOCIAL MOVEMENTS 80, 80 (Shin Gi-Wook and Paul Chang eds., 2011). Note that this article follows the Korean language rule for Korean names, with family names first and personal names second.
3 Id. at 83-85.
4 Id. at 78.
6 CHAU PAK-KWAN, HUMAN RIGHTS COMMISSIONS IN NORTHERN IRELAND, AUSTRALIA, SOUTH KOREA, AND INDIA 46 (2008).
surrounding its foundational legislation, and the criticisms that the government has faced over its interference with the agency. Turning to the legal analysis, part III explores how the Commission's statutory law influences its effective independence from the government. Provisions examined include both structural and operational features. The former include the agency's legal independence from the government, budgetary authority, Commissioner selection process and jurisdictional scope. Operational features examined cover the full range of advisory, investigatory and adjudicatory functions, with particular emphases on when the government must cooperate, and conversely, when the Commission must act. Throughout the analysis, practical vulnerabilities to government influence will be discussed, with particular attention paid to the government's control over the structural aspects of the organization, as well as on the potential for indirect influence through the NHRCK's broad discretionary powers in defining and carrying out its mandate. Finally, recommendations for addressing these legal vulnerabilities will be provided.

By unpacking and carefully analyzing the NHRCK's fundamental legal machinery, this article seeks to provide an important introduction to the Commission's structural vulnerabilities to influence, and to provide recommendations for addressing these shortcomings. This analysis will be useful to practitioners and activists intent on strengthening the organization, while also serving as a launching point for research into the Commission's current implementation of its legal mandate. It is the author's hope that this analysis also serves as a template for examining other national human rights institutions as well.

In order to put the legal analysis in perspective, we begin with a brief examination of the NHRCK's history to date.

II. THE PUSH FOR A NATIONAL HUMAN RIGHTS COMMISSION IN KOREA

Encouraged by Korea's then-growing connection to the international human rights movement, domestic civil society groups began advocating for the establishment of a national human rights commission in the early 1990's. With former human rights activist Kim Dae Jung’s successful presidential run in 1997, the Commission's creation began in earnest. However, government bureaucrats opposed to such an agency fought to subvert the NHRCK's

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7 Koo, supra note 2, at 83-85.
8 President Kim made a campaign pledge to create such an institution. Koo, supra note 2, at 78.
independence by attempting to place the Commission under the Ministry of Justice. Civil society eventually won out by pressuring elected officials to reject such proposals, thus securing the agency’s formal independence from the rest of the government.

Still, the Commission's foundational legislation remained highly controversial, passing by only four votes in a legislative body of 270 members. Conservatives from both the opposition Grand National Party and within Kim’s own party opposed the legislation, presaging the ongoing conflict over the organization’s activities. During negotiations, various ministries sought to cabin off parts of their own operations from the Commission’s jurisdiction. When that failed, they later sought to water down an implementing decree in order to limit the Commission’s authority. However, civil society criticism of bureaucratic opposition provided pushback against such attempts, setting the stage for continued domestic conflict over the agency and underscoring the challenges the Commission would face in engaging uncooperative government actors.

Ultimately, the organization launched in 2001 with a level of independence surpassing those of similar entities in other Asian countries. Positive assessments of its early years describe it as rapidly gaining the public’s trust, as well as enjoying a level of influence with the National Assembly. More critical observers charged that the NHRCK suffered from a high degree of political interference, a lack of financial independence and autonomy in personnel matters, and insufficient investigation powers that were coupled with overly broad discretion to reject complaints filed by individuals alleging human rights violations. Regardless, the Kim and succeeding Roh administrations continued to support the Commission, with the latter amending the National Human Rights Commission Act

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9 Id. at 79.
10 Id. at 79.
11 Id. at 79.
12 Id. at 79.
13 Id. at 79-80.
14 Id. at 80.
15 Including Indonesia, Malaysia, the Philippines and Thailand. Id. at 80. For a brief overview of these countries' human rights institutions, see HSIEN-LI TAN, THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS: INSTITUTIONALISING HUMAN RIGHTS IN SOUTHEAST ASIA 72-136 (2011).
16 Researchers observed that the Commission’s recommendations for new legislation were reportedly highly regarded, even if not always followed. For example, recommendations on conscientious objectors to military service spurred the government to draft alternate legislation, while those to abolish capital punishment were not followed. See id. at 80. See also Bae Sangmin, South Korea’s De Facto Abolition of the Death Penalty, 82 PACIFIC AFFAIRS 407, 420 (2009) (NHRCK recommendation for abolition of death penalty fails due to conservative opposition in National Assembly).
17 CHAU, supra note 6, at 45.
(NHRCA)\(^{18}\) in an effort to further strengthen the independence and functions of the NHRCK.\(^{19}\) Despite continued criticisms from some Korean NGOs that the NHRCK had accomplished relatively little throughout the decade,\(^{20}\) the organization's track record of independence was internationally recognized. The UN High Commissioner for Human Rights in 2008, for example, described the body as having an “excellent reputation in the international human rights system.”\(^{21}\)

However, the inauguration of the conservative Lee Myung-bak administration in the same year ushered in a government hostile to the NHRCK. In an apparent effort to severely constrain the organization's independence, the Lee administration attempted to move the Commission into the President’s Office.\(^{22}\) However, strong opposition from civil society,\(^{23}\) the UN High Commissioner for Human Rights,\(^{24}\) and NHRCK Commissioners led the administration to scrap the plan.\(^{25}\) Instead, the government drastically cut the Commission’s budget, downsizing it by 21% in 2009.\(^{26}\) Furthermore, a 2009 UN review of Korea’s implementation of the International Convention on Economic, Social and Cultural Rights charged that the Lee government's continued pressure on the Commission threatened its independence, to the point that it jeopardized the organization's accreditation with the International Coordination Committee of National Institutions (ICC).\(^{27}\) By raising the issue of

\(^{18}\) This is the main law that defines the scope and power of the NHRCK. Presidential decrees available in English do not address the issues discussed in this article.

\(^{19}\) Chau, supra note 6, at 35.

\(^{20}\) Cf. Joint Korean NGOs, NGOs’ ALTERNATIVE REPORT TO THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON THE THIRD PERIODIC REPORT SUBMITTED BY THE REPUBLIC OF KOREA (Sept. 2009) (Complaints alleging actions of the Lee government in 2008-09 “have quickly counteracted what little was accomplished by the NHRCK before.”), available at http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/JointKoreanNGOs_KOR43.doc.

\(^{21}\) Arbour, supra note 5.

\(^{22}\) Chau, supra note 6, at 46. The rationale given for this attempted move was that the NHRCK’s independence violated the principle of separation of powers. Id.

\(^{23}\) Joint Korean NGOs, supra note 20, at 13.

\(^{24}\) Arbour, supra note 5.

\(^{25}\) Chau, supra note 6, at 46.


