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A Critical Reflection

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Ten months have passed since the National Human Rights Commission (hereinafter the Commission) was established on 9 October 2001. It appears that by now the Commission has accumulated enough operational experience to warrant a critical reflection. This paper attempts to review both the main issues the fledgling Commission has confronted and the main decisions it has made during its formative period.

This paper proceeds as follows. First, as background information, it briefly describes the current profile of the Commission. Next, it reviews the major issues surrounding the governance structure and the operational practices of the Commission. Then, it addresses the typical issues raised in the process of performing its statutory functions and evaluates the ways the Commission copes with such issues. Finally, it describes some of the sensitive human rights issues the Commission has to tackle and suggests effective ways of dealing with them.

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* This paper covers the situation as of 10 August 2002.

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The Commission at a Glance

The Commission is composed of eleven members and the secretariat. The eleven members comprise the president, three standing members, and seven non-standing members. Four, including the president and one standing member, are nominated by the President, another four, including two standing members, by the National Assembly, and the remaining three by the Chief Justice of the Supreme Court, though all members are eventually appointed by the President. Four or more members should be women.

The members of the Commission were appointed on 9 October 2001. The president is a respected human rights lawyer and former president of the Korean Bar Association. The three standing members are an ex-officer of the World Council of Churches, a lawyer, and a writer. The seven non-standing members include three law professors, three lawyers, and one NGO leader. A total of eight members have legal expertise either as lawyers or as law professors. Five members including the president and two standing members have past or current NGO affiliations. One standing member and three non-standing members are women. This rough profile appears relatively diverse compared to other Korean commissions, the predominance of legal careers notwithstanding.

The present members have been criticized, though, as lacking proper expertise in the field of human rights. Given that expertise in human rights requires more than legal expertise, it is true that even members with legal training cannot be called human rights specialists in the proper sense. Lack of expertise leads to a lack of initiatives and contributions, especially in the area of policy and research. As members become more experienced, however, the problem of expertise is sure to diminish.

From the perspective of this writer, three members are progressive, three are centrist, and five are conservative in their political inclination. This implies that, left unchecked, the Commission is likely to make right-of-center choices in politically sensitive human rights issues. Its rather conservative makeup has been a serious cause of

disappointment and scepticism about the future of the Commission for most NGO activists and is generally regarded as being responsible for the Commission's lukewarm responses to divisive human rights issues such as conscientious objection and migrant workers.

The Commission is authorized to recruit up to 215 staff members. About 40 percent of the staff can be recruited anew from non-bureaucrats. In particular, higher posts are reserved more for civilians than for career bureaucrats. The Commission began to recruit staff members in March and have filled about 150 posts to date, only two-thirds of the full capacity of the secretariat. The recruitment process is still under way and will take a few more months to finish.

From 25 November 2001, the day it started operating, to early April 2002, when the first recruitment started working, the Commission had to confine its duties to mere compilation of complaints and ad hoc interventions in pressing policy matters. While individual complaints and policy issues were simply piled up unexamined, initial public expectations faded away and human rights NGOs became impatient. It should be stressed that the delays, the biggest cause of popular discontent, are caused by the shortage of personnel rather than the lack of will or action. It seems premature, therefore, to criticize the performance of the Commission, before it reaches its full capacity.

Governance and Operational Issues

The establishment of a new state agency requires much more than the parliamentary passage of its law. Under the Commission Act the task of translating the letter of the law into a living state agency equipped with its own rules, budget, and personnel was entrusted to the members of the Commission. Accordingly the members should have worked out a shared vision and strategy before they incorporated them into operational rules and practices.

The members faced an extreme time shortage, however. They were appointed just one and a half months before the legally fixed

opening date. During this preparatory period, they had to negotiate two presidential decrees, one for organization of the secretariat and the other for enforcement of delegated matters with the ministries involved, enact several operational rules, secure the annual budget for 2002, and recruit the staff. To expedite these procedures, the first plenary meeting was summoned just two days after the official appointment.

Biases in the Rules of Operation

The first bills of resolution concerned the size and posts of the secretariat, qualification criteria for staff members, nomination of the secretary general, operational rules, etc. Among these initial resolutions the Rules of Operation is of particular importance, because it is the second-order constitution of the Commission which fills in the gaps of the Commission Act, its first-order constitution. Like all constitutions, it also embodies the vision and strategy of its major drafters: the president and his task force.

