CHAPTER 3: OTHER ESSENTIAL CHARACTERISTICS

3.1. INDEPENDENCE:

The most critical factor in determining the effectiveness of an NHRI is its capacity to act independently in pursuing its mandate. However, achieving and sustaining independence involves a variety of factors – all of which are important, but some of which require a continuing and sometimes difficult balance with legitimate demands for accountability.

Ideally, a NHRI should be constitutionally entrenched, with a specific section in the national constitution briefly describing its role and prescribing its independence from the Executive. Details of its mandate, membership, powers and functions should then be embodied in an Act of Parliament. However, in the Asia-Pacific region only three of the 12 NHRIs established in accordance with the Paris Principles enjoy this status (the Human Rights Commissions in Fiji, the Philippines and Thailand).

In Afghanistan, Fiji and Thailand enabling legislation has been passed, following the NHRIs’ incorporation in recently adopted constitutions. In the Philippines, however, there is, as yet, no specific legislation (see Table A).

The enabling Act of Parliament should clearly stipulate that the institution is independent and accord it sufficient status, powers and resources to enable it to function independently and effectively. Independence does not, however, entail a lack of accountability. Generally, NHRIs must be accountable through their reports to Parliament which, after they have been tabled, should be publicly available and accessible.

In some jurisdictions the NHRI will report to the legislature through the Executive – usually by transmitting its annual report and any reports on specific issues to the relevant minister. The enabling law should clearly require that this minister tables these reports in the Parliament – and that the government responds to any recommendations made. Similarly, the law should enable the institution to operate effectively by requiring government departments and agencies, as well as private sector entities and individuals, to cooperate with the NHRI in the exercise of its functions.

Sanctions for failure to comply with lawful requests, directions or determinations by NHRIs are also an important element in ensuring the institution can operate independently and effectively. Not all NHRIs, however, enjoy this advantage (see Table H below). If the institution itself is unable to impose sanctions it should be able to refer recalcitrant respondents
to the appropriate authorities (usually the director or public prosecutions, the attorney-general or the courts) to impose appropriate penalties.

It is essential that the enabling legislation should empower the institution to adopt its own internal rules and regulations relating to management, personnel and financial administration (provided these are consistent with accepted public service standards) and, importantly, in relation to investigations and complaint handling (provided these are consistent with the rules of natural justice). In this context it is important to understand that the functional autonomy which NHRI s are entitled to enjoy must be practised within the parameters of widely accepted legal and public service norms. This does not mean, as is sometimes erroneously suggested, that NHRI s can enjoy only “limited” independence.\(^{44}\) Independence and accountability are not mutually inconsistent concepts; on the contrary, both are fundamental to the effective functioning of a national human rights commission.

Finally, as already noted, independence depends not only on appropriate legal prescriptions, but also on several other factors which are addressed in the following sections of this Chapter. The most important of these is the integrity capacity and commitment of those who lead the institution.

3.2. ACCESSIBILITY:

The success of NHRI s is directly related to their accessibility. Indeed one of the primary reasons motivating their establishment was the realisation among human rights activists and a belated acknowledgement by governments that the courts, notwithstanding their fundamental role in protecting human rights, were almost completely inaccessible to many of those within their jurisdiction whose rights were frequently and sometimes systematically violated.

In order to ensure that they are accessible, national institutions must address a number of geographical, social, procedural and financial issues.

Geographical realities are generally the most difficult challenge, since most NHRI s have very limited financial and human resources. Strategies which have been developed by institutions in the Asia-Pacific region include: opening regional or provincial offices; appointing local