\(^{27}\) U.N. Economic and Social Council, Id. at ¶8, Accreditation is based on the Paris Principles, which will be discussed further on. See Paris Principles, infra note 33. The Principles require National Human Rights Institutions to protect and promote human rights, and that they meet six main criteria, discussed below. See ICC Sub-Committee on Accreditation, http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx (last visited Oct. 5, 2012). Note that failure to meet ICC standards can result in a downgrade in an organization's membership status with the ICC, and a subsequent loss in voting rights with the international body. Id. While this would have little effect on the NHRCK's internal functioning, it would at the very least have diplomatic consequences that the
its accreditation, the review essentially accused the NHRCK of moving away from the principles the international community had set to guide the functioning of national human rights institutions. In 2010, NGOs further accused the government of interfering with the organization, charging that the current Commission President (CP), appointed by Lee, had no expertise in human rights, and by implication was merely a puppet of Lee. International human rights observers also criticized the new CP’s failure to speak out or to act on a range of significant human rights issues, while several Commissioners resigned in protest over the new CP’s actions, only to be replaced by individuals who observers charged were politically motivated appointments.

On the whole, political opposition to the organization has had a degree of success in compromising the Commission's independence and thus its ability to carry out its mission. Why the opposition has been able to do so, however, requires an understanding of how the organization's fundamental statutory structure leaves the Commission vulnerable to attacks by hostile government and political forces. In part III, we will explore both the structural features and operational powers set out in the Commission's foundational legislation, with an eye towards assessing the agency's legal protections from and vulnerabilities to government influence.

III. STATUTORY STRUCTURE: EXPLORING THE COMMISSION'S INHERENT VULNERABILITIES TO INFLUENCE

Criticisms against the NHRCK focus on an alleged lack of independence from the government, and its resulting ineffectiveness in carrying out its mandate. Unfortunately, English sources have not addressed a fundamental legal question, namely the extent to which the NHRCK's legal structure exposes it to governmental influence, thereby undermining its independence. Although a complete examination of all relevant legislation is necessary for a Korean government would have to consider. For a general treatment of the ICC, the Paris Principles, and how national human rights institutions are connected on the international level, see KJÆRUM MORTEN, NATIONAL HUMAN RIGHTS INSTITUTIONS IMPLEMENTING HUMAN RIGHTS 16-19 (2003).

Joint Korean NGOs, supra note 20, at 14.


Joint supra note 6, at 45.

Joint Korean NGOs, supra note 20.

I use the term independence to mean freedom from governmental influence, and the ability to take
full accounting of such structural vulnerabilities, an analysis of the NHRCA provides an important first step in assessing vulnerabilities to influence at the foundational level.

This part will be divided into three sections. Section A introduces the methodology used in analyzing the NHRCA. Section B examines vulnerabilities in the Commission’s organizational structure. Finally, Section C analyzes the operational provisions elaborated in the NHRCA.

A. METHODOLOGY

This article relies upon the UN promulgated Paris Principles to identify key areas of potential vulnerability to government influence. For each area identified, relevant NHRCA provisions are analyzed to assess the degree to which government actors may directly or indirectly influence the Commission. In laying out this approach, this section begins with an explanation of this article’s singular focus on the NHRCK rather than on a comparative analysis. It then discusses the Paris Principles and their use as broad guidelines rather than as concrete criteria. Specific considerations of potential influence that informed the analyses and recommendations made in the following sections are then discussed. This section concludes with an examination of the limitations inherent in the approach taken.

1. THE COMPARATIVE VERSUS ORGANIZATION-SPECIFIC APPROACH

As should already be clear, this article focuses solely on the NHRCK and its relevant legislation. While a comparative analysis is useful for identifying the relative strengths and weaknesses of the NHRCA, it sacrifices a deeper focus on a single entity for a broader perspective. As useful as comparative approaches are in this field, my goal instead was to analyze how this particular institution’s fundamental legislation shields or exposes it to undue influence from its own government.

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34 It should also be noted that different countries can employ very different styles of human rights institutions, which can further complicate a comparative legal analysis approach. See OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, NATIONAL HUMAN RIGHTS INSTITUTIONS: HISTORY, PRINCIPLES, ROLES AND RESPONSIBILITIES, at 31, U.N. Doc. HR/P/PT/4/Rev.1, U.N. Sales No. E.09.XIV.4 (2010) [hereinafter Guidelines for the Paris Principles]. Indeed, a country may have multiple independent agencies that together carry out the functions of an NHRI. While this does not rule out a comparative approach, it does highlight the importance of also examining each institution...
Additionally, comparisons with international frameworks suffer from a lack of detailed standards to measure the health of such institutions. The international community to date has only agreed upon baseline standards of institutional quality. These standards are the Paris Principles, which are employed by the ICC to evaluate the effectiveness and overall health of national human rights institutions (NHRI). They provide minimum standards that NHRI's should follow in attaining and maintaining accreditation with the ICC. The ICC's examination process has underscored the role of the Principles as a baseline by awarding the top accreditation status to 69 countries that range from poor countries like Afghanistan to wealthier ones like Denmark and South Korea. The Paris Principles are thus not on their own effective as a tool in examining the particular vulnerabilities to influence that a fully accredited NHRI faces.

2. The Paris Principles

Despite the limitations described above, the Paris Principles do provide useful guidance by elaborating the specific features necessary for a healthy and effective NHRI. These criteria include: 1) independence guaranteed by legislation or the Constitution of the Republic of Korea, 2) a broad mandate and competence based on universal human rights norms and standards, 3) autonomy from the government, 4) adequate resources, 5) adequate powers of investigation, and 6) adequate pluralism of Commissioners.

It is clear from these criteria that independence, mandate, and resources form the bulk of the assessment. Furthermore, these criteria overlap in places; autonomy from the government is particularly broad and would include both an organization's funding, structure and the extent to which it must rely on government cooperation in carrying out its functions.

As mentioned previously, given Korea's full accreditation with the ICC, a simple analysis of the NHRCA's provisions in light of the Paris Principles is a poor tool for

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35 Paris Principles, supra note 33.
36 See ICC Sub-Committee on Accreditation, supra note 27.
38 Paris Principles, supra note 33. Adequate pluralism is discussed at length in Kjærum, supra note 26, at 8. An examination of the pluralism of the NHRCK's board of Commissioners throughout its existence and the impact this has had upon its independence is beyond the scope of this article. Suffice it to say that, beyond the mandatory minimum 50% female representation on the Commission, the NHRCA makes no provisions guaranteeing other forms of pluralism among Commissioners; see NHRCA, infra note 44, art. 5(5).
uncovering the potential vulnerabilities to influence.\textsuperscript{39} In the absence of an appropriate framework, this article employs the broad criteria established in the Paris Principles, combined with a more general set of tools, to assess the Commission's vulnerabilities to government influence.\textsuperscript{40}

### 3. Scope and Focus of Analysis

With the above considerations in mind, two key areas of the NHRCA merit close attention. The first is the institutional structure of the organization, which includes its 1) official legal independence, 2) the scope of the organization's mandate, 3) the composition and selection process of its members, and 4) its independent budgetary authority. Second are its formal powers in carrying out its mandate, including its 1) research and advisory powers and 2) its investigative and adjudicatory powers that it exercises in response to individual complaints.