Upon close examination, the Rules are not free from biases favoring the president and his secretary general. The first example of such bias was a clause in the proposed Rules, which bestowed the secretary general with the power to freely attend and speak before any Commission meetings. A majority of the members opposed the clause on the grounds that the secretary general would then be made the 12th member and that there were no such precedents in comparable statutes. Most members were also conscious that the enhanced powers of the secretary general would boomerang by reinforcing presidential power. The proposed rule was therefore revised to allow the secretary general to make oral interventions only when strictly administrative affairs are discussed. Members, thereby, made it clear that they were mindful of the checks and balances of power among the president, the members, and the secretary general.

The second example is that the secretary general has no duties under the Rules. Missing were both the general duty of the secretary general to keep members well informed of the duties of the Commis-

sion and the more specific duty to make brief but comprehensive reports on the activities of the secretariat to the plenary Commission whenever it holds meetings. It is no wonder that members have been kept under a veil of ignorance about affairs inside the secretariat.

A third related example is the total absence in the Rules of any provisions as to the power of individual members, standing or non-standing. Since it is the members, and not the president, who have sovereign power over the duties of the Commission, it seems quite natural that each and every member should be given free access to all the information and materials inside the secretariat regarding the business and affairs of the Commission. But the Rules violated this basic right of members in general and non-standing members in particular.

In short, if members had dominated the drafting process, the Rules would have been different. As more members become aware of the unwritten rules and premises underlying the Rules through their own experience, the Rules are subject to much more criticisms. As a practical matter, however, it will take time for them to be revised in consensus because the Rules have been entrenched by subsequent rules they affected, vested interests they granted, and operating practices they shaped.

The Proper Role of the President

Under the Commission Act, the president is empowered to represent the Commission, coordinate its duties, direct the secretary general, appoint staff members, etc. The president of a commission-type agency should not be confused, however, with the president of a single-head agency. The sovereignty of the commission-type agency rests with its members acting as a collegial body, not with its president. In other words, it is the members, rather than the president, who has the ultimate power over the running of the Commission.

Even the administrative and operational powers of the president are not free from the intervention of the Commission. Under the Commission Act, the members are capable of enacting internal rules

concerning the operation of the Commission. In the case, therefore, that the president of the Commission wrongfully exercises his or her operational powers, other members are able to enact or revise rules so as to regulate the undesirable power practices of the president. In short, the president of a commission is different from the head of ministries, for example, in that the former is held accountable to the other members for his or her exercise of power.

The Proper Role of Standing Members

The Commission has three standing members in addition to the standing president. The Commission Act defines the roles and powers of the president but is entirely silent on the roles and powers of the standing members. Although such omission is the shared defect of Korean commission statutes, this Commission has suffered most from it because it has caused serious disagreements between the standing members and the secretary general.

The Commission is second to none among nonconstitutional commissions in the number and rank of standing members. The official rank of its standing members is vice-ministerial, one level higher than even the secretary general. The three standing members have been uneasy with their relationship with the secretariat. They have complained that they are completely severed from the information and decision-making process inside the secretariat. They want to be consulted and informed about what is going on inside the secretariat with regard to the duties of the subcommittee they chair.

It has been heatedly debated for months whether standing members may direct and supervise preparatory work preceding resolutions and executory works following resolutions. The secretary general's position has been that the role of members, standing or non-standing, is inherently confined to the collective deliberation and resolution of the meeting agenda. The natural corollary to this is that preparatory and executory works are the sole responsibility of the president and the secretary general.

The standing members disagree, arguing that there are no inher-

ent barriers for them to direct and monitor the manners in which preparatory and executory works are conducted, because under the Commission Act the members as a collegial body have exclusive power over the duties of the Commission. According to them, the inherent power of the president and the secretary general is limited to the affairs of the Commission.

Because the Commission as a collegial body of members may delegate all or part of its duties to subcommittees, members, or the secretariat as it deems necessary and because performing duties include preparatory, decision making, and executory works, it seems entirely up to the autonomous rule-making of the Commission to determine what to delegate among a variety of preparatory or executory works and to whom to delegate among the president, standing members, non-standing members, and the secretary general.

Under this interpretation, preparatory or executory works being performed by the secretariat are the duties categorically delegated by the Commission and therefore the conditions of delegation may be altered as deemed necessary by the Commission. If the Rules of Operation and related rules are amended to permit the standing member in the capacity of the subcommittee chairperson to direct and monitor the preparatory or executory phases of the business delegated to the subcommittee, his or her position will be made analogous to a lesser president insofar as the basic duties, but not the affairs, of the subcommittee are concerned.

The Privileged Status of the Policy Subcommittee, etc.