For each of these areas, the analysis focuses on how the NHRCA's relevant provisions may expose the Commission to outside influence. The greater the exposure, the more likely the Commission's independence is threatened in that area. In analyzing the NHRCA's provisions, the following forms of potential influence are considered:

1. The extent to which the government can directly influence the NHRCK.
2. The potential for indirect government influence exists.
3. The NHRCK's discretionary power and the situations in which it is compelled to take action.

The first item includes such perennial issues as funding and selection of Commissioners. Indirect influence focuses mostly on areas where the Commission lacks the power to independently compel action, i.e. those that make the agency dependent upon the government's cooperation. Similarly, the breadth of the NHRCK's discretionary power can provide an opportunity for the government to influence the agency. Commissioners friendly to the government can refuse to take action, or the Commission can decide not to exercise a

\textsuperscript{39} Despite concerns from the U.N. High Commissioner for Human Rights, to date the ICC has not downgraded the NHRCK, although it is not clear whether the ICC could do so prior to the next review of a country. See ICC, CHART OF THE STATUS OF NATIONAL INSTITUTIONS: ACCREDITATION STATUS AS OF MAY 2012, at 3 (2012). South Korea's next review is in 2013. See ICC Sub-Committee on Accreditation, supra note 27 (member states undergo accreditation review every five years). Additionally, it is unclear how the ICC uses these criteria to set an organization's ranking.

\textsuperscript{40} In addition, the Office of the High Commissioner for Human Rights has published guidance for practitioners explaining each of these criteria, and I will refer to these as appropriate. See Guidelines for the Paris Principles, supra note 34.
discretionary power in order to secure government cooperation in other activities. While mandating that the agency research all human rights issues and investigate all claims regardless of their merits is fiscally and logistically impossible, overly broad powers of discretion run the risk of enabling and even concealing government influence. This third point is particularly relevant, given the various criticisms over the NHRCK's decisions not to take action.41

4. LIMITATIONS

The author's reliance upon English language sources naturally limits the range of available primary source documents. The analysis is thus focused squarely on the NHRCA as rendered in English and the implications it holds for government influence over the Commission.42 While research was conducted in consultation with a Korean legal scholar,43 the author is not privy to the daily practices of the Commission. Readers more knowledgeable about the actions of the NHRCK will therefore have a better understanding of the extent to which the NHRCA's provisions are implemented, and the depth to which the vulnerabilities identified in this article are exploited. Ultimately, the goal of this analysis is to uncover the structural vulnerabilities built into the NHRCK's legal mandate, offer solutions for addressing them through legal revision, and to provide a foundation for additional legal research.

Finally, legal revision on its own is not a panacea for addressing challenges to the NHRCK. Political will and civil society efforts to build a culture of respect for the institution and its independence will be necessary to secure an effective organization more resistant to government influence.

We now turn to the analysis, beginning with an examination of the Commission's institutional structure as set forth in the NHRCA.

B. INSTITUTIONAL STRUCTURE

Despite fairly clear language mandating its independence, the NHRCK is still a government body, with Commissioners chosen and operational funds granted by the

41 See Joint Korean NGOs, supra note 20.
42 Potential discrepancies between the English and Korean versions, particularly in how particular terms are interpreted must also be kept in mind. Implementing the recommendations outlined in this article will require confirming the interpretation of existing provisions and ensuring that proposed language in Korean accomplishes the goals that these recommendations seek to achieve.
43 Dr. Kim Joongi, Professor, Yonsei Law School, Seoul, Republic of Korea.
government. The following subsections thus examine the provisions in the NHRCA to make the office officially independent, provide a sufficiently broad mandate, secure financial resources, and assign responsibility for selection of top level staff. Each of these areas will be introduced with a description of the law, followed by an analysis of how relevant provisions contribute to or threaten the body's independence, and concluded with recommendations for addressing the problems identified.

1. Official Legal Independence

The NHRCA makes clear that the Commission is to be set apart from the rest of the government, beginning with a provision entitled the “Establishment and Independence of the National Human Rights Commission.”44 In addition to declaring the creation and establishing the mission of the organization, the provision dictates that the Commission must “independently deal with the matters which fall under its jurisdiction.”45

**Analysis**

On the one hand, this language clearly satisfies the basic requirement under the Paris Principles that a human rights commission be empowered to act independently.46 On the other hand, it fails to explicitly state that the organization is situated independently of the rest of the government. While the language above implies that placing the agency anywhere within an existing government hierarchy would necessarily compromise its independence,47 this did not stop the Lee administration from attempting to "clarify" the agency's position by relocating it to the President's Office.48

**Recommendations**

Amending the NHRCA to explicitly position the Commission apart and independent

45 Id. art. 3(2).
46 See Paris Principles, supra note 33. (“Composition and guarantees of independence and pluralism,” art. 2). See also Guidelines for the Paris Principles, supra note 34, at 37-39.
47 Indeed, guidelines for implementing the Paris Principles state that placing an NHRI within a governmental ministry would void its independence. Id. at 40.
48 See CHAU, supra note 6, at 46.
from the rest of the government would render such attempts legally more difficult.

2. **Scope of the NHRCK's Mandate**

The Commission enjoys a broad mandate to “ensure that inviolable fundamental human rights of all individuals are protected and the standards of human rights are improved.”

Human rights itself broadly includes “any of [sic] human dignity, worth, liberty and rights which are guaranteed by the Constitution and Acts of the Republic of Korea,” international treaties of which Korea is a party, and customary international law. The rights of both Korean nationals and foreigners "residing" within Korea fall within the Commission's purview. Within this widely drawn jurisdiction, the Commission is required to act independently on all relevant matters.

The Commission's mandate could hardly be broader and is thus in line with the Paris Principles on this point. It is expansive enough to cover both the current scope of human rights as well as new issues that develop in the future.

**Analysis**

The NHRCA however fails to provide any direction on how the Commission should interpret its mandate on issues of first impression. Essentially free to shape its own jurisdiction, an aggressive body of Commissioners could drive the development of human rights in Korea, declaring a particular issue apropos through an interpretation of the Constitution or relevant international legal instrument. Equally possible, however, are interpretations that narrow its jurisdiction and thus limit the Commission's ability to act in certain areas. In fact, the current Commission President has been accused of doing just this by ruling that certain issues are outside the bounds of “human rights.”

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49 NHRCA, *supra* note 44, art. 1.
50 NHRCA, *supra* note 44, art. 2(1). A discussion of the extensive human rights protections guaranteed under the Constitution is unfortunately beyond the scope of this article. *See generally DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] arts. 10 - 37 (S. Kor.).*
51 NHRCA, *supra* note 44, art. 4. It is not clear whether the term “reside” includes those present without legal residence.
52 NHRCA, *supra* note 44, art. 3(2).
53 *See ICC Sub-Committee on Accreditation, supra* note 27.
54 Two such rulings include holding that prosecutors’ investigation methods, as well as a government-imposed ban on nighttime rallies, are outside the scope of “human rights,” and thus outside the Commission's jurisdiction. *See Bae Ji-sook, Revolt Persists at Human Rights Agency, THE KOREA*
With no clear guidance on approaching new issues, the NHRCK has seemingly broad power to elaborate the scope of existing human rights protections, enabling it to legally address or ignore certain cases as it chooses. Ultimately, while a broad mandate is important to ensure that the organization can accommodate, incorporate and even help advance evolving human rights norms, the discretion Commissioners enjoy in interpreting the NHRCK's purview creates an opportunity for outside influence.

**Recommendations**

Governmental pressure can influence the Commission to employ its discretion in a negative way, defining certain sensitive issues out of the scope of its jurisdiction. Limiting that discretion will be important to limiting the impact of outside influence. Two recommendations in this area are in order:

1. Establish canons of interpretation that favor broad interpretations of the Commission's mandate.
2. Require the Commission to establish a clear and transparent process for determining the scope of its mandate and that it publishes its reasons for its decisions.

Balancing interpretive freedom against the potential for self-censorship is a difficult one. However, the NHRCA would benefit from the inclusion of general principles of interpretation that are in keeping with the Commission's envisioned broad jurisdiction and duty to act. In theory, the NHRCK's mandate requires interpretation in cases of first impression. Where the cases are not frivolous, these will likely be controversial issues where international and domestic human rights laws are unclear or unsettled. In keeping with the Paris Principles that require NHRI's to have as broad a mandate as possible, and indeed to further advance human rights generally, the NHRCA should include language that preferences broad

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55 Note that this power likely extends in practice only to those areas that have not been widely recognized as human rights. Rights already clearly elaborated in the Constitution, in international instruments, and in court decisions are likely to be off-limits to reinterpretation. Issues at the margins are where this power will be most relevant. Such areas, however, are often the most critical ones, as they are where the normative structure of human rights continues to develop and advance. While beyond the scope of this article, it would also be worth studying what effects the NHRCK’s declarations have had on promoting or impeding the recognition of a particular issue as falling within the scope of existing human rights in Korea.

56 NHRCA, *supra* note 44, arts. 1, 2(1), 3(2).

interpretations of the mandate over narrow ones. In short, a relatively high bar to ruling an issue currently not settled in law as pertaining to human rights and thus to the NHRCK's mandate will be necessary.

Provisions that 1) clearly states that the NHRCK's mandate shall be interpreted in a way that ensures as broad and inclusive reading of relevant domestic international law as possible and that 2) to the greatest possible extent, avoids interpretations that narrow its mandate, should therefore be pursued. At the end of the day, no airtight definition will be possible, and indeed extensive negotiation over the most appropriate phrasing in Korean will be necessary. However, compared to the complete lack of guidance in the NHRCA on this point, canons of interpretations that favor expansive readings of the mandate will help guard against overly restrictive interpretations, while also holding the Commission accountable to the goal of having as broad a mandate as possible.

Secondly, sun shining the NHRCK's decision-making process in this area will be a key to ensuring that guiding language on interpreting its mandate is in fact being followed. As controversial issues can have political implications that expose Commissioners to governmental pressure, an imperative to publish the reasons for rejecting an issue as outside the scope of domestic and international human rights laws would provide a legal counterbalance against restrictive interpretations. It would also set the tone for how Commissioners, regardless of political loyalties, delineate the body's mandate going forward.58

Overall, the institutional structure that the NHRCA establishes provides an incredibly broad mandate, along with a measure of independence for Commissioners to carry it out. However, a lack of budgetary authority threatens the agency's independence, while the Commissioner selection process, particularly for the CP, is highly susceptible to government influence. Finally, overly broad discretion in defining its mandate enables the government to apply pressure, either directly or indirectly, to push the Commission to declare certain issues outside of its jurisdiction.59

58 Not inconsequentially, it would also provide a valuable record for how the Commission advances the field of human rights in South Korea, and could also prove useful as a comparative tool when examining other NHRI's.

59 As will be seen in the next section, broad discretion in the organization's operational powers create similar vulnerabilities to governmental influence.
3. BUDGET

In contrast to official independence outlined earlier, the NHRCA's budgetary provisions place the purse strings under the control of the Ministry of Justice.\textsuperscript{60} In fact, despite the CP’s position as the controlling officer of the Commission, he or she has no power over compiling the budget.\textsuperscript{61}

\textit{Analysis}

Although the Ministry was not successful in placing the Commission directly under its purview during its formation,\textsuperscript{62} budgetary control enables the Ministry to exercise a great deal of practical influence over the organization. Any potential investigations into the Ministry will necessarily be hampered by the potential threat of budget cuts in retaliation. While specifics on governmental funding mechanisms are beyond the scope of this article, the Ministry, and by extension the President’s office, have significant leeway in requesting and approving budgetary allocations for the NHRCK. Additionally, including the NHRCK's budget within that of the Ministry weakens direct legislative oversight of the Commission's budget. Worse yet, the Ministry is responsible for defending the funding of an institution charged with investigating the same ministry, creating a conflict of interest and an avenue for both direct and indirect influence. Whether cuts to the NHRCK in 2009 mentioned in part II were due to the Lee administration itself requesting a lower funding level or instead were the result of ministerial cuts to the Commission within an already approved budget framework, budgetary authority resting with a government Ministry is a serious breach of the Commission's independence.\textsuperscript{63}

\textit{Recommendations}

Budgetary autonomy is key to the Commission's overall independence, and guidance on

\textsuperscript{60} CHAU, \textit{supra} note 6, at 40.
\textsuperscript{61} See CHAU, \textit{supra} note 6, at 40. In fact, the word “budget” is mentioned only once in the Act, in reference to a technical change to the CP’s legal position when performing duties related to the Commission’s budget. NHRCA, \textit{supra} note 44, art. 6(5).
\textsuperscript{62} Koo, \textit{supra} note 2, at 79.
\textsuperscript{63} Despite complaints about the current CP’s loyalty to the Lee administration, the NHRCK annual report in 2010 repeatedly lamented the challenges it faced to its mandate due to drastic funding cuts the year before. National Human Rights Commission of Korea, \textit{Annual Report 2010}, at 15 (Jun. 2011) [hereinafter NHRCK Annual Report].
the Paris Principles published by the Office of the UN High Commissioner for Human Rights emphasizes this point. While the guidance unfortunately labels ministerial authority over an NHRI's budget as merely “less advisable,” its suggestion that NHRI's should have an independent budget line over which it has absolute management and control, and which it can directly advocate to the legislature, is sound. Amendments to the NHRCA should therefore make the following changes:

1. Clarify that the Commission has the power to compile its own budget as a line item independent from all other government agencies.
2. Make the NHRCK responsible for submitting and defending its budget to the National Assembly during the regular budgetary process.
3. Add clear language that commits funding sufficient for the Commission to carry out its functions.

These amendments would eliminate the Ministry of Justice's financial power over the Commission, and would set a stronger commitment to funding the NHRCK, weakening the potential for retaliation by a hostile legislature or President. While the political considerations inherent in government budgeting make complete budgetary security impossible, strengthening budgetary autonomy would remove a critical vulnerability to influence, while a clearer budgetary commitment would ensure greater stability and thus autonomy for the Commission.