Under the Rules of Operations, the Commission has three subcommittees. They are Subcommittee for Policy and External Cooperation, Subcommittee for Investigation of Discrimination, and Subcommittee for Investigation of Human Rights Violations. Of this triad, the Policy Subcommittee is unique in that its coverage is wide and its power unrestricted. First, out of nine enumerated duties of the Commission, seven are delegated to the Policy Subcommittee. Advisory, research and education, publicity, and cooperation functions are all entrusted

to the Policy Subcommittee. Second, the Policy Subcommittee is authorized to perform these functions without any reservations. That is, the plenary Commission does not have any policy powers unless the three members of the Policy Subcommittee fail to reach a consensus. Consequently the chance of the remaining members being informed of and dealing with policy matters at plenary meetings is extremely limited.

In contrast, all the members are given ample chances to determine human rights complaints at plenary meetings, because the plenary Commission retains the power to deliberate and resolve those complaints which require remedial measures such as injunction, restitution, damages, or improvement of the statute, policy, and practice involved. In other words, complaints-handling subcommittees are entrusted only to reject, dismiss, or conciliate individual complaints. In case the merits of a complaint warrant remedial measures the subcommittee should transfer the case to the plenary Commission. This practically means that contrary to policy matters, almost all valid complaints will be decided by the plenary Commission in which every member has an equal say.

The privileged status of the Policy Subcommittee will be dissolved if the plenary Commission reserves some categories of policy matters under its jurisdiction as it does in handling complaints. It is desirable for the plenary Commission to retain the most important power over policy, that is, the power to recommend improvement of statutes (including bills), decrees, policies, or practices. At the same time, the powers of two subcommittees handling complaints need be expanded to cover such basic relief measures as injunction, restitution, or damages. The plenary Commission will then exercise complete control over important policy recommendations whether they are required for advisory or for remedial purposes. And all members will have reasonable and equal access to both policy matters and individual complaints of practical importance, regardless of which subcommittee they belong to.

The third problem with the current subcommittee system is the chronic asymmetry in caseload between the Violation Subcommittee

and the Discrimination Subcommittee. At present, the Violations Subcommittee has about a dozen times more complaints than the Discrimination Subcommittee. As this striking imbalance stems, among others, from the institutional reality that gender discrimination in general and in employment in particular are easily addressed elsewhere too, this disparity is likely to continue until general sensitivity to discrimination sharply increases.

In summary, the current system of division of labor inside the Commission appears unequal and inefficient. Under the present arrangements in which the plenary Commission has no real access to policy affairs, the role of a member tend to be reduced to that of a subcommittee member. Together with the practice of making the secretariat accountable only to the president, this practice is most responsible for the dwarfed status and role of members in the Commission.

Undue Restriction of the Public's Right to Know

The original Rules of Operation provided that the proceedings of all Commission and subcommittees meetings should be audio recorded and stenographed, and full-text proceedings be prepared. The "full-text proceedings" requirement was challenged at the second plenary meeting. Several members expressed scepticism over the utility of the full-text proceedings. After repeated discussions, the Commission changed the provision so as to have a summary of the proceedings prepared.

Several members were conscious that the proceedings would be kept as official documents and be disclosed according to the freedom of information law. For them full-text proceedings almost meant standing naked before the public in general and the concerned NGOs in particular. At this time, members were almost united in minimizing the NGOs' influence and intervention. A summary of the proceedings was preferred in this context. The Commission thereby went against its inherent duty to guarantee the public's right to know to the fullest extent possible.

The second round involved the public's right to attend and monitor Commission meetings. Even though it is legally required to open its meeting to the public as the National Assembly does, most members felt uneasy about conducting meetings in the presence of NGO observers and postponed the deliberation of the proposed rules. This situation continued until early March 2001 when angered NGO activists threatened to begin monitoring immediately.

After a long debate, it was finally ruled that the meetings of the plenary Commission and the Policy Subcommittee should be made public in principle. It was also ruled that the investigation, deliberation and mediation of complaints should remain closed without exception. The wisdom of the latter decision is highly questionable, though. The main reason given for nondisclosure of complaints-handling is to protect the privacy and honor of the respondent. This rationale hardly applies, however, to cases when the respondent is a state agency or local government. Even in cases when the respondent is an individual, there is no strong reason for categorical nondisclosure in view of the fact that court trials of serious criminal cases proceed in public. Reasonable exceptions to the principle of nondisclosure of the complaints-handling process should be recognized in the interest of the public's right to know.

Interestingly the Commission lost no time in making exceptions to the principle of disclosure. The most controversial is the "agenda for discussion" exception. Agenda for discussion are those in need of in-depth discussion and prior negotiations before formal decision making. Almost all policy matters belong to this category. Since most of the agenda of plenary meetings concern either complaints or policy issues, plenary meetings are in effect closed to the NGO observers to the shame of the Commission.

Need for Strategic Discussions among Members

The most important role of members is to initiate or participate in strategic decision making. Under the current operational system, however, members have difficulty doing this. At the plenary meet-

ings, policy matters, operational matters, and sensitive issues are rarely discussed. Because of the institutionalized rarity of their opportunities to engage in and contribute to strategic discussions, members tend to identify themselves with the specific subcommittees they belong to and consequently lose the sense of overall direction. The readjustment of the division of labor among the plenary Commission, the Policy Subcommittee, and the complaint-handling subcommittees is required, among other tasks, to transform the Commission into a self-reflective organization, which encourages its members to be knowledgeable and responsible for its strategically important business and affairs.

Issues Involved in the Performance of Duties

The Commission has nine specific duties under the Commission Act. They are the investigation and remedy of complaints of human rights violations or discriminations, consultation and advice to the relevant state agencies as to the improvement of human rights related bills, statutes, institutions, policies, and practices under their control, investigation and survey of human rights conditions, urging of ratification of international human rights treaties, human rights education, etc. Though diverse and separate, these tasks are so closely interrelated as to complement and reinforce each other.

Certainly it takes both time and experience to understand the characteristics and potential of each duty from a holistic viewpoint. In order to speed up such understanding and minimize the process of trial and error, the Commission should have encouraged strategic discussions to develop goals and tasks so that it would not be operated on an ad hoc basis and engulfed in routine works. In its first ten months, the Commission has failed exactly on this point, though it worked hard.

Complaints-Handling

1) Complaints Statistics

As of 1 August 2002, a total of 2,338 complaints were filed with the Commission. Of these, at least 70 percent are seen to be outside of its jurisdiction. They are mostly complaints of police investigations, prosecution's decisions, judicial judgments, parliamentary legislations, and property disputes. Among valid complaints, human rights abuses by state agencies, local governments, and welfare accomodations occupy 80 percent or more. Complaints about discrimination account for the rest and number about 120. Of these, the majority are complaints about discrimination in the public sphere. Complaints of discrimination in the private sphere number less than 50 so far. The relative paucity of discrimination cases is attributable to the fact that gender discrimination in general and in employment in particular is effectively addressed elsewhere and social sensitivity to discrimination is still rather underdeveloped.

2) Face-to-Face Complaints

The right of internees to face-to-face complaints is a entirely new right introduced by the Commission Act. A member or staff of the Commission should visit the detaining or protective facilities to receive complaints face-to-face when their internees so request. The Commission have received over 400 such requests, but all from prison inmates. No such requests have been filed yet from the internees of welfare facilities or army prisons, which implies that the Commission has failed to reach out to them. The Commission should make efforts to publicize this new right to all internees, wherever they are detained.

3) The "Rejection First" Policy

Staffed by late March, the secretariat started to review and investigate complaints from early April. By this time early complainants had become frustrated and discontent. Burdened by the sheer number of

pending complaints, the president decided to give priority to those complaints that were rejectable at first sight. For the subsequent four months, the two complaints-handling subcommittees were preoccupied with rejecting more than 600 cases, but still have hundreds of cases to reject because new complaints were being filed in the meanwhile. The frustrating fact is that during the past ten months remedied cases number less than a dozen. Moreover, they are mostly discrimination cases.

The wisdom of the "rejection first" policy is questionable. During the rejection campaign period, all but a dozen urgent cases were neglected. It is regrettable that the Commission has never been given a chance to discuss how to respond to foreseen delays in complaints-handling or how to expedite the process and reduce the backlog at meetings on the doctrine that the power to decide over such matters belongs to the president.

4) The Burden of Proof

Another cause of worry is that following hundreds of rejections, a sequence of dismissals may await the Commission due to the lack of evidence. In particular, complaints involving prisons, the police, and the army are suspected to be very difficult to prove because witnesses are few and tend to keep silent. Testifying inmates will keep silent out of fear of reprisal and employees out of false loyalty to their organization and colleagues.

To cope with the problem of evidence in cases of human rights violations, the Commission is now seriously considering the transfer of the burden of proof to the respondent, that is, state agencies such as the police and correctional services. State agencies or local governments exercising public power are under constitutional duties to respect and ensure human rights. They are also bound by law to prevent their officials from violating the human rights of those under their custody or protection, be they facility inmates or criminal suspects. It follows therefore that such public agencies may be required to prove that they have done their best to fulfill their duties. If they fail to do so they cannot claim their innocence or immunity. If this

strategy fails for any reason, the future of complaints-handling is bleak because very few prison, police, or army complaints can be proven and remedied. In that case, expectations would change into disappointments.