4. SELECTION AND RETENTION OF COMMISSIONERS

The Commission is composed of eleven members, including one president and three full-time Commissioners. Appointments are split 4-4-3 between the Korean President’s office, the National Assembly and the Chief Justice of the Supreme Court, respectively. Two of the three full-time members are appointed by the National Assembly. Who selects the third member is not specified in the English version of the Act. Nominees must have

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64 Guidelines for the Paris Principles, supra note 34, at 40-41.
65 Id.
66 Ideally, the NHRCK's budget should be approved on an agency level rather than on an item-by-item basis to ensure the Commission's autonomy in allocating its resources.
67 See also Guidelines for the Paris Principles, supra note 34, at 39 (“The very fact that an NHRI is a State body funded by the State raises difficulties”).
68 NHRCA, supra note 44, art. 5(1).
69 NHRCA, supra note 44, art. 5(2).
70 NHRCA, supra note 44, art. 5(2).
71 This Commissioner could thus come from either the President’s or the Supreme Court’s nominees.
“professional knowledge and experience on the matters of human rights,” and be able to carry out their duties of protecting and improving human rights in a fair and independent manner.72

Once the nomination roster has been set, the Korean President selects the Commission President from the list of nominees.73 The CP and full-time Commissioners are explicitly designated political appointees under the law,74 although somewhat paradoxically, members of political parties and candidates for political office are disqualified from serving as Commissioners.75 All Commissioners serve for three years and may be reappointed for an additional term.76 Commissioners cannot be removed unless they are convicted of a serious crime.77

Analysis

On the whole, the selection and retention process protects Commissioner independence to some extent. The strongest provision by far is the extremely high bar the government faces in removing members. Furthermore, dividing appointment powers among different governmental bodies disperses selection authority, making it difficult for the governing party to pack the Commission with its supporters. However, the process ultimately tilts toward the President’s Office and its selection of the CP, and it is here where the government can particularly influence the Commission. The CP is no mere figurehead; he or she is not only the face of the Commission, but also has broad power to direct the body’s affairs.78 The CP can thus greatly influence how much, or how little, the NHRCK accomplishes. An administration hostile to the NHRCK could simply nominate a loyalist who would be less likely to investigate issues that could harm or embarrass the administration.79 Note also that the criteria for serving as a Commissioner is fairly broad, and if the criticisms about the current CP are to be believed, do not effectively deter the President from picking someone

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72 NHRCA, supra note 44, art. 5(2).
73 NHRCA, supra note 44, art. 5(3).
74 NHRCA, supra note 44, art. 5(4).
75 NHRCA, supra note 44, art. 9(1), (2). During their term, Commissioners are also prohibited from joining political parties, attaining elected office, or serving as a public official of any state or local government, except for education officials, who are allowed to serve concurrently as Commissioners. NHRCA, supra note 44, art. 10.
76 NHRCA, supra note 44, art. 7(1).
77 NHRCA, supra note 44, art. 8. Removal is also possible due to physical or mental health reasons, but requires assent by 2/3rds of all Commissioners. Id.
78 NHRCA, supra note 44, art. 6(1) (“The president of the Commission shall represent the Commission and exercise the overall control of the affairs thereof”).
79 As the Lee government has been accused of doing. See Joint Korean NGOs, supra note 20, at 14.
without human rights experience.

Political opposition aside, even Presidents friendly to the Commission could be tempted to select a CP who is less likely to thoroughly investigate potentially embarrassing or politically damaging issues. The possibility of reappointment also means any CP interested in seeking a second term could face pressure to constrain their activities in order to obtain reappointment to the Commission. As reappointment is possible for all Commissioners, those appointed by the National Assembly are also open to similar pressure. 80 With eight of the eleven members selected by the political branches, and the CP selected by the President, appointment and reappointment are thus avenues to political influence that can threaten the Commission's independence.

**Recommendations**

Decreasing the level of government influence inherent in the nomination process will require several structural changes:

1. Move the nomination of the CP from the President to the Commissioners.
2. Lengthen the terms of service so that politically appointed Commissioners outlast the President or the legislature that installed them.
3. Investigate the balance of power between the CP and the rest of the Commission.

Starting with the CP, moving the nominating and reappointment powers from the President to the Commission itself would go a long way to alleviating Presidential influence. A majority vote of Commissioners at the very least should be required to select or reappoint the CP, and given that 8 out of 11 members are selected by the political branches, requiring the majority vote to include at least one if not two votes by the Supreme Court nominated Commissioners would further insulate the process from political influence. 81

Secondly, concerns about influence over the reappointment process could be addressed

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80 Note that this particular concern implies that Commissioners seek to be reappointed. Resignations in protest over the Lee government, and even the early resignation by then CP Ahn Kyong-Whan, show that at least some recent Commissioners have put principle over reappointment. See Park Si-Soo, *Korea on Verge of Becoming Shameful Nation*, THE KOREA TIMES, Jul. 08, 2009. Still, this structural weakness remains, and Commissioners appointed by the political branches who wish to serve a full six years will certainly feel pressure to conform their actions to ensure reappointment.

81 In a system where the President's office and the National Assembly are controlled by separate parties, the current selection process would represent a balance of opposing powers. As of October 2012, President Lee's Saenuri Party controls the National Assembly, amplifying his party's voice in the selection process. See Members by Negotiating Group, NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, http://korea.na.go.kr/mem/mem_04.jsp (last visited Oct 12, 2012).
by lengthening terms of service such that either the President or the legislature will have changed by the time their term is completed. This will make the CP in particular less beholden to the President who nominated him or her, and would help alleviate potential influence over other Commissioners as well.

Finally, it may also be the case that the CP wields too much power. If so, the President's appointment power gives him or her potentially outsized influence over the Commission. Research into the Commission’s now decade of operation should provide sufficient information on whether this is so. Given NGO complaints about the current CP’s loyalty to the President and his overall ineffectiveness, revisiting the distribution of power between the CP and the Commissioners as a whole may be in order. In addition to moving election of the CP away from the President's office, weighing the advantages and drawbacks between a strong CP and a dispersed leadership structure will require assessing the NHRCK’s track record to date, as well as the experience of similar bodies in other countries.

C. Operational Powers

The NHRCK's mission includes research and advisory functions, as well as powers to investigate and adjudicate individual complaints of human rights violations. The ability to carry out these functions without having to depend on government cooperation, the power to compel action when necessary, and the imperative for the Commission to take action determine how well the organization can remain independent from and thus resist undue government influence. As we will see, the NHRCK's powers range from hortatory recommendations to binding decisions, with fines and other criminal penalties available to reinforce some of its investigatory powers. Ultimately deciding when to engage these powers is largely left to the discretion of the Commission, providing an opening for outside actors to pressure the organization against taking action. This section will first examine the Commission's largely non-binding research and advisory powers and then turn to its more coercive investigatory functions. As before, each of these areas will be introduced with a description of the law, followed by an analysis of how relevant provisions contribute to or threaten the body's independence, and conclude with recommendations for addressing the problems identified.

83 One consideration, for example, is the greater susceptibility of a single individual to outside influence versus the potential for less focused leadership and direction inherent in a committee-run structure.
1. Research and Advisory Powers

The Commission is empowered to research and comment on a wide range of government activities, from legislative acts and subordinate statutes to “institutions, policies and practices related to” human rights. Although merely advisory, it may offer its input as necessary, and may also submit opinions to any court on pending cases that implicate human rights. Additionally government agencies intending to establish acts or regulations “likely to affect the protection and improvement of human rights” must notify the Commission in advance of promulgation. Together, these provisions enable the Commission to proactively investigate relevant issues while also ensuring (at least on paper) that government organs bring relevant matters to its attention.