5) Remedial Measures

Three issues have been discussed regarding remedial measures. The first issue was whether the Commission may recommend remedial measures which victims do not want. This question was raised because both the victim and the complainant of a disability discrimination case stated at a hearing that their goal was to obtain official apologies and reliable preventive measures rather than monetary compensation. The Commission decided in the affirmative on the ground that its procedure is not strictly adversarial.

The second issue of whether the Commission may recommend compensation for damages without specifying the amount was also resolved in the affirmative. Its wisdom is highly questionable, though, in light of the fact that a new dispute over the proper amount of compensation is likely to continue until the court intervenes. There appears no such precedents, either, in comparable complaints-resolving commissions, at home and abroad. The Commission should give second thought to this practice of recommending proper compensation.

The third issue was whether the Commission may include among its remedial recommendations public apologies through mass media. The Constitutional Court held it unconstitutional for courts or state agencies to order public apologies on the grounds that apologies, being moral by nature, must not be coerced. In other words, compulsory apologies have been prohibited as violating the constitutionally protected freedom of conscience. Because the Commission cannot issue orders but only recommendations which the respondent is free to accept or refuse, it may be argued that mere recommendations to apologize publicly should be acceptable. According to the Commission Act, however, the respondent public power should endeavor to implement recommendations and in case it cannot, it

should provide reasons. Based on this provision, majority members interpreted recommendations of public apologies as being semicoercive and as also prohibited.

Surveys of Human Rights Conditions

In early July 2002, the Commission invited NGOs and experts to bid for nine survey projects of substantial amounts. The nine human rights survey projects included the prison conditions survey and the army conditions survey. Two problems passed unnoticed in this matter. First, field surveys into prison or army conditions are unsuitable for total contracting-out because neither NGOs nor experts have legal access to prisons or army camps. Unlike literature surveys, field surveys need to be conducted under the authority of the Commission. Second, the results of the survey need to be published also in the name of the Commission so that they can carry its authority. Under the present format, the Commission must attach the usual copyright disclaimer on the cover page of the survey report, which reads: "The analysis and contents of this report are not necessarily those of the Commission." Certainly more authoritative accounts and analyses of the human rights conditions in question are in need. The Commission's authority to conduct human rights surveys should serve that purpose.

The Power to Visit and Inspect Prisons and Other Facilities

Detaining facilities and prison-like "protective facilities" remained closed to the outside world until the founding of the Commission. Now those facilities have two wide openings for the exercise of human rights: one is the inmate's right to freely make complaints to the Commission and the other the Commission's power to visit and inspect these facilities without prior notice. The latter, in particular, is very effective for general deterrence and detailed understanding. Even better, the Commission may bring civilian experts into the facilities. Accordingly, the power of visitation and inspection can be a

very useful means of promoting mutual enrichment and reciprocal cooperation between the Commission and its alliances. It is highly regrettable, therefore, that the Commission has not exercised this power thus far.

The authority of the Commission to visit and inspect unauthorized welfare facilities has been debated. One of the staff member visited an unauthorized welfare facility for alcoholics to conduct on-site investigations but was not given entry. According to the welfare statistics, over 600 unauthorized welfare facilities are in operation across the country. These facilities are notorious for their poor conditions and human rights abuses, but are not subject to administrative monitoring.

The Ministry of Health and Welfare (MOHW) seems to view these facilities as Pandora's Box. Accordingly the MOHW has staunchly opposed the Commission's attempts to look into unauthorized welfare facilities. In fact, the Commission already lost the battle to the MOHW at the time of the enacting the Enforcement Decree of the Commission Act. It failed then to define protective facilities to include unauthorized facilities because of the MOHW resistance.

After much discussion, however, the Commission concluded that visitation and inspection was most needed in unauthorized facilities, the blind spot of the administrative watch. The Commission is quite right in judging the need to fill in the gap as both urgent and substantial; otherwise, the plight of the internees of unauthorized faicilities will never improve.

Policy Advisory Functions

The Commission has the legal power to initiate consultations or express opinions on any bills, statutes, institutions, policies, and practices from the viewpoint of human rights. The Commission has effectively intervened in such diverse areas as an antiterrorism bill, the driver's law, the nationality law, etc., as circumstances required. In the future, policy interventions need be more planned beforehand rather than being rushed by time and circumstances.

The Commission's opinions are likely to prevail in most cases even though they lack binding force, because state agencies normally respect the rational judgments of other state agencies concerned, unless they have convincing counter-arguments or their vital interests are at stake. It is important in the latter case that the Commission shows its commitment to have its opinions respected, by doing the necessary lobbying and allying with NGOs.

As pointed out earlier, the Commission's powers over policy have been unreservedly delegated to the three-member Policy Subcommittee. Consequently, remaining eight members are seldom exposed to policy discussions. It is necessary to change the Rules of Operations so that policy issues involving treaties and laws are made the responsibility of the plenary Commission.

Public Hearings

The Commission may hold public hearings to hear the testimony of a wide variety of persons and agencies including victims and experts. The Commission once arranged a public hearing, but it lasted only a few hours because it heard opinions rather than facts. The public hearings function need be activated more frequently for gathering facts. Public hearings are useful for a balanced view of the multifaceted reality surrounding sensitive human rights issues. Sometimes, public hearings of this kind could continue for weeks or months. It seems highly desirable that large-scale public hearings precede strategic policy interventions. It is also important to remember that large-scale public hearings are natural companions to research and surveys of complicated human rights situations.

Submission of Opinions to the Courts

The Commission may submit written opinions to courts trying a human rights case. The court may also request the Commission to submit an opinion. To exercise this power judiciously, the Commission has to know, above all, what cases are in the court dockets and

then carefully select a manageable number of representative cases. Until now, however, the full list of human rights cases pending in courts and the Constitutional Court is unavailable to the Commission. As a result, the Commission failed to intervene in at least three important human rights cases decided by the Constitutional Court. They questioned, respectively, the constitutionality of a statutory censorship of "unsound" content in the cyberspace, of the strip search practice of the police, and of the law-abiding oath required of national security criminals as a prerequisite to conditional release.

The Commission has discussed whether it can officially express opinions or comment on the decision of the Constitutional Court and concluded in the negative. Arguments in favor of the Commission's announcement of reasoned regrets were twofold: First, because the Commission has the power to submit an expert opinion to the Constitutional Court, it is natural to make a critical statement in cases where its opinion is ignored; Second, because the Commission is expected to speak for international human rights law as well as domestic law, it may at times be the duty of the Commission to publicly criticize the Constitutional Court in relation to a human rights issue. On the grounds, however, that all the state agencies are legally bound by the decisions of the Constitutional Court, such arguments lost the debate. It is noteworthy that whereas members from the bench or the bar unanimously supported the negative position, members representing NGOs denied its wisdom and warned of the danger of accepting the unconditional supremacy of the Constitutional Court.

Pending Issues: A Few Illustrations

Conscientious Objection

The very first day the Commission began to function, it received a complaint about the discrimination of conscientious objectors in the penal administration. It argued that Jehovah's Witnesses inmates serving sentence for conscientious objection are discriminated in con-

ditional release.

Every year in Korea, over 500 Witnesses are newly imprisoned for their refusal to take arms as a soldier. Because they have been as a rule sentenced to three years in imprisonment, the total number of Witnesses in Korean prisons has always exceeded 1,500. Both the militarist Korean state and the intolerant Korean society have closed their eyes and ears for decades to the collective plight of these religious pacifists.

It was the spring of 2000 when this old issue at last succeeded in drawing the attention and dedication of a number of human rights attorneys and advocates. They argued before the military court that the criminal punishment of conscientious objection to taking arms violates the freedom of conscience and faith and demanded that the military court stop this sentencing of three years imprisonment, which is the maximum punishment prescribed for the crime of disobeying military orders under the Military Penal Code. The military court was touched and hesitated for weeks but finally adhered to its usual sentencing practice.

Abandoning hopes of influencing the military court, the attorneys involved changed their strategy to persuading conscripted Jehovah's Witnesses to reject military service from the start rather than to disobey orders during military service so that they can be tried by civilian courts. The change in litigation strategy worked, resulting in two significant changes. First, the courts lowered the sentence to 18 months, the minimum period of sentence for criminal convicts to be exempted from military service. Secondly, one of the judges involved was convinced of the unconstitutionality of the current system of compulsory military service in which no alternative means of military service is offered to conscientious objectors, and officially asked for the judgment of the Constitutional Court.

Under these new developments, those Jehovah's Witnesses who had been serving the three-year sentence began to sense injustice. It was particularly painful for them and their parents to see latecomers conditionally released in advance, because of the sentence differences. Upon close examination, it turned out that Jehovah's Witnesses convicts are given conditional release upon serving 27 months on the grounds that those convicts who disobeyed military orders should be imprisoned for a period one month longer than the compulsory military service period, which is currently 26 months.