In carrying out its mandate, the Commission may engage both government and private organs through methods that have different levels of binding force. At the least coercive level is the broad power to request consultations with any governmental entity at any time the Commission deems necessary to carry out its duties. Governmental agencies may refuse such requests, provided there exists “any justifiable reason.” The Act however does not require this reason to be communicated to the Commission. Written justification is mandatory when an agency refuses to follow a Commission recommendation that suggests changes to policies or practices in order to protect or improve human rights. The Commission can in turn publish both its recommendation and the agency’s response if it so desires. Finally, in the performance of any of its duties, the Commission may compel submission of “relevant materials” from government agencies, who must comply “without delay.” It can also order representatives of relevant entities, whether governmental or private, to appear at hearings and give testimony.

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84 NHRCA, supra note 44, art. 19(1).
85 NHRCA, supra note 44, art. 28.
86 NHRCA, supra note 44, art. 20(1).
87 NHRCA, supra note 44, art. 20(2).
88 NHRCA, supra note 44, art. 20(3).
89 Compare NHRCA, supra note 44, art. 20(3) and NHRCA, supra note 44, art. 25(3) (failure to implement a Commission recommendation must be justified in writing to the Commission).
90 NHRCA, supra note 44, art. 25(1). Note that the agency must “endeavor to implement” the recommendations, implying something less than a hard duty and something more than a hortatory obligation to simply take notice. NHRCA, supra note 44, art. 25(2).
91 NHRCA, supra note 44, art. 25(3).
92 NHRCA, supra note 44, art. 22(1), (3).
93 NHRCA, supra note 44, art. 23.
Analysis

On the whole, the Commission’s institutional role as advisor and advocate for improving human rights is theoretically broad enough to enable it to both uncover information and to provide advice to the National Assembly and the bureaucracy. While not supported by compulsory powers, its ability to publicize its findings enables it to attract public scrutiny that can in turn bring pressure upon the government to act. Additionally, government agency obligations to contact the Commission on human rights issues are an important provision to ensure positive action by the bureaucracy.

However, no information available in English stipulates how an agency is to determine when notification is required, nor what disciplinary measures, if any, exist for failure to contact the Commission. As a result, the Commission must likely rely on bureaucratic willingness to share information, both in terms of proactively doing so, and in responding to the Commission requests. Such a situation enables government agencies to effectively stonewall investigations, and encourages the Commission to prioritize its investigations by the level of governmental cooperation it can obtain rather than on the importance of the issue to advancing and protecting human rights. This state of affairs constitutes a subtle threat to the Commission's independence, as obstinate agencies can simply refuse to provide information, and can further fight requests to cooperate. The latter challenge is offset to an extent by the Commission’s power to publicize refusals and thus draw media and civil society attention.94 In the best cases, the threat of publication can pressure agencies to carefully consider the Commission's recommendations rather than simply dismissing them out of hand.95

Recommendations

Reducing government actors' ability to refuse to cooperate is a priority in ensuring that the NHRCK can carry out its work. Legal amendments in this area should include:

1. Eliminating the current ambiguity over when a government agency must notify the

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94 This power is of course dependent on mass media and civil society responding to such publications.
95 The Commission’s lack of expertise on non-human rights issues makes it difficult to argue that agencies should always have to follow the Commission’s advice. While an appeal procedure could be put in place as a safeguard, recalcitrant agencies could simply file appeals to every part of a recommendation, effectively preventing compliance for long periods of time while simultaneously taxing the Commission’s resources through adjudication proceedings.
NHRCK.

2. Providing guidelines on what constitutes a "justifiable reason" for a government agency refusing to respond, and requiring the agency to send a written explanation to the Commission.

Clear guidelines that detail when a government agency must notify the NHRCK, and a clear decision-making process involving staff of appropriate seniority, should be promulgated. While it will not entirely obviate resistance from agencies hostile to the Commission, it will help ensure that they have less leeway in deciding when and when not to communicate with the NHRCK.

Secondly, the currently vague "justifiable reason" language undermines the Commission's independence by letting agencies determine what constitutes such a reason. A clear definition of the above term, coupled with a mandate to provide written justifications for refusing consultation requests, as are currently required when refusing NHRCK recommendations, would provide stronger legal imperatives for agency cooperation. The feasibility of statutory deadlines for agency responses, and whether the ability to sue to compel obstinate agencies to respond exists in current law, deserves further research, as it may also help deter the bureaucracy from stonewalling investigations.96

2. INVESTIGATING AND ADJUDICATING INDIVIDUAL COMPLAINTS

Individuals who believe that government has violated their Constitutional human rights97 or who have faced discriminations from either governmental or private organizations,98 may petition the NHRCK to investigate the matter with an adjudicated outcome possible. The process that the NHRCA establishes is fairly robust, but as will be shown, is engaged largely at the discretion of the Commissioners.

In contrast to its research and advisory roles, the NHRCA empowers the Commission to

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96 Understanding that suits compelling action would be expensive and time consuming, and may thus not be practically feasible even if they are legally so.
97 NHRCA, supra note 44, art. 30(1)(1). Government organs include both those at national and local levels. Note that the scope of valid petitions is narrower than the Commission's mandate; neither international law nor national legislation is included. In the latter case, however, a petitioner may be able to allege that a piece of legislation or regulation contravenes Constitutional human rights protections. Id.
98 Private entities are called “juristic persons” in the English translation. See NHRCA, supra note 44, art. 30(1), (2). The Commission may also conduct ex officio investigations when there is a reasonable belief that serious human rights violations or discrimination have taken place. NHRCA, supra note 44, art. 30(3).
compel cooperation in many instances. For example, when investigating complaints, the Commission can order statements from the petitioner, the respondent, and all interested parties. With some limitations, it can also order these parties to appear before the Commission and give testimony.\footnote{NHRCA, \textit{supra} note 44, art. 36(1)(1). Although not clearly worded, respondents are required to appear only when 1) their statement does not provide sufficient information to judge the veracity of the petitioner’s claim, 2) the respondent is an individual accused of direct responsibility and 3) reasonable grounds exist to determine that the human rights violation and discriminatory act pursuant to art. 30(1) have occurred. The “and” immediately prior to the third prong implies that both a violation and discrimination must have occurred.} It can further compel concerned parties, including government agencies, to submit materials the Commission deems necessary to the investigation,\footnote{NHRCA, \textit{supra} note 44, art. 36(1), (2).} and it can even conduct “on the spot” inspections as necessary.\footnote{NHRCA, \textit{supra} note 44, art. 36(1), (3). Commissioners can directly conduct on the spot investigations and require testimony from relevant individuals on the site. NHRCA, \textit{supra} note 44, art. 36(1), (4).} Requests for materials or inspections can be refused only when issues of national security, “diplomatic relations,” or serious impediments to ongoing criminal investigations or pending trials are implicated.\footnote{NHRCA, \textit{supra} note 44, art. 36(7)(1), (7)(2).} Those refusing to cooperate with a Commission investigation as required can face fines of up to 10 million Korean Won (about US$9,000).\footnote{The fine is set at up to 10 million Korean Won. NHRCA, \textit{supra} note 44, art. 63(1). Amount in US dollars based on an exchange rate of 1,111.26 Won = US$1 as of Oct. 13, 2012. \textit{See} Bloomberg, http://www.bloomberg.com/markets/currencies/asia-pacific.} Obstructing the Commission’s duties “by any deceit,” destruction or falsification of evidence, or intimidating Commissioners or their staff through threat or force carries a prison term of up to 5 years or a fine of up to 30 million Won (about US$27,000).\footnote{30 million Korean Won. NHRCA, \textit{supra} note 44, art. 56(1). \textit{See} Bloomberg, http://www.bloomberg.com/markets/currencies/asia-pacific.}

In resolving cases, the Commission can establish a “conciliation committee”\footnote{The scope and nature of conciliation committees are beyond the scope of this article. \textit{See} NHRCA, \textit{supra} note 44, arts. 41-42.} to either negotiate a resolution between the petitioner and the respondent, or, should parties fail to come to an agreement, to render a decision to “fairly settle the case.”\footnote{NHRCA, \textit{supra} note 44, art. 42(3).} Decisions can include halting the acts that led to the violation,\footnote{NHRCA, \textit{supra} note 44, art. 42(4)(1).} recovery and/or compensation for damages, “other necessary remedies,”\footnote{NHRCA, \textit{supra} note 44, art. 42(4)(2).} and/or any measure to prevent reoccurrence of the violation.\footnote{NHRCA, \textit{supra} note 44, art. 42(4)(3).} Failure to file a complaint within two weeks of a decision constitutes the party’s acceptance...
of that complaint.\textsuperscript{110} Both successful conciliations, as well as the Committee decisions rendered when conciliation fails, have the force of a settlement in court.\textsuperscript{111} Where a human rights violation or an act of discrimination is found, the Commission may recommend disciplinary action to the head of the institution(s) that the individual(s) work at.\textsuperscript{112} Should the investigation uncover potential criminal liability, the Commission can file a complaint with the appropriate investigatory body.\textsuperscript{113}

Finally, on the individual level, the Commission’s binding quasi-judicial decisions give its determinations the force of law, providing individuals with an actual opportunity to seek redress, either in terms of a compromise or an adjudicated outcome.

\textit{Analysis}

Overall, the Commission's investigatory authority would seem to fit within the guideline of the Paris Principles' directive for adequate powers of investigation.\textsuperscript{114} In fact, the Commission's powers in this area appear to be fairly well supported with binding force. Justified refusals to cooperate are based on seemingly narrow grounds. However, those grounds could most easily be over-used by the military, police, and prosecutors,\textsuperscript{115} the very groups that are empowered to use (and thus possibly abuse) the government's monopoly on force.\textsuperscript{116} Although hopefully never reaching the level of human rights violations perpetrated by previous authoritarian regimes in Korea,\textsuperscript{117} the national security exemption is ripe for abuse.

These limitations notwithstanding, penalties for non-cooperation, although somewhat light for those simply refusing a request by the panel, can be severe for more pernicious attempts at obstructing the Commission, signaling that proper requests are to be taken

\begin{footnotesize}
\begin{itemize}
\item[110] NHRCA, supra note 44, art. 42(6). Note that complaint procedures are not stipulated in the Act.
\item[111] NHRCA, supra note 44, art. 43. It is assumed that an outcome with such binding force would be recognized and enforced in court should the losing party fail to honor a negotiated compromise or the Committee’s decision.
\item[112] NHRCA, supra note 44, art. 45(2). The provision is silent on what an agency receiving such a recommendation must do. On the face of the law, the recommendation appears hortatory.
\item[113] See Guidelines for the Paris Principles, supra note 34, at 31.
\item[114] See Guidelines for the Paris Principles, supra note 34, at 31.
\item[115] See Guidelines for the Paris Principles, supra note 34, at 31.
\item[116] The Commission's refusal to probe a military whistleblower case provides a key example of how restrictions on its investigatory powers hamper its effectiveness in an area where the agency's vigilance against human rights abuses is sorely needed. See Lee Hyo-Sik, Rights Panel Not to Probe 'Military Whistleblower' Case, THE KOREA TIMES, Mar. 4, 2012.
\item[117] The Gwangju massacre would be but one example. See e.g., James M. West, Martial Lawlessness: The Legal Aftermath of Kwangju, 6 PAC. RIM L. & POL’Y J. 85, 93-96 (1997).
\end{itemize}
\end{footnotesize}
seriously.

That said, an examination of the application of these penalties will be important in assessing how effective they have been as a deterrent to non-cooperation. Significantly, it is not clear from the NHRCA alone whether these penalties could be applied to individuals within the government who are found responsible for an agency's unjustified refusal to cooperate. The ability to simply stonewall investigations is in itself a threat to the Commission's independence, as it pressures the Commission to self-censor in order to secure government agencies' cooperation in carrying out investigations.

For all of the compulsory authority the Commission wields, however, the law gives it incredibly broad discretion over whether to investigate complaints of human rights violations. Aside from specific justified reasons, the Commission may also reject a petition it simply deems “improper to investigate.” Although the Commission must immediately provide an explanation to the petitioner for its rejection, what defines "improper" is not at all clear. Such a vague term enables overly broad discretion in accepting cases, allowing political considerations to affect case management at the least, and permitting Commissioners loyal to the government to reject large swaths of politically damaging complaints at the worst. Furthermore, negative decisions carry no right of appeal, and are thus not automatically open to judicial scrutiny. Alarmingly, petition statistics from 2002 to 2010 display an affirmation rate of only about 5%, as seen in the graphs below.

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118 NHRCA, supra note 44, art. 32(7).
119 NHRCA, supra note 44, art. 32(4).
120 A broader legal assessment of whether a petitioner would have standing to appeal a rejection to the court system is beyond the scope of this article, but the absence of such a mechanism in the NHRCK’s enabling legislation is striking.
121 Data in the following charts is drawn from NHRCK Annual Report, supra note 63, at 71. Note that while the annual report refers to these as “civil rights” violations. Although the term is not defined in the report, statistics regarding violators cover only government agencies, implying that the term applies only to violations by government actors.
Note that the NHRCK annual report in 2010 claimed without explanation that dismissed cases were primarily composed of those withdrawn by the complainants, because “the complaints were resolved” or that “complainants were satisfied with the outcome.”

While much attention has focused on the Lee administration’s attempts to hobble the Commission, an approximately 95% rejection or dismissal rate in the first nine years, which included Presidents who were friendly to the Commission, is suggestive of an agency whose independence from government influence is compromised to at least some extent. Such a high rate may be partially explained by the Commission’s duty to respond to all requests, whether frivolous or beyond the Commission’s mandate, but it should still raise calls for investigation into how the Commission decides whether or not to reject a case, and the grounds upon which it dismisses them.