While conscientious objectors are conditionally released without exception after serving 28 months in jail or 75 percent of their sentences, 80 percent or more of other convicts with a three-year sentence have been conditionally released after serving more than 80 percent of their sentence. In other words, Jehovah's Witnesses or conscientious objectors have been rather favored in the administration of conditional releases.

Nevertheless, an important discrimination seems to exist against conscientious objectors. According to the conditional release rules, the basic criterion of conditional release is the percentage of the sentenced period served. But in this case the genuine criterion has been the obligatory service period plus one month. In other words, the government has applied a unique and differential criterion to conscientious objectors in terms of conditional release. It is almost nonsense, however, to identify the military service period with the imprisonment period and the veteran soldier with the convicted criminal.

Unpersuaded by this logic, majority members seem to think this case should be dismissed. The criminal punishment of conscientious objection should be treated as a violation of the freedom of conscience and religion. It is a shame that the Commission still does not have an official position on this controversial subject. The Commission should at least form a task force or special subcommittee to address this question with more speed and responsibility.

Consecutive Segregation: An Example of Prison Reforms

Most complaints from prisoners involve abuses of disciplinary power and tools of restraint. A typical case that took place in Busan Penitentiary last May illustrates this point. An inmate committed suicide at a disciplinary segregation cell. He was in mid-thirties. He had already served over four years and was only eight months away from release.

Normally no sane inmate would attempt suicide in this hopeful situation.

According to his brother, his situation was extraordinarily dire, however. First of all, he was disciplined over a dozen times during his 52 months in jail. Rumor has it that after whistle-blowing intramural drug trafficking he became the *persona non grata* among ward officials and ended in frequenting segregation cells. Secondly, by the time he killed himself, he had been kept under segregation for four months and would have to endure the same situation four more months, because a total of eight months was prescribed for four different accounts of bad behaviors. Thirdly, by the time of his death, he was kept handcuffed and chained for three days. His sense of dignity must have been damaged decisively when he could not help but eat like a dog. His brother argued that these triple factors had compelled him to suicide.

Once placed into segregation cells, inmates are prohibited from going out for physical exercise, meeting family and friends, reading books and newspapers, writing letters or petitions, watching television, and purchasing goods. In a word, segregation cells are the prison of prisons. The maximum period of disciplinary segregation under Korean law is two months. But the law is silent as to what if an inmate is subject to a second or third two month period of segregation before the elapse of the first two months. This issue is of utmost practical importance in Korean prisons where solitary confinement for two months is the most frequently utilized means of discipline.

The prison authorities have made it a routine practice to consecutively enforce multiple periods of confinement regardless of the total period of isolation. The unrestricted practice of consecutive enforcement would lead, however, to an indefinite deprivation of sunlight and speech in extreme cases, which amounts to a slow murder. Consecutive enforcement of solitary confinement is also incompatible with the legal provision limiting the maximum length of disciplinary segregation to two months, because its rationale must be that sunlight being one of the most basic necessities of life, deprivation of it

should never exceed two months.

It was a grave mistake, therefore, that the Committee of Standing Members, which was entrusted with emergency relief power, voted last February against granting emergency relief to an inmate who had been under disciplinary segregation for more than six consecutive months. Relying on the legality of consecutive enforcement of multiple sentences of imprisonment, the Committee almost ruled that consecutive enforcement is legally acceptable if each disciplinary measure is lawful. The Committee failed thereby to distinguish between consecutive imprisonment, which should be allowed because sunlight, exercise, and books are allowed, and consecutive segregation, which should be disallowed because sunlight, exercise, and reading are denied.

The Commission is expected to deal with the issue of consecutive segregation again in the suicide case. It should recommend the Ministry of Justice to stop the correctional practice of consecutive segregation exceeding two months in total. The Commission should mobilize all means within its reach to make effective interventions with a view to reform prisons by guaranteeing prisoners' rights. Public hearings, prison conditions surveys, visitations to inspect, and complaints-handling, to list a few tactics, should be utilized and coordinated. A task force or a special subcommittee is required here as well.

Discrimination in Repatriation to North Korea

From time to time, the Commission has to deal with politically sensitive complaints. One such case involved government policy towards converted former long-term prisoners. The complainant, a former spy dispatched from North Korea, was caught in action and sentenced to lifetime imprisonment. In 1985, he yielded to tenacious and terrible conversion operations and signed a document called the letter of conversion renouncing the pro-North communist ideology. As a result, he was released in 1987. In 1999, he publicly revoked the past conversion in the hopes of returning to North Korea, but the government

rejected his application for repatriation to North Korea in 2000 on the grounds that he did not fall under the category of unconverted long-term ex-prisoners because he converted while he was in prison. Citing the case of another long-term ex-prisoner who was allowed to return to North Korea despite the fact that he had once converted and later revoked, the complainant argues that the government discriminated against him and thereby violated his right to equal protection under law.