Finally, of the 1,962 cases affirmed for the petitioner between 2002 and 2010, only 160 cases have led to recommendations for criminal investigation or even disciplinary action. Excepting those caused by government regulations or policies, human rights violations are otherwise caused by one or more individuals, meaning that a recognized violation should have led to a recommendation of at least disciplinary sanctions in many more cases. While a more thorough assessment of the case data behind the statistics is needed, the Commission

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122 NHRCK Annual Report, supra note 63, at 72.
123 Note that the rejection rate alone should not be used as a barometer of the Commission’s effectiveness. Determining what the level of frivolous cases are (and indeed what constitutes a frivolous case!) are the more important questions. Still, a 95% rejection rate is more than sufficient justification to investigate when and why the NHRCK rejects a case.
124 NHRCK Annual Report, supra note 63, at 72. Discrimination complaints have fared somewhat better, with approximately 11% of cases reaching settlement or a recommendation from the Commission from 2002-10, and remaining around the 11% mark each year for 2008-2010. Out of approximately 8,666 cases, however, the Commission has recommended disciplinary action in only 3 cases. Id. at 88.
seems to be greatly underutilizing its powers to recommend sanctions or request criminal investigations.

Given the above statistics, attempts from various corners of the government to curb the Commission’s investigatory powers during both friendly and hostile Presidential administrations cannot be ruled out. As the history of opposition to the Commission makes clear, the organization faces a less than supportive political environment. The agency's coercive powers are neither all-encompassing nor automatic, meaning that it must work to secure at least some degree of cooperation from the agencies it investigates. The discretion to reject cases could be a negotiating point, enabling the Commission to avoid cases that would damage its relationship with agencies and important actors within the government. This compromises the agency's ability to carry out its mandate and threatens victims' ability to obtain justice.

**Recommendations**

Revisions that cut down on the Commission's discretion to avoid acting would serve as a buffer against pressure from the government, while making it more difficult for hostile administrations to control the agency through sympathetic Commissioners. In particular legal revisions should:

1. Clarify the meaning of “improper to investigate.”
2. Revisit the national security exemption.
3. Communicate to petitioners the reasons for rejections.
4. Create a right to appeal rejections.

The Commission requires the power to reject frivolous cases, but the term "improper to investigate" provides no clear boundaries. Guidelines delineating a transparent decision making process and specific criteria governing when to accept a case should be developed and communicated clearly. The national security exemption requires similar clarification, and must be particularly policed to ensure that the Commission does not cave to governmental pressure to invoke this exemption when it is inappropriate to do so. A written record of rejections would bring public scrutiny upon the organization's deliberation, making it less likely to bend to government pressure. As an additional check on the Commission's discretion, the ability to appeal would bring judicial scrutiny down upon the organization and would
enable a more objective development of the contours of what constitute meritorious cases. Finally, case research could uncover more issues that should be addressed.

Ultimately, a balance must be struck between investigatory discretion to dismiss frivolous cases, and an imperative to follow through on meritorious ones. Where that balance lies will necessarily arise initially through legal amendments and then through the accumulation of case experience, both at the Commission level and through the courts.

In examining the NHRCA's operational provisions, the Commission's robust powers to compel government and even private entity action in investigating human rights violations theoretically give it the ability to carry out its mission with limited interference from or dependence on government cooperation. At the same time, the NHRCK has very broad discretion in deciding when to pursue its duties. Legislative language defining the contours and limits of the Commission's discretionary power would help ensure that the organization would be required to act in certain circumstances, regardless of how friendly Commissioners are to the government. Indeed, such guidelines, coupled with greater reporting requirements, would increase outside scrutiny on the organization to ensure it carries out its duties, making it less vulnerable to undue government influence.

IV. CONCLUSION

The short history of the NHRCK shows an organization working in an environment of sharp political conflict that has shown no sign of subsiding. While receiving early commendation for its independence and effectiveness relative to similar institutions in other parts of Asia, both domestic and international observers have come to criticize it as a compromised entity, thanks to the actions of a hostile presidential administration.

The Commission's legal structure echoes this narrative of compromised independence. While largely following the Paris Principles' general guidelines for an agency with a broad mandate, official independence, and ability to carry out investigations, key vulnerabilities in both its structural and operational provisions undermine the organization's ability to carry out its mission.

Structurally, the Commission enjoys a broad mandate that prevents governmental agencies from declaring parts of their activities off-limits to the NHRCK. However, a lack of

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125 Although costs to the court system could be significant, given the current petition rejection rate, Cf. NHRCK Annual Report, supra note 63, at 71.
interpretational guidelines enables the Commission to cabin off issues it does not wish to address. Presidential control over the CP’s selection and retention can especially hinder the organization even during friendly administrations, as issues of loyalty and the implied threat of non-reappointment can influence the Commission’s leader and all members generally. Shifting CP selection to Commissioners and doing away with reappointment while lengthening the term of service can help address these particular weaknesses. The budget is another key area of concern, as it is controlled by a governmental ministry. The President’s direct authority over the Ministry of Justice, and thus the NHRCK’s budgetary requests, provides a real and substantial point of influence. Empowering the NHRCK to compile and present its own budget to the National Assembly would sever the Commission’s conflicting relationship with the Ministry.

In carrying out its mandate, the Commission's research and advisory functions are supplemented with limited but insufficient requirements that government agencies cooperate. Practically, the Commission must rely on bureaucratic cooperation to carry out these functions, making it susceptible to pressure against investigating issues that government actors want left untouched. Requiring specific timelines for agencies to respond to the Commission requests, clarifying when agencies can refuse to cooperate, and mandating that they publish reasons for non-cooperation would strengthen the bureaucracy's duty to respond to the Commission.

In investigating human rights complaints, the Commission enjoys a broad array of compulsory powers, supported by fines and even criminal penalties for particularly egregious attempts to halt an investigation. However, incredibly broad discretion in rejecting petitions the Commission deems "inappropriate" is a very practical point of vulnerability to government influence. Commissioners friendly to the government can use this discretion to sidestep investigating embarrassing issues, and it enables the Commission to bargain away investigations in return for increased bureaucratic cooperation elsewhere. The high percentage of rejected or dismissed petitions, coupled with an equally low rate of sanctions and criminal investigation referrals, strongly hint at direct or indirect influence over the organization.

The common thread connecting both the structural and operational aspects of the NHRCA is the issue of discretion. Whether influenced directly by friendly political appointees, or bending to the realities of political bargaining in order to secure bureaucratic cooperation, the high level of discretion afforded the Commission in exercising most of its powers is ripe for abuse. Clearly setting the contours and limits of its discretionary powers
will be vital to ensuring that the organization is less directly influenced through appointees, and that it is less susceptible generally to pressure from the government.

On the whole, the NHRCK’s foundational law reflects the conflict played out on the political stage. Although having received little attention, the flaws in the NHRCA are a critical factor preventing the agency from operating independently and effectively, especially when a hostile administration is in power. Achieving the necessary statutory changes discussed will require concerted effort by the public to overcome conservative and bureaucratic opposition, and must be followed up with public scrutiny to ensure that the NHRCK fully engages its powers to protect and advance human rights. At the end of the day, statutory revisions are critical, but they alone are not sufficient. They must be matched with public pressure and lasting political will to ensure that the Commission fully lives up to its mandate as an independent advocate within the government for human rights.

**KEYWORDS**

Human Rights, Korea, National Human Rights Institutions

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