Upon close examination, it turns out that the repatriated convert signed an official conversion document while he was detained in a security surveillance camp after being released from prison. The Ministry of Justice's position is that he was qualified to return to North Korea because he remained unconverted during the entire period of serving his sentence. The fact that he later converted at a security surveillance camp should not affect his status as the unconverted ex-prisoner because surveillance camps are not prisons, at least in theory.

In fact, the repatriated person made a conversion in 1982 and cancelled it in 1999. He lived in South Korea after his conversion for three more years than the complainant. The reasons and motives for their conversions and revocations are identical. They made conversions out of fear and despair. They revoked to recover their self-esteem and to be reunited with their families. In most cases, ideological conversions were the result of physical and psychological torture. State-compelled conversions are shameful violations of the freedom of thought.

Moreover, the overall conditions of security surveillance camps were worse than ordinary prisons because the former was specially designed to detain unconverted pro-North reds. Security surveillance camps were regarded as sacred areas beyond the reach of the rule of law. Considering these facts, it seems groundless to distinguish between those who converted while in prisons and those in post-prison surveillance camps for repatriation purposes.

Before making the forced conversion, the complainant had already served in prison for long enough to be eligible for the status of the unconverted long-term ex-prisoner. If the state regretted having violated his freedom of conscience and thought, it should have helped him return to his family and live a happy life in North Korea. Instead, the state developed an extremely formal and bizarre distinction between two converts and discriminated against those who converted while in prison regardless of the actual period of sentence served. The government seems to believe that converts should not be allowed to repatriate, but from the viewpoint of the freedom to travel and to choose a nationality, those wishing to move to North Korea should be allowed to do so.

The Commission is likely to dismiss this case. It is advisable, though, for the Commission to take this issue seriously as part of the momentum to reconstruct Korean contemporary history from the viewpoint of human rights. Those who are separated from their beloved families and homeland have a human right to return to them, whether they are converts or non-converts.

International Criminal Court

The Rome Statute of the International Criminal Court (ICC) entered into force as of 1 July 2002. In Asia, only three countries (Cambodia, Mongolia, and Tyrigyzstan) ratified the Rome Statute. Discussing whether it will recommend the Korean government to ratify it, the Commission nearly came to the conclusion that a separate implementation legislation is not needed under the Korean legal system. It also came to realize that in order to participate in the establishment process and to secure a seat at the ICC bench, Korean government will have to ratify the ICC treaty by mid-November 2002 because ICC judges are to be appointed by mid-January under the current timetable.

Under this situation, the Commission is expected to perform a two-fold task: first to urge the government to ratify it as soon as possible and second to pressure lawmakers so that the National Assembly will not delay approving the ratification. To this end, the Commission should form allies with domestic NGOs campaigning for a legislation of nonapplicability of statutory limitations to state crimes,

etc. Otherwise, a favorable social and political atmosphere conducive to the speedy ratification of the ICC treaty will not obtain, especially because as the presidential election scheduled for mid-December approaches, power politics will dominate the coming months.

Conclusion

The National Human Rights Commission possesses enormous potential to contribute to the development of human rights because it is endowed with the necessary power, personnel, and budget. Fitting for an independent state agency whose sole purpose is to promote and protect human rights, it has made several remarkable achievements and contributions such as the blocking of antiterrorism legislation and the protection of the personal information of the mentally ill.

The Commission has failed, however, to reach its full potential. Above all, internal strifes have replaced strategic discussions among the president, the members, and the secretary general. Secondly, strategically designed policy initiatives have been nearly absent and sensitive issues have been avoided. Thirdly, communication and cooperation with NGOs have been unsatisfactory. In short, the Commission has been operating on a highly ad hoc basis.

Considering that its current staff is very competent and devoted, the Commission would perform excellently if its top-down organizational culture is changed to a more horizontal and cooperative one. What is most in need at this point is an organizational culture in which lively reflective and strategic discussions take place. Above all, such discussions should prevail during the meetings of the plenary Commission so that the members can develop and share a heightened sense of direction and mission. Members will then cease to be passive and discontent voters and become active and responsible citizens as they should be. Herein lies the key to the future success of the Commission.